IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Respondent, :

v. : CASE NO. 84,848

ROGER LEO DAUTEL, :

Petitioner. :

_____/

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CITATIONS

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ROGER LEO DAUTEL,	:	
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STATE OF FLORIDA,	:	
Appellee.	:	
	:	

PETITIONER'S INITIAL BRIEF ON THE MERITS

STATEMENT OF THE CASE

Roger Leo Dautel was convicted, after jury trial, of aggravated battery (R355-357), was sentenced, on May 18, 1993, to fifteen years in prison (R370,443), and appealed. (R384). The First District Court of Appeal affirmed his sentence, with one judge dissenting, and certified the following question:

> MAY THE TRIAL COURT CONSIDER THE UNDERLYING FACTS IN DETERMINING WHETHER AN OUT-OF-STATE CONVICTION IS ANALOGOUS TO A FLORIDA STATUTE FOR THE PURPOSE OF CALCULATING POINTS FOR A SENTENCING GUIDELINES SCORESHEET.

Dautel v. State, 19 Fla. Law Weekly D2412 (Fla. 1st DCA, Nov. 16, 1994). The decision of the First District Court of Appeal from which review is sought is attached to this brief as Appendix A.

STATEMENT OF THE FACTS

At the sentencing hearing before the trial judge, defense counsel raised several objections to the guidelines scoresheet attached to the pre-sentence investigation report (PSI); one objection dealt with the scoring of an Ohio conviction for gross sexual imposition. (R419-428). The prosecutor had provided the court with a certified record of Dautel's Ohio conviction. (R417). This document does not appear in the record on appeal, but was submitted as an appendix to Dautel's initial brief in the district court without objection from the state, and is submitted with this brief as Appendix B. The conviction indicates that Dautel entered a no-contest plea to a violation of section 2907.05(A)(2), Ohio Revised Code, the plea was entered September 12, 1984, and the conviction was filed with the Medina County, Ohio, clerk of courts the next day.

The conviction for gross sexual imposition had been counted on the PSI scoresheet as a second degree felony. (R381, 419). Defense counsel argued it should have been scored as a misdemeanor, and pointed out that the Ohio crime did not exist in Florida. (R419-420). He stated that under the section of the Ohio statute Dautel was convicted of violating, gross sexual imposition is committed when a defendant gives a victim an intoxicant in order to impair the victim's judgment and then has sexual contact with the victim; sexual contact could be proved by showing a touching of the victim's erogenous zone, including thigh or buttocks. (R421). Defense counsel pointed out that the age of the victim was not an element of the crime of gross sexual

imposition. (R421-422). He maintained that touching a person other than by sexual union or penetration, where age is not an element, is no crime in Florida other than battery. (R422).

The prosecutor responded that she had submitted factual material "the probable cause and so forth," that showed the victim was fourteen years old, and that the Ohio conviction was therefore equivalent to the second degree felony of lewd assault under section 800.04, Fla. Stat. (R423). Defense counsel responded:

> [DEFENSE COUNSEL]: [W]hen you take an out of state conviction, you're not to look at -- first of all, let me point out there was no trial in this case --
>
> [PROSECUTOR]: Right, Your Honor. He admitted he did all this.
>
> THE COURT: Don't interrupt, Ms. Ashley.
>
> [PROSECUTOR]: Right, Your Honor, I'm just over exuberant on this.
>
> [DEFENSE COUNSEL]: There was no trial. It was a no contest plea. Be that as it may, what the Florida rule provides is not that you look at the underlying facts but you look at the offense, and then you find what Florida --
>
> THE COURT: I have done that. I have done that. I find that the gross sexual imposition constitutes a second degree felony under Florida law. Period.

(R424).

After some unrelated corrections were made, the trial court found Dautel's score on the violent personal crimes scoresheet, with gross sexual imposition scored as a second degree felony, to be 257 points. (R401,427-428). This put the permitted guidelines sentence in the range of seven to seventeen years. (R428; Rule of

Crim. Proc. 3.888(d)). Dautel was sentenced to fifteen years prison. (R370,443).

SUMMARY OF ARGUMENT

Issue I. The trial court erred in scoring Dautel's Ohio conviction for gross sexual imposition as a second degree felony.

It was error to score Dautel's gross sexual imposition conviction as equivalent to lewd assault. First, Rule of Crim. Proc. 3.701 does not authorize trial courts to look behind out-of-state convictions at underlying facts in order to determine a defendant's prior record. Second, there was no evidence or finding that the Ohio victim was fourteen years old, as the prosecutor asserted. Third, at the time of Dautel's Ohio conviction, Florida's lewd assault statute required proof that the victim be under fourteen years of age. Thus, at the time of the conviction, no crime against a fourteen year old victim could constitute lewd assault in Florida.

When the scoring error is corrected, Dautel's maximum permitted sentence is twelve years, so his fifteen year sentence is above the permitted maximum.

ARGUMENT

ISSUE I THE TRIAL COURT ERRED IN SCORING DAUTEL'S OHIO CONVICTION FOR GROSS SEXUAL IMPOSITION AS A SECOND DEGREE FELONY.

A. Out-of-state convictions must be scored without consideration of facts aside from the conviction.

The district court affirmed the scoring of gross sexual imposition under section 2907.05(A)(2), Ohio Revised Code, as a second degree felony on the theory that the Ohio crime was analogous to lewd assault under section 800.04, Fla. Stat. As the certified question indicates, the district court saw this result as justified by its view of the underlying facts of the Ohio crime, not by the Ohio statute.

The district court held it proper to classify out-of-state convictions by determining the defendant's conduct that led to the conviction. Under the district court's holding, the statutory elements of the out-of-state crime do not matter.

The First District did not base its affirmance in this case on any binding precedent. The district court acknowledged that:

> A good argument can be made that the trial court should only look at the elements of the out-of-state crime because that is all that has been established as a result of an entry of a plea or which has been proven beyond a reasonable doubt as evidenced by a guilty verdict. In addition, in [Forehand v. State, 537 So.2d 103 (Fla. 1989)], the supreme court discusses comparing elements of an out-of-state statute with the analogous Florida statute, and never mentions consideration of underlying conduct.

19 Fla. Law Weekly D2412. Nonetheless, the district court affirmed because:

> We, however, can find no Florida case

> prohibiting the use of underlying facts when making this determination, nor can we find a case where the Florida Supreme Court has specifically addressed this issue.

Id.

Until this case, the district courts had not directly addressed the question of whether facts underlying foreign convictions are to be considered. Some decisions assumed that the score is to be determined by looking at the elements of the foreign statute, with no mention of the underlying facts. Aleman v. State, 535 So.2d 342 (Fla. 2nd DCA 1988); Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990), rev.den. 576 So.2d 286 (Fla. 1991); Rotz v. State, 521 So.2d 355 (Fla. 5th DCA 1988); Lowe v. State, 478 So.2d 888 (Fla. 1st DCA 1985). Other decisions seemed to assume that underlying facts may be considered. Samples v. State, 516 So.2d 50 (Fla. 2nd DCA 1987); Collier v. State, 535 So.2d 316 (Fla. 1st DCA 1988); Robbins v. State, 482 So.2d 580 (Fla. 5th DCA 1986).

As the district court noted, however, in Forehand v. State, 537 So.2d 103 (Fla. 1989), this Court held that out-of-state convictions should be classified based on the elements of the crime. Forehand had maintained that his Texas murder conviction should not have been scored as a life felony because his two-to-eighteen year Texas sentence showed the murder was not a life felony. This Court held:

> We agree with the district court that the elements of the subject crime, not the stated degree or the sentence received, control in determining whether there is a Florida statute analogous to an out-of-state crime. The various jurisdictions may choose

> to punish the same acts differently, so the elements of a crime are the surest way to trace that crime.

537 So.2d 104.

As the First District noted below, Forehand does not explicitly address whether the conduct underlying the foreign conviction can be considered. Nonetheless, this Court's emphasis on the elements of the crime indicates that Forehand was focusing on the out-of-state statute, not the factual question of what the defendant did. The approach Forehand seems to suggest is an included offense analysis. If the Florida crime is identical to the out-of-state crime, or if the elements of the Florida crime are included in the elements of the out-of-state crime, then commission of the out-of-state crime implies commission of the Florida crime. Out-of-state crimes should be scored as the Florida crime that they imply.

The applicable rule is Fla. Rule of Crim. Proc. 3.701(d)(5)(B), which provides:

> (5) "Prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, prior to commission of the primary offense. ...
>
> (B) When scoring federal, foreign, military, or out-of-state convictions, assign the score for the analogous or parallel Florida statute.

The Sentencing Guidelines Commission Notes to rule 3.701 state:

> Each separate prior felony and misdemeanor conviction in an offender's prior record that amounts to a violation of Florida law shall be scored, unless discharged by the passage of time. Any uncertainty in the scoring of the defendant's prior record shall be resolved in favor of the

> defendant, and disagreement as to the propriety of scoring specific entries in the prior record should be resolved by the trial judge.

Strict construction of the rule is also required by due process. In Perkins v. State, 576 So.2d 1310 (Fla. 1991), this Court held that the strict construction of criminal statutes in favor of the accused is required by due process. The same due process need for definiteness in statutes, in order to be fair to defendants, mandates the strict construction of rules, like rule 3.701, that determine the punishment for crimes.

While rule 3.701 is not without ambiguity, the rule, strictly construed in favor of the accused, does not authorize going beyond convictions to look at underlying conduct. Strictly construed, the rule directs the scoring of "convictions." As the district court noted below, convictions establish only the elements of the crime. A construction of rule 3.701 that allowed trial courts to go beyond the elements of the out-of-state crime would violate the rule of strict construction.

Also, as Judge Benton noted in his dissent below, rule 3.701 does not contemplate evidentiary hearings to determine the conduct underlying foreign convictions; yet this is what a rule allowing the consideration of underlying conduct would require. Moreover, if underlying conduct, rather than the conviction itself, were what was scored, defendants would be able to attack prior convictions by asserting that the underlying conduct was not a violation of Florida law. Undoubtedly, defendants would assert that they had entered pleas of convenience, and would deny

all the underlying facts, requiring a re-litigation of old charges from other states.

Properly construed, rule 3.701(d)(5)(B) requires that out-of-state convictions be scored based on the Florida crime established by the elements of the foreign crime, without regard to any asserted underlying facts. The version of section 2907.05(A)(2) in effect at the time of Dautel's conviction provided:[1]

> (A) No person shall have sexual contact with another, not the spouse of the offender ... when any of the following apply:
>
> 2) For the purpose of preventing resistance, the offender substantially impairs the other person's ... judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

Sexual contact was defined by section 2907.01(B), Ohio Revised Code:

> "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

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[1]The current version of section 2907.05, Ohio Revised Code, and the definition section, 2907.01, Ohio Revised Code, together with amendments showing the version of these sections in effect at the time of Dautel's conviction, are attached as Appendix C. The versions in effect between 1977 and 1990 were not significantly different from the current versions.

Age of the victim is not an element of the Ohio crime.[2] Since Florida's section 800.04 does require proof of the victim's age, the Ohio crime can be committed without committing the Florida crime, and the two crimes are not equivalent for scoring purposes. Dautel's Ohio conviction should not have been scored as equivalent to lewd assault.

B. The Ohio victim's age was not proved or found.

The district court's affirmance based on underlying facts is also wrong because the underlying facts were never proved or found. The district court ruled Dautel's Ohio conviction equivalent to lewd assault based on the district court's conclusion that:

> The state introduced undisputed evidence that the Ohio conviction was based on acts where appellant's 14-year old daughter was the victim ...

19 Fla. Law Weekly D2412. In fact, there was no evidence of this fact, only the prosecutor's assertion, and possibly a probable cause affidavit that did not make it into the record. Defense counsel's response to the prosecutor's allegation that the victim was fourteen and that Dautel had admitted "he did all this," was not a concession of the prosecutor's assertion; rather, defense counsel pointed out there had been no trial, just a no-contest plea. The significance of there having been no trial, just a no-

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[2]Ohio did have a crime of gross sexual imposition on a child. Section 2709.05(A)(3)[now (4)], Revised Ohio Code, prohibited sexual contact with a person less than thirteen years old. Dautel was not convicted of that crime.

contest plea, is that there was no factual determination of what the facts were.

Moreover, the trial court did not make any finding that the victim was fourteen. As defense counsel was arguing that the rule required the judge to look not at the underlying facts, but at the offense, the judge interrupted and said, "I have done that. I have done that. I find that the gross sexual imposition constitutes a second degree felony under Florida law. Period." (R424). The apparent meaning of the judge's statement is that he was not considering the underlying facts. He was looking only at the offense, that is, the Ohio statute, and his decision to score the Ohio crime as a second degree felony was based solely on the language of the statute. If the judge had ruled instead that he would consider underlying facts, the defense would have had an opportunity to point out the lack of proof of the alleged underlying facts, and to introduce evidence, such as Dautel's testimony, disputing the state's factual assertion. It was error for the district court to affirm based on a supposed fact that was not proved, not conceded, and not found by the trial court.

C. The Florida statute in effect at the time of the Ohio conviction should have been used.

The First District's decision also assumed that gross sexual imposition with a fourteen year old victim would be a lewd assault under section 800.04. The district court was apparently looking at the current version of the Florida statute. At the time of Dautel's Ohio conviction, Florida's lewd assault law

applied only when the victim was under fourteen years old. Section 800.04, Fla. Stat. (1983) provided:

> Any person who shall handle, fondle or make an assault upon any child under the age of 14 years in a lewd, lascivious or indecent manner ... shall be guilty of a felony of the second degree ...

Section 5 of ch. 84-86, Laws of Fla., changing the age of the victim in the lewd assault statute from under fourteen to under sixteen, took effect on October 1. 1984. This was after the date of Dautel's Ohio conviction. Thus, even if the victim's age of fourteen had been established, or had been an element of the Ohio crime, the Ohio crime would not have been a lewd assault under Florida law.

Out-of-state convictions should be compared to the Florida law in effect at the time of the out-of-state crime. The purpose of scoring out-of-state convictions is to ensure that defendants whose prior record was accumulated in another state are treated comparably with defendants whose prior crimes were committed in Florida. If, in 1984, Dautel had committed the acts he was accused of in Florida, instead of Ohio, he could not have been convicted of lewd assault, and there would have been no lewd assault conviction to be scored when Dautel was sentenced in this case. Treating Dautel's prior record more harshly because it is from another state does not make sense. See Witherspoon v. State, 601 So.2d 607 (Fla. 5th DCA 1992), rev.den. 613 So.2d 13 (Fla. 1992), where the court, in considering the proper classification of Texas robberies, stated:

> We assume the Florida statute in effect when

> Witherspoon committed his Texas robberies is the "parallel" or "analogous" statute referred to by rule 3.701.d.5(a)(2).

601 So.2d 609. (emphasis by the court). See also Richard Johnson v. State, 476 So.2d 786 (Fla. 1st DCA 1985), rev.den. 482 So.2d 348 (Fla. 1985), where the issue was the proper classification of 1975 Florida burglaries that were second degree felonies at the time, but would currently be third degree felonies. The court held that "the classification in effect at the time of appellant's prior convictions should control any later scoring of those convictions." 476 So.2d 787. (emphasis by court). In Willie Johnson v. State, 525 So.2d 964 (Fla. 1st DCA 1988), the court considered the proper classification of a 1970 robbery. At the time, no degree of felony was specified for robbery, although the crime was punishable by up to life. The court held that the degree had to be determined at the time of the prior conviction, and since there was no degree specified at that time, the conviction had to be scored as a third degree felony. See, contra, Jenkins v. State, 556 So.2d 1239 (Fla. 5th DCA 1990), classifying a Florida 1965 armed robbery as a first degree felony based on current law, although in 1965 robberies were not classified as any particular degree of felony. Jenkins seems to assume that out-of-state convictions should also be classified based on current Florida law.

Dautel's Ohio conviction should have been compared with the Florida statute in effect at the time. So compared, the Ohio conviction cannot be considered to be equivalent to Florida's lewd assault.

D. The scoring error was significant. The PSI scoresheet gave Dautel 329 points. (R401). The trial court made several corrections, resulting in a score of 257 points, which is the score Dautel was sentenced on.[3] (R428). The 257 point score assumed two prior second degree felonies, including the gross sexual imposition.[4] When gross sexual imposition is not scored as a second degree felony, this changes the number of prior second degree felonies from two to one, and changes the prior second degree felony score from 33 to 15, for a reduction of 18 points. Rule 3.888(d). Even if gross sexual imposition were added back as a misdemeanor for an additional two points, or a third degree felony for an additional 9 points, the total score will still be less than 255. 255 is the bottom of the seven to seventeen sentencing guidelines range. Rule 3.888(d). The next lower cell has a permitted range of 5 1/2 to twelve years, which puts Dautel's fifteen year sentence above the maximum. Rule 3.888(d).

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[3]Appendix D, attached to this brief, charts the prior offenses and scoring, showing the difference between the PSI scoresheet and the score used by the judge. The information for Appendix D comes from the PSI scoresheet (R401), and from the sentencing hearing (R419-428).

[4]The PSI scoresheet had scored three second degree felonies. (R401). The trial judge changed one of those to a misdemeanor. (R401, 425). This left two prior second degree felonies, one of which was gross sexual imposition.

CONCLUSION

The trial court erred in scoring Dautel's Ohio conviction as a second degree felony, and this error had an effect on Dautel's sentence. The sentence must be reversed and the case remanded for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Mr. James Rogers, Bureau Chief, Criminal Appeals, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, on this 17th day of January, 1995.

STEVEN A. BEEN

IN THE SUPREME COURT OF FLORIDA

ROGER LEO DAUTEL,

Appellant,

v. CASE NO. 88,848

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX A

NANCY A. DANIELS
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Criminal law—Sentencing—Guidelines—Scoresheet—Prior out-of-state convictions—Trial court could properly look beyond elements of crime for which defendant was convicted in foreign state and consider underlying facts in determining the analogous or parallel crime in Florida—Question certified as to whether trial court may consider the underlying facts in determining whether an out-of-state conviction is analogous to a Florida statute for the purpose of calculating points for a sentencing guidelines scoresheet

ROGER LEE DAUTEL, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 93-1645. Opinion filed November 16, 1994. An appeal from the Circuit Court for Leon County. William Gary, Judge. Counsel: Nancy A. Daniels, Public Defender; John R. Dixon, Assistant Public Defender, Tallahassee, for appellant. Robert A. Butterworth, Attorney General; Joe S. Garwood, Assistant Attorney General, Tallahassee, for appellee.

(WOLF, J.) Appellant challenges the sentence imposed pursuant to a conviction for aggravated battery. He alleges that the trial court erred in treating a prior out-of-state conviction as a second-degree felony for purposes of calculating his sentencing guidelines scoresheet. We affirm, but certify a question to the Florida Supreme Court concerning what matters may be considered by the trial court when determining that an out-of-state conviction is analogous or parallel to a Florida statute.

Following a jury trial, the appellant was convicted of aggravated battery. At the sentencing hearing, defense counsel argued before the trial court that a prior out-of-state conviction had been erroneously scored in the appellant's sentencing guidelines scoresheet as a second-degree felony rather than a first-degree misdemeanor. Argument centered around whether the appellant's Ohio conviction for gross sexual imposition, a fourth-degree felony in Ohio, equated with the Florida second-degree felony of lewd and lascivious act upon a child. § 800.04, Florida Statutes (1991).

Section 800.04, Florida Statutes (1991), provides that it is a second-degree felony to commit certain sexually related acts in the presence of a child under 16 years of age. The Ohio statute for which appellant had been convicted does not contain any requirement concerning the age of the victim. The state argued that in determining the analogous Florida crime, the trial court may look beyond the elements of the out-of-state conviction and consider the underlying facts behind the conviction. The state introduced undisputed evidence that the Ohio conviction was based on acts where appellant's 14-year-old daughter was the victim, and argued that the Ohio crime is therefore analogous to section 800.04, Florida Statutes (1991). The trial court found that the Ohio conviction was analogous to a second-degree felony under Florida law.

Rule 3.701(d)(5), Florida Rules of Criminal Procedure, provides that when determining how to score an out-of-state conviction on a sentencing guidelines scoresheet, the score for the analogous or parallel Florida statute must be assigned. It appears that there are few cases in Florida that directly address the issue of what matters the trial court may consider in determining whether an out-of-state conviction is analogous to Florida statutes. In *Forehand v. State*, 537 So. 2d 103 (Fla. 1989), the supreme court held that a court must look at the elements of the out-of-state conviction rather than the sentence that could be imposed for the out-of-state conviction when determining whether there is an analogous Florida statute. In *Collier v. State*, 535 So. 2d 316 (Fla. 1st DCA 1988), this court determined that a Tennessee sexual battery statute was not analogous to sexual battery in Florida because the Tennessee statute did not contain the requirement of penetration which was required by the Florida statute; therefore, the prior Tennessee conviction was more analogous to attempted sexual battery in Florida. The court went on, however, to note that the underlying facts of the Tennessee offense indicated that appellant actually never penetrated his victim. The court never specifically addressed whether the trial judge could utilize evidence of the underlying facts of the out-of-state conviction in determining the analogous Florida statute.[1] In *Samples v. State*, 516 So. 2d 50 (Fla. 2d DCA 1987), however, the Second District Court of Appeal did approve the trial court's consideration of underlying facts, and stated that while the specific facts of the prior offense are not normally considered, if there is any question as to the severity, "the burden ... is on the state to clearly demonstrate the nature of the prior crime." *Id.* at 51-52. In that case, the court approved the introduction of Drug Enforcement Agency reports concerning the appellant's prior federal convictions.

A good argument may be made that the trial court should only look at the elements of the out-of-state crime because that is all that has been established as the result of an entry of a plea or which has been proven beyond a reasonable doubt as evidenced by a guilty verdict. In addition, in *Forehand, supra*, the supreme court discusses comparing elements of an out-of-state statute with an analogous Florida statute, and never mentions consideration of underlying conduct.

We, however, can find no Florida case prohibiting the use of underlying facts when making this determination, nor can we find a case where the Florida Supreme Court has specifically addressed this issue. We, therefore, certify the following question to be of great public importance:

> MAY THE TRIAL COURT CONSIDER THE UNDERLYING FACTS IN DETERMINING WHETHER AN OUT-OF-STATE CONVICTION IS ANALOGOUS TO A FLORIDA STATUTE FOR THE PURPOSE OF CALCULATING POINTS FOR A SENTENCING GUIDELINES SCORESHEET.

The conviction and sentence are affirmed. (JOANOS, J., concurs; BENTON, J., concurring and dissenting with written opinion.)

(BENTON, J., concurring and dissenting.) The majority opinion recognizes that "a good argument may be made that the trial court should only look at the elements of the out-of-state crime because that is all that has been established as the result of an entry of a plea or which has been proven beyond a reasonable doubt as evidenced by a guilty verdict." I find at least the premise of this argument persuasive.

The inquiry for the sentencing court should be whether the facts *established by the conviction* in the foreign jurisdiction would have supported conviction for an offense under Florida law that, if not precisely parallel, is at least "analogous." For purposes of the rule, conviction is defined as "a determination of guilt *resulting from plea or trial.*" Fla. R. Crim. P. 3.701(d)(2) (1993) (emphasis supplied). Here the prosecution relied on unspecified "documentation," "factual material . . . the probable cause and so forth" (documents which did not—apart from the pre-sentence investigation report itself—find their way into the record on appeal.)

The rule contemplates that the guidelines scoresheet will have been prepared out of court, and requires that the judge simply "approve" the scoresheet. Fla. R. Crim. P. 3.701(d)(1) (1993). The superseding rule now in force provides that the "sentencing judge shall review the scoresheet for accuracy." Fla. R. Crim. P. 3.702(d)(1) (1994). Neither rule imposes on the sentencing judge the duty to conduct an evidentiary hearing to determine what facts gave rise to the prior conviction, and neither should be so construed, in my opinion. *See generally Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990).

Florida Rule of Criminal Procedure 3.701(d)(5)(B) (1993) provides that the sentencing judge consider extrajurisdictional *convictions* "scored at the severity level at which the analogous or parallel Florida crime is located." Only allegations set out in the indictment, information, or affidavit on which a foreign conviction was obtained, and which the jury found or the convict admitted, should be deemed established for purposes of scoring under Florida Rule of Criminal Procedure 3.701(d)(5)(B) (1993), in my view.

APPENDIX A

In *Forehand v. State*, 537 So. 2d 103, 104 (Fla. 1989), our supreme court held that "the elements of the subject crime, not the stated degree or the sentence received, control in determining whether there is a Florida statute analogous to an out-of-state crime." The *Forehand* court explained that because "[t]he various jurisdictions may choose to punish the same acts differently, . . . the elements of a crime are the surest way to trace that crime." *Id.* Under one reading of *Forehand*, even allegations found to be true should be ignored, unless they constitute elements of the foreign offense.

A conviction can fairly be said to incorporate the facts alleged in the accusatory pleading, however, even if the pleaded facts are not elements of the offense.[2] This may account for the decision in *Samples v. State*, 516 So. 2d 50 (Fla. 2d DCA 1987), on which the majority chiefly relies. In *Samples*[3] as here, the question was how to analogize a non-Florida conviction in the absence of a "precisely parallel Florida Statute." *Samples*, 516 So. 2d at 52. The court said:

> Florida Rule of Criminal Procedure 3.701(d)(5)(a)(2) clearly intends that convictions, not acts, are to be scored. For this reason, the specific facts of the prior offense are not normally considered. If there is any question, however, as to the severity, "[t]he burden . . . is on the state to clearly demonstrate the nature of the prior crime, . . . otherwise, as the rules provide, the benefit of the doubt goes to the defendant." *Rodriguez v. State*, 472 So. 2d 1294, 1296 (Fla. 5th DCA 1985).
>
> There was a question as to severity here because there is no precisely parallel Florida Statute. Accordingly, the state here introduced into evidence DEA *reports of the* appellant's prior federal *conviction*. Those reports revealed that the appellant was *convicted* of conspiring to possess and deliver over one hundred pounds of marijuana. Under these circumstances, where there is no precisely parallel Florida Statute, we believe that the state met its burden of proving the nature of the crime and that, as a consequence, the court properly found the appellant's prior federal *conviction* to be most analogous to the Florida offense of trafficking under section 893.135(1)(a)(1), Florida Statutes (1985). The court properly scored the appellant's prior federal conviction, and we uphold the sentence imposed.

Samples, 516 So. 2d at 51-52 (emphasis supplied). If the DEA reports of Samples' federal conviction revealed[4] that the indictment on which it was predicated alleged that more than one hundred pounds were involved and that Samples furthered the conspiracy by sale, purchase, manufacture, delivery, transportation, or possession, *Samples* is not authority for the majority's view that other evidence should be looked to.

In *Collier v. State*, 535 So. 2d 317 (Fla. 1st DCA 1988), we held that a conviction under another state's sexual battery statute was not analogous to sexual battery in Florida because the Florida offense required proof of an additional element. In the present case, the trial court analogized Dautel's conviction for "gross sexual imposition," a fourth-degree felony in Ohio, to Florida's second-degree felony of lewd and lascivious assault on a child. This was error, in my opinion, because the Florida offense requires proof of an element which need not be proven to establish the Ohio offense and which was not, as far as the evidence shows, even alleged in Ohio.

The Ohio statute prohibits sexual contact (except between spouses) that is compelled by force or the threat of force, or that is achieved by administering drugs or intoxicants, or with the knowledge that the victim's judgment is impaired by drugs or intoxicants. Ohio Rev. Code Ann. § 2907.05. According to the 1974 Committee Comment to the statute, gross sexual imposition is "an offense analogous to rape, though less serious. Its elements are identical to those of rape, except that the type of sexual activity involved is sexual contact, rather than sexual conduct."

Dautel's Ohio *conviction* was for gross sexual imposition, not "gross sexual imposition upon a child under the age of sixteen years," a hybrid offense existing neither under Ohio law, nor under Florida law. The Florida crime of lewd and lascivious assault upon a child requires proof, as one of its elements, that the victim is a "child under the age of 16 years," section 800.04, Florida Statutes, while the Ohio crime contains no element rendering the age of the victim pertinent. In addition, the Ohio crime includes the element of compulsion or "imposition" which is not present in the Florida crime. Although less significant than the Florida element lacking in the Ohio offense, the element in the Ohio offense not present in the Florida offense is an additional reason why the Ohio conviction is not analogous.

I respectfully dissent from affirmance of the sentence; I would remand for recalculation of the scoresheet. I concur in certifying the question as one of great public importance.

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[1]Nor would such a ruling have been necessary since neither the statute itself nor the underlying facts indicated penetration.

[2]This may explain the defense position in the trial court that the Ohio conviction should be analogized to battery under Florida law and scored accordingly.

[3]Samples "had a prior federal conviction for conspiracy to possess with intent to distribute marijuana under 21 U.S.C. §§ 846 and 841(a)(1) (1970 and 1978)." *Samples*, 516 So. 2d at 51. "The trial court . . . scored the federal conviction as it would an offense under the Florida trafficking statute. § 893.135(1)(a)(1), Fla. Stat. (1985)." *Id.* The question was whether "the court should have scored his prior federal conviction under section 893.13(1)(a)(2), Florida Statutes (1985) and the conspiracy statute (section 777.04(4)(d), Florida Statutes (1985)) because [it was contended] section 893.13(1)(a)(2) is the true analogue to the federal statute involved." *Id.* The "Florida trafficking statute contains a specific pound requirement, while the federal statute does not. In addition, while the federal statute proscribes possession with intent to sell, the Florida trafficking statute does not. The Florida Statute (§ 893.13(1)(a)(2), Fla. Stat. (1985)) advanced by the appellant does contain that language." *Id.*

[4]It is not clear from the opinion what the DEA reports revealed. Whatever the precise import of *Samples*, I would follow *Forehand* and *Collier v. State*, 535 So. 2d 317 (Fla. 1st DCA 1988), rather than rely on a problematic precedent from a sister court that may conflict with the supreme court in *Forehand* and our decision in *Collier*, both of which were decided after *Samples*.

* * *

Criminal law—Sentencing—Correction—Denial of rule 3.800 motion alleging error in imposition of consecutive habitual offender sentences for offenses arising out of single criminal episode affirmed—Defendant may file rule 3.850 motion alleging same ground because factual determination is necessary on single criminal episode issue

MICHAEL ANTHONY STOCKER, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 93-4079. Opinion filed November 16, 1994. An appeal from the Circuit Court for Okaloosa County. Jack R. Heflin, Judge. Counsel: Michael Anthony Stocker, Pro Se, for Appellant. Robert A. Butterworth, Attorney General; Sonya Roebuck Horbelt, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) Appellant, Michael Anthony Stocker, appeals the summary denial of his motion for post-conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850 and his motion for correction of illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800. We hold that appellant's rule 3.850 motion for post-conviction relief was appropriate for summary denial. In appellant's rule 3.800 motion, appellant asserts that the trial court erred in imposing consecutive habitual offender sentences for offenses arising out of a single criminal episode. Because a factual determination is necessary on the single criminal episode issue, we affirm the trial court's denial of appellant's rule 3.800 motion without prejudice to appellant's right to file a timely sworn motion for post-conviction relief on the same ground pursuant to rule 3.850. *See Callaway v. State*, 19 Fla. L. Weekly D1976 (Fla. 2d DCA Sept. 14, 1994) (wherein the second district held that the two-year time limit for filing such a motion begins to run upon *Hale v. State*, 630 So. 2d 521 (Fla. 1993) becoming final); *see also Bass v. State*, 530 So. 2d 282 (Fla 1988).

AFFIRMED. (ALLEN, WEBSTER, and DAVIS, JJ. CONCUR.)

* * *

IN THE SUPREME COURT OF FLORIDA

ROGER LEO DAUTEL,

Appellant,

v. CASE NO. 88,848

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX B

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

STEVEN A. BEEN
ASSISTANT PUBLIC DEFENDER
FLORID BAR NO. 335142
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

COMMON PLEAS COURT

IN THE COURT OF COMMON PLEAS

1984 SEP 13 AM 11: 39 MEDINA COUNTY, OHIO

FILED
JEAN WATERS
MEDINA COUNTY
CLERK OF COURTS

STATE OF OHIO	)	CASE NO. 8011
Plaintiff	)	
vs.	)	JUDGE NEIL W. WHITFIELD
ROGER DAUTEL	)	
Defendant	)	JUDGMENT ENTRY

This matter came on for change of plea on September 12, 1984 before the Honorable Neil W. Whitfield, Judge of the Court of Common Pleas, Medina County, the Defendant being in court with his counsel, J. Richard McMannis, and the State of Ohio being represented by Judith A. Cross, Assistant Prosecutor.

The State of Ohio moved to amend the Indictment by dismissing Count Two conditioned upon the Defendant entering a plea of guilty or no contest to the indictment as amended. The State also moved to dismiss Case No. 7962. The Court conditionally granted the State's motion.

The Defendant through his counsel indicated that he wished to withdraw his previous plea of not guilty and enter a plea of no contest to the charge of the indictment. The Court then inquired of the Defendant as to whether or not he understood his Criminal Rule 11 and Constitutional Rights. Having been satisfied that the defendant had a proper understanding of his Criminal Rule 11 and Constitutional Rights and that said plea is knowingly, intelligently, and voluntarily made in open court and upon the record, the Court accepted the Defendant's plea of "no contest" to the charge of the indictment. The Court unconditionally granted the State's motion.

The Court proceeded to sentencing, having previously received a presentence report on a prior case, Case No. 7946. Defendant and Defendant's counsel were given an opportunity to speak pursuant to Criminal Rule 32. The Court considered the criteria for sentencing as set forth in Section 2929.12 and the criteria for probation as set forth in Section 2951.02 of the Ohio Revised Code. The Court sentences the Defendant to incarceration in a penitentiary of the State of Ohio for a period of one (1) year definite sentence, for a violation of Section 2907.05(A)(2) of the Ohio Revised Code, Gross Sexual Imposition, a felony of the fourth degree.

Said sentence shall run concurrently with the sentence previously imposed in Case No. 7946, pursuant to Section 2929.41 of the Ohio Revised Code.

The Sheriff of Medina County shall transport the Defendant to the superintendent of the Chillicothe Correctional Institute within fifteen (15) days. Costs of this action are assessed against the Defendant for which judgment is hereby rendered.

IT IS SO ORDERED.

THE HONORABLE NEIL W. WHITFIELD

MEDINA COUNTY COURT OF COMMON PLEAS STATE OF OHIO, MEDINA COUNTY, SS.
I hereby certify that this is a true copy of the original on file in said Court.
WITNESS my hand and the seal of said Court at Medina, Ohio this 13 day of September, 1984
Kathy Forney, Clerk of Courts
By Deputy

VOL 389 PAGE 305

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

ROGER LEO DAUTEL,

Appellant,

v. CASE NO. 88,848

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX C

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

STEVEN A. BEEN
ASSISTANT PUBLIC DEFENDER
FLORID BAR NO. 335142
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

statute, and in a prosecution of one over eighteen years of age for having carnal knowledge of a girl under sixteen with consent, it is not necessary that criminal intent be either averred or proved: Zent v. State, 3 OApp 473, 21 CC(NS) 475, 25 CD 219.

6. (1972) A sixteen year old boy having carnal knowledge of a female under sixteen years of age cannot be held delinquent for violating [former] RC § 2905.03, since the statute specifically identifies the class of persons who are criminally liable for statutory rape as being eighteen years of age or over: In re J. P., 32 OMisc 5, 61 OO2d 24, 287 NE2d 926 (CP).

7. (1943) Where a man over eighteen years of age has sexual intercourse with his daughter or sister under sixteen years of age, with her consent, he may be prosecuted and punished under provisions of this section, notwithstanding the fact that he is also guilty of incest: 1943 OAG p.6557.

§ 2907.05 Gross sexual imposition.

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's, or one of the other person's, judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The offender knows that the other person's, or one of the other person's, judgment or control is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with his consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of gross sexual imposition. Violation of division (A)(1), (2), or (3) of this section is a felony of the fourth degree. Violation of division (A)(4) of this section is a felony of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

HISTORY: 134 v H 511 (Eff 1-1-74); 136 v S 144 (Eff 8-27-75); 137 v H 134 (Eff 8-8-77); 143 v H 208. Eff 4-11-90.

Not analogous to former RC § 2907.05 (RS § 6833; S&C 425; 54 v 162; GC § 12435; 113 v 541; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

Committee Comment to H 511

This section defines an offense analogous to rape, though less serious. Its elements are identical to those of rape, except that the type of sexual activity involved is sexual contact, rather than sexual conduct. See, section 2907.02.

Gross sexual imposition is a felony of the fourth degree when the sexual contact is committed by force or threat or with the use of drugs or intoxicants. When the victim of the offense is under age 13, regardless of the means used to commit the offense, gross sexual imposition is a felony of the third degree.

Cross-References to Related Sections

Penalties for felonies, RC § 2929.11.

Adjudication order permanently excluding pupil from public schools, RC § 3313.66.2.

Admission of videotaped preliminary hearing testimony of child victim at trial, RC § 2945.49.

Certain offenders disqualified from day-care or preschool activities, RC §§ 3301.54, 5104.09.

Child victim of sex offenses, testimony—
Juvenile Court proceedings, RC § 2151.35.11.
List of persons experienced in questioning children, RC § 109.54.
Other court proceedings, RC § 2907.41.
Preliminary hearing, RC § 2937.11.

Complaint against juvenile, RC § 2151.27.

Costs of medical examination of victims, RC § 2907.28.

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CHAPTER 2907: SEX OFFENSES

Section

[IN GENERAL]

2907.01 Definitions.

[SEXUAL ASSAULTS]

2907.02 Rape.
[2907.02.1] 2907.021 Repealed.
2907.03 Sexual battery.
2907.04 Corruption of a minor.
2907.05 Gross sexual imposition.
2907.06 Sexual imposition.
2907.07 Importuning.
2907.08 Voyeurism.
[2907.08.1, 2907.08.2] 2907.081, 2907.082 Repealed.
2907.09 Public indecency.
2907.10 Repealed.
2907.11 Suppress information upon request.
2907.12 Felonious sexual penetration.
[2907.12.1] 2907.121 Repealed.
2907.13, 2907.14 Repealed.
[2907.14.1-2907.14.5] 2907.141-2907.145 Repealed.
2907.15-2907.20 Repealed.
[2907.20.1] 2907.201 Repealed.

[PROSTITUTION]

2907.21 Compelling prostitution.
2907.22 Promoting prostitution.
2907.23 Procuring.
2907.24 Soliciting.
2907.25 Prostitution.
2907.26 Rules of evidence in prostitution cases.
2907.27 Examination and treatment for venereal disease; HIV tests.

[MEDICAL ASSISTANCE FOR VICTIMS]

2907.28 Cost incurred in medical examination or test.
2907.29 Hospital emergency services for victims.
2907.30 Victim to be interviewed by crisis intervention trained officer.

[OBSCENITY]

2907.31 Disseminating matter harmful to juveniles.
[2907.31.1] 2907.311 Displaying matter harmful to juveniles.
2907.32 Pandering obscenity.
[2907.32.1] 2907.321 Pandering obscenity involving a minor.
[2907.32.2] 2907.322 Pandering sexually oriented matter involving a minor.
[2907.32.3] 2907.323 Illegal use of minor in nudity-oriented material or performance.
2907.33 Deception to obtain matter harmful to juveniles.
2907.34 Compelling acceptance of objectionable materials.
2907.35 Presumptions; notice.
2907.36 Declaratory judgment.
2907.37 Injunction.
2907.38-2907.40 Repealed.
2907.41 Child victim's testimony.
2907.42-2907.48 Repealed.

Committee Comment to H 511

Chapter 2907. deals with three main categories of crimes: sexual assaults and displays; prostitution offenses; and offenses related to the dissemination of obscenity and matter harmful to juveniles.

The principle on which the first group of offenses is founded is that sexual activity of whatever kind between consenting adults in private ought not to be a crime, but that the law ought to proscribe sexual assaults, sexual activity with the young and immature, public sexual displays and other sexually oriented conduct which carries a significant risk of harming or unreasonably affronting others. Distinctions of sex between offenders and victims are generally discarded. The comparative seriousness of assaultive sex offenses is based on one or more of four factors: the type of sexual activity involved; the means used to commit the offense; the age of the victim; and whether the offender stands in some special relationship to the victim. Besides assaultive sex offenses, the first group of sections prohibits: soliciting sexual activity with underage persons; soliciting deviate sexual activity; voyeurism; and public indecency.

The prostitution offenses defined in the chapter are roughly analogous to the former prostitution offenses, although the total number of such offenses is reduced. The chapter retains special rules of evidence in prostitution cases, as well as a requirement for venereal disease examination and treatment.

The offenses and collateral control measures dealing with obscenity and matter harmful to juveniles are similar to former law, although the basic obscenity offense is drafted as a pandering offense to take advantage of *Ginzburg v. United States*, 383 U.S. 463, 16 L.Ed. 2d 31, 86 S.Ct. 942 (1966). The sections dealing with matter harmful to juveniles are somewhat more stringent than former law, since the definition of what constitutes such matter is not as narrowly drawn as its predecessor.

[IN GENERAL]

§ 2907.01 Definitions.

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or represen-

tation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

(L) "Spouse" means a person married to an offender at the time of an alleged offense, except that such person shall not be considered the spouse when any of the following apply:

(1) When the parties have entered into a written separation agreement authorized by section 3103.06 of the Revised Code;

(2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or legal separation;

(3) In the case of an action for legal separation, after the effective date of the judgment for legal separation.

(M) "Minor" means a person under the age of eighteen.

HISTORY: 134 v H 511 (Eff 1-1-74); 136 v S 144 (Eff 8-27-75); 142 v H 51 (Eff 3-17-89); 143 v H 514. Eff 1-1-91.

Not analogous to former RC § 2907.01 (RS § 6830-3; 95 v 649; GC § 13387; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

Committee Comment to H 511

"Sexual conduct" is defined to include vaginal and anal intercourse, cunnilingus, and fellatio.

"Sexual contact" is defined as a touching of an erogenous zone of another for the purpose of sexual arousal or gratification.

"Sexual activity" is a shorthand term including both sexual conduct and sexual contact.

A "prostitute" is stated to be a person who promiscuously engages in sexual activity for hire. The definition no longer includes as prostitutes those who engage in indiscriminate sexual activity without hire.

Any material or performance is "harmful to juveniles" if it offends prevailing standards in the adult community as to fitness for juveniles and, in addition, meets any one of seven listed tests.

The definition of obscenity is designed to meet the requirements of *Roth v. United States*, 354 U.S. 476, 14 OO 2d 331, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957), and cases following in its wake. It spells out what is "obscene" in much greater detail than existing case law, in order to increase the utility of the definition for law enforcement purposes.

The section retains slightly modified definitions of "sexual excitement," "nudity," "juvenile," "material," and "performance."

Cross-References to Related Sections

Disclosure of HIV test results or diagnosis, RC § 3701.24.3

Endangering children, RC § 2919.22.

Kidnapping, RC § 2905.01.

Notification of victim of communicable disease, RC §§ 2151.14, 2907.30.

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1990 LEGISLATION

January 1, 1990 through January 15, 1990

(Amended Substitute House Bill Number 298)

File 118

AN ACT

eff 4-11-90

To amend sections 2907.05, 4715.09, 4715.30, and 4731.22 of the Revised Code to extend the crime of gross sexual imposition to include sexual contact when a drug or intoxicant has been administered with consent for the purpose of medical or dental examination, treatment, or surgery, to require the automatic suspension of the license or certificate of a dentist or dental hygienist who is convicted of or pleads guilty to any one of eleven specified felonies, to prohibit a person from practicing dentistry while the person's license is under suspension, and to require the automatic suspension of the license of a physician, osteopath, or podiatrist who is convicted of or pleads guilty to gross sexual imposition.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 2907.05, 4715.09, 4715.30, and 4731.22 of the Revised Code be amended to read as follows:

● Sec. 2907.05. (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following ~~apply~~ APPLIES:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's, or one of the other ~~persons'~~ PERSON'S, judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) THE OFFENDER KNOWS THAT THE OTHER PERSON'S, OR ONE OF THE OTHER PERSON'S, JUDGMENT OR CONTROL IS SUBSTANTIALLY IMPAIRED AS A RESULT OF THE INFLUENCE OF ANY DRUG OR INTOXICANT ADMINISTERED TO THE OTHER PERSON WITH HIS CONSENT FOR THE PURPOSE OF ANY KIND OF MEDICAL OR DENTAL EXAMINATION, TREATMENT, OR SURGERY.

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of gross sexual imposition. Violation of division (A) (1) ~~or~~, (2), OR (3) of this section is a felony of the fourth degree. Violation of division (A)~~(3)~~(4) of this section is a felony of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise IS unable to obtain the services of counsel, the court ~~may~~, upon request, MAY appoint counsel to represent the victim without cost to the victim.

● Sec. 4715.09. (A) No person shall practice dentistry ~~until he has obtained~~ WITHOUT a CURRENT license from the state dental board. NO PERSON SHALL PRACTICE DENTISTRY WHILE THE PERSON'S LICENSE IS UNDER SUSPENSION BY THE STATE DENTAL BOARD.

(B) No dentist shall use the services of any person not licensed to practice dentistry in this state, or the services of any partnership, corporation, or association, to construct, alter, repair, or duplicate any denture, plate, bridge, splint, or orthodontic or prosthetic appliance, without first furnishing the unlicensed person, partnership, corporation, or association with a written work authorization on forms prescribed by the state dental board.

The unlicensed person, partnership, corporation, or association shall retain the original work authorization, and the dentist shall retain a duplicate copy of the work authorization, for two years from its date. Work authorizations required by this section shall be open for inspection during the two-year period by the state dental board, its authorized agent, or the prosecuting attorney of a county or the director of law of a municipal corporation wherein the work authorizations are located.

(C) If the person, partnership, association, or corporation receiving a written authorization from a licensed dentist engages another person, firm, or corporation, referred to in this division as "subcontractor," to perform some of the services relative to the work authorization, he or it shall furnish a written sub-work authorization with respect thereto on forms prescribed by the state dental board.

The subcontractor shall retain the sub-work authorization and the issuer thereof shall retain a duplicate copy, attached to the work authorization received from the licensed dentist, for inspection by the state dental board or its duly authorized agents, for a period of two years in both cases.

(D) No unlicensed person, partnership, association, or corporation shall perform any service described in division (B) of this section without a written work authorization from a licensed dentist. Provided, that if a written work authorization is demanded from a licensed dentist who fails or refuses to furnish it for any reason, the unlicensed person, partnership, association, or corporation shall not, in such event, be subject to the enforcement provisions of section 4715.05 or the penal provisions of section 4715.99 of the Revised Code.

(E) No dentist shall employ or use conscious intravenous sedation unless the dentist possesses a valid permit issued by the state dental board authorizing him to do so.

● Sec. 4715.30. (A) The holder of a certificate or license issued under this chapter is subject to disciplinary action by the state dental board for any of the following reasons:

(1) Employing or cooperating in fraud or material deception in applying for or obtaining a license or certificate;

(2) Obtaining or attempting to obtain money or anything of value by intentional misrepresentation or material deception in the course of practice;

(3) Advertising services in a false or misleading manner or violating the board's rules governing time, place, and manner of advertising;

(4) Conviction of a misdemeanor committed in the course of practice or of any felony;

(5) Engaging in lewd or immoral conduct in connection with the provision of dental services;

(6) Selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes, or conviction of violating any law of this state or the federal government regulating the possession, distribution, or use of any drug;

women of African, Mexican, Puerto Rican, and American Indian descent as well as other ethnic and racial groups in Ohio and the United States;

~~(C)~~ (3) Mathematics;

~~(D)~~ (4) Natural science, including instruction in the conservation of natural resources;

~~(E)~~ (5) Health education, which shall include instruction in ~~the~~:

(a) THE nutritive value of foods, including natural and organically produced foods, the relation of nutrition to health, AND the use and effects of food additives~~, and the~~;

(b) THE harmful effects of and legal restrictions against the use of drugs of abuse, alcoholic beverages, and tobacco~~, and venereal~~;

(c) VENEREAL disease education, except that upon written request of his parent or guardian, a student shall be excused from taking instruction in venereal disease education;

(d) IN GRADES KINDERGARTEN THROUGH SIX, INSTRUCTION IN PERSONAL SAFETY AND ASSAULT PREVENTION, EXCEPT THAT UPON WRITTEN REQUEST OF HIS PARENT OR GUARDIAN, A STUDENT SHALL BE EXCUSED FROM TAKING INSTRUCTION IN PERSONAL SAFETY AND ASSAULT PREVENTION.

~~(F)~~ (6) Physical education;

~~(G)~~ (7) The fine arts, including music;

~~(H)~~ (8) First aid, including a training program in cardiopulmonary resuscitation, safety, and fire prevention, except that upon written request of his parent or guardian, a student shall be excused from taking instruction in cardiopulmonary resuscitation.

(B) Every school shall include in the requirements for promotion from the eighth grade to the ninth grade one year's course of study of American history.

(C) Every high school shall include in the requirements for graduation from any curriculum one unit of American history and government, including a study of the constitutions of the United States and of Ohio.

(D) Basic instruction in geography, United States history, the government of the United States, the government of the state of Ohio, local government in Ohio, the Declaration of Independence, the United States Constitution, and the Constitution of the state of Ohio shall be required before pupils may participate in courses involving the study of social problems, economics, foreign affairs, United Nations, world government, socialism and communism.

● Sec. 3319.07~~2~~* THE BOARD OF EDUCATION OF EACH COUNTY, CITY, AND EXEMPTED VILLAGE SCHOOL DISTRICT SHALL DEVELOP, IN CONSULTATION WITH PUBLIC OR PRIVATE AGENCIES OR PERSONS INVOLVED IN CHILD ABUSE PREVENTION OR INTERVENTION PROGRAMS, A PROGRAM OF IN-SERVICE TRAINING FOR PERSONS EMPLOYED BY ANY SCHOOL DISTRICT TO WORK IN AN ELEMENTARY SCHOOL AS A NURSE, TEACHER, COUNSELOR, SCHOOL PSYCHOLOGIST, OR ADMINISTRATOR. EACH PERSON EMPLOYED BY ANY SCHOOL DISTRICT TO WORK IN AN ELEMENTARY SCHOOL AS A NURSE, TEACHER, COUNSELOR, SCHOOL PSYCHOLOGIST, OR ADMINISTRATOR SHALL COMPLETE AT LEAST FOUR HOURS OF IN-SERVICE TRAINING IN CHILD ABUSE PREVENTION WITHIN THREE YEARS OF COMMENCING EMPLOYMENT WITH THE DISTRICT.

SECTION 2. That existing section 3313.60 of the Revised Code is hereby repealed.

SECTION 3. Notwithstanding section 3319.07~~2~~* of the Revised Code, a person who is employed by any school district to work in an elementary school as a nurse, teacher, counselor, school psychologist, or administrator on the effective date of this act shall complete the in-service training required by that section within three years of the effective date of this act.

SECTION 4. Notwithstanding Section 81 of Amended Substitute House Bill 171 of the 117th General Assembly, the two panels of the Gillmor Commission on School Funding and Expenditures created by that section shall report their findings and recommendations to the Senate no later than February 15, 1989, at which time the Commission shall cease to exist.

Substitute House Bill Number 51

File 281

AN ACT

eff 3-17-89

To amend sections 2907.01, 2907.21, 2907.22, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2907.34, 2919.22, and 2929.41, and to enact section 2907.311 of the Revised Code to modify the criminal law relative to juvenile prostitution, material harmful to juveniles, obscenity involving minors, sexually oriented matter involving minors, illegal use of a minor in a nudity-oriented material or performance and endangering children.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 2907.01, 2907.21, 2907.22, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2907.34, 2919.22, and 2929.41 be amended, and section 2907.311 of the Revised Code be enacted to read as follows:

● Sec. 2907.01. As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female; and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the infliction of serious physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, dance, or other exhibition performed before an audience.

(L) "Spouse" means a person married to an offender at the time of an alleged offense, except that such person shall not be considered the spouse when any of the following apply:

(1) When the parties have entered into a written separation agreement authorized by section 3103.06 of the Revised Code;

(2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or alimony;

(3) In the case of an action for alimony, after the effective date of the judgment for alimony.

*Section 3319.07.2 was changed to 3319.07.3 by the Legislative Service Commission.

(M) "MINOR" MEANS A
TEEN.

● Sec. 2907.21. (A) No pe
FOLLOWING:

(1) Compel another to eng

(2) Induce ~~or~~, procure, ~~
~~sixteen years of age~~ to engage
the offender knows the age of ~~
the offender knows that the

(3) PAY OR AGREE TO
OR THROUGH THE MINOR
ENGAGE IN SEXUAL ACT
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(4) PAY A MINOR, EIT
MINOR'S AGENT, FOR THE
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WHETHER OR NOT THE O
MINOR.

(B) Whoever violates this
a felony of the third degree.

● Sec. 2907.22. (A) No perso

(1) Establish, maintain, o
an interest in a brothel;

(2) Supervise, manage, o
engaging in sexual activity for

(3) Transport another, or
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(4) For the purpose of v
section, induce or procure anot

(B) Whoever violates this
a felony of the fourth degree. If
offense, or the prostitute who
controlled by the offender, or
cured by the offender to engage
~~the age of sixteen~~, whether or
minor, then promoting prostit
degree.

● Sec. 2907.31. (A) No per
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(1) SELL, DELIVER, fu
HIBIT, RENT, or present to
~~which~~ THAT is obscene or harm

(2) OFFER OR AGREE
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(3) ALLOW ANY JUVE
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HARMFUL TO JUVENILES

(B) The following are aff
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THAT is harmful to juveniles bu

(1) The defendant is the p
involved.

(2) The juvenile involved, a
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his parent or guardian who, wit
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(3) The juvenile exhibited
draft card, driver's license, bi
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(C)(1) It is an affirmative
involving material or a perform
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other proper purpose, by a ph
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(2) EXCEPT AS PROVI
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UNDER THIS SECTION.

(D) Whoever violates thi
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law of the State of Ohio:

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be enacted to read as follows:

2907.01 to 2907.37 of the Revised

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and cunnilingus between persons
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(M) "MINOR" MEANS A PERSON UNDER THE AGE OF EIGHTEEN.

● Sec. 2907.21. (A) No person shall knowingly DO ANY OF THE FOLLOWING:

(1) Compel another to engage in sexual activity for hire;

(2) Induce ~~or~~, procure, SOLICIT, OR REQUEST a minor ~~under sixteen years of age~~ to engage in sexual activity for hire, whether or not the offender knows the age of ~~such~~ THE minor;

(3) PAY OR AGREE TO PAY A MINOR, EITHER DIRECTLY OR THROUGH THE MINOR'S AGENT, SO THAT THE MINOR WILL ENGAGE IN SEXUAL ACTIVITY, WHETHER OR NOT THE OFFENDER KNOWS THE AGE OF THE MINOR;

(4) PAY A MINOR, EITHER DIRECTLY OR THROUGH THE MINOR'S AGENT, FOR THE MINOR HAVING ENGAGED IN SEXUAL ACTIVITY, PURSUANT TO A PRIOR AGREEMENT, WHETHER OR NOT THE OFFENDER KNOWS THE AGE OF THE MINOR.

(B) Whoever violates this section is guilty of compelling prostitution, a felony of the third degree.

● Sec. 2907.22. (A) No person shall knowingly:

(1) Establish, maintain, operate, manage, supervise, control, or have an interest in a brothel;

(2) Supervise, manage, or control the activities of a prostitute in engaging in sexual activity for hire;

(3) Transport another, or cause another to be transported across the boundary of this state or of any county in this state, in order to facilitate such other person's engaging in sexual activity for hire;

(4) For the purpose of violating or facilitating a violation of this section, induce or procure another to engage in sexual activity for hire.

(B) Whoever violates this section is guilty of promoting prostitution, a felony of the fourth degree. If any prostitute in the brothel involved in the offense, or the prostitute whose activities are supervised, managed, or controlled by the offender, or the person transported, induced, or procured by the offender to engage in sexual activity for hire, is a minor ~~under the age of sixteen~~, whether or not the offender knows the age of ~~such~~ THE minor, then promoting prostitution is a felony of the ~~third~~ SECOND degree.

● Sec. 2907.31. (A) No person, with knowledge of its character OR CONTENT, shall recklessly DO ANY OF THE FOLLOWING:

(1) SELL, DELIVER, furnish, DISSEMINATE, PROVIDE, EXHIBIT, RENT, or present to a juvenile any material or performance ~~which~~ THAT is obscene or harmful to juveniles;

(2) OFFER OR AGREE TO SELL, DELIVER, FURNISH, DISSEMINATE, PROVIDE, EXHIBIT, RENT, OR PRESENT TO A JUVENILE ANY MATERIAL OR PERFORMANCE THAT IS OBSCENE OR HARMFUL TO JUVENILES;

(3) ALLOW ANY JUVENILE TO REVIEW OR PERUSE ANY MATERIAL OR VIEW ANY LIVE PERFORMANCE THAT IS HARMFUL TO JUVENILES.

(B) The following are affirmative defenses to a charge under this section ~~involving~~ THAT INVOLVES material or a performance ~~which~~ THAT is harmful to juveniles but not obscene:

(1) The defendant is the parent, guardian, or spouse of the juvenile involved.

(2) The juvenile involved, at the time OF the ~~material or performance was presented to him~~ CONDUCT IN QUESTION, was accompanied by his parent or guardian who, with knowledge of its character, consented to the material or performance being furnished or presented to the juvenile.

(3) The juvenile exhibited to the defendant or his agent or employee a draft card, driver's license, birth certificate, marriage license, or other official or apparently official document purporting to show that such juvenile was eighteen years of age or over or married, and the person to whom such document was exhibited did not otherwise have reasonable cause to believe that such juvenile was under the age of eighteen and unmarried.

(C)(1) It is an affirmative defense to a charge under this section, involving material or a performance ~~which~~ THAT is obscene or harmful to juveniles, that such material or performance was furnished or presented for a bona fide medical, scientific, educational, governmental, judicial, or other proper purpose, by a physician, psychologist, sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, or other proper person.

(2) EXCEPT AS PROVIDED IN DIVISION (B)(3) OF THIS SECTION, MISTAKE OF AGE IS NOT A DEFENSE TO A CHARGE UNDER THIS SECTION.

(D) Whoever violates this section is guilty of disseminating matter harmful to juveniles. If the material or performance involved is harmful to juveniles but not obscene, violation of this section is a misdemeanor of the first degree. If the material or performance involved is obscene AND THE JUVENILE TO WHOM IT IS SOLD, DELIVERED, FURNISHED, DISSEMINATED, PROVIDED, EXHIBITED, RENTED, OR PRESENTED, THE JUVENILE TO WHOM THE OFFER IS MADE OR WHO IS THE SUBJECT OF THE AGREEMENT, OR THE JUVENILE WHO IS ALLOWED TO REVIEW, PERUSE, OR VIEW IT IS THIRTEEN YEARS OF AGE OR OLDER, violation of this section is a felony of the fourth degree. IF THE MATERIAL OR PERFORMANCE INVOLVED IS OBSCENE AND THE JUVENILE TO WHOM IT IS SOLD, DELIVERED, FURNISHED, DISSEMINATED, PROVIDED, EXHIBITED, RENTED, OR PRESENTED, THE JUVENILE TO WHOM THE OFFER IS MADE OR WHO IS THE SUBJECT OF THE AGREEMENT, OR THE JUVENILE WHO IS ALLOWED TO REVIEW, PERUSE, OR VIEW IT IS UNDER THIRTEEN YEARS OF AGE, VIOLATION OF THIS SECTION IS A FELONY OF THE THIRD DEGREE.

● Sec. 2907.311. (A) NO PERSON WHO HAS CUSTODY, CONTROL, OR SUPERVISION OF A COMMERCIAL ESTABLISHMENT, WITH KNOWLEDGE OF THE CHARACTER OR CONTENT OF THE MATERIAL INVOLVED, SHALL DISPLAY AT THE ESTABLISHMENT ANY MATERIAL THAT IS HARMFUL TO JUVENILES AND THAT IS OPEN TO VIEW BY JUVENILES AS PART OF THE INVITED GENERAL PUBLIC.

(B) IT IS NOT A VIOLATION OF DIVISION (A) OF THIS SECTION IF THE MATERIAL IN QUESTION IS DISPLAYED BY PLACING IT BEHIND "BLINDER RACKS" OR SIMILAR DEVICES THAT COVER AT LEAST THE LOWER TWO-THIRDS OF THE MATERIAL, IF THE MATERIAL IN QUESTION IS WRAPPED OR PLACED BEHIND THE COUNTER, OR IF THE MATERIAL IN QUESTION OTHERWISE IS COVERED OR LOCATED SO THAT THE PORTION THAT IS HARMFUL TO JUVENILES IS NOT OPEN TO THE VIEW OF JUVENILES.

(C) WHOEVER VIOLATES THIS SECTION IS GUILTY OF DISPLAYING MATTER HARMFUL TO JUVENILES, A MISDEMEANOR OF THE FIRST DEGREE. EACH DAY DURING WHICH THE OFFENDER IS IN VIOLATION OF THIS SECTION CONSTITUTES A SEPARATE OFFENSE.

● Sec. 2907.32. (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) ~~Exhibit~~ PROMOTE or advertise for sale, DELIVERY, or dissemination, ~~or~~, sell, ~~or~~, DELIVER, publicly disseminate ~~or~~, PUBLICLY display, EXHIBIT, PRESENT, RENT, OR PROVIDE; OR OFFER OR AGREE TO SELL, DELIVER, PUBLICLY DISSEMINATE, PUBLICLY DISPLAY, EXHIBIT, PRESENT, RENT, OR PROVIDE, any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise OR PROMOTE an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged.

(5) ~~Possess~~ BUY, PROCURE, POSSESS, or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender ~~has~~ previously HAS been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

● Sec. 2907.321. (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers;

(2) ~~Exhibit~~ PROMOTE or advertise for sale or dissemination, sell, DELIVER, disseminate, ~~or~~ display, EXHIBIT, PRESENT, RENT, OR PROVIDE; OR OFFER OR AGREE TO SELL, DELIVER, DISSEMINATE, DISPLAY, EXHIBIT, PRESENT, RENT, OR PROVIDE, any obscene material that has a minor as one of its participants or portrayed observers;

(3) Create, direct, or produce an obscene performance that has a minor as one of its participants;

(4) Advertise OR PROMOTE for presentation, present, or participate in presenting an obscene performance that has a minor as one of its participants;

(5) ~~Possess~~ BUY, PROCURE, POSSESS, or control any obscene material, that has a minor as one of its participants.

(6) Bring or cause to be brought into this state ~~an~~ ANY obscene material that has a minor as one of its participants or portrayed observers.

(B)(1) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) MISTAKE OF AGE IS NOT A DEFENSE TO A CHARGE UNDER THIS SECTION.

(3) IN A PROSECUTION UNDER THIS SECTION, THE TRIER OF FACT MAY INFER THAT A PERSON IN THE MATERIAL OR PERFORMANCE INVOLVED IS A MINOR IF THE MATERIAL OR

PERFORMANCE, THROUGH ITS TITLE, TEXT, VISUAL REPRESENTATION, OR OTHERWISE, REPRESENTS OR DEPICTS THE PERSON AS A MINOR.

(C) Whoever violates this section is guilty of pandering obscenity involving a minor. Violation of division (A)(1), (2), (3), (4), or (6) of this section is a felony of the second degree. Violation of division (A)(5) of this section is a ~~misdemeanor~~ FELONY of the ~~first~~ FOURTH degree. If the offender previously has been convicted of or pleaded guilty to a violation of ~~division (A)(5) of~~ this section OR SECTION 2907.322 OR 2907.323 OF THE REVISED CODE, pandering obscenity involving a minor IN VIOLATION OF DIVISION (A)(5) OF THIS SECTION is a felony of the ~~fourth~~ THIRD degree.

● Sec. 2907.322. (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, RECORD, PHOTOGRAPH, FILM, DEVELOP, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(2) ~~Extort or advertise~~ ADVERTISE for sale or dissemination, sell, DISTRIBUTE, TRANSPORT, disseminate, EXHIBIT, or display any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(3) Create, direct, or produce a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(4) Advertise for presentation, present, or participate in presenting a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(5) ~~Possess~~ SOLICIT, RECEIVE, PURCHASE, EXCHANGE, POSSESS or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(6) Bring or cause to be brought into this state any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, OR BRING, CAUSE TO BE BROUGHT, OR FINANCE THE BRINGING OF ANY MINOR INTO OR ACROSS THIS STATE WITH THE INTENT THAT THE MINOR ENGAGE IN SEXUAL ACTIVITY, MASTURBATION, OR BESTIALITY IN A PERFORMANCE OR FOR THE PURPOSE OF PRODUCING MATERIAL CONTAINING A VISUAL REPRESENTATION DEPICTING THE MINOR ENGAGED IN SEXUAL ACTIVITY, MASTURBATION, OR BESTIALITY.

(B)(1) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) MISTAKE OF AGE IS NOT A DEFENSE TO A CHARGE UNDER THIS SECTION.

(3) IN A PROSECUTION UNDER THIS SECTION, THE TRIER OF FACT MAY INFER THAT A PERSON IN THE MATERIAL OR PERFORMANCE INVOLVED IS A MINOR IF THE MATERIAL OR PERFORMANCE, THROUGH ITS TITLE, TEXT, VISUAL REPRESENTATION, OR OTHERWISE, REPRESENTS OR DEPICTS THE PERSON AS A MINOR.

(C) Whoever violates this section is guilty of pandering sexually oriented matter involving a minor. Violation of division (A)(1), (2), (3), (4), or (6) of this section is a felony of the second degree. Violation of division (A)(5) of this section is a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of ~~division (A)(5) of~~ this section OR SECTION 2907.321 OR 2907.323 OF THE REVISED CODE, pandering sexually oriented matter involving a minor IN VIOLATION OF DIVISION (A)(5) OF THIS SECTION is a felony of the fourth degree.

● Sec. 2907.323. (A) No person shall do any of the following:

(1) Photograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity, unless both of the following apply:

(a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(b) The minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used.

(2) Consent to the photographing of his minor child or ward, or photograph his minor child or ward, in a state of nudity or consent to the use of his minor child or ward in a state of nudity in any material or performance, or use or transfer such material or performance, unless the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

(B) Whoever violates this section is guilty of illegal use of a minor in a nudity-oriented material or performance. Whoever violates division (A)(1) or (2) of this section is guilty of a felony of the second degree. Whoever violates division (A)(3) of this section is guilty of a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of ~~division (A)(3) of~~ this section OR SECTION 2907.321 OR 2907.322 OF THE REVISED CODE, illegal use of a minor in a nudity-oriented material or performance IN VIOLATION OF DIVISION (A)(3) OF THIS SECTION is a felony of the fourth degree.

● Sec. 2907.34. (A) No person, as a condition to the sale, ALLOCATION, CONSIGNMENT, or delivery of any material or goods of any kind, shall ~~over the objection of the purchaser or consignee~~ require the purchaser or consignee to accept any other material reasonably believed to be obscene, or which if furnished or presented to a juvenile would be in violation of section 2907.31 of the Revised Code.

(B) NO PERSON SHALL DENY OR THREATEN TO DENY ANY FRANCHISE OR IMPOSE OR THREATEN TO IMPOSE ANY FINANCIAL OR OTHER PENALTY UPON ANY PURCHASER OR CONSIGNEE BECAUSE THE PURCHASER OR CONSIGNEE FAILED OR REFUSED TO ACCEPT ANY MATERIAL REASONABLY BELIEVED TO BE OBSCENE AS A CONDITION TO THE SALE, ALLOCATION, CONSIGNMENT, OR DELIVERY OF ANY OTHER MATERIAL OR GOODS OR BECAUSE THE PURCHASER OR CONSIGNEE RETURNED ANY MATERIAL BELIEVED TO BE OBSCENE THAT HE INITIALLY ACCEPTED.

(C) Whoever violates this section is guilty of compelling acceptance of objectionable materials, a felony of the fourth degree.

● Sec. 2919.22. (A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

(1) Abuse the child;

(2) Torture or cruelly abuse the child;

(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;

(4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development;

(5) Entice, COERCE, permit, encourage, compel, HIRE, employ, USE, or allow the child to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any material or performance that HE KNOWS OR REASONABLY SHOULD KNOW is obscene, ~~as defined in section 2907.01 of the Revised Code, or any material or performance that~~ is a sexually oriented matter, or IS nudity-oriented matter;

(6) Allow, ENTICE, encourage, or force the child to solicit for or engage in prostitution as a prostitute, OR OTHERWISE FACILITATE A CHILD IN SOLICITING FOR OR ENGAGING IN PROSTITUTION AS A PROSTITUTE. As used in this division, "prostitute" has the same meaning as in section 2907.01 of the Revised Code.

(C) Division (B)(5) of this section does not apply to any material or performance that is produced, presented, or disseminated for a bona fide artistic, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) MISTAKE OF AGE IS NOT A DEFENSE TO A CHARGE UNDER DIVISION (B)(5) OR (6) OF THIS SECTION.

(3) IN A PROSECUTION UNDER DIVISION (B)(5) OF THIS SECTION, THE TRIER OF FACT MAY INFER THAT AN ACTOR,

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● Sec. 2929.41. (A) Exce
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MODEL, OR PARTICIPANT IN THE MATERIAL OR PERFORMANCE INVOLVED IS A JUVENILE IF THE MATERIAL OR PERFORMANCE, THROUGH ITS TITLE, TEXT, VISUAL REPRESENTATION, OR OTHERWISE, REPRESENTS OR DEPICTS THE ACTOR, MODEL, OR PARTICIPANT AS A JUVENILE.

(4) As used in this division and division (B)(5) of this section:

(a) "Material," "performance," "OBSCENE," and "sexual activity" have the same meanings as in section 2907.01 of the Revised Code.

(b) "Nudity-oriented matter" means any material or performance that shows a minor in a state of nudity and that, taken as a whole by the average person applying contemporary community standards, appeals to prurient interest.

(c) "Sexually oriented matter" means any material or performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.

(D) Whoever violates this section is guilty of endangering children. If the offender violates division (A) or (B)(1) of this section, endangering children is a misdemeanor of the first degree, except that if the violation results in serious physical harm to the child involved, or if the offender has previously been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, endangering children is a felony of the fourth degree. If the offender violates division (B)(2), (3), or (4) of this section, endangering children is a felony of the third degree, except that if the violation results in serious physical harm to the child involved, or if the offender has previously been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, endangering children is a felony of the second degree. If the offender violates division (B)(5) or (6) of this section, endangering children is a felony of the second degree.

● Sec. 2929.41. (A) Except as provided in division (B) of this section, a sentence of imprisonment shall be served concurrently with any other sentence of imprisonment imposed by a court of this state, another state, or the United States. In any case, a sentence of imprisonment for misdemeanor shall be served concurrently with a sentence of imprisonment for felony served in a state or federal penal or reformatory institution.

(B) A sentence of imprisonment shall be served consecutively to any other sentence of imprisonment, in the following cases:

(1) When the trial court specifies that it is to be served consecutively;

(2) When it is imposed for a violation of DIVISION (A)(2), (3), OR (4) OF SECTION 2907.21, division (B) of section 2917.02, SECTION 2907.321, SECTION 2907.322, DIVISION (B)(5) OR (6) OF SECTION 2919.22, section 2921.34, or division (B) of section 2921.35 of the Revised Code, OR FOR A VIOLATION OF SECTION 2907.22 OF THE REVISED CODE THAT IS A FELONY OF THE SECOND DEGREE;

(3) When it is imposed for a new felony committed by a prisoner, parolee, or escapee;

(4) When a three-year term of actual incarceration is imposed pursuant to section 2929.71 of the Revised Code.

(C) Subject to the maximums provided in division (E) of this section:

(1) When consecutive sentences of imprisonment are imposed for felony under division (B)(1) of this section, the minimum term to be served is the aggregate of the consecutive minimum terms imposed, and the maximum term to be served is the aggregate of the consecutive maximum terms imposed.

(2) When consecutive sentences of imprisonment are imposed for felony under division (B)(2) or (3) of this section, the minimum term to be served is the aggregate of the consecutive minimum terms imposed reduced by the time already served on any such minimum term, and the maximum term imposed is the aggregate of the consecutive maximum terms imposed.

(3) When consecutive sentences of imprisonment are imposed under division (B)(4) of this section, all of the three-year terms of actual incarceration imposed pursuant to section 2929.71 of the Revised Code shall be served first, and then the indefinite terms of imprisonment shall be served, with the aggregate minimum and maximum terms being determined in the same manner as aggregate minimum and maximum terms are determined pursuant to division (C)(2) of this section.

(4) When a person is serving definite terms of imprisonment consecutively to indefinite terms of imprisonment or to three-year terms of actual incarceration imposed pursuant to section 2929.71 of the Revised Code or to both indefinite terms of imprisonment and the three-year terms of actual incarceration, the aggregate of the three-year terms of actual incarceration shall be served first, then the aggregate of the definite terms of imprisonment shall be served, and then the indefinite terms of imprisonment shall be served, with the aggregate minimum and maximum terms being determined in the same manner as aggregate minimum and maximum terms are determined pursuant to division (C)(2) of this section.

(D) Subject to the maximum provided in division (E) of this section, when consecutive sentences of imprisonment are imposed for misdemeanor, the term to be served is the aggregate of the consecutive terms imposed.

(E) Consecutive terms of imprisonment imposed shall not exceed:

(1) An aggregate minimum term of twenty years, when the consecutive terms imposed include a term of imprisonment for murder and do not include a term of imprisonment for aggravated murder;

(2) An aggregate minimum term of fifteen years plus the sum of all three-year terms of actual incarceration imposed pursuant to section 2929.71 of the Revised Code;

(3) An aggregate minimum term of fifteen years, when the consecutive terms imposed are for felonies other than aggravated murder or murder;

(4) An aggregate term of eighteen months, when the consecutive terms imposed are for misdemeanors. When consecutive terms imposed including more than one year are imposed for misdemeanor by the trial court under Code and at least one such consecutive term is for a misdemeanor the first degree that is an offense of violence, the trial court may order the aggregate term imposed to be served in a state or federal reformatory institution.

SECTION 2. That existing sections 2907.01, 2907.21, 2907.22, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2907.34, 2919.22, and 2929.41 of the Revised Code are hereby repealed.

Amended Senate Bill Number 452

File 282

AN ACT

eff 12-15-88

To amend sections 101.27, 141.011, 141.04, 325.11, 325.14, 325.18, 505.24, 507.09, 1901.11, and 1907.16 of the Revised Code to provide compensation increases for judges, officers and members of the General Assembly, elected county officials, township trustees and clerks, and the elected executive state officials, and to make an appropriation.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 101.27, 141.011, 141.04, 325.11, 325.14, 325.18, 505.24, 507.09, 1901.11, and 1907.16 of the Revised Code be amended to read as follows:

● Sec. 101.27. Every member of the senate, except the members elected president, president pro tempore, assistant president pro tempore, majority whip, minority leader, assistant minority leader, minority whip, and assistant minority whip, shall receive as compensation a salary of thirty thousand one hundred fifty-two dollars a year during his term of office, and every member of the house of representatives, except the members elected speaker, speaker pro tempore, majority floor leader, assistant majority floor leader, majority whip, assistant majority whip, minority leader, assistant minority leader, minority whip, and assistant minority whip, shall receive as compensation a salary of thirty thousand one hundred fifty-two dollars a year during his term of office. Such salaries shall be paid in equal monthly installments during the term. All monthly payments shall be made on or before the fifth day of each month. Upon the death of any member of the general assembly during a term of office, any unpaid salary due such member for the remainder of the term shall be paid to his dependent, surviving spouse, children, mother, or father, in the order in which the relationship is set forth in this section in monthly installments.

Each member shall receive a travel allowance of twenty and one-half cents a mile each way for mileage once a week during the session from and to his place of residence, by the most direct highway, or the cost of public travel to and from the seat of government, to be paid quarterly on the last day of March, June, September, and December of each year.

Beginning on January 1, 1985, the member of the senate elected president and the member of the house of representatives elected speaker shall each receive as compensation a salary of forty-seven thousand dollars a year during his term of office.

The member of the senate elected president pro tempore, the member of the senate elected minority leader, the member of the house of representatives elected speaker pro tempore, and the member of the house of representatives elected minority leader shall each receive as compensation a salary of forty-two thousand eight hundred eighty-three dollars a year during his term of office. The member of the house of representatives elected majority floor leader and the member of the senate elected assistant president pro tempore shall each receive as compensation a salary of forty thousand three hundred ninety-four dollars a year during his term of office. The member of the senate elected assistant minority leader and the member of the house of representatives elected assistant minority leader shall each receive as compensation a salary of thirty-nine thousand one hundred fifty-two dollars a year during his term of office. The member of the senate elected majority whip and the member of the house of representatives elected assistant majority floor leader shall each receive a salary of thirty-seven thousand nine hundred eighty dollars a year during

IN THE SUPREME COURT OF FLORIDA

ROGER LEO DAUTEL,

Appellant,

v. CASE NO. 88,848

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX D

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

STEVEN A. BEEN
ASSISTANT PUBLIC DEFENDER
FLORID BAR NO. 335142
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

ROGER LEO DAUTEL SCORESHEET

CRIME	SCORED IN PSI	SCORED BY TRIAL COURT
Ohio #3011 gross sexual imposition	F2	F2
Ohio #8300 vandalism	F3	MM
Ohio #7946 complicity to perjury	F3	F3
Levy Co 87-304		
armed burglary	F1	F1
criminal mischief	F3	F3
grand theft	F3	F3
grand theft	F3	F3
burglary	F3	F3
criminal mischief	F3	F3
Sumpter Co 88-530 escape	F2	F2
Leon Co C92-234 trespass aft warning	MM	MM
Leon Co C92-1395		
AM1 possession chemicals	F3	MM
AM2 loitering	MM	MM
Leon Co R92-1064		
AF1 aggravated assault on LEO	F3	no crime-acquittal
AM2 trespass structure	F2	Lesser offense MM

PSI scored 1 F1, 3 F2, 9 F3, 2 MM, and legal constraint. Trial court scored 1 F1, 2 F2, 6 F3, 5 MM, and no legal constraint.

SCORESHEET

	PSI	TRIAL COURT
I Primary offense	105	105
II other offenses	0	0
III prior convictions		
F1	30	30
F2	48	33
F3 (1st 4)	27	27
F3 (additional)	45	18
MM (1st 4)	2	6
MM (additional)	0	2
IV Legal restraint	36	0
V Victim injury	36	36
Total	329=9-22	257=7-17

APPENDIX D