APPENDIX TABLE OF CONTENTS

Page

Opinion, United States Court of Appeals for the Sixth Circuit (Aug. 8, 2023) ..... App. 1

Judgment, United States Court of Appeals for the Sixth Circuit (Aug. 8, 2023) ..... App. 13

Order, United States Court of Appeals for the Sixth Circuit (Aug. 4, 2022) ..... App. 14

Opinion and Order, United States District Court, Southern District of Ohio, Eastern Division (Dec. 20, 2021) ..... App. 24

Motion to Alter or Amend Judgment, United States District Court, Southern District of Ohio, Eastern Division (Dec. 1, 2021) ..... App. 30

Opinion and Order, United States District Court, Southern District of Ohio, Eastern Division (Nov. 9, 2021) ..... App. 35

Judgment in a Civil Action, United States District Court, Southern District of Ohio (Nov. 9, 2021) ..... App. 44

Entry, Supreme Court of Ohio (Feb. 2, 2021) .... App. 46

Entry, Supreme Court of Ohio (Dec. 29, 2020) ... App. 47

Application to Reopen Appeal Under App.R. 26(B), Court of Appeals, Muskingum County, Ohio, Fifth Appellate District (Oct. 22, 2020) ..... App. 48

Judgment Entry, Court of Appeals, Muskingum County, Ohio, Fifth Appellate District (Oct. 20, 2020) ..... App. 57

APPENDIX TABLE OF CONTENTS—Continued

Page

Opinion, Court of Appeals, Muskingum County, Ohio, Fifth Appellate District (Jul. 27, 2020) ..... App. 62

Judgment Entry, Court of Appeals, Muskingum County, Ohio, Fifth Appellate District (Jul. 27, 2020) ..... App. 88

Entry, Court of Common Pleas, Muskingum County, Ohio, Criminal Division (Aug. 14, 2019) ..... App. 89

Transcript, Court of Common Pleas, Muskingum County, Ohio (Aug. 12, 2019) ..... App. 95

Order Denying Rehearing, United States Court of Appeals for the Sixth Circuit (Oct. 5, 2023) ..... App. 98

Constitutional and Statutory Provisions ..... App. 99

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0361n.06

No. 22-3031

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

GERALD D. FIELDS, Petitioner-Appellant, v. JAY FORSHEY, Warden, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO OPINION (Filed Aug. 8, 2023)

Before: SUTTON, Chief Judge; BATCHELDER and MURPHY, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. Gerald Fields appeals the district court's denial of his habeas petition. This court granted a certificate of appealability for two of his claims: ineffective assistance of appellate counsel and the underlying right to counsel claim. Fields alleges that his state court appellate counsel was ineffective because he failed to argue that Fields' constitutional right to counsel at sentencing was violated because he did not have counsel at sentencing. The state courts and the federal district court denied relief. We affirm.

I. Background and Procedural History

A jury convicted Fields of possessing and trafficking marijuana and cocaine, and manufacturing cocaine, all in violation of Ohio law. Fields was represented by counsel at trial. After trial, but before sentencing, Fields' trial counsel moved to withdraw due to an alleged conflict of interest. The court granted the motion.

About a month later, on July 11, 2019, Fields retained a different attorney to represent him. Then, on August 8, 2019, four days before sentencing, this new attorney filed a motion to withdraw as counsel because of a misunderstanding about the scope of representation. Fields signed the motion, which stated that Fields did not want this counsel to represent him or be involved with his sentencing.

At sentencing on August 12, 2019, the state trial court confirmed that Fields no longer wanted to be represented by his counsel. The court told Fields that he would still be sentenced that day; Fields said he understood. After confirming that the attorney still sought to withdraw, the court dismissed the attorney. The court proceeded to sentence Fields without counsel present and without any further questioning regarding representation. The record does not establish whether any pre-sentencing documents were filed, but the district court did address the charges Fields was being sentenced for and that he was given jail credit, and explained why charges were merged for sentencing. The court allowed Fields to argue on his own behalf as to

the appropriate sentence. The court sentenced Fields to ten years in prison and a $7,500 fine.

Fields was appointed appellate counsel, and he timely appealed. Counsel raised six issues on appeal, but none of them involved the lack of counsel at sentencing. On July 27, 2020, the state court of appeals affirmed the trial court.

On October 22, 2020, Fields filed a pro se Ohio Appellate Rule 26(B) motion to reopen his direct appeal. This Rule allows inmates to file motions raising ineffective assistance of appellate counsel. Fields argued that his sentence was "void" because the trial court sentenced him "without counsel without having obtained and cause to be journalized a written waiver of counsel signed" by him, and that he was prejudiced by the lack of counsel because counsel could have "prevented conviction and sentences for unproven charges, as well as ensured the return of the appellant's property."

On October 27, 2020, the state appellate court denied his motion. The court rejected Fields' ineffective assistance of appellate counsel claim as meritless. The court discussed the *Strickland* standard and held that:

> Upon review, we find no merit in Appellant's argument that his counsel was ineffective. Appellant himself requested that his trial counsel withdraw, with full knowledge and a cautionary statement by the trial court that sentencing would still go forward. . . . Upon consideration, we find Appellant has failed to

> demonstrate that his counsel was incompetent or that he suffered prejudice as a result of his counsel's decisions. We further do not find that Appellant has established that the result of the proceedings [would] have been different. We find Appellant's arguments unpersuasive and thus find no genuine issue exists as to whether Appellant was denied the effective assistance of counsel on appeal.

Fields appealed to the Ohio Supreme Court on December 7, 2020, but it declined to exercise jurisdiction.

On April 16, 2021, Fields filed a pro se § 2254 habeas petition in the Southern District of Ohio. He raised five claims, only two of which are before us. The magistrate judge thoroughly examined the merits of the right-to-counsel claim and concluded that the state court did not err because Fields: (1) never asked for a continuance to hire a new attorney, (2) did not ask for an attorney to be appointed for sentencing, (3) understood that sentencing would continue despite his not wanting his retained counsel to represent him, and (4) insisted on firing his attorney four days before sentencing. The magistrate judge also said that the dangers of self-representation are less at sentencing than during pretrial or trial proceedings. The magistrate judge concluded that it would have been better if the trial judge had given *Faretta* warnings, but the failure to do so "did not deprive Fields of any right clearly established by Supreme Court precedent." Even if the failure was a constitutional violation, the magistrate judge held, it was harmless error because his sentence was not

impacted, as Fields only alleged that counsel could have relitigated his crimes at sentencing. Because no prejudice was shown as a result of Fields' lack of representation at sentencing, the magistrate judge recommended dismissing the denial-of-the-right-to-counsel and ineffective-assistance-of-appellate-counsel claims.

The federal district court agreed with the magistrate judge's "conclusion that any constitutional error in proceeding to sentencing in this case without an attorney was at most harmless error." The court stated that Fields "has never suggested how he was prejudiced by the absence of counsel, *i.e.*, what an attorney would or could have said that would have resulted in a different sentence," especially when that attorney was hired to move for a new trial but was then fired, and Fields never asked for a continuance to obtain new counsel. The district court denied his petition on November 9, 2021. Fields appealed, and this court granted a certificate of appealability on the two claims before us.

I. Discussion

A. Legal Standard

This court reviews de novo the district court's denial of a writ for habeas corpus; we review findings of fact for clear error. *Reiner v. Woods*, 955 F.3d 549, 554 (6th Cir. 2020). AEDPA allows relief when the state court's decision is either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2)

"based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). The court must determine "whether the state court's application of clearly established federal law was objectively unreasonable." *King v. Bobby*, 433 F.3d 483, 490 (6th Cir. 2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 409 (2000)).

A state court's legal decision is contrary to clearly established federal law if the conclusion reached is either opposite of the conclusion the Supreme Court reached on the question of law, or if the state court decides a case differently from one decided by the Supreme Court that has materially indistinguishable facts. *Id.* at 489 (citing *Williams*, 529 U.S. at 413). A state court also unreasonably applies clearly established federal law if the state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (quoting *Williams*, 529 U.S. at 413) (quotation marks omitted). "Federal law is clearly established only when it is embodied in a holding of the Supreme Court; dicta does not count." *Jones v. Bell*, 801 F.3d 556, 564 (6th Cir. 2015) (quoting *Thaler v. Haynes*, 559 U.S. 43, 47 (2010)) (quotation marks omitted).

An application for habeas relief shall not be granted unless the state courts have had a fair opportunity to address the constitutional claims first. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); 28 U.S.C. § 2254(b)(1)(A). State court factual findings are

"presumed to be correct" and are entitled to a "high measure of deference." 28 U.S.C. § 2254(e)(1); *Sumner v. Mata*, 455 U.S. 591, 598 (1982). The petitioner must rebut the "presumption of correctness with clear and convincing evidence." *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998). The court "must conclude that the state court's findings lacked even 'fair[] support' in the record"; clear error is insufficient. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Hand v. Houk*, 871 F.3d 390, 407-08 (6th Cir. 2017).

B. Claim 4 – Right to counsel at sentencing

It is undisputed that Fields' right-to-counsel claim is procedurally defaulted and is not resurrected simply because it forms the basis of his ineffective assistance of appellate counsel claim. *Lott v. Coyle*, 261 F.3d 594, 611-12 (6th Cir. 2001). Fields must therefore show that the default is excused. *Fautenberry v. Mitchell*, 515 F.3d 614, 633 (6th Cir. 2008). To excuse procedural default, Fields must show both cause and actual prejudice from the alleged constitutional violation. *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977).

Fields argues that ineffective assistance of appellate counsel provides cause because the deprivation of counsel, without an adequate inquiry into waiver of the right to counsel, constitutes structural error such that counsel's performance was automatically prejudicial to him, making appellate counsel's performance deficient for failing to raise a "dead-bang winner" of an argument. Specifically, he argues that the Supreme

Court has "repeatedly held that a defendant is entitled to counsel at all 'critical stages' of a case," which includes sentencing, and he did not have counsel at sentencing. He also argues that a defendant's waiver of the right to counsel must be knowing and voluntary, and his was not. Because the deprivation of the right to counsel is structural error, he argues, both *Strickland* prejudice and actual prejudice are shown because he was inherently prejudiced by the lack of counsel.

Ineffective assistance of counsel can serve as cause to excuse the procedural default of his right-to-counsel claim. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). To establish cause, Fields must show the merits of the ineffective-assistance claim, which includes showing the merits of the underlying right-to-counsel claim. *Coleman v. Thompson*, 501 U.S. 722, 755 (1991); *Davie v. Mitchell*, 547 F.3d 297, 312 (6th Cir. 2008). If Fields cannot demonstrate that appellate counsel was ineffective for failing to raise the right-to-counsel claim on appeal, he cannot show cause to excuse the default. *Davie*, 547 F.3d at 312.

Even if we assume that Fields can show cause to excuse the procedural default, he must also show that he suffered actual prejudice from that constitutional violation. But he cannot show actual prejudice, so the procedural default of his right-to-counsel claim cannot be cured.

While Fields may be correct that it is structural error to be deprived of counsel at sentencing, a structural error does not automatically establish actual

prejudice to cure procedural default. *Jones*, 801 F.3d at 564; *Ambrose v. Booker*, 684 F.3d 638, 649 (6th Cir. 2012); *McConnell v. Rhay*, 393 U.S. 2, 3-4 (1968); *see also Davis v. United States*, 411 U.S. 233, 245 (1973); *Weaver v. Massachusetts*, 582 U.S. 286, 293-95, 298-300 (2017). Actual prejudice requires that the actual and eventual outcome would have been different "regardless of the nature of the underlying constitutional claim." *Ambrose*, 684 F.3d at 651. Actual prejudice goes beyond, and must be shown in addition to, *Strickland* prejudice. *Jones*, 801 F.3d at 563-64.

Fields cannot show actual prejudice because he has not pointed to anything that shows that the outcome of his sentencing would have been different if he had had counsel. Fields' argument that his sentence would have been shorter because counsel's help could have resulted in dismissal of some of his convictions fails because convictions cannot be relitigated at sentencing. His next argument – that his sentence was double the minimum requirement and that counsel could have helped secure a concurrent sentence instead of a consecutive sentence – fails for two reasons. First, judges have discretion in sentencing. Second, Ohio law permits the court to order consecutive sentences if the defendant's criminal history demonstrates the need to protect the public. Ohio Rev. Code § 2929.14(C)(4)(c). Fields has substantial criminal history, and the state court found that the public needed protection from Fields, so he cannot show that this part of his sentence would have been different.

Finally, Fields cannot show that he would not have been given the $7,500 fine had he had counsel at sentencing. Ohio law requires that the defendant file an affidavit *prior* to sentencing that says the defendant is indigent and unable to pay a fine. Ohio Rev. Code § 2929.18(B)(1). The court must also find the defendant indigent. *Id.* It is unclear whether Fields was indigent. His sentencing counsel was retained, which suggests he was not. On appeal, however, he was indigent, which suggests otherwise. No affidavit was filed, and nothing in the record shows that the trial court ever found that Fields was indigent. Beyond that, Fields had counsel up until sentencing and he is not complaining about that counsel's actions. That counsel could have filed the affidavit for him. Fields therefore cannot show that his sentence would not have included the $7,500 fine if he had had counsel at sentencing.

Because Fields cannot demonstrate that he was actually prejudiced by the lack of counsel at sentencing, he cannot excuse the procedural default of his right-to-counsel claim. This claim fails.

C. Claim 5 – Ineffective assistance of appellate counsel

Fields also cannot show that his state appellate counsel was ineffective for failing to raise his right-to-counsel claim on direct appeal. Because the state appellate court resolved this ineffective-assistance claim, AEDPA requires that Fields show a violation of clearly established Supreme Court precedent before habeas

relief can be granted. Fields cannot meet that standard. To begin with, *Strickland* requires that the defendant show that he was prejudiced by counsel's ineffectiveness. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* prejudice requires that Fields demonstrate a reasonable probability he would have prevailed but for counsel's failure to raise the issue. *Moore v. Mitchell*, 708 F.3d 760, 776 (6th Cir. 2013). As explained above, Fields cannot show that he was prejudiced by counsel's failure to raise the right-to-counsel claim on appeal.

In addition, the state court did not unreasonably apply *Strickland's* deficiency prong. It found that Fields' appellate counsel did not act deficiently by failing to raise the right-to-counsel claim because that claim was meritless. Fields argues that the state trial court should have made a *Faretta* inquiry before denying him counsel at sentencing. *Faretta* requires the court to conduct an inquiry into whether a defendant's waiver of the right to counsel at a criminal trial is knowing and voluntary before allowing him to waive that right. *Faretta v. California*, 422 U.S. 806, 807, 832-36 (1975). The court must also ensure that the defendant understands "the dangers and disadvantages of self-representation" and knows what he is doing. *Id.* at 835. Here, it is not clearly established that the state court failed to make a proper *Faretta* inquiry when it only asked one question at sentencing before permitting Fields to dismiss his counsel. The Supreme Court has not applied the *Faretta* inquiry in the sentencing context. And it is not clear that the state court's inquiry

was insufficient, considering that Fields has criminal court experience, wanted counsel dismissed, and understood that sentencing would continue without counsel present. Fields did not ask for replacement counsel or say that he did not want to be sentenced without counsel. On these facts, it is not clear that Fields was deprived of the right to counsel when he made no effort to preserve it. The state courts, therefore, did not unreasonably apply clearly established Supreme Court precedent. Fields' ineffective assistance of counsel claim fails.

CONCLUSION

For the foregoing reasons, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-3031

GERALD D. FIELDS,

Petitioner-Appellant,

v.

JAY FORSHEY, Warden,

Respondent-Appellee.

Before: SUTTON, Chief Judge; BATCHELDER and MURPHY, Circuit Judges.

JUDGMENT

(Filed Aug. 8, 2023)

On Appeal from the United States District Court
for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

No. 22-3031

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GERALD D. FIELDS, Petitioner-Appellant, v. JAY FORSHEY, Warden, Noble Correctional Institution, Respondent-Appellee.	)	ORDER (Filed Aug. 4, 2022)

Before: McKEAGUE, Circuit Judge.

Gerald D. Fields, a pro se Ohio prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The timely notice of appeal has been construed as a request for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). Fields has filed a motion for leave to proceed in forma pauperis (IFP). The State opposes the IFP motion on the ground that Fields's appeal is not taken in good faith.

In 2019, a jury found Fields guilty of possession of cocaine and marijuana, in violation of Ohio Revised Code § 2925.11(A); trafficking in cocaine and marijuana, in violation of Ohio Revised Code § 2925.03(A)(2); and illegal manufacture of cocaine, in violation of Ohio Revised Code § 2925.04(A). He was sentenced to an aggregate term of ten years in prison. The Ohio Court of

Appeals affirmed, *State v. Fields*, No. CT2019-0073, 2020 WL 4558314 (Ohio Ct. App. July 27, 2020), and the Ohio Supreme Court denied leave to appeal, *State v. Fields*, 159 N.E.3d 1152 (Ohio 2020) (table).

After unsuccessfully pursuing post-conviction relief in the state courts, Fields filed his habeas petition, claiming that (1) his trial counsel was ineffective for failing to object to an improper jury instruction on continued deliberation, (2) the trial court improperly admitted prior bad acts testimony, (3) he was convicted on insufficient evidence, (4) his appellate counsel was ineffective, and (5) he was denied his right to counsel at sentencing.

A magistrate judge recommended that the petition be denied, reasoning that Fields's claims were reasonably adjudicated on the merits on the state courts, are not cognizable on federal habeas review, or lack merit. The district court agreed, overruled Fields's objections, denied the petition, and declined to issue a COA. Fields then filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). Over Fields's objections, the district court adopted the magistrate judge's recommendation that the motion be denied. Fields's appeal of that denial "is treated as an appeal from the underlying judgment itself" *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 833 (6th Cir. 1999).

A COA may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v.*

Cockrell, 537 U.S. 322, 327 (2003). The applicant must demonstrate that reasonable jurists would find the district court's assessment of his claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court denies a habeas petition on procedural grounds, the applicant must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* When a state court previously adjudicated the petitioner's claims on the merits, the district court may not grant habeas relief unless the state court's adjudication resulted in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011).

Claims One and Two

Fields has forfeited review of his first and second claims because he did not object to the magistrate judge's recommendation that these claims be denied. *See United States v. Walters*, 638 F.2d 947, 949 (6th Cir. 1981); *see also Thomas v. Am*, 474 U.S. 140, 155 (1985). Instead, he expressly stated that he was objecting to claims three, four, and five only, so the district court reviewed only those claims. Although the failure to

object to a magistrate judge's recommendation may be excused "in the interests of justice," *Thomas*, 474 U.S. at 155, this case does not justify excusing the forfeiture, particularly when Fields also did not address his first and second claims in his Rule 59(e) motion. *See Jackson v. Jackson*, 13 F. App'x 217, 218 (6th Cir. 2001).

Claim Three – Sufficiency of the Evidence

Fields claims that the evidence was insufficient to support his conviction for illegally manufacturing cocaine. In reviewing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In a federal habeas proceeding, review of a sufficiency claim is doubly deferential: "First, deference should be given to the trier-of-fact's verdict, as contemplated by *Jackson;* second, deference should be given to the [state] Court of Appeals' consideration of the trier-of-fact's verdict, as dictated by [Antiterrorism and Effective Death Penalty Act]." *Tucker v. Palmer*, 541 F.3d 652, 656 (6th Cir. 2008).

The physical evidence included photographs taken at Fields's home showing "marijuana mixed with cocaine, digital scales with cocaine residue on them, a bag containing cocaine located on the side of the bed, baking soda on the carpet beside the bed, [and] sandwich baggies with the corners torn off," as well as

cocaine and baggies in a hot cocoa container. A detective testified that baking soda is used as a "cutting agent" to manufacture cocaine. A forensic scientist testified that the baking soda recovered from Fields's home was tested and found not to be a "controlled substance." She testified, however, that other substances found at Fields's home were tested and found to be cocaine. The detective also testified that Fields had initially admitted to the detective that he "snorted a little bit of powder" and that the crack cocaine found at his home belonged to him. Fields's sister, however, testified that the scales, baggies, and cocaine found at Fields's home belonged to her but that law enforcement officers did not believe her.

Viewing this and all other evidence most favorably to the prosecution, *see Jackson*, 443 U.S. at 319, the Ohio Court of Appeals determined that a rational trier of fact could have found Fields guilty of illegally manufacturing cocaine, *Fields*, 2020 WL 4558314, at *8; *see* Ohio Rev. Code § 2925.04(A). Fields disagrees and challenges the circumstantial nature of the evidence, arguing in particular that, contrary to the state appellate court's finding that baking soda was found, "it could not be determined what the powder on the bedrail was." The detective, though, confirmed that the powder on the rail and carpet had been tested and was found to be baking soda – i.e., a "cutting agent" that can be used to manufacture cocaine – and the forensic scientist concluded that the powder was not a "controlled substance." Circumstantial evidence alone can establish a sufficiency of evidence, *United States v.*

Washington, 702 F.3d 886, 891 (6th Cir. 2012), and this court cannot weigh the evidence, assess the credibility of witnesses, or substitute its judgment for that of the jury. *United States v. Wright*, 16 F.3d 1429, 1440 (6th Cir. 1994). As set forth above, there was circumstantial evidence that was Fields was illegally manufacturing cocaine in his home. Reasonable jurists therefore could not debate the district court's conclusion that the Ohio Court of Appeals did not unreasonably apply the *Jackson* standard in rejecting Fields's insufficiency-of-the-evidence claim.

Claims Four and Five – Right to Counsel and Ineffective Assistance of Appellate Counsel

Fields's fourth claim is that his appellate counsel was ineffective for failing to raise his fifth claim – namely, that he was denied his right to counsel at sentencing. More specifically as to his right-to-counsel claim, Fields contends that, at sentencing, he was not given an opportunity to seek substitute counsel when his retained counsel withdrew, did not sign a waiver of his right to counsel in open court, and was not appointed stand-by counsel and instead was "forced" to proceed at sentencing without counsel.

Reasonable jurists would agree that Fields's right-to-counsel claim was procedurally defaulted. The arguments underlying this claim were raised for the first time in Fields's application to reopen his appeal filed under Ohio Rule of Appellate Procedure 26(B) as an ineffective-assistance-of-appellate-counsel

claim, which is the only type of claim that can be raised in a Rule 26(B) motion. *See* Ohio R. App. 26(B)(1). Fields's Rule 26(B) application therefore preserved for habeas review his ineffective-assistance-of-appellate-counsel claim (Claim Four), but not the underlying substantive claim that he was denied his right to counsel (Claim Five). *See Davie v. Mitchell*, 547 F.3d 297, 312 (6th Cir. 2008). Further, Fields may not return to state court and raise his right-to-counsel claim due to Ohio's res judicata rule, which bars claims that could have been raised in earlier proceedings. *See State v. Perry*, 226 N.E.2d 104, 108 (Ohio 1967). Accordingly, reasonable jurists could not debate the district court's conclusion that Fields's right-to-counsel claim is procedurally defaulted, as this court has routinely held that Ohio's res judicata rule is an adequate and independent state procedural ground upon which to foreclose federal habeas review. *See Fautenberry v. Mitchell*, 515 F.3d 614, 633 (6th Cir. 2008).

Reasonable jurists could, however, debate whether Fields's procedural default is excused. Appellate counsel's failure to raise an issue on appeal can serve as cause to excuse a procedural default if the error rises to the level of ineffective assistance of counsel based on the two-pronged deficient performance and prejudice standard announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). To prevail on an ineffective-assistance claim in the appellate context, the petitioner must demonstrate that the issue omitted by counsel "was clearly stronger than the issues that counsel did

present," *Webb v. Mitchell*, 586 F.3d 383, 399 (6th Cir. 2009) (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)), and a reasonable probability that he would have prevailed but for counsel's failure to raise the issue, *Moore v. Mitchell*, 708 F.3d 760, 776 (6th Cir. 2013). Examining whether cause exists to excuse the default of Fields's fifth claim "mirrors the analysis implicated by the merits" of that claim. *See Akrawi v. Booker*, 572 F.3d 252, 261-62 (6th Cir. 2009).

At sentencing, the trial court acknowledged that Fields's attorney had filed a motion to withdraw four days earlier and asked Fields if he wanted his attorney to represent him during sentencing. Fields replied that he did not. The trial court then indicated that it "wanted to make certain" that Fields wished to have his attorney withdraw with knowledge that he will "still . . . be sentenced today." Fields indicated that he understood, and his attorney was dismissed from the courtroom. The trial court then went on with the sentencing proceedings, with Fields speaking in accordance with his right to allocution.

Sentencing is a critical stage of the criminal process to which the right to counsel attaches. *Benitez v. United States*, 521 F.3d 625, 630 (6th Cir. 2008). If a defendant chooses to waive his right to counsel, he must do so "voluntarily and intelligently," and should, through what are known as "*Faretta* warnings," "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 807, 835

(1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)); *see Iowa v. Tovar*, 541 U.S. 77, 81 (2004). The district court rejected Fields's right-to-counsel claim, reasoning that the failure to give *Faretta* warnings did not amount to a constitutional violation and that, even if it did, the error was harmless. This conclusion is debatable.

Here, no *Faretta* warnings were given, and there is some support in the record for Fields's claim that he did not knowingly waive his right to counsel at sentencing through his words or conduct. If it is determined that Fields was denied his right to counsel, it is also debatable whether the error is subject to harmlessness review, as the district court found. *See Washington v. Renico*, 455 F.3d 722, 734 (6th Cir. 2006) (noting that the denial of the *Faretta* right to self-representation, which is the flip-side of the right to counsel at issue here, "is a structural error for which [a defendant] need not show any prejudice"); *United States v. Virgil*, 444 F.3d 447, 453-54, 456 (5th Cir. 2006) ("[W]e hold that *Faretta* violations . . . , even at the sentencing stage, are so fundamentally violative of due process that the error is harmful *per se."); but see United States v. Crawford*, 487 F.3d 1101, 1107 (8th Cir. 2007). And even if harmless error analysis applies, reasonable jurists could also debate whether, if an error occurred here, that error was harmless in view of Fields's contention that his sentence "would likely have been considerably shorter" had he been afforded his right to counsel.

In short, the district court's denial of Fields's right-to-counsel claim (Claim Five) is debatable among reasonable jurists. It follows that reasonable jurists could also debate the district court's rejection of Fields's related, interdependent ineffective-assistance-of-appellate-counsel claim (Claim Four). A COA therefore will issue on grounds four and five. Because the district court's decision is debatable, this appeal is taken in good faith, and Fields will be permitted to proceed IFP.

The court **GRANTS** a COA as to Fields's fourth and fifth claims. A COA is **DENIED** as to all other claims. The court **GRANTS** Fields's motion for leave to proceed IFP. The clerk's office is directed to appoint counsel under the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B), and to issue a briefing schedule.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GERALD D. FIELDS, Petitioner,	:	Case No. 2:21-cv-1877
- vs -		District Judge Sarah D. Morrison
JAY FORSHEY, Warden, Noble Correctional Institution,		Magistrate Judge Michael R. Merz
Respondent.	:	

OPINION AND ORDER

(Filed Dec. 20, 2021)

This habeas corpus case is before the Court on Petitioner's Objections (ECF No. 23) to the Magistrate Judge's Report and Recommendations (ECF No. 22) recommending denial of Petitioner's Motion to Alter or Amend the Judgment (ECF No. 21). A litigant who objects to a Magistrate Judge's report is entitled to *de novo* consideration by the District Judge of any substantial objection made to the report. The Court has conducted that *de novo* review and includes her conclusions in this Order.

Fields first objects to what he calls the Magistrate Judge's "meddling" and asks that the Report be stricken (Objections, ECF No. 23, PageID 902, relying on *Bannister v. Davis*, 140 S. Ct. 1698 (2020). Fields argues:

> In *Banister*, the High Court reasoned that a timely-filed motion suspends the finality of the original judgment, which, in turns [sic], renders it a matter solely for the judgment's creator - a judge. In habeas relief, Rule 59(e) motions are special pleadings directed at a special proceedings, and not of the species generalized by thee [sic] Magistrate. *Id.* Consequently, it should be stricken.

(Objections, ECF No. 23, PageID 902).

In *Bannister* the Supreme Court held a motion to amend a judgment, brought under Fed.R.Civ.P. 59(e), was proper in habeas corpus cases under the rules applicable to such motions in all civil cases. In particular it held Rule 59(e) motions are not "second or successive" habeas petitions requiring prior approval by the circuit court under 28 U.S.C. § 2244(b).

Justice Kagan's opinion says nothing about the use of Magistrate Judges in recommending decisions on Rule 59(e) motions. In general the Magistrates' Act distinguishes between "non-dispositive" matters which Magistrate Judges can decide in the first instance, subject to appeal, and "dispositive" matters which require a report and recommendations if assigned to a Magistrate Judge, but final decision by an Article III District Judge. Examples of the former are pretrial motions for discovery, extensions of time, and the like. Dispositive matters, on the other hand, must be decided by an Article III judge.

However, the Magistrates' Act expressly permits the reference to a Magistrate Judge of dispositive matters for "proposed findings of fact and recommendations for the disposition" of dispositive matters such as motions for injunction, for summary judgment, to dismiss, or to suppress evidence in a criminal case. 28 U.S.C. § 636(b)(1)(B).

That is what happened here. The Magistrate Judge did not purport to decide the Rule 59(e) motion and expressly recognized "Because this is a post-judgment motion, it requires a report and recommendations, rather than a decision, from a Magistrate Judge to whom the case has been referred." Rather than "meddling," the Magistrate Judge was complying with the General Order of Assignment and Reference for this Court (General Order Col 14-01) which refers all habeas corpus proceedings to Magistrate Judges from the date of filing and empowers them to:

> conduct of all proceedings that may be conducted in such cases by Magistrate Judges under 28 U.S.C. § 636. If any such motion is a matter that a Magistrate Judge may not hear and determine in the first instance under § 636(b)(1)(A), the Magistrate Judge may file a report and recommendation on that matter without the need for a specific order of reference.

Id. Regarding the Rule 59(e) Motion, the Magistrate Judge here proceeded in accordance with General Order Col 14-01. The request to strike his Report and Recommendations is denied.

In his Motion to Amend, Fields relied on a purported distinction between evidence "adduced or presented at trial" and evidence "developed" at trial. The Report rejected that distinction and found that it was no part of the analysis of sufficiency of the evidence in *Jackson v. Virginia*, 443 U.S. 307 (1979), the governing precedent. Fields objects that the Supreme Court in *Jackson* "found that even a modicum of circumstantial evidence did not support a conviction beyond a reasonable doubt." (Objections, ECF No. 23, PageID 902). That is not part of the holding in *Jackson*. There the Court held that a mere modicum of evidence – defined as some relevant evidence – would not be enough to satisfy the Fourteenth Amendment. Instead the Court held

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts.

Jackson v. Virginia, 443 U.S. at 319. The Court did not distinguish between direct and circumstantial evidence or between physical and testimonial evidence. Instead, a reviewing court must consider all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have convicted. After adoption of the Antiterrorism and

Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"), a habeas court must defer to the decision that the evidence was sufficient made by the trier of fact and then by the reviewing state courts. *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). In a sufficiency of the evidence habeas corpus case, deference should be given to the trier-of-fact's verdict under *Jackson v. Virginia* and then to the appellate court's consideration of that verdict, as commanded by AEDPA. *Tucker v. Palmer*, 541 F.3d 652 (6th Cir. 2008); *accord Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011)(en Banc); *Parker v. Matthews*, 567 U.S. 37, 43 (2012). Notably, "a court may sustain a conviction based upon nothing more than circumstantial evidence." *Stewart v. Wolfenbarger*, 595 F.3d 647, 656 (6th Cir. 2010).

The Court did not commit a manifest error of law in applying the *Jackson* standard. Fields' objection to the contrary is overruled.

In rejecting Fields' Fourth and Fifth Grounds for Relief, the Court concluded that failure to appoint new counsel for sentencing after Fields discharged his attorney was at most harmless error (Opinion, ECF No. 19, PageID 888). Fields objects that lack of counsel at that stage can never be harmless (Objections, ECF No. 23, PageID 903, citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977). *Gardner* was a capital case in which the defendant was sentenced to death in part on the basis of confidential information included in a presentence investigation report which was not disclosed to counsel. The Court's opinion was fractured, but the

ultimate holding was that a sentencing judge in a capital case could not rely on information not shared with defense counsel. The case does not hold that absence of counsel at sentencing can never be harmless. Fields' *per se* argument aside, he has never suggested any harm he suffered from the absence of counsel at sentencing.

Conclusion

Having considered *de novo* all of the objections made by Petitioner, the Court finds they are without merit and are overruled. The Report is adopted and Petitioner Fed.R.Civ.P. 59(e) Motion is denied.

/s/ Sarah D. Morrison
Sarah D. Morrison
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Gerald D. Fields,	**Case No. 2:21-cv-1877**
Petitioner,	**Judge Sarah D. Morrison**
v.	**MOTION TO ALTER OR AMEND ORDER OR JUDGMENT.**
Jay Forshey, Warden, Noble Correctional Inst.,	(Filed Dec. 1, 2021)
Respondent.	

Now comes thee Petitioner, pro se, and hereby respectfully moves this Honorable Court, under color of Fed.R.Civ.P. 59(e), to alter or amend its November 9, 2021 opinion and order.

Memorandum of Law

Rule 59(e) allows a federal court to reconsider matters properly encompassed in a decision on the merits. **Banister v. Davis,** 140 S.Ct. 1698, 1703 (2020), citing **White v. New Hampshire Dep't of Employment Sec.,** 455 U.S. 445, 451 (1982). Those matters include a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. **GenCorp, Inc. v. Am. Int'l Underwriters,** 178 F.3d 804, 834 (6th Cir. 1999)(internal citations omitted).

A clear error of law occurred when this Court found the state appellate court's use of Detective Wilhite's testimony in its sufficiency of evidence

analysis as consistent with **Jackson v. Virginia,** 443 U.S. 307 (1979). **Jackson** concluded that the proper analysis relies upon the evidence adduced, or presented, at trial rather than that developed at trial. The evidence presented in support of illegal manufacturing of drugs was the baggie of unidentified powder, lab report of substance, photo of substance before collection and random baggier. While testimony may corroborate presented evidence, none of the state's witnesses could do such, beyond a reasonable doubt, here.

During direct, Detective Wilhite describes **attached** photo as depicting "a white powder substance on the floor there **on the railing** and in the carpet as well". **Doc. #9-1, PAGEID #493.** This is the account Petitioner relied upon in alleging the state appellate court got it wrong. Even though Detective Wilhite goes on to profess that, "using a Tactic ID", "the substance was determined to be sodium bicarconate, commonly known as baking soda", the test result wasn't submitted for cross-examination or as physical evidence.

On cross, Detective Wilhite admits that baking soda is found in other household products. **Doc. #9-1, PAGEID #526.** He also admits that a microwave, or cooking apparatus, wasn't present in bedroom for manufacturing of crack cocaine. **Id., PAGEID #527.**

Manufacturing of crack cocaine was the focal point of the state's allegation, and even its own expert witness, thee forensic scientist, refutes the charge. When asked: "Your testing is specifically for what purpose?"; Ms. Voss responds: "It's to determine if there are

controlled substance on the evidence". **Doc. #9-1, PAGEID #548-49.** Without the presence of a controlled substance, or cooking apparatus, it remains very doubtful that the carpet freshner in photo wasn't a catalysis for the crack cocaine found.

A sufficiency analysis weighs the evidence, not the testimony, in relations to the elements of the offense. Without the presence of other ingredients of crack cocaine being detected in the powder substance found under bed and collected off bedrail, or the presence of a cooling apparatus in room, one couldn't reasonably conclude the evidence helped create the crack cocaine found. Without any corroborating evidence demonstrating the baggies housed crack cocaine, the abstract theory of housing marijuana cannot be dismissed because marijuana was found too. The state simply failed to prove manufacturing beyond a reasonable doubt, and sufficiency does not incorporate circumstantial evidence – verdicts do.

This Court created a manifest injustice when it came to Ground Four and Five. Petitioner did not fire Atty. Kaido in "open court" but a closer look at the motion filed will reveal that Atty. Kaido discharged himself, on August 8, 2019, well-before sentencing. **Doc. #9, PAGEID #46-47.** Atty. Kaido was at the courthouse for another client and the court simply inquired if he still wanted to withdraw from Petitioner's case. **Doc. #9, PAGEID #48.** There was no request for a hearing on the motion, just as none came with Atty. Drew's **(Doc. #9, PAGEID #41-42),** and Atty. Kaido was considered formally discharged at filing of motion

on August 8, 2019. As such, Petitioner effectively appeared without counsel at onset of hearing. Petitioner was never offered court-appointed representation nor given opportunity to seek substitute counsel. The Constitution does not tolerate such treatment, because the Supreme Court still views sentencing as a "critical stage of the criminal proceedings" requiring counsel. **Gardner v. Fla.,** 430 U.S. 349,358 (1977)(the sentencing is a critical stage of the criminal proceeding at which there is an entitlement to effective assistance of counsel, citing **Mempa v. Rhay,** 389 U.S. 128 (1967)(sentencing is a critical stage in a criminal case)). There does not exist any authority to the contrary, supporting conclusion that sentencing is a less substantial proceeding.

Consequently, it isn't fair to say that Petitioner knowingly or willingly relinquished the right to counsel. **Johnson v. Zerbst,** 304 U.S. 458, 464 (1938).

Conclusion

Wherefore, judgment ought to be altered or amended.

MAY IT BE SO ORDERED.

Respectfully submitted,

/s/ Gerald D. Fields

GERALD D. FIELDS, pro se,
N.C.I. #A765-446
15708 McConnelsville Road
Caldwell, Ohio 43724-8902

Certificate of Service

Copy of this Motion to Alter or Amend Order or Judgment has been sent by regular U.S. mail to counsel of record for respondent: Maura O'Neill Jaite, Sr. Asst. Attorney General of Ohio at 30 East Broad Street, 23rd Floor; Columbus, Ohio 43215-6001 on this 1st day of December, 2021.

/s/ Gerald D. Fields
GERALD D. FIELDS, pro se,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GERALD D. FIELDS,	:	
Petitioner,	:	**Case No. 2:21-cv-1877**
v.	:	**Judge Sarah D. Morrison**
WARDEN, NOBLE CORRECTIONAL INSTITUTION,	:	**Magistrate Judge Michael R. Merz**
Respondent.	:	

OPINION AND ORDER

(Filed Nov. 9, 2021)

This habeas corpus case, brought *pro se* by Petitioner Gerald Fields under 28 U.S.C. § 2254, is before the Court on Petitioner's Objections (Objs., ECF No. 17) to the Magistrate Judge's Report and Recommendations recommending the Petition be dismissed (R&R, ECF No. 16). The Warden has timely responded to those Objections (Resp., ECF No. 17).

A litigant who is the subject of an adverse report and recommendations from a Magistrate Judge is entitled to *de novo* review of those portions of the report to which substantial objections is made. Fed. R. Civ. P. 72(b). This Opinion embodies the results of that review.

The Petition pleads five grounds for relief, but Mr. Fields objects only to the Magistrate Judge's recommended disposition of Grounds Three, Four, and Five.

(Objs., PageID # 868.) Therefore, only those three grounds for relief are analyzed. Petitioner makes no objections to the Magistrate Judge's summary of the litigation history.

I. GROUND THREE (CONVICTION ON INSUFFICIENT EVIDENCE)

In his Third Ground for Relief, Mr. Fields asserts he was convicted on insufficient evidence. The R&R recognized that the Ohio Court of Appeals for the Fifth District decided this claim on the merits and concluded that such court's decision was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent, particularly *Jackson v. Virginia*, 443 U.S. 307 (1979). (R&R, PageID # 851-58.)

Mr. Fields objects to the finding that the white powder on the bedrail of his bed was baking soda. (Objs., PageID # 868.)[1] He explains:

> Ground Three boils down to a factual determination of direct evidence. As urged in Petitioner's traverse, the state appellate court determined that the powder substance **found on the bedrail** was baking soda, when the lab report didn't determine what it was. This had nothing to do with circumstantial evidence because the state court misconstrued something presented, as opposed to something

[1] He had also claimed there was no direct evidence of trafficking, but concedes in his Objections that he cannot overcome the Fifth District's conclusion to the contrary.

> suggested as a whole. The state never produced any baking soda evidence, but relied on Det. Wilhite's forensic background to conclude powder on bedrail was just that. The state's own forensic scientist cast reasonable doubt as to proving manufacturing[.]

(*Id.*) (internal citations omitted) (emphasis added).

Paragraph 61 of the appellate court's opinion reads:

> Upon entering Appellant's home, the officers saw drugs and drug paraphernalia in plain sight. The State presented photographs of marijuana mixed with cocaine, digital scales with cocaine residue on them, a bag containing cocaine located on the side of the bed, baking soda **on the carpet beside the bed**, sandwich baggies with the corners torn off found in the bedroom, Appellant's prescription bottles and men's watches on the night stand next to the bed, cocaine and baggies in a hot cocoa container, and marijuana roaches in a cashew container in the kitchen.

State v. Fields, No. CT2019-0073, 2020 WL 4558314, at *7 (Ohio Ct. App., July 27, 2020) (emphasis added). Thus, the Fifth District made no finding of fact with respect to any substance on the bedrail. Rather, it found the substance at the side of the bed was baking soda from a photograph and it had evidence before it in the form of the forensic scientist's testimony that that substance was not cocaine. (ECF No. 9-1, PageID # 548.) The Fifth District also had testimony from Detective Wilhite that baking soda is a commonly used

cutting agent by which drug traffickers increase the bulk of the cocaine they have for sale. *Fields*, 2020 WL 4558314, at *7.

When a habeas petitioner seeks to overcome a state court finding of fact, he must prove the finding is in error by clear and convincing evidence. 28 U.S.C. § 2254(e). Mr. Fields has failed to prove by clear and convincing evidence that the white powder on the carpet besides the bed was not baking soda; the forensic evidence on which he relies proves only that it was not cocaine. The Fifth District's conclusion that it was baking soda is supported by Detective Wilhite's testimony that baking soda is commonly used in manufacturing cocaine for sale and the many other pieces of evidence found in the bedroom that are also associated with preparing narcotics for sale.

Mr. Fields concludes his argument by stating, "The powder substance was scientifically-tested and was determined to not be drug-related." (Objs., PageID # 869.) On the contrary, the forensic testing showed it did not contain a controlled substance but did not show it was not "drug-related."

II. GROUND FOUR (INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL) AND GROUND FIVE (DENIAL OF COUNSEL OF CHOICE)

In the R&R, the Magistrate Judge concluded that the merits of Ground Four depended on the merits of Ground Five. In other words, if the claim made in

Ground Five was a "dead-bang winner," it would have been ineffective assistance of appellate counsel to fail to raise that claim on direct appeal.

The proper – indeed, the only – method of raising a claim of ineffective assistance of appellate counsel in Ohio is by an application for reopening under Ohio R. App. P. 26(B). *See State v. Davis*, 894 N.E.2d 1221, 1223-24 (Ohio 2008). As the R&R found, Mr. Fields filed such an Application in which he asserted only that the following Assignment of Error should have been raised.

> **New Assignment of Error 1:** The sentence is Void or Voidable where the Trial Court sentenced the Appellant Without counsel Without Having Obtained and Cause to Be Journalized a Written Waiver of Counsel Signed by the Appellant; and the Appellant was Prejudiced where Counsel Could have Prevented Conviction and Sentences for Unproven Charges, as well as Ensured the Return of the Appellant's Property.

(ECF No. 9, PageID # 242.) This claim did not rely on any facts outside the appellate record, but instead evinced the belief that Mr. Fields's new attorney, retained after trial but before sentencing, would essentially have been able to relitigate the case:

> Obviously, had the Appellant been represented by competent counsel at the sentencing hearing, such counsel could have argued that no evidence was presented to prove the Manufacturing and/or Trafficking charges; as well as

> having requested that the Trial Court include in the Judgment Entry an order returning the Appellant's $7,700.00, that the Jury determined. was not subject to forfeiture, and which both the Trial Court and Zanesville Police Department now have repeatedly refused to return, despite lacking legal authority to continue to deprive the Appellant of his funds; and the Appellant's sentence would likely have been considerably shorter, especially if the Trafficking and Manufacture Counts had been dismissed; but it is beyond argument that the Court of Appeals would have been required by law to declare the sentencing hearing, and resulting sentence, void, had Appellate Counsel Assigned and argued this error.

(*Id.* at PageID # 243.) The Fifth District Court of Appeals rejected this claim, finding that Mr. Fields had expressly asked at the sentencing hearing that his new attorney withdraw. (*Id.* at PageID # 252.)

Mr. Fields then appealed to the Ohio Supreme Court adding an entirely new argument: that his original trial attorney had a severe conflict of interest because they attorney was attempting to start a romantic relationship with Mr. Fields's girlfriend. (ECF No. 9, PageID # 258-59.) Mr. Fields alleged he hired his new attorney (the one he asked to withdraw at sentencing) to file a motion for new trial based on the conflict of interest. (*Id.*) However, no such motion was ever filed, and Mr. Fields did not include evidence regarding the conflict in his petition for post-conviction relief.

The R&R found that the Fifth District's decision on the Rule 26(B) Application was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), because failure to give *Faretta* warnings at sentencing was at most harmless error. Thus, the Magistrate Judge concluded that Grounds Four and Five were without merit.

Mr. Fields objects, arguing that "[a] *Faretta* waring [*sic*] is mandatory for *pro se* representation, . . . and its denial warrants vacation of the proceeding affected by its absence," citing *Faretta v. California*, 422 U.S. 806, 835 (1975). However, in *Faretta*, the Supreme Court upheld the defendant's right to represent himself in the face of trial court insistence that he accept court-appointed counsel. Here, the obverse is the case: the trial court allowed Mr. Fields to proceed with sentencing when he fired his chosen attorney in open court.[2]

Mr. Fields relies on *Iowa v. Tovar*, 541 U.S. 77 (2004). There, the Iowa Supreme Court held that the plea colloquy preceding Mr. Tovar's guilty plea was inadequate because he had not been advised specifically that waiving counsel's assistance in deciding whether to plead guilty (1) entails the risk that a viable defense will be overlooked and (2) deprives him of the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. *Id.* at 78. The Supreme Court reversed, holding unanimously that neither warning was required by the

---

[2] Mr. Fields had also signed the earlier-filed Motion to Withdraw.

Sixth Amendment and that the validity of waiver of counsel would depend on the facts and circumstances of each case. As the R&R points out, the utility of an attorney at sentencing is less than at the arraignment/guilty plea stage which was at issue in *Tovar*.

Mr. Fields has never suggested how he was prejudiced by the absence of counsel, *i.e.*, what an attorney would or could have said that would have resulted in a different sentence. He had expressly hired his new attorney to move for a new trial, but he fired that attorney and did not ask for a continuance to obtain new counsel.

The Court accepts the Magistrate Judge's conclusion that any constitutional error in proceeding to sentencing in this case without an attorney was at most harmless error.

III. CONCLUSION

Based on the foregoing analysis, Mr. Fields's Objections are **OVERRULED** and the R&R is **ADOPTED**. The Clerk will enter judgment in favor of the Respondent and against Petitioner, dismissing the Petition with prejudice. Because reasonable jurists would not disagree with this conclusion, the Petitioner is denied a certificate of appealability and the Court certifies to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

IT IS SO ORDERED.

/s/ Sarah D. Morrison
SARAH D. MORRISON
UNITED STATES DISTRICT JUDGE

AO 450 (Rev. 11/11) Judgment in a Civil Action

UNITED STATES DISTRICT COURT
for the Southern District of Ohio

GERALD D. FIELDS, *Plaintiff* v. WARDEN, NOBLE CORRECTIONAL INSTITUTION, Defendant	)	Civil Action No. 2:21-cv-1877

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

☑ other: The Court overrules Petitioner's objections and hereby adopts the Magistrate Judge's

Report and Recommendation. The Petition is dismissed with prejudice and Petitioner is denied a certificate of appealability. The Court certifies to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed in forma pauperis. This case is hereby terminated.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☐ decided by Judge _____ on a motion for

Date: 11/9/2021 *CLERK OF COURT*

/s/ Theresa J. Bragg [SEAL]
Sign of Clerk or Deputy Clerk

The Supreme Court of Ohio

State of Ohio	Case No. 2020-1479
v.	ENTRY
Gerald Fields	(Filed Feb. 2, 2021)

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Muskingum County Court of Appeals; No. CT2019-73)

/s/ Maureen O'Connor
Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

State of Ohio	Case No. 2020-1071
v.	ENTRY
Gerald Fields	(Filed Dec. 29, 2020)

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Muskingum County Court of Appeals; No. CT2019-0073)

/s/ Maureen O'Connor
Maureen O'Connor
Chief Justice

In the Court of Appeals
Muskingum County, Ohio
Fifth Appellate District

State of Ohio, Appellee, Vs. Gerais D. Fields, Appellant.	)))))))	Case No. CT2019-0073 On Appeal from Muskingum County Court of Common Pleas Case No. CR2019-0123 (Filed Oct. 22, 2020)

Appellant Gerald D. Fields' Application to Reopen
His Direct Appeal Under App.R. 26(B)

For the Appellant:

Gerald D. Fields
Appellant, Pro se
Noble Corr. Inst. (#765446)
15708 McConnellsville Rd.
Caldwell, Ohio 43724-9678

For the Appellee:

D. Michael Haddox
Prosecuting Attorney
Taylor P. Bennington
Assistant Prosecutor
27 North Fifth St., P.O. Box 189
Zanesville, Ohio 43702-0189

In the State of Ohio, County of Noble, SS: Appellant Gerald D. Fields, having first been duly sworn according to law, upon personal, firsthand

knowledge, showing the basis of his claim that Appellate Counsel's representation was deficient, that he was prejudiced, and but for Appellate Counsel's deficient performance, the outcome of the appeal would likely have been different, states:

1. Appellant was Defendant in Muskingum County Case No. CR2019-0123;

2. The record shows that the appellant was convicted and sentenced for Count 1, Possession of Drugs (Cocaine); Count 2, Possession of Drugs (Marijuana); Count 3 Trafficking in Drugs (Cocaine); Count 4, Trafficking in Drugs (Marijuana); Count 5, Illegal Manufacture of Drugs (Cocaine); and count Six, Possession of Drug Paraphernalia was nolled;

3. The Trial Court merged Counts 1 and 3, as well as 2 and 4, and sentenced the Appellant to an aggregate term of 10 years consisting of 12 months each for Counts 3 and 4, and 8 years for Count 5, to be served consecutive;

4. Counts 3 and 4 also contained forfeiture specifications seeking forfeiture of the Appellant's home and $7,700.00 in case, which the Jury determined was not subject to forfeiture (although the Trial Court and Police Department now have repeatedly refused to return the cash to the Appellant);

5. Appellate Counsel's representation was deficient with respect to the new Assignments of Error presented herein, by his failure to raise and argue the errors; and the Appellant was prejudiced by such

failure which allowed the convictions and sentences for Illegal Manufacture and Trafficking in Drugs to stand despite constitutionally insufficient evidence where the "evidence" tested negative for any illegal drug, and that the convictions are against the manifest weight of the evidence, where the State failed to produce a single witness or iota of evidence to show the Appellant sold any person any illegal substance, and where residues tested negative for drugs; and allowed the sentences to stand where the record shows that the Appellant was sentenced without counsel, and without having signed a waiver of counsel, causing the sentencing hearing and the resulting sentences to be void or voidable as a matter of law; and but for Appellate Counsel's deficient performance, and failure to raise these important issues, the outcome of the appeal would have been different;

6. In support of his claim of Ineffective Assistance of Appellate Counsel, and the resulting prejudice, Appellant submits the following Assignments of Error which should have been, but were not, raised by Appellate Counsel:

> **<u>New Assignment of Error 1:</u> The Sentence is Void or Voidable where the Trial Court Sentenced the Appellant Without Counsel Without Having obtained and Cause to Be Journalized a Written Waiver of Counsel Signed by the Appellant; and the Appellant was Prejudiced where Counsel amid have Prevented Conviction and Sentences for Unproven**

Charges, as well as Ensured the Return of the Appellant's Property.

The record plainly shows that the Trial allowed the Appellant's replacement Trial Counsel to withdraw moments prior to sentencing after asking the Appellant if he understood that sentencing would still occur with or without counsel; then without any mention of a waiver of counsel, or securing new counsel, the Trail Court proceeded to sentence the Appellant (Sent. Tp. 3).

Proof that the Appellant wanted Counsel was in the fact that he had hired Counsel for sentencing, but had apparently misunderstood what representation that attorney Kaido would be able to provide (Sent. Tp. 3); and the Trial Court's statement "Mr. Kaido has filed a motion to withdraw, and I wanted to make certain that was where you were at this point in time. You know you're still going to be sentence today" (Sent. Tp. 3) shows it was predetermined that no time or effort would be allowed for the Appellant to obtain new counsel, and that the Trial Court intended to proceed without first obtaining a written Journalized waiver.

It is well settled that a Trial Court has no authority to sentence Defendant for felony conviction without Counsel present, or without a signed written waiver having been Journalized; and where the Trial Court sentences a Defendant without Counsel or a written waiver of counsel signed by the Defendant and Journalized into the record, the sentence is void as if the hearing never occurred. See

See State v. Brandon (1989), 45 Ohio St.3d 85, 86, and Nichols v. U.S. (1994), 511 U.S. 738 (Uncounseled conviction without a valid waiver has been recognized as Constitutionally infirm); and State v. Dubose, 117 Ohio App.3d 219, and City of Parma v. Wiseman, 2015 Ohio 4983 (8th Dist.) (non-compliance with Crim.R. 44(B) requires vacation of the sentence of confinement). See also, State v. Johnson, 2019 Ohio 4007.

Obviously, had the Appellant been represented by competent counsel at the sentencing hearing, such counsel could have argued that no evidence was presented to prove the Manufacturing and/or Trafficking charges; as well as having requested that the Trial Court include in the Judgment Entry an order returning the Appellant's $7,700.00, that the Jury determined was not subject to forfeiture, and which both the Trial Court and Zanesville Police Department now have repeatedly refused to return, despite lacking legal authority to continue to deprive the Appellant of his funds; and the Appellant's sentence would likely have been considerably shorter, especially if the Trafficking and Manufacture Counts had been dismissed; but it is beyond argument that the Court of Appeals would have been required by law to declare the sentencing hearing, and resulting sentence, void, had Appellate Counsel Assigned and argued this error.

New Proposition of Law 2: The Evidence was constitutionally Insufficient to Support Conviction for Trafficking in, and/or Illegal Manufacture of, Drugs; and the

Convictions are Against the Manifest weight of the Evidence.

Despite all the talk about illegal drugs, the State failed to present even circumstantial evidence to prove that the Appellant either manufactured or sold a single illegal substance to a single person. No outright testimony of such was presentence, and the Baggies, which might otherwise be considered circumstantial evidence, tested negative for cocaine, or weren't even tested (Trial Tp. 228, 252, 268), as did the "white powdery substance" that forms the basis of the Illegal Manufacture conviction and sentence.

In fact, State witnesses admitted there was no evidence to demonstrate the Appellant bought or sold drugs (Trial Tp. 243, et seq.)

The record does show that some small, almost trace, amounts of drugs, mostly marijuana, was found in the Appellant's home, and that two small baggies containing cocaine, and four small haggles containing Marijuana, was found in the house, providing proof of drug use, but without evidence that the Appellant sold drugs, all the evidence is constitutionally sufficient to establish is possession.

While the State attempted to establish trafficking in Cocaine by stating that the haggles with the corners torn off were examples of how Cocaine was commonly packaged for sale, a State's witness testified that only two small baggies were found with cocaine in them, and four small haggles with Marijuana were found – but no evidence was produce to claim these baggies

matched any of the torn baggies-, admitted that it was not what one would expect to find if it was meant for trafficking (Trial Tp. 248-249); that the white powdery substance (tested negative for drugs) was found on the bedroom floor nowhere near a microwave, which they said is how crack is manufactured (Tp. 246-247); and claimed it was just bad timing that they did not find an amount of prepackaged drugs one would expect to find in a trafficking operation (Tp. 249), after implying the Appellant put cocaine into the corners of baggies for sale; but it is improbable that a person who was selling drugs that he also manufactured, would allow himself to run out, or that the police would have such "bad timing" as to just happen to raid the "operation" when there was barely sufficient quantities left for personal use.

What the evidence does not show, even in the weakest of circumstantial forms, is that the Appellant sold a single illegal drug to any person; that was all mere speculation. What the evidence does show is that someone in the Appellant's home possessed two small baggies of crack, and four small baggies of Marijuana (Tp. 248) which is sufficient for less than one day of personal use, and possession, but not for trafficking.

And, as a Manifest weight issue, the "positive" tests regarding those small baggies was inadmissible hearsay as the person who testified to the contents of the reports was not the person who conducted the tests or wrote the reports (Tp. 276), the same testimony showed no fingerprints were on the baggies, and later testimony by Misty Roe showed that the baggies of

Marijuana belonged to her, not the Appellant (Tp. 291-296, 303-307), but she denied owning the two small baggies of Crack, while Tara Harris testified (Tp. 232, et seq.) that the two small baggies of Crack were her's, that she admitted this to the police from the beginning, and they laughed at her, showing the police decided from the beginning to ignore admissions that exposed both witnesses to criminal prosecution, and decided against evidence the Crack was owned by the Appellant. But even if it had been the appellant's, it was the only drugs found, and was in an amount sufficient for personal use, but not for trafficking or manufacturing.

The presence of $7,700.00 in cash is insufficient to establish a trafficking offense, and the fact that the Jury decided neither it, nor the Appellant's home, were subject to forfeiture, demonstrates the Jury did not conclude the cash was evidence of a crime; and the remaining evidence is insufficient as a matter of law to establish the offenses of Manufacturing or Trafficking in Drugs. See State v. Jenks (1991), 61 Ohio St.3d 259.

See also, State v. Moore, 2009 Ohio 4958 (Stark County) (conviction for trafficking must include evidence that the defendant sold or offered to sell a controlled substance.

Wherefore, for the foregoing reasons, the Appellant has established that Appellate Counsel's representation was ineffective and deficient; that but for Appellate Counsel's deficient performance, the outcome of the appeal would likely have been different, and that the Appellant has suffered actual prejudice as

a result; and the Court of Appeals should reopen the above captioned appeal, assign new Appellate Counsel, and allow these issues to be determined on their merits and the record.

Respectfully submitted,

/s/ Gerald D. Fields
Gerald D Fields
Appellant

Sworn and subscribed before me this 19th day of October, 2020.

/s/ Christina McHenry
Notary Public

[SEAL]

IN THE COURT OF APPEALS FOR
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGMENT ENTRY
Plaintiff-Appellee	:	(Filed Oct. 20, 2020)
-vs-	:	Case No. CT2019-73
GERALD FIELDS	:	[28 / 77–80]
Defendant-Appellant	:	

This matter came before the Court on Appellant Gerald Fields' Application to Reopen his Direct Appeal Under App.R. 26(B), filed October 22, 2020, and the State's Opposition to Defendant's Application to Reopen pursuant to App.R. 26(B), filed October 23, 2020.

Appellate Rule 26(B)(1) provides:

> A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

This Court's opinion and entry affirming Appellant's conviction and sentence were filed on July 27, 2020. We therefore find such Application to be timely filed.

In his Application to Re-open his appeal, Appellant argues that he was denied effective assistance of appellate counsel.

The standard when reviewing an ineffective assistance of counsel claim is well-established. Pursuant to *Strickland v. Washington* (1994) 466 U.S. 668, 687, 104 S Ct. 2052, 2064, 80 L.Ed.2d 674, in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, *i.e.*, errors on the part of counsel of a nature so serious that there exists s reasonable probability that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 138, 538 N.E.2d 373.

In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *id.* at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

The Supreme Court of Ohio, in *State v. Smith*, 95 Ohio St.3d 127, 766 N.E.2d 588, 2002-Ohio-1753, has once again examined the standards that must be applied to an application for reopening as brought pursuant to App.R. 28(B). In *Smith*, the Supreme Court of Ohio specifically held that:

"Moreover, to justify reopening his appeal, [Appellant] 'bears the burden of establishing that there was a "genuine issue" as to whether he has a "colorable claim" of Ineffective assistance of counsel on appeal.' *State v. Spivey*, 84 Ohio St.3d at 25, 701, 706 N.E.2d 323, N .E.2d 896.

"*Strickland* charges us to 'appl[y] a heavy measure of deference to counsel's judgments,' 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674, and to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' *id.* at 689, 466 U,S, 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Moreover, we must bear in mind that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes* (1983), 483 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987; *State v. Sanders* (2002), 94 Ohio St.3d 150, 761 N.E.2d 18." *State v. Smith*, 95 Ohio St.3d 127, 766 N.E.2d 588, *2002-Ohio-1753*, at 7.

Appellant herein argues his Appellate counsel was ineffective for failing to argue that the trial court erred in allowing his replacement trial counsel to withdraw immediately prior to sentencing, and for failing to argue that his convictions were against the manifest weight and sufficiency of the evidence.

Upon review, we find no merit in Appellant's argument that his counsel was ineffective. Appellant himself requested that his trial counsel withdraw, with full knowledge and a cautionary statement by the trial court that sentencing would still go forward.

Additionally, upon review, we find that appellate counsel did raise two separate assignments of error challenging the manifest weight and sufficiency of Appellant's convictions:

> "IV. THE JURY VERDICTS AGAINST FIELDS ARE BASED ON INSUFFICIENT EVIDENCE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 & 16, ARTICLE I OF THE OHIO CONSTITUTION.
>
> "V. THE JURY VERDICTS AGAINST FIELDS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 & 16, ARTICLE I OF THE OHIO CONSTITUTION."

Upon consideration, we find Appellant has failed to demonstrate that his counsel was incompetent or that he suffered prejudice as a result of his counsel's decisions. We further do not find that Appellant has established that the result of the proceedings have been different.

We find Appellant's arguments unpersuasive and thus find no genuine issue exists as to whether Appellant was denied the effective assistance of counsel on appeal.

We therefore find Appellant's Application for Reopening not well-taken and hereby deny same.

/s/ John W. Wise
HON. JOHN W. WISE

/s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

/s/ Craig R. Baldwin
HON. CRAIG R. BALDWIN

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- GERALD D. FIELDS Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P. J. Hon. John W. Wise, J. Hon. Craig R. Baldwin, J. Case No. CT2019-0073 OPINION (Filed Jul. 27, 2020)
CHARACTER OF PROCEEDING: JUDGMENT: DATE OF JUDGMENT ENTRY:	Criminal Appeal from the Court of Common Pleas, Case No. CR2019-0123 Affirmed

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
D. MICHAEL HADDOX PROSECUTING ATTORNEY TAYLOR P. BENNINGTON ASSISTANT PROSECUTOR 27 North Fifth Street, P.O. Box 139 Zanesville, Ohio 43702-0189	JAMES A. ANZELMO 446 Howland Drive Gahanna, Ohio 43230

Wise, J.

{¶1} Defendant-Appellant Gerald Fields appeals his conviction and sentence entered in the Muskingum

County Court of Common Pleas on two counts of drug possession, two counts of trafficking in drugs and one count of the illegal manufacture of drugs, following a jury trial,

{¶2} Plaintiff-Appellee is the State of Ohio

STATEMENT OF THE FACTS AND CASE

{¶3} The relevant facts and procedural history are as follows:

{¶4} On February 8, 2019. officers with the CODE task force conducted surveillance of 1308 Jackson Street after receiving citizen complaints of heavy foot traffic and drug activity that was occurring at the residence. During their surveillance, the officers were able to observe traffic in and out of the residence as well 1308 Jackson Street is the residence of Gerald Fields, "Appellant."

{¶5} After making these observations, the officers contacted Eric Gaumer, who is with the Adult Parole Authority. Mr. Gaumer has supervision over Appellant from a prior conviction of trafficking in drugs. Gaumer asked the Muskingum County Sheriff's Office and the Central Ohio Drug Enforcement Task Force if they would accompany him on his visit, and they agreed.

{¶6} Once Mr. Gaumer arrived and knocked on the door, it took an unusually long time for Appellant to answer it. Gaumer made contact with Appellant.

Also in the house at this time was Appellant's girlfriend Misty Roe and Appellant's sister Tara Harris.

{¶7} Officers began to walk through the house and found digital scales and the twisted-off end of a baggie containing a white rock-like substance in the sheets of his bed. On the scale, they could see white powder residue. On a table, they found marijuana and some white powder mixed into it. Under the bed, officers located a box of 150 sandwich baggies. Next to the bed were bottles of prescription medications in Appellant's name, men's watches, and a man's ring. At the end of the bed, $7,700 in cash was located in a pillow case. In a dresser drawer they found marijuana in a large bag and in individual baggies prepared for sale. Also located was a pay/owe ledger. Baking soda residue was found along the bed. More marijuana was located on a shelf. Inside hot chocolate containers, numerous baggies with corners twisted off were located. Burnt marijuana was found inside a cashew container and more marijuana was found in a tea canister. A smoking pipe was also located. The white powder was tested and found to be cocaine; the suspected marijuana was confirmed to be marijuana.

{¶8} Appellant was subsequently arrested.

{¶9} On February 20, 2019, Appellant was indicted on:

> Count 1: Possession of Drugs (Cocaine), a felony of the fifth degree, in violation of R.C. §2925.11(A).

Count 2: Possession of Drugs (Marijuana), a minor misdemeanor, in violation of R.C. §2925.11(A).

Count 3: Trafficking in Drugs (Cocaine), with a forfeiture specification, a felony of the fifth degree, in violation of R.C. §2925.03(A)(2).

Count 4: Trafficking in Drugs (Marijuana), with a forfeiture specification, a felony of the fifth degree, in violation of R.C. §2925.03(A)(2).

Count 5: Illegal Manufacture of Drugs (Cocaine), a felony of the second degree, in violation of R.C. §2925.04(A).

Count 6: Possession of Drug Paraphernalia, a misdemeanor of the fourth degree, in violation of R.C. §2925.14(C)(1).

{¶10} On March 1, 2019, Appellant entered a plea of not guilty to the charges.

{¶11} On June 4, 2019, a jury trial commenced in this matter. The State nolled Count 6 and proceeded on Counts 1 through 5.

{¶12} Approximately two hours into deliberations, the jury submitted a question inquiring as to what would happen if they could not come to a consensus on three of the counts, stating "this may be a while". (T. at 455). The trial court instructed the jury "You must continue your discussion and deliberations in an attempt to reach a verdict." *Id.* Neither party objected to the trial court's instruction.

{¶13} The following day, the jury found Appellant guilty as charged on all five (5) counts.

{¶14} On August 12, 2019, a sentencing hearing was held. For purposes of sentencing, the trial court found that Counts 1 and 3 should merge and Counts 2 and 4 should merge. The State of Ohio elected to proceed under counts 3 and 4.

{¶15} The trial court then sentenced Appellant to twelve (12) months in prison on Count 3, twelve (12) months in prison on Count 4, and eight (8) years in prison on Count 5. The periods of incarceration imposed were ordered to be served consecutively for an aggregate prison sentence of ten (10) years. The trial court additionally terminated Appellant's post-release control and imposed the remainder of time left to be served.

{¶16} Appellant now appeals, raising the following assignments of error for review.

ASSIGNMENTS OF ERROR

{¶17} "I. FIELDS' TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY NOT OBJECTING WHEN THE TRIAL COURT PROVIDED AN IMPROPER INSTRUCTION ON CONTINUED DELIBERATIONS AFTER THE JURY INDICATED THAT IT COULD NOT REACH A UNANIMOUS VERDICT.

{¶18} "II. THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO PRESENT WITNESS TESTIMONY ON THE DETAILS OF THE INVESTIGATION OF FIELDS' PRIOR DRUG OFFENSE, IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION SIXTEEN, ARTICLE ONE OF THE OHIO CONSTITUTION.

{¶19} "III. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY TO CONSIDER TWO COUNTS OF TRAFFICKING IN COCAINE, EVEN THOUGH FIELDS WAS INDICTED ON ONE COUNT OF TRAFFICKING IN MARIJUANA AND ONE COUNT OF TRAFFICKING IN COCAINE.

{¶20} "IV. THE JURY VERDICTS AGAINST FIELDS ARE BASED ON INSUFFICIENT EVIDENCE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 & 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶21} "V. THE JURY VERDICTS AGAINST FIELDS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 & 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶22} "VI. THE TRIAL COURT UNLAWFULLY ORDERED FIELDS TO SERVE CONSECUTIVE SENTENCES, IN VIOLATION OF HIS RIGHTS TO DUE PROCESS, GUARANTEED BY SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

I.

{¶23} In his first assignment of error, Appellant argues he was denied the effective assistance of counsel. We disagree.

{¶24} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. See, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶25} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the

wide range of professionally competent assistance." *Id.* at 690.

{¶26} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prang of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A court may dispose of a case by considering the second prong first, if that would facilitate disposal of the case. *State v. Bradley.* 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989), citing *Strickland*, 466 U.S. at 697. We note that a properly licensed attorney is presumed competent. *See Vaughn v. Maxwell*, 2 Ohio St.2d 299, 209 N.E.2d 164 (1965); *Stale v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999).

{¶27} Further, reviewing courts must refrain from second-guessing strategic decisions and presume that counsel's performance falls within the wide range of reasonable legal assistance. *State v. Merry*, 5th Dist. Stark No. 2011CA00203, 2012-Ohio-2910, ¶ 42, citing *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Debatable trial tactics do not establish ineffective assistance of counsel. *State v. Wilson*, 2018-Ohio-396, 106 N.E.3d 806, ¶ 36 (5th Dist.), citing *State v. Hoffner*, 102 Ohio St.3d 358, 365, 2004-Ohio-3430, 811 N.E.2d 48 (2004), ¶ 45.

{¶28} Appellant herein argues that defense trial counsel provided ineffective assistance in failing to

object to the instruction provided to the jury to continue deliberations in an attempt to reach a verdict. Appellant argues that the trial court should have read the jury the *Howard*[1] charge.

{¶29} In *State v. Howard*, 42 Ohio St.3d 18 (1989), the Ohio Supreme Court approved a supplemental charge to be given to juries deadlocked on the question of conviction or acquittal. *Id.* at paragraph two of the syllabus. The charge must be balanced and neutral, and comport with the following goals: (1) encourage a unanimous verdict only when one can conscientiously be reached, leaving open the possibility of a hung jury and resulting mistrial; and (2) call for all jurors to reevaluate their opinions, not just the jurors in the minority. *Id.* at 25.

{¶30} A trial court is not required to give a verbatim Howard charge, as long as the given charge did not coerce the jurors into reaching a verdict. *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174 (2006).

{¶31} "Where it appears to a trial court that a jury is incapable of reaching a consensus, the court, in its discretion, may make a last-ditch effort to prod the jury into reaching a unanimous verdict so long as its instructions are balanced, neutral, and not coercive." *State v. King*, 8th Dist. Cuyahoga No. 99319, 2013-Ohio-4791, 2013 WL 5886605, ¶ 24, citing *Howard* at 24, 537 N.E.2d 188. "[T]he determination of whether a

---

[1] *See State v. Howard*, 42 Ohio St.3d 18, 24, 537 N.E.2d 188 (1989).

jury is irreconcilably deadlocked is within the discretion of the trial court." *Id.* at ¶ 25, citing *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 127. Moreover, "there is no bright-line test to determine what constitutes an irreconcilably deadlocked jury." *King* at ¶ 26. "There is no formula or required period of time a trial court must wait before issuing a *Howard* instruction." (Citations omitted.) *Id. See also State v. May*, 2015-Ohio-4275, 49 N.E.3d 736, ¶ 55 (8th Dist.) (where this court found that the trial court did not abuse its discretion or did not commit plain error "in giving a supplemental *Howard* instruction at 4:30 p.m. rather than the following morning"). *See also Jones v. Cleveland Clinic Found.*, 8th Dist. No. 107030, 2019-Ohio-347, 119 N.E.3d 490, ¶¶ 37-38

{¶32} In the instant case, the jury had only been deliberating for two hours when they sent their question to the trial court. Further, the jury did not inform the trial court that they were deadlocked, only that their deliberations may take a while. The instruction provided to the jury did not stress or coerce them into reaching a verdict, it stated only that they must continue their "discussion and deliberations in an attempt to reach a verdict." We do not find the trial court abused its discretion in giving the instruction it did and not giving a *Howard* charge at that time.

{¶33} Having found no error in the trial court's instructions, we find no ineffective assistance of Appellant's trial counsel for failure to object to same.

{¶34} Appellant's first assignment of error is overruled.

II.

{¶35} In his second assignment of error, Appellant argues the trial court erred in allowing testimony regarding a prior drug offense. We disagree.

{¶36} Appellant complains that under Evid.R. 404(B), testimony concerning his prior conviction was improperly used to show a propensity or inclination to commit the crime of trafficking in drugs in the instant case.

{¶37} Extrinsic acts may not generally be used to prove the inference that the accused acted in conformity with his other acts or that he has the propensity to act in that manner. *State v. Smith* (1990), 49 Ohio St.3d 137, 140, 551 N.E.2d 190, 193–194. Evid.R. 404(B) permits "other acts" evidence for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶38} The Ohio Supreme Court has discussed Evid.R. 404, stating:

> Evid.R. 404 codifies the common law with respect to evidence of other acts of wrongdoing. The rule contemplates acts that may or may not be similar to the crime at issue. If the other act is offered for some relevant purpose other than to show character and propensity

> to commit crime, such as one of the purposes in the listing, the other act may be admissible. Another consideration permitting the admission of certain other-acts evidence is whether the other acts "form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment" and are "inextricably related" to the crime. (Citations omitted.) *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 13.

{¶39} In determining whether to admit other-acts evidence, courts are to employ a three-step analysis. The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R 403. *State v. Hare*, 2018-Ohio-765, 108 N.E.3d 172, ¶ 42 (2d Dist.), quoting *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶40} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is

exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.*, 58 Ohio St. 3d 269, 271, 559 N.E.2d 1056 (1991). "A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary." *State v. Darmond.* 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

{¶41} Upon review, we find no abuse of discretion here.

{¶42} At trial, Appellant testified that he did not know how to make cocaine and that he had never seen a collection of baggies before, (T. at 356). In response, the State then showed Appellant photographs from his 2009 conviction where officers located numerous baggies, crack cocaine and powder cocaine, baking soda, and a pan on the stove which was used to manufacture cocaine. Appellant denied ever seeing any of the items in the photographs. The State then called Detective Moore who was the evidence technician in 2009. At that time he assisted the drug unit and SRT team with the photographing and collection of evidence. The detective identified the photographs and the items in the photographs from Appellant's prior case, recalling that the evidence found at that time included baggies with crack cocaine, baggies with powder cocaine, and baggies with residue with the corners torn out of them. One of the photographs specifically showed a pile of baggies with the corners twisted and torn out and packaged for sale.

{¶43} Here, the rebuttal testimony was admitted not to show other bad acts by Appellant, but rather

to impeach Appellant's testimony by demonstrating that Appellant had knowledge regarding the manufacturing process of cocaine and the tools used in said process. As such, we find the trial court did not err in allowing said testimony and evidence.

{¶44} Appellant's second assignment of error is overruled.

III.

{¶45} In his third assignment of error, Appellant argues the trial court's jury instructions were erroneous. We disagree.

{¶46} Here, during the reading of the instructions to the jury, the trial court erroneously initially instructed the jury to consider two counts of trafficking in cocaine rather than one count of trafficking in cocaine and one count of trafficking in marijuana.

> In Count 4, the defendant is charged with trafficking in drugs, cocaine, Ohio Revised Code section 2925.03(A)(2), with a forfeiture specification.
>
> Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 8th day of February, 2019, in Muskingum County, Ohio, Gerald D. Fields knowingly prepared for shipment, shipped, transported, delivered, prepared for distribution, or distributed a controlled substance, to-wit: marijuana, in an amount less than 200 grams, when the said Gerald D. Fields knew or had reasonable cause to believe

> that the controlled substance, to-wit, marijuana, or a controlled substance analogue, was intended for sale or resale by the said Gerald D. Fields, or another person . . .
>
> If you find that the State proved beyond a reasonable doubt all of the essential elements of the offense of trafficking in drugs, marijuana, in an amount less than 200 grams, your verdict must be guilty . . . (T. at 440-41).

{¶47} The trial court again properly instructed the jury that Count 4 charged Appellant with trafficking in marijuana when it reviewed the verdict form with the jury. (T. at 451).

{¶48} Upon review, because we find that the jury was properly informed of the charges, in both the instructions and the verdict form, the error in the trial court's erroneous instruction to the jury to consider two counts of trafficking in cocaine was harmless.

{¶49} Appellant's third assignment of error is overruled

IV., V.

{¶50} In his fourth and fifth assignments of error, Appellant argues his convictions were against the manifest weight and sufficiency of the evidence. We disagree.

{¶51} The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), in

which the Ohio Supreme Court held, "an appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶52} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lots its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶53} It is well-established, though, that the weight of the evidence and the credibility of the witnesses are determined by the trier of fact *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216. The jury was free to accept or reject any

and all of the evidence offered by the parties and assess the witness's credibility. *Id.*

{¶54} Appellant herein argues that the state failed to produce any witnesses to verify that they bought drugs from Fields or that they saw Fields possess or manufacture drugs." (Appellant's brief at 10).

{¶55} In the present case, Appellant was convicted of two counts of Possession of Drugs (Cocaine and Marijuana), in violation of R.C. §2925.11(A), two counts of Trafficking in Drugs (Cocaine and Marijuana), in violation of R.C. §2925.03(A)(2) and one count of the Illegal Manufacture of Drugs (Cocaine), in violation of R.C. §2925.04(A), which provide, in relevant part:

{¶56} R.C. §2925.11

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

{¶57} R.C. §2925.03

> (A) No person shall knowingly do any of the following:
>
> ****
>
> (2) Prepare for shipment, ship, transport. deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance

> analog is intended for sale or resale by the offender or another person.

{¶58} R.C. §2925.04

> (A) No person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance.

{¶59} At trial, the State introduced evidence to establish all of the elements of the possession, trafficking and manufacturing statutes recited above.

{¶60} At trial, the State introduced unrefuted evidence from the police officers that they received complaints regarding high numbers of people coming and going and drug trafficking from Appellant's residence. Detectives with the CODE task force investigated and observed the foot traffic at the house. Det. Wilhite testified this type of foot traffic is consistent with trafficking in drugs.

{¶61} Upon entering Appellant's home, the officers saw drugs and drug paraphernalia in plain sight. The State presented photographs of marijuana mixed with cocaine, digital scales with cocaine residue on them, a bag containing cocaine located on the side of the bed, baking soda on the carpet beside the bed, sandwich baggies with the corners torn off found in the bedroom, Appellant's prescription bottles and men's watches on the night stand next to the bed, cocaine and baggies in a hot cocoa container, and marijuana roaches in a cashew container in the kitchen.

{¶62} The jury also heard testimony from Detective Wilhite who explained that baking soda is used as a cutting agent in the manufacturing of cocaine. He also testified that sandwich baggies are used in the packaging of drugs and that same were found under Appellant's bed. He further testified that $7,700.00 was found in a pillow case on Appellant's bed and three (3) bags containing marijuana were found in his dresser. The baggies were balled up in the corner and tied in a knot, which he explained is indicative of drug trafficking. (T. at 216).

{¶63} Additionally, the jury was shown Appellant's pay/owe ledger, which Det. Wilhite explained is associated with drug trafficking and is used to keep track of who owes money when the drug dealer fronts the drugs to someone for a period of time. (T. at 217, 257).

{¶64} Det. Wilhite testified that Appellant admitted that he smoked marijuana and that he also snorted powder cocaine. (T. at 383-384). Appellant also admitted to them that the crack cocaine they located belonged to him. *Id.*

{¶65} While the defense presented testimony and evidence that the marijuana, marijuana pipe, and the money belonged to Appellant Misty Roe and the cocaine and scales belonged to Tara Harris, the jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the trier of fact may take note of the inconsistencies and resolve or discount

them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No. 99AP–739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). Indeed, the trier of fact need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th last. Franklin No. 02AP–604, 2003–Ohio–958, ¶ 21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP–1238, 2003–Ohio–2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although some of the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 102 at n.4, 684 N.E.2d 668 (1997).

{¶66} Based on the foregoing, we find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. Based upon the foregoing and the entire record in this matter we find Appellant's convictions are not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before

them. The jury heard the witnesses, evaluated the evidence, and was convinced of Appellants guilt. The jury neither lost their way nor created a miscarriage of justice in convicting Appellant of the offenses.

{¶67} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crimes for which Appellant was convicted.

{¶68} Appellant's fourth and fifth assignments of error are overruled.

VI.

{¶69} In his sixth assignment of error, Appellant argues the trial court erred in imposing consecutive sentences. We disagree.

{¶70} We review felony sentences using the standard of review set forth in R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 22; *State v. Howell*, 5th Dist. Stark No. 2015CA00004, 2015-Ohio-4049, ¶ 31

{¶71} In *State v. Gwynne*, a plurality of the Supreme Court of Ohio held that an appellate court may only review individual felony sentences under R.C. §2929.11 and R.C. §2929.12, while R.C. §2953.08(G)(2) is the exclusive means of appellate review of consecutive felony sentences. 158 Ohio St.3d 279, 2019-Ohio-4761, ¶16-18; *State v. Anthony*, 11th Dist. Lake No. 2019-L-045, 2019-Ohio-5410, ¶60.

{¶72} R.C. §2953.08(G)(2) provides we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find that either the record does not support the sentencing court's findings under R.C. §2929.13(B) or (D), §2929.14(8)(2)(e) or (C)(4), or §2929.20(l), or the sentence is otherwise contrary to law. *See*, *also, State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.2d 659, ¶ 28; *State v. Gwynne*, ¶16.

{¶73} Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118(1954), paragraph three of the syllabus. *See* also. *In* re *Adoption of Holcomb*, 18 Ohio St.3d 361 (1985). "Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Cross*, 161 Ohio St. at 477 120 N.E.2d 118.

{¶74} In the case at bar, Appellant does not contest that the trial court made the proper findings under R.C. §2929.14(C)(4), only that the record does not support said findings.

{¶75} As the Ohio Supreme Court noted in *Gwynne*,

> Because R.C. 2953.08(G)(2)(a) specifically mentions a sentencing judge's findings made under R.C. 2929.14(C)(4) as falling within a

> court of appeals' review, the General Assembly plainly intended R.C. 2953.08(G)(2)(a) to be the exclusive means of appellate review of consecutive sentences. *See State v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, 28 N.E.3d 1267, ¶ 7 ("We primarily seek to determine legislative intent from the plain language of a statute").
>
> While R.C. §2953.08(G)(2)(a) clearly applies to consecutive-sentencing review, R.C. §2929.11 and §2929.12 both clearly apply only to *individual* sentences. 2019-Ohio-4761, ¶¶16-17 (emphasis in original).

{¶76} "In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry[.]" *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶37. Otherwise, the imposition of consecutive sentences is contrary to law. *See Id.* The trial court is not required "to give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record and are incorporated into the sentencing entry." *Id.*

{¶77} Appellant agrees that the trial judge in his case made the requisite findings to impose consecutive sentences under R.C. §2929.14(C)(4). (Appellant's Brief at 13).

{¶78} According to the Ohio Supreme Court, "the record must contain a basis upon which a reviewing court can determine that the trial court made the

findings required by R.C. 2929.14(C)(4) before it imposed consecutive sentences." *Bonnell*, ¶28. "[A]s 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." *Id.* at ¶29.

{¶79} The plurality of the Ohio Supreme Court in *Gwynne* held that appellate courts may not review consecutive sentences for compliance with R.C. §2929.11 and R.C. §2929.12. *See* 2019-Ohio-4761, ¶18.

{¶80} In the case at bar, the trial court had the benefit of a Pre-Sentence Investigation Report. That report detailed Appellant's significant criminal history which included a 2009 case in Muskingum County for trafficking in crack cocaine and permitting drug use, for which Appellant was sentenced to nine (9) years in prison. Appellant was still on post-release control for those convictions. Appellant also had a 2005 conviction in Guernsey County for trafficking in drugs (crack cocaine), possession of drugs (crack cocaine) for which he was sentenced to ten (10) months in prison. Appellant had three other separate convictions in Guernsey County in 2003: for trafficking in drugs (crack cocaine); and, for trafficking in drugs (cocaine), both of which he was sentenced to six (6) months in prison, and possession of drugs (crack cocaine) on which he was sentenced to one (1) year in prison. Appellant also had older convictions in Muskingum County in 2001, 1999, 1989 and 1981, for receiving stolen property, theft by deception and drug abuse, as well as misdemeanor convictions for petty theft, disorderly conduct, passing

bad checks, falsification, domestic violence, criminal trespass and drug abuse.

{¶81} The trial court found that, in addition to Appellant being on post-release control when these crimes occurred, Appellant had previously been on community control on more than one occasion and that his control had been revoked.

{¶82} Upon review, as set forth above, we find the record supports the trial court findings as required in order to impose consecutive sentences. We find that the trial court's sentencing on the charges complies with applicable rules and sentencing statutes. The sentence was within the statutory sentencing range. Further, the record contains evidence supporting the trial court's findings under R.C. §2929.14(C)(4). Therefore, we have no basis for concluding that it is contrary to law.

{¶83} Appellant's sixth assignment of error is overruled.

{¶84} Accordingly, the judgment of the Court of Common Pleas, Muskingum County, Ohio, affirmed.

By: Wise, J.

Hoffman, J., and

Baldwin, J., concur.

/s/ John W. Wise
HON. JOHN W. WISE

/s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

/s/ Craig R. Baldwin
HON. CRAIG R. BALDWIN

JWW/kw

IN THE COURT OF APPEALS FOR
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- GERALD D. FIELDS Defendant-Appellant	:	JUDGMENT ENTRY Case No. CT2019-0073

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed.

Costs assessed to Appellant.

/s/ John W. Wise
HON. JOHN W. WISE

/s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

/s/ Craig R. Baldwin
HON. CRAIG R. BALDWIN

IN THE COURT OF COMMON PLEAS,
MUSKINGUM COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO **Plaintiff,** **vs.** **GERALD D. FIELDS** **Defendant.**	**Case Number:** **CR2019-0123** [485/880-882] **JUDGE:** **KELLY J. COTTRILL** **CHARGE:** **1. Possession of Drugs (Cocaine) F/5** **2. Possession of Drugs (Marijuana) NUM** **3. Trafficking in Drugs (Cocaine) F/5** **4. Trafficking in Drugs (Marijuana) F/5** **5. Illegal Manufacture of Drugs (Cocaine) F/2** **ORC: 1,2. §2925.11(A)** **3,4. §2925.113 (A)(2)** **5. §2925.04 (A)**

ENTRY

(Filed Aug. 14, 2019)

This matter came before the Court on August 12. 2019 for sentencing hearing before Judge Kelly J. Cottrill. The Defendant was brought before the Court in the custody of the Sheriff and represented by his

counsel, Attorney Mark Kaido, representing the State was Asst. Prosecuting Attorney, Donald L. Welch.

At this time the Court inquired of Attorney Mark Kaido if it was still his desire to withdraw as counsel. Attorney Mark Kaido advised he would like to withdraw as counsel. Additionally, it was the Defendant's desire that Attorney Kaido withdraw. The Court advised the Defendant he would he sentenced on this date and the Defendant advised he understood. The Court granted Attorney Mark Kaido's Motion to Withdraw as Counsel. Sentencing then continued with Defendant herein representing himself.

The Court finds that the Defendant was found "guilty" of the above stated offenses by a jury on June 5, 2019. Thereafter, the Court entered the finding on the record. The Court further finds that the Defendant has been afforded all or his rights pursuant to Criminal Rule 32.

The Court has considered the record, all statements, any victim impact statement, the plea recommendation in this matter, as well as the principles and purposes of sentencing under Ohio Revised Code §2929,11 and its balance of seriousness and recidivism factors under Ohio Revised Code §2929.12. The Court finds that the Defendant has previously been found guilty of one (1) felony of the second degree, three (3) felonies of the fifth degree and one (1) minor misdemeanor.

THE COURT FINDS THE DEFENDANT HAS BEEN CONVICTED OF THE FOLLOWING:

Count 1: Possession of Drugs (Cocaine), a felony of the fifth degree, in violation of ORC §2925.11(A);

Count 2: Possession of **Drugs (Marijuana), a minor misdemeanor, in violation of ORC §2925.11(A);**

Count 3: Trafficking in Drugs (Cocaine), a felony of the fifth degree, in violation of ORC §2925.03(A)(2);

Count 4: Trafficking in Drugs (Marijuana), a felony of the fifth degree, in violation of ORC §2925.03(A)(2);

Count 5: Illegal Manufacture of Drugs (Cocaine) a felony of the second degree, in violation of ORC §2925.04 (A).

The Court inquired of the Defendant if he knew of any reason why judgment should not be pronounced, or if he had anything further to say: the Defendant made a lengthy statement.

The Court made judicial findings that Defendant has a significant criminal record.

The Court found for purposes of sentencing that Counts One and Three should merge. and Counts Two and Four should merge. The State elected to sentence under Counts Three and Four.

IT IS, THEREFORE, ORDERED that the Defendant serve the following sentence:

Count Three: a **stated** prison term of **twelve** (12) **months;**
Count Four: a **stated** prison term of twelve (12) **months;**
Count Five: a **mandatory** prison term of eight **(8)** years; **mandatory** fine of **$7,500.00.**

Provided however, the periods of incarceration imposed herein shall be served consecutively to one another for an aggregate prison sentence of ten (10) years. This Court finds the Defendant is no longer amenable to Post Release Control and, pursuant to ORC §2929.141, terminates the same and imposes the remainder of time left on Post Release Control be served in prison . According to statute, it is mandatory that the remainder of time left on Post Release Control be served consecutively to the ten (10) year aggregate prison sentence in the instant case.

Pursuant to ORC §2929.14(C)(4), the Court further found that the imposition of consecutive sentences are necessary to protect the public from future crime or to punish the Defendant, and that consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct, and to the danger the Defendant poses to the public.

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

The Court further notified the Defendant that **"Post Release Control"** is **mandatory** in this case fur **three (3) years** as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code §2967.28. The Defendant is ordered to serve as part of this sentence any term for violation of that post release control.

The Court further advised the Defendant that a violation of any post release control rule, or condition can result in a more restrictive sanction while Defendant is under post release control, an increased duration of supervision or control, up to the maximum term and re-imprisonment even though Defendant served the entire stated prison term imposed upon him/her by this Court for all offenses.

Additionally, if Defendant violates conditions of supervision while under post release control. the Parole Board could return Defendant to prison for up to nine months for each violation. for a total of ½ of Defendant's originally stated prison term. If the violation is a new felony, Defendant could receive a mandatory consecutive prison term of the greater of one year or the time remaining on post release control, in addition to any other prison term imposed fur the offense.

Defendant is assessed all court costs in regard to this matter.

Pursuant to Criminal Rule 32(B), the Court advised the Defendant that he has a right to appeal his sentence within thirty (30) days; a right to have an appeal tiled on his behalf; a right to have counsel

appointed for the appeal process; and a right to have necessary documents provided without cost.

Pursuant to ORC §2929.19 and §2967.191 the Court found, and the parties stipulated, that Defendant has one-hundred eighty-six (186) days of jail credit in regard to this matter as follows:

> 02/08/2019 to 02/20/2019 in the Zanesville City Jail;
> 02/21/2019 to 08/12/2019 in the Muskingum County Jail.

The Defendant is therefore remanded to the custody of the Muskingum County Sheriff and **ORDERED** conveyed to the custody of the Ohio Department of Corrections.

The Clerk is ORDERED to make a record in this case.

/s/ Kelly J. Cottrill , JUDGE
Court of Common Pleas
Muskingum County, Ohio

IN THE COMMON PLEAS COURT OF
MUSKINGUM COUNTY, OHIO

– – –

STATE OF OHIO,	)	
PLAINTIFF,	)	
vs.	)	CASE NO. CR2019-0123
GERALD FIELDS,	)	
DEFENDANT.	)	

– – –

SENTENCING HEARING held before the Honorable Kelly J, Cottrill, taken before me, Jennifer D. Jarrett, Registered Professional Reporter and Notary Public in and for the State of Ohio, taken on Monday, August 12, 2019.

– – –

TAHYI VIDEO & COURT REPORTING, LTD.
P.O. Box 935
334 Main Street
Zanesville, Ohio 43702-0935

– – –

[2] APPEARANCES:

ON BEHALF OF THE STATE OF OHIO:

RON WELCH
Assistant Prosecuting Attorney
27 North Fifth Street, Suite 2
Zanesville, Ohio 43701

ON BEHALF OF THE DEFENDANT:

Pro Se

[3] THE COURT: You are Gerald D. Fields?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And, Mr. Fields, at this moment Mr. Kaido is still your attorney. Do you want him to be your attorney for sentencing?

THE DEFENDANT: No, Your Honor.

THE COURT: You said no?

THE DEFENDANT: No, Your Honor.

THE COURT: Mr. Kaido has filed a motion to withdraw, and I wanted to make certain that was where you were at this point in time. You know you're still going to be sentenced today?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Kaido, do you still wish to withdraw in this matter?

MR. KAIDO: That's correct, Your Honor.

THE COURT: You may leave. Thank you.

MR. KAIDO: Thank you, Your Honor.

(WHEREUPON MR. KAIDO LEFT THE COURTROOM.)

THE COURT: Mr. Fields, it's probably easier if you just remain standing. We'll get into anything you

want to talk about. I'm going to let Mr. Welch start with the case number, et cetera. Mr. Welch.

No. 22-3031

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GERALD D. FIELDS, Petitioner-Appellant, v. JAY FORSHEY, WARDEN, Respondent-Appellee.	)	ORDER (Filed Oct. 5, 2023)

BEFORE: SUTTON, Chief Judge; BATCHELDER and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

1. U.S. Const. Amend. VI provides:

> 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.

2. 28 U.S.C. § 2254 provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)
>
> > (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
> >
> > > (A) the applicant has exhausted the remedies available in the courts of the State; or
> > >
> > > (B)
> > >
> > > > (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

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

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court

proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction

proceedings shall not be a ground for relief in a proceeding arising under section 2254.

3. Ohio Rev. Code Ann. § 2929.14 provides:

(A) Except as provided in division (B)(1), (B)(2), (B)(3), (B)(4), (B)(5), (B)(6), (B)(7), (B)(8), (B)(9), (B)(10), (B)(11), (E), (G), (H), (J), or (K of this section or in division (D)(6) of section 2919.25 of the Revised Code and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a prison term that shall be one of the following:

(1)

(a) For a felony of the first degree committed on or after March 22, 2019, the prison term shall be an indefinite prison term with a stated minimum term selected by the court of three, four, five, six, seven, eight, nine, ten, or eleven years and a maximum term that is determined pursuant to section 2929.144 of the Revised Code, except that if the section that criminalizes the conduct constituting the felony specifies a different minimum term or penalty for the offense, the specific language of that section shall control in determining the minimum term or otherwise sentencing the offender but the minimum term or sentence imposed under that specific language shall be

considered for purposes of the Revised Code as if it had been imposed under this division.

(b) For a felony of the first degree committed prior to March 22, 2019, the prison term shall be a definite prison term of three, four, five, six, seven, eight, nine, ten, or eleven years.

(2)

(a) For a felony of the second degree committed on or after March 22, 2019, the prison term shall be an indefinite prison term with a stated minimum term selected by the court of two, three, four, five, six, seven, or eight years and a maximum term that is determined pursuant to section 2929.144 of the Revised Code, except that if the section that criminalizes the conduct constituting the felony specifies a different minimum term or penalty for the offense, the specific language of that section shall control in determining the minimum term or otherwise sentencing the offender but the minimum term or sentence imposed under that specific language shall be considered for purposes of the Revised Code as if it had been imposed under this division.

(b) For a felony of the second degree committed prior to March 22, 2019, the prison term shall be a definite term of two, three, four, five, six, seven, or eight years.

(3)

(a) For a felony of the third degree that is a violation of section 2903.06, 2903.08, 2907.03, 2907.04, 2907.05, 2907.321, 2907.322, 2907.323, or 3795.04 of the Revised Code, that is a violation of division (A) of section 4511.19 of the Revised Code if the offender previously has been convicted of or pleaded guilty to a violation of division (A) of that section that was a felony, or that is a violation of section 2911.02 or 2911.12 of the Revised Code if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of section 2911.01, 2911.02, 2911.11, or 2911.12 of the Revised Code, the prison term shall be a definite term of twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.

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

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

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

(B)

(1)

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

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

(ii) A prison term of three years if the specification is of the type described in division (A) of section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and

displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

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

(iv) A prison term of nine years if the specification is of the type described in division (D) of section 2941.144 of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or suppressor on or about the offender's person or under the offender's control while committing the offense and specifies that the offender previously has been convicted of or pleaded guilty to a specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code;

(v) A prison term of fifty-four months if the specification is of the type described in division (D) of section 2941.145 of the Revised Code that charges the offender with

having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using the firearm to facilitate the offense and that the offender previously has been convicted of or pleaded guilty to a specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code;

(vi) A prison term of eighteen months if the specification is of the type described in division (D) of section 2941.141 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and that the offender previously has been convicted of or pleaded guilty to a specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code.

(b) If a court imposes a prison term on an offender under division (B)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised

Code. Except as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c)

(i) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in division (A) of section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for the other felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other

provision of Chapter 2967. or Chapter 5120. of the Revised Code.

(ii) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in division (C) of section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home and that the offender previously has been convicted of or pleaded guilty to a specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for the other felony offense under division (A), (B)(2), or (3) of this section, shall impose an additional prison term of ninety months upon the offender that shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of

Chapter 2967. or Chapter 5120. of the Revised Code.

(iii) A court shall not impose more than one additional prison term on an offender under division (B)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (B)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (B)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.1411 of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender an additional prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under

division (B)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (B)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (B)(1)(d) of this section.

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

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

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

(f)

(i) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in division (A) of section 2941.1412 of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in section 2935.01 of the Revised Code or a corrections officer, as defined in section 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code.

(ii) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in division (B) of section 2941.1412 of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer, as defined in section 2935.01 of the Revised Code, or a corrections officer, as defined in section 2941.1412 of the Revised Code, and that the offender previously has been convicted of or pleaded guilty to a specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (B)(2), or (3) of this section, shall impose an additional prison term of one hundred twenty-six months upon the offender that shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or 5120. of the Revised Code.

(iii) If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element,

causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (B)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an offender under division (B)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (B)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of

the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

(2)

(a) If division (B)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense or, for offenses for which division (A)(1)(a) or (2)(a) of this section applies, in addition to the longest minimum prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

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

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of

death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

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

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

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

(b) The court shall impose on an offender the longest prison term authorized or required for the offense or, for offenses for which division (A)(1)(a) or (2)(a) of this section applies, the longest minimum prison term authorized or required for the offense, and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

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

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

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

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

(d) A sentence imposed under division (B)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under division (B)(2)(a) or (b) of this section consecutively to and prior to the prison term imposed for the underlying offense.

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

(3) Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender, if the offender commits a violation of section 2925.05 of the Revised Code and division (E)(1) of that section classifies the offender as a major drug offender, if the

offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (E) of section 4729.51, or division (J) of section 4729.54 of the Revised Code that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in division (A) of section 2941.1410 of the Revised Code charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code, the court shall impose upon the offender for the felony violation a mandatory prison term determined as described in this division that cannot be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or 5120. of the Revised Code. The mandatory prison term shall be the maximum

definite prison term prescribed in division (A)(1)(b) of this section for a felony of the first degree, except that for offenses for which division (A)(1)(a) of this section applies, the mandatory prison term shall be the longest minimum prison term prescribed in that division for the offense.

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

division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (B)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (B)(4) of this section, the court also may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

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

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 of the Revised Code that charges that the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, or a firefighter or emergency medical worker, both as defined in

section 4123.026 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (B)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) 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 offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (B)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under

division (B)(6) of this section for felonies committed as part of the same act.

(7)

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

(i) If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than eleven years, except that if the offense is a felony of the first degree committed on or after March 22, 2019, the court shall impose as the minimum prison term a mandatory term of not less than five years and not greater than eleven years;

(ii) If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the

maximum prison term allowed for the offense by division (A)(2)(b) or (3) of this section, except that if the offense is a felony of the second degree committed on or after March 22, 2019, the court shall impose as the minimum prison term a mandatory term of not less than three years and not greater than eight years;

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

(b) The prison term imposed under division (B)(7)(a) of this section shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

(8) If an offender is convicted of or pleads guilty to a felony violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1423 of the Revised Code that charges that the victim of the violation was a woman

whom the offender knew was pregnant at the time of the violation, notwithstanding the range prescribed in division (A) of this section as the definite prison term or minimum prison term for felonies of the same degree as the violation, the court shall impose on the offender a mandatory prison term that is either a definite prison term of six months or one of the prison terms prescribed in division (A) of this section for felonies of the same degree as the violation, except that if the violation is a felony of the first or second degree committed on or after arch 22, 2019, the court shall impose as the minimum prison term under division (A)(1)(a) or (2)(a) of this section a mandatory term that is one of the terms prescribed in that division, whichever is applicable, for the offense.

(9)

(a) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.11 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1425 of the Revised Code, the court shall impose on the offender a mandatory prison term of six years if either of the following applies:

(i) The violation is a violation of division (A)(1) of section 2903.11 of the Revised Code and the specification charges that the offender used an accelerant in committing the violation

and the serious physical harm to another or to another's unborn caused by the violation resulted in a permanent, serious disfigurement or permanent, substantial incapacity;

(ii) The violation is a violation of division (A)(2) of section 2903.11 of the Revised Code and the specification charges that the offender used an accelerant in committing the violation, that the violation caused physical harm to another or to another's unborn, and that the physical harm resulted in a permanent, serious disfigurement or permanent, substantial incapacity.

(b) If a court imposes a prison term on an offender under division (B)(9)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(9) of this section for felonies committed as part of the same act.

(c) The provisions of divisions (B)(9) and (C)(6) of this section and of division (D)(2) of section 2903.11, division (F)(20) of section 2929.13, and section 2941.1425 of the Revised Code shall be known as "Judy's Law."

(10) If an offender is convicted of or pleads guilty to a violation of division (A) of section 2903.11 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1426 of the Revised Code that charges that the victim of the offense suffered permanent disabling harm as a result of the offense and that the victim was under ten years of age at the time of the offense, regardless of whether the offender knew the age of the victim, the court shall impose upon the offender an additional definite prison term of six years. A prison term imposed on an offender under division (B)(10) of this section shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If a court imposes an additional prison term on an offender under this division relative to a violation of division (A) of section 2903.11 of the Revised Code, the court shall not impose any other additional prison term on the offender relative to the same offense.

(11) If an offender is convicted of or pleads guilty to a felony violation of section 2925.03 or 2925.05 of the Revised Code or a felony violation of section 2925.11 of the Revised Code for which division (C)(11) of that section applies in determining the sentence for the violation, if the drug involved in the violation is a fentanyl-related compound or a compound, mixture, preparation, or substance containing a fentanyl-related compound, and if the offender also is convicted of or pleads guilty to a

specification of the type described in division (B) of section 2941.1410 of the Revised Code that charges that the offender is a major drug offender, in addition to any other penalty imposed for the violation, the court shall impose on the offender a mandatory prison term of three, four, five, six, seven, or eight years. If a court imposes a prison term on an offender under division (B)(11) of this section, the prison term shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(11) of this section for felonies committed as part of the same act.

(C)

(1)

(a) Subject to division (C)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term

imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (B)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

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

(c) If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any

prison term imposed for the underlying felony under division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

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

(e) If a mandatory prison term is imposed upon an offender pursuant to division (B)(11) of this section, the offender shall serve the mandatory prison term consecutively to any other mandatory prison term imposed under that division, consecutively to and prior to any prison term imposed for the underlying felony, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, or 2921.35

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

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

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is

necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

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

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

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

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

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

(6) If a mandatory prison term is imposed on an offender pursuant to division (B)(9) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.11 of the Revised Code and consecutively to and prior to any other prison term or mandatory prison term previously or subsequently imposed on the offender.

(7) If a mandatory prison term is imposed on an offender pursuant to division (B)(10) of this section, the offender shall serve that mandatory prison term consecutively to and prior to any prison term imposed for the underlying felonious assault. Except as otherwise provided in division (C) of this section, any other

prison term or mandatory prison term previously or subsequently imposed upon the offender may be served concurrently with, or consecutively to, the prison term imposed pursuant to division (B)(10) of this section.

(8) Any prison term imposed for a violation of section 2903.04 of the Revised Code that is based on a violation of section 2925.03 or 2925.11 of the Revised Code or on a violation of section 2925.05 of the Revised Code that is not funding of marihuana trafficking shall run consecutively to any prison term imposed for the violation of section 2925.03 or 2925.11 of the Revised Code or for the violation of section 2925.05 of the Revised Code that is not funding of marihuana trafficking.

(9) When consecutive prison terms are imposed pursuant to division (C)(1), (2), (3), (4), (5), (6), (7), or (8) or division (H)(1) or (2) of this section, subject to division (C)(10) of this section, the term to be served is the aggregate of all of the terms so imposed.

(10) When a court sentences an offender to a non-life felony indefinite prison term, any definite prison term or mandatory definite prison term previously or subsequently imposed on the offender in addition to that indefinite sentence that is required to be served consecutively to that indefinite sentence shall be served prior to the indefinite sentence.

(11) If a court is sentencing an offender for a felony of the first or second degree, if division (A)(1)(a) or (2)(a) of this section applies with

respect to the sentencing for the offense, and if the court is required under the Revised Code section that sets forth the offense or any other Revised Code provision to impose a mandatory prison term for the offense, the court shall impose the required mandatory prison term as the minimum term imposed under division (A)(1)(a) or (2)(a) of this section, whichever is applicable.

(D)

(1) If a court imposes a prison term, other than a term of life imprisonment, for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is an offense of violence and that is not a felony sex offense, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with section 2967.28 of the Revised Code.

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

this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

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

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

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

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or

after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code, or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender pursuant to section 2971.03 of the Revised Code.

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

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

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

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

sentence the offender pursuant to section 2971.03 of the Revised Code.

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

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

(H)

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

consecutively to and prior to the prison term imposed for the underlying offense.

(2)

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

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

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

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

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

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

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

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the

offender was not placed in the recommended program or prison.

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

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

(K)

(1) The court shall impose an additional mandatory prison term of two, three, four, five, six, seven, eight, nine, ten, or eleven years on an offender who is convicted of or pleads guilty to a violent felony offense if the offender also is convicted of or pleads guilty to a

specification of the type described in section 2941.1424 of the Revised Code that charges that the offender is a violent career criminal and had a firearm on or about the offender's person or under the offender's control while committing the presently charged violent felony offense and displayed or brandished the firearm, indicated that the offender possessed a firearm, or used the firearm to facilitate the offense. The offender shall serve the prison term imposed under this division consecutively to and prior to the prison term imposed for the underlying offense. The prison term shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or 5120. of the Revised Code. A court may not impose more than one sentence under division (B)(2)(a) of this section and this division for acts committed as part of the same act or transaction.

(2) As used in division (M(1) of this section, "violent career criminal" and "violent felony offense" have the same meanings as in section 2923.132 of the Revised Code.

(L) If an offender receives or received a sentence of life imprisonment without parole, a sentence of life imprisonment, a definite sentence, or a sentence to an indefinite prison term under this chapter for a felony offense that was committed when the offender was under eighteen years of age, the offender's parole eligibility shall be determined under section 2967.132 of the Revised Code.

4. Ohio Rev. Code Ann. § 2953.08 provides:

> (A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:
>
> > (1) The sentence consisted of or included the maximum definite prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code or, with respect to a nonlife felony indefinite prison term, the longest minimum prison term allowed for the offense by division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code, the maximum definite prison term or longest minimum prison term was not required for the offense pursuant to Chapter 2925. or
> >
> > any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:
> >
> > > (a) The sentence was imposed for only one offense.
> > >
> > > (b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum definite prison term or longest minimum prison term for the offense of the highest degree.
> >
> > (2) The sentence consisted of or included a prison term and the offense for which it was imposed is a felony of the fourth or fifth degree

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

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of definite terms listed in section 2929.14 of the Revised Code or, with respect to a non-life felony indefinite prison term, the longest minimum prison term allowed for the offense by division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent

predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

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

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

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

(2) The sentence is contrary to law.

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

(C)

(1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum definite prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted or, with respect to a non-life felony indefinite prison term, exceed the longest minimum prison term allowed by division (A)(1)(a) or (2)(a) of that section for the most serious such offense. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

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

(D)

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

prosecution in the case, and is imposed by a sentencing judge.

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

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

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

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

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

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

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

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial

release under division (I) of section 2929.20 of the Revised Code.

(G)

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

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

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

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

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

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

(I) As used in this section, "non-life felony indefinite prison term" has the same meaning as in section 2929.01 of the Revised Code.

5. Ohio App. R. 26. Application for reconsideration; Application for en banc consideration; Application for reopening.

(A) Application for reconsideration and en banc consideration

(1) Reconsideration

(a) Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A).

(b) Parties opposing the application shall answer in writing within ten days of service of the application. The party making the application may file a reply brief within seven days

of service of the answer brief in opposition. Copies of the application, answer brief in opposition, and reply brief shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(c) The application for reconsideration shall be considered by the panel that issued the original decision.

(2) En banc consideration

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

(b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

(c) The rules applicable to applications for reconsideration set forth in division(A)(1) of this rule, including the timing requirements, govern applications for en banc consideration. Any sua sponte order designating a case for en banc consideration must be entered no later than ten days after the clerk has both mailed the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A). In addition, a party may file an application for en banc consideration, or the court may order it sua sponte, within ten days of the date the clerk has both mailed to the parties the judgment or order of the court ruling on a timely filed application for reconsideration under division (A)(1) of this rule if an intra-district conflict first arises as a result of that judgment or order and made a note on the docket of the mailing, as required by App.R. 30(A). A party filing both an application for reconsideration and an application for en banc consideration simultaneously shall do so in a single document.

(d) The decision of the en banc court shall become the decision of the court. In the event a majority of the full-time judges of the appellate district is unable to concur in a decision, the decision of the original panel shall remain the decision in the case unless vacated under App.R. 26(A)(2)(c) and, if so vacated, shall be reentered.

(e) Other procedures governing the initiation, filing, briefing, rehearing, reconsideration, and determination of en banc

proceedings may be prescribed by local rule or as otherwise ordered by the court.

(B) Application for reopening

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the

court grants the application, it shall do both of the following:

(a) Appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) Impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the

court shall issue an order confirming its prior judgment.