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1983

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THE NEW SENTENCING LAW
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Ohio's new sentencing law raises a number of important constitutional and statutory issues. Several of these issues are examined briefly in this article. See generally Note, *S.B.199: Ohio Adopts a Mandatory Sentencing Measure*, 8 U. Dayton L. Rev. 425 (1983).

An initial problem with the new law is its complexity and use of confusing terminology. For example, there are two types of "actual incarceration" in the new law. Aggravated-felony actual incarceration may be diminished by good time; firearms-offender actual incarceration may not be reduced by good time. RC 2929.01(C) & 2929.71(D)(2). There is now a general classification of offenses known as "aggravated felonies," which must be distinguished from specific crimes such as aggravated murder and aggravated burglary. Prior to the new law, Ohio had six classifications for felonies: aggravated murder, murder, and felonies of the first, second, third, and fourth degree. With the addition of the new classifications of aggravated felonies of the first, second, and third degree, there are now nine classifications.

CRUEL AND UNUSUAL PUNISHMENT

One of the principal effects of the new law will be the imposition of increased criminal sentences. The new categories of "aggravated felonies" involve enhanced punishments for offenses falling within these categories. In addition, the firearms provision, RC 2929.71, automatically adds three years to the term of confinement and each firearms-related offense triggers a new three-year consecutive prison term.

These increased penalties raise the issue of whether, in a particular case, the Eighth Amendment's prohibition against cruel and unusual punishment may be violated. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). As one commentator has noted, the "prohibition on cruel and unusual punishment would . . . appear to bar punishment authorized by statute which is excessive, that is, out of all proportion to the offense committed. . . ." W. LaFave & A. Scott, *Criminal Law* 164 (1972). Several Supreme Court decisions contain statements supporting this view. See *Weems v. U.S.*, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime be graduated and proportioned to offense."); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) ("Cruel and Unusual Punishment Clause . . . proscribes punishment grossly disproportionate to the severity of the crime. . . ."); *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

Rummel v. Estelle

The Supreme Court's latest decisions on this issue, however, make it unlikely that the application of the new statute will be successfully challenged on this ground. In *Rummel v. Estelle*, 445 U.S. 263 (1980), the defendant challenged a mandatory life sentence, imposed pursuant to a Texas recidivist statute, as a violation of the cruel and unusual punishment clause. Rummel was convicted of obtaining \$120.75 by false pretenses. He had been convicted of two prior felonies. The first conviction was for the fraudulent use of a credit card in which he had obtained \$80 worth of goods and services; the second conviction was for passing a forged check in the amount of \$28.36. *Rummel* argued that the imposition of a mandatory life sentence was "grossly disproportionate to the three felonies that formed the predicate for his sentence." *Id.* at 265.

The Supreme Court disagreed, noting that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Id.* at 272. The one noncapital case in which the argument was successful, *Weems v. U.S.*, 217 U.S. 349 (1910), involved an unusual form of punishment known as *cadena temporal*, which required imprisonment with "a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, nor marital authority or parental rights or rights of property, no participation even in family council." *Id.* at 366. The fact that Rummel's crimes were nonviolent and involved small amounts of money were of no consequence. The Court's "hands off" policy in *Rummel* places a heavy burden on a defendant claiming a disproportionate sentence in a noncapital case. See generally Note, *Terrebonne v. Blackburn: The Proportionality Principle in the Fifth Circuit After Rummel V. Estelle*, 33 Mercer L. Rev. 1365 (1982).

Hutto v. Davis

The Court next considered the proportionality issue in *Hutto v. Davis*, 454 U.S. 370 (1982). Davis was convicted in a state court of possession with intent to distribute and distribution of marijuana, for which a jury imposed a \$10,000 fine and two consecutive 20-year prison terms. He argued that a forty-year sentence was so grossly disproportionate to the crime of possessing less than nine ounces of marijuana that it constituted cruel and unusual punishment. A federal district court agreed and granted the defendant habeas relief, a decision that was upheld by the Fourth Circuit sitting en banc.

In a per curiam opinion, the Supreme Court summarily reversed. According to the Court, "*Rummel* stands for the proposition that federal courts

should be 'reluctant to review legislatively mandated terms of imprisonment,' . . . and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare' . . ." *Id.* at 460, quoting *Rummel v. Estelle*. In a footnote the Court provided an example of the "rare" case in which the proportionality argument might be successful: "We noted in *Rummel* that there could be situations in which the proportionality principle would come into play, such as "if a legislature made overtime parking a felony punishable by life imprisonment." *Id.* at 374 n. 3.

The Court is presently considering another case in which the proportionality argument has been raised. *Helm v. Solem*, 684 F.2d 582 (8th Cir. 1982), cert. granted, 103 S. Ct. 339 (1982). In *Helms* the Eighth Circuit held that the imposition of a life sentence without parole for a habitual offender violated the cruel and unusual punishment clause. The court distinguished *Rummel* on two grounds. First, *Rummel's* life sentence did not preclude the possibility of parole. Second, *Helms* was an alcoholic, a factor that contributed to his present and prior convictions. The Supreme Court heard arguments on March 29, 1983. See 33 Crim. L. Rptr. 4003 (1983).

Ohio Cases

The Ohio Constitution also contains a cruel and unusual punishment clause. Ohio Const. art. I, § 9. The Ohio courts, however, have followed the approach of the U.S. Supreme Court and rejected proportionality attacks on sentences.

In *McDougle v. Maxwell*, 1 Ohio St. 2d 68, 203 N.E.2d 334 (1964), the court recognized that the Eighth Amendment prohibits "punishments which are so disproportionate to the offense as to shock the moral sense of the community." *Id.* at 69, 203 N.E.2d at 336. In applying this standard in *State v. Chaffin*, 30 Ohio St. 2d 13, 282 N.E.2d 46 (1972), the court held "that the 20-to 40-year sentence imposed [for the sale of marijuana] does not constitute cruel or unusual punishment." *Id.* at 17, 282, N.E.2d 49. Significantly, the defendant in *Chaffin* based his challenge on state as well as federal constitutional grounds. See also *State v. Juliano*, 24 Ohio St. 117, 120, 265 N.E.2d 290, 293 (1970) ("[I]f a sentence falls within the terms of a valid statute, it will not amount to a 'cruel and unusual punishment.' "); *State v. Wilkinson*, 17 Ohio St. 2d 9, 244 N.E.2d 480, cert. denied, 395 U.S. 946 (1969); *State v. Abercrombie*, 40 Ohio App. 2d 89, 318 N.E.2d 179 (1973).

In *State v. Bonello*, 3 Ohio App. 3d 365, 445, N.E.2d 667 (1981), the defendant argued that the imposition of a mandatory sentence of actual incarceration imposed pursuant to RC 2925.03 for the sale of LSD was a cruel and unusual punishment. Rejecting this argument, the court commented: "Long terms of imprisonment in drug offense cases have been upheld for much less aggravated offenses than in the instant case." *Id.* at 366, 445 N.E.2d at 670. The court also rejected the defendant's equal protection claim. According to

the court, the "legislature has inherent power to create classifications if such classifications are reasonable and some legitimate state interest is advanced." *Id.* at 366, 445 N.E.2d at 669.

DOUBLE JEOPARDY

The new sentencing law provides that a person who either uses a firearm or has a firearm on or about his person or under his control at the time of the commission of an offense will serve three years of incarceration in addition to the sentence for the substantive offense for which he is convicted. RC 2929.71. Under this provision, it could be argued that the defendant is being subjected to double punishment in violation of the double jeopardy clause. U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). See generally *C. Whitebread, Criminal Procedure ch. 24* (1980). In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Supreme Court stated that the double jeopardy clause "protects against multiple punishments for the same offense." *Id.* at 717. See also *U.S. v. Benz*, 282 U.S. 304, 307-308 (1931); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169, 173 (1873) ("[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.").

Missouri v. Hunter

The Supreme Court recently addressed the issue of multiple punishments in *Missouri v. Hunter*, 10: S. Ct. 673 (1983). Based on participation in a robbery of an A & P store in which he used a weapon Hunter was convicted of first degree robbery and armed criminal action. Under Missouri law, armed criminal action is defined as follows:

[A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years. *Id.* at 676.

Hunter was sentenced to concurrent terms of 1 years for first degree robbery and 15 years for armed criminal action. The Missouri Supreme Court held that armed criminal action and the underlying felony were "the same offense" for purposes of the double jeopardy clause and therefore the imposition of punishment for both offenses was prohibited. On review, the U.S. Supreme Court reversed.

According to the Court, "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than pre-

vent the sentencing court from prescribing greater punishment than the legislature intended." *Id.* at 678. In a subsequent passage, the Court wrote that "simply because two criminal statutes may be construed to proscribe the same conduct. . . does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes." *Id.* at 679. Since the Missouri Supreme Court had found that the legislature specifically intended to impose cumulative punishments, Hunter had suffered no constitutional deprivation. To remove any remaining doubt, the Court added: "Legislatures, not courts, prescribe the scope of punishments." *Id.*

Ohio Cases

The Ohio Supreme Court has also addressed this issue. In *State v. Moss*, 69 Ohio St. 2d 515, 433 N.E.2d 181 (1982), the defendant challenged the imposition of consecutive sentences for aggravated murder and aggravated burglary on the ground that his sentence violated both the federal and state double jeopardy clauses. See Ohio Const. art. I, § 10 ("No person shall be twice put in jeopardy for the same offense."). In rejecting this argument, the court wrote: "In determining the constitutionality of the trial court's imposition in a single criminal proceeding of consecutive sentences, appellate review is limited to ensuring that the trial court did not exceed the sentencing authority which the General Assembly granted it." *Id.* (syllabus 1). See also *State v. Royster*, 3 Ohio App. 3d 442, 446 N.E.2d 190 (1982).

RELEASE ON APPEAL

Amended RC 2949.02 prohibits a trial court from releasing a defendant on his own recognizance if convicted of aggravated murder, murder, or an aggravated felony. This amendment conflicts with Criminal Rule 46(E), which governs release after conviction. Rule 46 does not prohibit release on recognizance after conviction in cases involving these offenses.

This conflict raises a state constitutional issue. Article IV, section 5(B) of the Ohio Constitution provides: "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Under this constitutional provision, procedural rules promulgated by the Ohio Supreme Court control over conflicting statutory provisions. See Milligan & Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 Ohio St. L.J. 811, 829 (1968) ("There should now be no doubt that the authority of the Supreme Court in the rule-making area is plenary. Court action in this area supercedes contradictory legislation."); Note, *Substance and Procedure: The Scope of Judicial Rule Making Authority in Ohio*, 37 Ohio St. L.J. 364, 382 (1976) ("[R]esponsibility for judicial procedure is placed,

by the Ohio Constitution, with the Ohio Supreme Court. . . .").

The issue is whether the right to release after conviction is a procedural right, in which case the rule controls, or a substantive right, in which case the statute controls. In interpreting section 5(B), the Supreme Court has written: "'Substantive' means the body of law which creates, defines and regulates the rights of the parties." *Krause v. State*, 31 Ohio St. 2d 132, 145, 285 N.E.2d 736, 744 *cert. denied*, 409 U.S. 1052 (1972). This definition is not particularly helpful and the resolution of this conflict will probably have to await Supreme Court review. See also *State v. Slatter*, 66 Ohio St. 2d 452, 423, N.E.2d 100 (1981); *State v. Waller*, 47 Ohio St. 2d 52, 351 N.E.2d 195 (1976). See generally Giannelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking*, 29 Case W. Res. L. Rev. 16, 33-59 (1978).

CONSPIRACY AND ATTEMPT

RC 2923.01(J) contains the penalty section for conspiracy. Subdivision (1) of that provision remains unchanged; a person is guilty of a felony of the first degree "when one of the objects of the conspiracy is aggravated murder or murder." Subdivision (2) has been amended. It now provides that a person is guilty of a "felony of the next lesser degree than the most serious offense that is the object of the conspiracy, when the most serious offense that is the object of the conspiracy is an aggravated felony of the first, second, or third degree, or a felony of the first second, or third degree." The issue is whether conspiracy to commit an aggravated felony of the first degree is an aggravated felony of the second degree or a felony of the first degree.

A similar issue arises with respect to attempts. RC 2923.02(E) provides: "An attempt to commit aggravated murder or murder is a felony of the first degree. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted." The penalty provision, RC 2929.11, lists offenses in the following order: aggravated felony of the first degree, felony of the first degree, aggravated felony of the second degree, felony of the second degree, and so forth. It seems doubtful, however, that the issue can be resolved merely by reference to this provision.

The controlling statute should be RC 2901.04(A), which provides: "Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." This statement is a codification of the rule long recognized in Ohio as well as in other jurisdictions. See *Harrison v. State*, 112 Ohio St. 429, 147 N.E. 650 (1925), *aff'd*, 270 U.S. 632 (1926); *State ex rel. Moore Oil Co. v. Dauben*, 99 Ohio St. 406, 124 N.E. 232 (1919). The rationale for the rule is fair warning. As Justice Holmes has commented: "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a

fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. U.S.*, 283 U.S. 25, 27 (1931). See generally W. LaFare & A. Scott, *Criminal Law* 72-74 (1972).

CONCLUSION

Several issues raised by the new sentencing statute have been examined in this article. Undoubtedly, there are other issues. For example, the firearms provision, RC 2929.71, does not specify a mental element (*mens rea*) for possession or control of a firearm. RC 2901.21 would appear to control. It provides that "[w]hen the section neither

specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

In addition to these issues, the new law raises a number of policy issues. One issue concerns the effect the law will have on the already overcrowded state prison system. The Columbus Correctional Facility is subject to a federal court consent decree that requires closing that facility by December 31, 1983. The Ohio State Reformatory (Mansfield) is subject to a federal court consent decree, conditionally approved, that requires closing the existing cellblocks of that institution by 1987. Although new facilities are planned for Cleveland, Dayton, Chillicothe, and possibly Columbus, construction has not commenced.

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RECENT DEVELOPMENTS

In *State v. Williams*, 4 Ohio St. 3d 53, 446 N.E. 2d 444 (1983), the Ohio Supreme Court ruled voiceprint evidence admissible. The case is significant for two reasons. First, the court in *Williams* changed the standard for admitting novel scientific evidence. Prior to *Williams*, the court had followed the test set forth in *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923). Under the *Frye* test, novel scientific evidence is admissible only if it has "gained general acceptance in the particular field in which it belongs." *Id.* at 1014. See *State v. Thomas*, 66 Ohio St. 518, 521-22, 423 N.E. 2d 137, 140 (1981) (battered wife syndrome not generally accepted). The court explicitly rejected the general acceptance test in *Williams*. Instead, admissibility is now determined by applying the rules governing relevancy, Ohio Evid. R. 401-403, and expert testimony, Ohio Evid. R. 702. "We believe the Rules of Evidence established adequate preconditions for admissibility of expert testimony, and we leave to the discretion of this state's judiciary, on a case by case basis, to decide whether the questioned testimony is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue." 446 N.E. 2d at 448. See generally Giannelli, *The Admissibility of Novel Scientific*

Evidence: Fyre v. United States, a Half-Century Later, 80 Colum. L. Rev. 1197 (1980); McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 Iowa L. Rev. 879 (1982)

Second, *Williams* is important because it permits the use of voiceprint evidence. Unfortunately, the court was apparently unaware of the most recent report on voiceprints. See National Academy of Sciences, *On the Theory and Practice of Voice Identification* (1979). This report, the only independent report on the subject, was not cited by the court in *Williams*. According to the report, the error rates reported in the prior studies "do not constitute a generally adequate basis for a judicial or legislative body to use in making judgments concerning the reliability and acceptability of aural-visual voice identification in forensic applications." *Id.* at 60. In other words, even when applying the approach to novel scientific evidence outlined in *Williams*, the admissibility of voiceprint evidence is highly questionable. FBI policy is to use voiceprints for investigative purposes only: FE voiceprint experts do not testify in court. See Koenig, *Speaker Identification (Part 2)*, *FBI Law Enforcement Bull.* 20, 22 (Feb. 1980).