KEY CRIMINAL LAW ISSUES 2024

Office of the Ohio Public Defender

May 2024

Key Criminal Law Issues

The Office of the Ohio Public Defender developed the Key Criminal Law Issues as a starting point for research. The topics are not meant to cover every possible direct appeal issue, but rather be an introduction to the specific area of law covered by the topic. This resource provides rules and statutes, as well as cases reported by the Supreme Court of the United States, the Supreme Court of Ohio, and sometimes other federal and Ohio district courts.

The material provided in this resource is for general information purposes. It is not intended to be legal advice. The law is subject to frequent change, and the information contained herein may not reflect the most current developments. Readers should not rely upon this information in lieu of legal advice and are encouraged to consult with a licensed attorney about their particular situation.

Table of Contents

To go directly to a specific section, hover over and click on the text.

Accomplic Liability	1
Allied Offenses of Similar Import	3
Challenging a Plea, Part 1 (on Direct Appeal)	5
Challenging a Plea, Part 2 (Withdrawing a Plea via Motion)	8
Confrontation Clause	10
Discovery	13
Double Jeopardy	16
Fourth Amendment Search and Seizure	18
Hearsay	23
Indictments	25
Ineffective Assistance at Trial and Post-Conviction Petitions	27
Jail-time Credit	29
Jury Instructions	31
Jury Selection	35
Jury Verdicts and Forms	37
Sufficiency and Manifest Weight of the Evidence	38
Miranda v. Arizona and the Fifth Amendment	40
Ohio Rules of Evidence 401 – 404	43
Prosecutorial Misconduct	47
Right to the Effective Assistance of Counsel	49
Right to Direct Appeal	51
Self Defense	53
Self Representation	54
Speedy Trial	56
Void v. Voidable	61

Accomplice Liability

For accomplice liability, the defendant must have the same mental state required for the principal offense and do something to assist the principal offender. A person's "mere presence" during the commission of a crime is insufficient to establish criminal liability. But culpability can be inferred from the surrounding circumstances. Accomplices are liable to the same extent as the principal offender. *Note: Cases throughout his document are hyperlinked; hover over and click on the text to view the citation.*

Relevant Statute: R.C. 2923.03 – Complicity

CASES

***State v. Perryman*, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976)**
The state need not establish the principal's identity; under R.C. 2923.03(C), the state need only prove that a principal committed the offense.

When the evidence produced at trial could reasonably be found to have proven the defendant guilty as an accomplice, a jury instruction by the trial court on that subject is proper.

***State v. Scott*, 61 Ohio St.2d 155, 400 N.E.2d 375 (1980)**
A jury can infer an accomplice's purpose to kill where the facts show that the participants in a felony entered into a common plan and either the accomplice knew that an inherently dangerous instrumentality (like a deadly weapon) was to be employed to accomplish the felony or the felony and the manner of its accomplishment would be reasonably likely to produce death.

***State v. Jacobozzi*, 6 Ohio St.3d 59, 451 N.E.2d 744 (1983)**
While the principal offender need not be convicted to sustain another's conviction as an accomplice, the state must still present sufficient evidence to prove beyond a reasonable doubt that the offense occurred.

***State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336,754 N.E.2d 796**
An accomplice must share the principal's culpable mental state. A person's mere presence at the crime scene cannot support a charge of complicity. This protects innocent bystanders who have no connection to the crime other than being nearby. However, complicity may be inferred from presence, companionship, and conduct before and after the offense is committed.

***In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, 849 N.E.2d 286**
The doctrine of transferred intent applies in complicity cases.

***State v. McFarland*, 162 Ohio St.3d 36, 2020-Ohio-3343, 164 N.E.3d 316**
The evidence was sufficient to support the defendant's conviction for conspiracy to commit aggravated murder or murder under R.C. 2923.01 because she provided or assisted her boyfriend's associate in procuring a gun. There was sufficient evidence that defendant violated R.C. 2911.11(A)(1) through her complicity because assailants entered the victim's apartment building and inflicted physical harm on him; the defendant was complicit under R.C. 2923.03 and, therefore, could be prosecuted under the aggravated-robbery statute even though she was not in the apartment when the murder occurred.

***State v. Chambers*, 53 Ohio App.2d 266, 373 N.E.2d 393 (9th Dist. 1977)**
The proximate cause theory of criminal liability is the applicable standard in R.C. 2903.04 and where a person, acting individually or in concert with another, sets in motion a sequence of events, the foreseeable consequences of which

were known or should have been known to them at the time, they are criminally liable for the direct, proximate and reasonably inevitable consequence of death resulting from their original criminal act.

***State v. Ferguson*, 30 Ohio App.3d 171, 507 N.E.2d 388 (8th Dist. 1986)**
A trial court errs when it instructs the jury that an accomplice's testimony is to be considered in the same manner as other witnesses.

As is clear from this instruction, the trial court neglected to charge the jury regarding the accomplice's special motive to distort their testimony, and the jury's need to carefully examine and use such testimony with caution. Such instruction is very important. It serves to alert the jurors that accomplices are witnesses with special motives that the average juror may never before have encountered.

Allied Offenses of Similar Import

The purpose of R.C. 2941.25 is to prevent shotgun convictions, otherwise known as multiple findings of guilt and corresponding punishments heaped upon a defendant for closely related offenses arising from the same occurrence. When in substance and effect only one offense has been committed, a defendant may be convicted of only one offense.

Reversing a line of decisions requiring an abstract comparison of the offenses at issue, the Supreme Court of Ohio explained in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, syllabus, that in determining whether two offenses are allied offenses of similar import subject to merger, the actual conduct of the accused must be considered.

The Supreme Court further explained the allied offense statute in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892. The court explained that in determining whether offenses are allied offenses of similar import, courts must evaluate three separate factors—the import, the conduct, and the animus.

Two or more offenses of dissimilar import exist when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable. The court laid out a three-part test: (1) Does the conduct constitute offenses of dissimilar import? (2) Does the conduct show that the offenses were committed separately? (3) Does the conduct show that the offenses were committed with separate animus?

No bright line rules can govern every situation. The court declined to create an absolute rule based upon the definition of the offenses. In practice, allied offenses of similar import are simply multiple offenses that arise out of the same conduct and are similar but not identical in the significance of the criminal wrongs committed and the resulting harm.

Relevant Statute: R.C. 2941.25 – Allied Offenses of Similar Import - Multiple Counts

CASES

***State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892**

Two or more offenses of dissimilar import existed under R.C. 2941.25(B) when the defendant's conduct constituted offenses involving separate victims or the harm resulting from each offense was separate and identifiable. When considering whether there were allied offenses that merged under R.C. 2941.25(A), how the offenses were committed had to be considered. If any of the following were true, the offenses do not merge and the defendant could be convicted and sentenced for multiple offenses: the offenses were dissimilar in import or significance; the offenses were committed separately; and the offenses were committed with separate animus.

In practice, allied offenses of similar import are simply multiple offenses that arise out of the same criminal conduct and are similar but not identical in the significance of the criminal wrongs committed and the resulting harm.

***State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061**

When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered.

***State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245**

A trial court's ruling on allied offenses is subject to de novo review.

***State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923**
Error in failing to merge allied offenses is not insulated from appellate review by a statute prohibiting appeal of sentences authorized by law. Concurrent sentences are not a cure for failure to merge allied offenses. Convictions for allied offenses is plain error.

***State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661**
When deciding whether to merge multiple offenses at sentencing, a court must review the entire record, including arguments and information presented at the sentencing hearing, to determine whether the offenses were committed separately or with a separate animus.

***State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603**
The statute is not applicable to a RICO violation and a RICO offense does not merge with its predicate offenses for purposes of sentencing. The Double Jeopardy Clause does no more than prevent the imposition of greater punishment than the legislature intended. The RICO statute demonstrates the legislature's intent to allow cumulative punishment under the applicable circumstances.

***State v. Bailey*, 171 Ohio St.3d 486, 2022-Ohio-4407, 218 N.E.3d 858**
Although determining whether the merger statute has been properly applied is a legal question, it necessarily turns on an analysis of the facts, which can lead to exceedingly fine distinctions. Even assuming that the trial court erred by not merging the counts, the facts of the case indicated that such an error was not obvious. As a result, the defendant had failed to establish plain error, and the court of appeals erred in concluding otherwise.

***State v. Bollar*, 171 Ohio St.3d 678, 2022-Ohio-4370, 220 N.E.3d 690**
Because the plain language of R.C. 2929.14(B)(1)(g) requires that certain offenders receive prison terms for multiple firearm specifications, imposing separate prison terms for multiple firearm specifications is required when the criminal offenses to which those firearm specifications are attached have been merged as allied offenses.

Challenging a Plea, Part 1 (on Direct Appeal)

Guilty Plea

A guilty plea is a complete admission of guilt. Crim.R. 11(B)(1); *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51. A defendant who enters a knowing, voluntary, and intelligent guilty plea waives all non-jurisdictional defects for the purpose of future proceedings. The waiver is effective both for direct appeal and collateral attack of a conviction. A guilty plea waives the right to challenge the sufficiency of the evidence.

Ohio Rule of Criminal Procedure 11(C)(2) requires that a trial court determine from talking with the defendant: (1) whether the defendant's plea was voluntary; (2) whether the defendant understood the effects of the guilty plea at the time they entered it; and (3) whether the defendant, at the time they entered the guilty plea, understood that by entering the plea they were waiving constitutional rights. The underlying purpose, from the defendant's perspective, of Crim.R. 11(C) is to convey to the defendant certain information so that they can make a voluntary and intelligent decision whether to plead guilty.

A defendant may still challenge some aspects of the sentence on appeal from a guilty plea. However, a jointly recommended and imposed sentence is not appealable unless it is contrary to law.

No Contest Plea

A no contest plea is not an admission of guilt, but is an admission of the truth of the facts alleged in the indictment. *See* Crim.R. 11(B)(2); *State ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 425, 662 N.E.2d 370, 373 (1996). When a court accepts a no contest plea, the record must affirmatively demonstrate that the plea was entered voluntarily, intelligently, and knowingly. The trial court must explain the effects of the plea through a meaningful conversation which substantially complies with Crim.R. 11(E). *Garfield Hts. v. Mancini*, 121 Ohio App.3d 155, 156-157, 699 N.E.2d 132 (8th Dist.1997); *State v. Richard*, 113 Ohio App.3d 141, 144-145, 680 N.E.2d 667 (7th Dist.1996). A failure to undertake a recitation of operative facts in relation to a no contest plea is not fatal to the plea where the charging instrument states facts sufficient to constitute a crime. Crim.R. 11(B)(2); *State v. Bowsher*, 116 Ohio App.3d 170, 172, 687 N.E.2d 316 (6th Dist.1996), appeal dismissed, 78 Ohio St.3d 1452, 677 N.E.2d 813 (1997).

A plea of guilty or no contest must be knowingly, intelligently, and voluntarily entered, or the plea violates due process and is invalid. Before accepting a plea, the trial court must address the defendant to explain the rights contained in Crim.R. 11(C)(2). A plea may be vacated as involuntary if the trial court fails to properly explain these rights; however, the effect of failing to comply with the rule depends on whether the trial court fails to comply with the requirements for constitutional rights, contained in Crim.R. 11(C)(2)(c); or for non-constitutional rights, contained in Crim.R. 11(C)(2)(a) and (b).

Trial courts must strictly comply with the requirements to explain constitutional rights, but a substantial-compliance standard applies to non-constitutional rights.

A no contest plea may preserve the ability to raise issues on appeal that a guilty plea would not. For example, if a defendant's motion to suppress was denied, that denial could be challenged on direct appeal from a no contest plea, but not from a guilty plea.

Alford Plea

In *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), the Supreme Court of the United States held that a trial court may accept a guilty plea from a defendant who nonetheless maintains their innocence because a defendant who believes they are innocent may rationally conclude that the evidence against them is so incriminating that there is a significant chance that a jury would find them guilty of the offense with which they are charged. Before

accepting an Alford plea, the trial court must make an inquiry of the defendant to ascertain that the defendant has rationally concluded that accepting the plea bargain is in their best interest, since they will avoid the risk of greater punishment if a jury should find them guilty.

All guilty pleas, including Alford pleas, must meet the general requirement that the defendant knowingly, voluntarily, and intelligently waives their right to trial. *Id*. at 338. Because guilty pleas accompanied by a protestation of innocence give rise to an inherent suspicion that a knowing, voluntary, and intelligent waiver has not occurred, Alford pleas place a heightened duty upon the trial court to ensure that the defendant's rights are protected and that entering the plea was a rational decision on the part of the defendant. When a defendant protests their innocence, the rational calculation differs significantly than that made by a defendant who admits they are guilty; accordingly, the trial court's obligation with regard to taking an Alford plea is correspondingly different.

The trial judge must ascertain that notwithstanding the defendant's protestations of innocence, they have made a rational calculation that it is in their best interest to accept the plea bargain offered by the prosecutor. This requires, at a minimum, inquiry of the defendant concerning their reasons for deciding to plead guilty notwithstanding protestations of innocence. The record must also contain a recitation of the facts in support of the plea.

If a guilty plea is to be accepted, the trial court must determine, in a meaningful way, that the defendant's decision to tender the plea is knowing and intelligent. If it becomes impossible for the trial court to satisfy itself that the defendant's decision is knowing and intelligent, the trial court has the alternative of declining to accept the plea.

Relevant Rule: Crim.R. 11 – Pleas, Rights Upon Plea

CASES

***State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826**
An alleged ambiguity during a Crim.R. 11 oral plea colloquy may be clarified by reference to other portions of the record, including the written plea.

***State v. Johnson*, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1988)**
Failure to inform a defendant who pleads guilty to more than one offense that the court may order them to serve any sentences imposed consecutively, rather than concurrently, is not a violation of Crim. R. 11(C)(2) and does not render the plea involuntary where they were told of the maximum sentences for each offense.

***State v. Veney*, 120 Ohio St. 3d 176, 2008-Ohio-5200, 897 N.E.2d 621**
When a trial court fails to explain a constitutional right, the plea is invalid under a presumption that it was involuntary. But failure to use the exact language of the rule is not grounds for vacating the plea, so long as the court explained the constitutional right in a manner reasonably intelligible to the defendant. A non-constitutional right only requires substantial compliance.

***State v. Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474 (1990)**
Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of their plea and the rights being waived.

***State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462**
When the trial court does not substantially comply with Crim.R. 11, reviewing courts determine whether the trial court partially complied or failed to comply with the rule. If the trial court partially complied, the plea may be vacated only if the defendant shows prejudice, meaning the plea would not have otherwise been made. If the trial court completely failed to comply with the rule, the plea must be vacated.

***State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224**
Trial court had completely failed to comply with Crim.R. 11(C)(2)(a)'s requirement that it explain the maximum penalty when the court made no mention of post-release control in the plea colloquy, despite the fact the defendant was subject to a mandatory five years of post-release control.

***State v. Dangler*, 162 Ohio St. 3d 1, 2020-Ohio-2765, 164 N.E.3d 286**
Because the trial court advised the defendant that they would be subject to the sex offender registration requirements of R.C. Chapter 2950, the trial court did not completely fail to comply with Crim. R. 11(C)(2)(a)'s maximum-penalty-advisement requirement prior to accepting the plea. The defendant did not establish prejudice because there was nothing in the record indicating that the defendant would not have entered the plea had they been more thoroughly informed of the details of the sex-offender-classification scheme. Because the defendant did not establish prejudice, they were not entitled to have the no-contest plea vacated for a failure to comply with Crim.R. 11(C).

Challenging a Plea, Part 2 (Withdrawing a Plea Via Motion)

A defendant may file a motion with the trial court to withdraw a guilty or no-contest plea. A presentence motion to withdraw a guilty plea should be freely and liberally granted, provided the movant demonstrates a reasonable and legitimate basis for the withdrawal. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). Nevertheless, a defendant does not have an absolute right to withdraw a plea before sentencing. *Id.* Therefore, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. Id.

A post-sentence motion to withdraw a plea should be granted to correct a manifest injustice. Crim.R. 32.1; *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, ¶8. The purpose of the manifest-injustice requirement in Crim.R. 32.1 is to "avoid the possibility of a defendant pleading guilty [or no contest] to test the weight of potential punishment." *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). Additionally, a plea agreement "'is contractual in nature and subject to contract-law standards.'" *State v. Butts*, 112 Ohio App.3d 683, 685-686, 679 N.E.2d 1170 (8th Dist.1996), quoting *Baker v. United States*, 781 F.2d 85, 90 (6th Cir.1986).

Generally, courts presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), at paragraph one of the syllabus; *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 544 N.E.2d 920 (1989), at syllabus. Only when the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning will extrinsic evidence be considered in an effort to give effect to the parties' intentions. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d at 132. Furthermore, extrinsic evidence outside of the four corners of a contract may be reviewed if a party to the contract was induced into signing due to fraud or mistake. *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, ¶12.

Relevant Rule: Crim.R. 32.1 – Withdrawal of a guilty plea

CASES

***State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9**
Ohio courts of appeals have applied res judicata, the rule against the same parties relitigating a settled claim, to bar the assertion of claims in a motion to withdraw a guilty plea that were or could have been raised at trial or on appeal.

***State v. Fish*, 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995)**
A non-exclusive list of factors for appellate courts to consider in reviewing a trial court's ruling on a presentence motion to withdraw: (1) whether the withdrawal will prejudice the state; (2) quality of representation provided to the defendant; (3) the extent of the Crim.R. 11 plea hearing; (4) the extent of the hearing on the motion to withdraw; (5) whether the trial court gave full and fair consideration to the motion; (6) timing of the motion; (7) the reasons given for withdrawal; (8) the defendant's understanding of the nature of the charges and penalties; and (9) whether the defendant has a meritorious defense.

***Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012)**
Where counsel's ineffective advice led to an offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed.

***Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012)**
Counsel has a duty to communicate any formal plea offers by the prosecutor that are favorable to the defendant. If the offer lapses or is rescinded due to counsel's failure to inform, the defendant must establish prejudice by showing that

there is a reasonable probability that: (1) they would have accepted the favorable offer; (2) the state would have gone through with the offer; and (3) the court would have accepted the plea bargain.

***Padilla v. Kentucky*, 599 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)**
Counsel must advise non-citizen clients about the risks of deportation when pleading guilty. Subsequently, remedy for failure to give such advice hinges on proof of prejudice, which the Padilla court did not address.

***State v. Pearson*, 11th Dist. Geauga Nos. 2002-G-2413 & 2002-G-2414, 2003-Ohio-6962**
The decision whether to grant or deny a post-sentence motion to withdraw a guilty plea is within the sound discretion of the trial court. The good faith, credibility, and weight of the movant's assertions in support of the motion are to be resolved by the trial court. Accordingly, appellate review of the trial court's denial of a post-sentence motion to withdraw a guilty plea is limited to a consideration of whether the lower court abused its discretion.

***State ex rel. Special Prosecutors v. Judges*, Court of Common Pleas, 55 Ohio St.2d 94, 378 N.E.2d 162 (1978)**
A trial court cannot grant a post-sentence motion to withdraw a guilty plea after the conviction has been affirmed on appeal.

Confrontation Clause

A criminal defendant has the right to confront and cross-examine the witnesses against them. The Confrontation Clause bars testimonial hearsay evidence, unless the witness is unavailable and there has been a prior opportunity to cross-examine.

Out-of-court statements made by defendants are generally admissible at trial. However, in a joint trial, it is unconstitutional to use an out-of-court statement by a non-testifying co-defendant that tends to incriminate another co-defendant. In such a case, regardless of the reliability of the confession, out-of-court testimonial statements—formal statements made for the purpose of investigation or trial—are inadmissible unless the witness is unavailable and was previously subject to cross-examination.

Constitutional Provisions: Sixth Amendment, United States Constitution
Article I, Section 10, Ohio Constitution

CASES

Testimonial Statements

***Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)**
Confrontation bars testimonial hearsay evidence, unless the witness is unavailable and there has been a prior opportunity to cross-examine.

***Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)**
Statements are nontestimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

***Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2007)**
Crime lab reports and sworn affidavits are testimonial. Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.

***Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011)**
The primary purpose of a statement is determined by objective view of the statement and the actions of all participants in the particular context.

***Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011)**
Testimony about a blood alcohol report by a surrogate—rather than by the scientist who did not sign the certification or perform or observe the test—violates the confrontation clause.

***Williams v. Illinois*, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012)**
No rationale received a majority of the votes in this 5-4 decision. Combining the rationales, the decision holds that a forensic report created (1) before an individual is targeted for a crime and (2) lacks indicia of solemnity is not testimonial for *Crawford* purposes. This is the first time "testimonial" means "testimonial against X." Here, DNA comparison testimony, relying on reports prepared by non-testifying witnesses, was admitted at trial.

***State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834**
Objective witness test: In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of the questioner is relevant only if it could affect a reasonable declarant's expectations.

***State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534**
To determine whether a child declarant's statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply the Davis primary-purpose test, and the declarant's age is not determinative of whether a testimonial statement has been made during a police interrogation.

***State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775**
The Supreme Court of Ohio affirmed the appellate court's judgment to the extent that statements of the victim to a social worker were admitted for medical diagnosis and treatment. It reversed to the extent that the victim's statements made for forensic or investigative purposes were admitted, and remanded the case to the appellate court to determine if harmless error occurred in admitting the improper statements.

***State v. Hood*, 135 Ohio St.3d 137, 2012-Ohio-6208, 984 N.E.2d 1057**
Cell-phone records, if properly authenticated, are business records and are not testimonial under *Crawford v. Washington*. Lack of authentication of records, not their hearsay nature, makes admission of records unconstitutional under the Confrontation Clause. Authentication may be provided only by a custodian or other witness who is qualified to testify that records were kept in the ordinary course of regularly conducted business. Error in admission of evidence is harmless when other evidence of guilt is overwhelming.

***State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930**
Trial court did not err in allowing doctor who did not perform the victim's autopsy to testify because his testimony did not violate the Confrontation Clause as he testified that he reached his own independent judgment on the cause and manner of the victim's death based upon his analysis of the evidence in the autopsy report, which was admissible.

CASES

Co-defendant Statements

***Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)**
At a joint trial, Bruton's codefendant, Evans, did not testify, but the government introduced Evans' prior oral statement that Bruton and Evans had committed the robbery. The court held that a limiting instruction did not and could not cure the violation of Bruton's confrontation rights.

***Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)**
Confession admissible because the co-defendant's statement only became incriminating when linked with other evidence against Marsh (her own testimony that she was in the car with the co-defendant).

***Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998)**
Conviction based on co-defendant's redacted confession, with petitioner's name replaced with "[deleted]," violated confrontation clause.

***State v. Edwards*, 11th Dist. Lake No. 2012-L-034, 2013-Ohio-1290**
Confrontation Clause violations about co-defendants' statements are subject to harmless error analysis.

***State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181**
Admission of testimonial, out-of-court statements of alleged accomplice who did not testify at defendant's trial violated defendant's right to confront the witnesses against him under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10, of the Ohio Constitution.

***Samia v. United States*, 599 U.S. 635, 143 S.Ct. 2004, 216 L.Ed.2d 597 (2023)**
Based on long-standing historical practice, the general presumption that jurors followed their instructions, and the relevant judicial precedents, the Sixth Amendment's Confrontation Clause did not bar the admission of a non-testifying codefendant's confession where the confession had been modified to avoid directly identifying the non-confessing codefendant, and the trial court had offered a limiting instruction that jurors could consider the confession only with respect to the confessing codefendant.

Discovery

Ohio Criminal Rule 16 governs the criminal discovery process in Ohio. The prosecution has a duty to disclose material to the defense. But if the defense requests discovery, the same can be said for its duties. The rule's staff notes provide, in part:

> The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties. Nothing in this rule shall inhibit the parties from exchanging greater discovery beyond the scope of this rule. The rule accelerates the timing of the exchange of materials, and expands the reciprocal duties in the exchange of materials. The limitations on disclosure permitted under this rule are believed to apply to the minority of criminal cases.
>
> The new rule balances a defendant's constitutional rights with the community's compelling interest in a thorough, effective, and just prosecution of criminal acts.

Materials subject to a privilege, confidentiality, or to work product protection need not be disclosed. Attorneys also need not disclose transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or codefendant. Also, and subject to judicial review and protections under due process and the rule, the prosecution can deem certain sensitive materials as "counsel only" or subject to nondisclosure, which limits the defense's access to the materials. Defense counsel may orally communicate the content of "counsel only" material to the defendant, but may not show or give the physical discovery material to the defendant.

Further, the defendant has a pretrial due process right to all material, exculpatory or impeachment evidence, in possession of the prosecution, even if the defense does not request it. Evidence in the possession of the police is imputed to the prosecution. If the prosecution fails to provide this *"Brady"* material to the defendant and the defendant is convicted, the defendant is entitled to a new trial if there was a reasonable likelihood of a different outcome if the defendant had known of the material. The prosecutor's duty to disclose such information is ongoing.

Relevant Provisions:

Fifth, Sixth, and Fourteenth Amendment, United States Constitution
Article I, Section 10, Ohio Constitution
Article I, Section 16, Ohio Constitution
Crim.R. 12 - Pleadings and Motions Before Trial: Defenses and Objections
Crim.R. 12.1 - Notice of Alibi
Crim.R. 16 - Discovery and Inspection

CASES

***Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)**

Withholding by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Exculpatory means evidence that supports a claim of innocence. Evidence is "material" if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different. Reasonable probability is sufficient to undermine confidence in the outcome. Under principles of due process, the prosecution's failure to provide Brady material may be grounds for a new trial.

***United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)**
The omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

***California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)**
Whatever duty the Constitution imposes on the states to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

***United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)**
Brady requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." The state does not violate its constitutional duty of disclosure unless the omission is of sufficient significance to result in the denial of a fair trial. When a defendant challenges a conviction under *Brady*, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt regarding the defendant's guilt.

***Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)**
Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

***Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct 1555, 131 L.Ed.2d 490 (1994)**
Regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

***United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002)**
The Constitution does not require the government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. The government was not required to disclose its potential case, and thus the value of the evidence impeaching the government's case was unknown.

***State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689 (1983)**
Where, in a criminal trial, the prosecution fails to comply with Crim. R.16(B)(1)(a)(ii) by informing the accused of an oral statement made by a co-defendant to a law enforcement officer, and the record does not demonstrate (1) that the prosecution's failure to disclose was a willful violation of Crim. R. 16, (2) that foreknowledge of the statement would have benefited the accused in the preparation of their defense, or (3) that the accused was prejudiced by admission of the statement, the trial court does not abuse its discretion under Crim.R. 16(E)(3) by permitting such evidence to be admitted.

***State v. Zeh*, 31 Ohio St.3d 99, 509 N.E.2d 414 (1987)**
Generally, a prosecution witness for the state has the right to refuse an extra-judicial, pre-trial interview, deposition, or examination by an agent of the defendant.

But when the mental condition of the victim-potential witness is a contested, essential element of the crime charged, the defense may move the court that the state be barred from utilizing evidence of such mental condition obtained

in a clinical interview of the witness prior to trial, unless such witness voluntarily agrees to a court-appointed, independent examination with the results being made available to both sides.

***Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987)**
Any infringement on a defendant's constitutional rights caused by a discovery-violation sanction must be afforded great weight. A trial court must impose the least drastic sanction possible that is consistent with the state's interest.

It is only when exclusion acts to completely deny defendant their constitutional right to present a defense that the sanction is impermissible.

***State v. Moore*, 40 Ohio St.3d 63, 531 N.E.2d 691 (1988)**
Pursuant to Crim. R. 16(B)(1)(a)(i), a defendant is entitled to discovery of relevant written or recorded statements made by him, and it is not within the province of the state to determine, and then to provide, only that which the state believes to be relevant to the defense.

***State v. Stojetz*, 84 Ohio St.3d 452, 705 N.E.2d 329 (1999)**
Absent particularized need, Crim.R 16 requires disclosure of grand jury testimony of codefendants, but not that of coconspirators.

***State v. Lawson*, 64 Ohio St.3d 336, 595 N.E.2d 902 (1992)**
The prosecution, not the judge, bears the duty to examine documents for potential Brady material. Although a specific request will sometimes require the trial court to conduct a review to determine whether something is Brady material, a trial court's failure to conduct such review is subject to harmless error.

***State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971**
The standard of review on appeal from a trial court's ruling on a discovery matter is whether the trial court abused its discretion.

***State v. Keenan*, 143 Ohio St. 3d 397, 2015-Ohio-2484, 38 N.E.3d 870**
It is possible for a Brady violation (or other type of discovery abuse) to be so severe, so detrimental to the interests of justice, that it can be the basis for the granting of a great writ and for the subsequent granting of a motion for dismissal.

Double Jeopardy

In criminal cases, the double jeopardy clause of the Fifth Amendment protects defendants from successive prosecution for the same conduct, whether they were originally convicted or acquitted. Double jeopardy attaches once the jury has been empaneled and sworn in for jury trials and after the first witness has been sworn in for bench trials. If the trial ends with an acquittal or a ruling by the court of insufficient evidence, the state cannot appeal or retry the case. However, double jeopardy does not prevent the state from appealing and retrying any reversal of conviction, other than those based on insufficient evidence. Moreover, double jeopardy does not prevent multiple jurisdictions, such as the state and the federal government, from seeking successive prosecution.

Establishing a claim of double jeopardy

A defendant must establish (1) that there was a former prosecution in the same state for the same offense; (2) that the same person was in jeopardy in the first prosecution; (3) that the parties are identical in both prosecutions; and (4) that the particular offense was one that creates a bar to being retried. Two offenses are not the same offense (and therefore there is no bar to prosecution) if the statutory provision for one offense contains an element not found in the statute for the other offense. For example, if Statute 1 requires the elements A + B + C, and Statute 2 requires the elements A + B + D, then the earlier prosecution does not bar the second prosecution.

There are some exceptions to this rule that would prevent the state from bringing the second prosecution, but they are uncommon and very fact specific. Separate and apart from the constitutional protections provided by the double-jeopardy provisions, a plea agreement may bar further charges based on principles of contract law. The underlying premise is that when a plea rests on a promise made by the prosecutor, that promise must be fulfilled. The rule is based on contract-law principles, not the Double Jeopardy Clauses of state and federal constitutions.

Relevant Provisions:

Fifth Amendment, United States Constitution
Article I, Section 10, Ohio Constitution
R.C. 2941.25 - Allied Offenses.
See Allied Offenses of Similar Import section

CASES

***Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)**
The same act or transaction could be prosecuted as two distinct statutory violations if "each provision requires proof of a fact which the other does not." If so, double jeopardy is not a bar to the second prosecution. This is not the only double jeopardy standard in Ohio, but it does apply to bar the state from pursuing successive prosecutions.

***Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982)**
Defendant may invoke the bar of double jeopardy in a second prosecution when the conduct giving rise to a prior successful motion for a mistrial was intended by the state to provoke the defendant into moving for a mistrial. Prosecutorial misconduct will bar a second trial only when such behavior was designed to cause or invite mistrial.

***State v. Best*, 42 Ohio St.2d 530, 330 N.E.2d 421 (1975)**
To sustain a claim of double jeopardy it must appear, (1) that there was a former prosecution in the same state for the same offense, (2) that the same person was in jeopardy on the first prosecution, (3) that the parties are identical in the two prosecutions, and (4) that the particular offense, on the prosecution of which the jeopardy attached, was such an offense as to create a bar. The dual sovereignty doctrine does not apply between the state and municipalities. So, prosecution under state law bars subsequent prosecution under municipal ordinance.

***Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978)**
In both state and federal courts, the Fifth and Fourteenth Amendments dictate that jeopardy attaches when the jury is empaneled and sworn.

***State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542**
If the statute sets forth multiple ways to commit the same offense, each alternative element is a separate offense for double jeopardy purposes. The aggravated vehicular assault statute contained an element for reckless driving and another for driving under the influence. Even though the defendant already pleaded guilty to driving under the influence, he could still be prosecuted for aggravated vehicular assault but only under the recklessness alternative.

***Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)**
The state cannot seek successive prosecutions of greater and lesser included offenses arising out of the same conduct.

***State v. Tolbert*, 60 Ohio St.3d 89, 573 N.E.2d 617 (1991)**
Generally, the prosecution of a lesser offense bars the subsequent prosecution of a greater offense.

***State v. Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, 939 N.E.2d 1217**
The state cannot indict a defendant for murder after the court accepts a negotiated guilty plea to a lesser offense and the victim later died of injuries sustained in the crime, unless the state expressly reserves the right to file additional charges on the record at the time of the defendant's plea.

***United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978)**
When the trial court grants a defendant's motion to dismiss unrelated to the determination of innocence or guilt, the state can appeal and retry without offending the double jeopardy clause.

***State ex rel. Leis v. Gusweiler*, 65 Ohio St.2d 60, 418 N.E.2d 397 (1981)**
Jeopardy only attaches once a plea has been accepted by the court.

***Heath v. Alabama*, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985)**
Under the dual sovereignty doctrine, double jeopardy does not bar successive prosecutions for the same conduct by governments with independent sovereign authority, such as the federal and state governments.

***State v. Soto*, 158 Ohio St.3d 44, 2019-Ohio-4430, 139 N.E.3d 889**
Double Jeopardy Clauses do not bar murder prosecution of defendant whose prior involuntary-manslaughter charge was dismissed under plea agreement.

***State v. Ramirez*, 159 Ohio St.3d 426, 2020-Ohio-602, 151 N.E.3d 598**
Crim.R. 33(A)(4)—Neither the double-jeopardy protection nor R.C. 2945.67 prevents the state from appealing an order granting a new trial based on insufficient evidence.

Fourth Amendment Search and Seizure

Under the Fourth Amendment, a warrantless search or seizure is presumptively unreasonable, unless an exception applies. A search occurs when the state violates an individual's reasonable expectation of privacy. A seizure occurs when a reasonable person would not feel free to leave the state's control, or when the state causes some meaningful interference with an individual's possessory interests in their property. Police may conduct a limited stop and frisk, for officer safety, based on reasonable suspicion that a suspect is armed and dangerous. Reasonable suspicion is a lower standard that probable cause. An officer must have probable cause to obtain a warrant or to make an arrest.

The good-faith exception excuses a search or seizure conducted without a warrant when the state acted in objectively reasonable, good-faith reliance on an erroneous warrant or the existence of an exception to the warrant requirement.

Relevant Provisions:

Fourth and Fourteenth Amendments United States Constitution
Article I, Section 14, Ohio Constitution
R.C. 2933.21 - Search warrant
R.C. 2933.22(A) - Probable cause
R.C. 2933.23 - Affidavit for search warrant
R.C. 2935.04 - When any person may arrest
Crim.R. 41(C) - Search and seizure

CASES

***Katz v. United States*, 389 U.S. 437, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)**
The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in their own home or office, is not a subject of Fourth Amendment protection. But what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. A concurring opinion laid out a two-prong test for determining whether a person is entitled to Fourth Amendment protection. First, a person must have an actual, subjective expectation of privacy. Second, that expectation must be one that society is prepared to recognize as reasonable.

***Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)**
A court may exclude any evidence obtained in violation of the defendant's Fourth Amendment rights.

Probable Cause

***Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)**
Probable Cause: When issuing a warrant, a magistrate uses a totality of the circumstances test to determine whether there is a fair probability that contraband or evidence of a crime will be found in a particular place.

***California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991)**
A search or seizure conducted without a prior finding of probable cause by a judge or magistrate is per se unreasonable, subject to a few specific and well-delineated exceptions.

Stops and Reasonable Suspicion

***Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968)**
Police may conduct a limited stop and frisk, for officer safety, based on reasonable suspicion that a suspect is armed and dangerous.

***Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)**
An anonymous phone tip to police supplied reasonable suspicion to justify an investigatory stop under the totality of the circumstances, considering the informant's veracity, reliability, and basis of knowledge. The officer needed to point to articulable facts. Here, the tip was sufficiently corroborated.

***Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000)**
An anonymous tip was not enough for reasonable suspicion where there were no corroborating facts to show that the tipster had knowledge of concealed criminal activity.

***Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)**
Reasonable suspicion is based on commonsense judgments and inferences about human behavior. Officers were justified in suspecting defendant was involved in criminal activity where he was in high-crime area, holding a bag, and ran when he saw officers.

Searches and Seizures

***U.S. v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984)**
A seizure occurs when a reasonable person would not feel free to leave the state's control, or when the state causes some meaningful interference with an individual's possessory interests in their property.

***Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.920 (1979)**
Search warrant was invalid because it did not describe things to be seized with particularity. Magistrate who became part of search party was not neutral and detached.

***U.S. v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012)**
GPS tracking is a search, under the common-law trespasser test. The government physically occupied private property for the purpose of obtaining information.

***Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960)**
Abandoned property is not subject to Fourth Amendment protection. Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts.

***Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987)**
In certain circumstances a warrantless seizure by police of an item that comes within plain view during their lawful search of a private area may be reasonable under the Fourth Amendment. But moving personal property within a residence—for example, to view and record serial numbers—constitutes a separate search, apart from the search that was the lawful objective of police entry into the residence. Such actions will be deemed unrelated to the objectives of the authorized entry, and the evidence obtained thereby will be suppressed.

***Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993)**
The police may seize nonthreatening contraband detected through the sense of touch during a protective pat-down search of the sort permitted by *Terry*, so long as the search stays within the bounds marked by *Terry*. If an officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.

***Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)**
The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

***Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013)**
Without a warrant, the police brought a drug-sniffing dog to Mr. Jardines' front door. The dog indicated drugs were present, resulting in a warrant and Mr. Jardines' arrest. The court held that a search had occurred within the meaning of the Fourth Amendment. At the Fourth Amendment's core stands the right of a person to retreat into their own home and there be free from unreasonable governmental intrusion. The area immediately surrounding and associated with the home—the curtilage—is part of the home itself for Fourth Amendment purposes. The officers entered Mr. Jardines' curtilage, as the front porch is the classic exemplar of an area to which the activity of home life extends.

***State v. Banks-Harvey*, 152 Ohio St.3d 368, 2018-Ohio-201, 96 N.E.3d 262**
A law-enforcement agency's policy that an arrestee's personal effects must accompany the arrestee to jail cannot, on its own, justify the warrantless retrieval of an arrestee's personal effects from a location that is protected under the Fourth Amendment to the United States Constitution.

***State v. Gardner*, 135 Ohio St.3d 99, 2012-Ohio-5683, 984 N.E.2d 1025**
Mere existence of an outstanding warrant does not render a later unjustified seizure lawful.

***State v. Bembry*, 151 Ohio St.3d 502, 2017-Ohio-8114, 90 N.E.3d 891**
Once the warrant had been issued, the exclusionary rule was not the appropriate remedy under Ohio Const. art. I, §14 for a violation of the knock-and-announce rule in R.C. 2935.12.

***State v. Leak*, 145 Ohio St. 3d 165, 2016-Ohio-154, 47 N.E.3d 821**
The arrest of a recent occupant of a legally parked vehicle did not, by itself, establish reasonableness to justify a warrantless search of the vehicle the arrestee had been riding in; thus, the warrantless search of the car in the instant case was unreasonable under U.S. Const. amend. IV and Ohio Const. art. I, §14.

***Carpenter v. United States*, 585 U.S. 296, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018)**
The government's acquisition from wireless carriers of defendant's historical cell-site location information (CSLI) was a search under the Fourth Amendment. When the government accessed defendant's CSLI, it invaded his reasonable expectation of privacy in the whole of his physical movements, and the fact that the government obtained the information from a third party did not overcome defendant's claim to Fourth Amendment protection. A court order obtained by the government under the Stored Communications Act, 18 U.S.C.S. §2703(d), was not a permissible mechanism for accessing historical CSLI because the showing required under the Act fell well short of probable cause. A warrant was necessary to obtain CSLI in the absence of an exception such as exigent circumstances.

Standing

***State v. Wintermeyer*, 158 Ohio St.3d 513, 2019-Ohio-5156, 145 N.E.3d 278**
A defendant who argues that they have been subjected to an unlawful search or seizure in violation of the Fourth Amendment to the United States Constitution bears the burden of establishing that their own Fourth Amendment rights have been violated. This concept is often referred to as Fourth Amendment standing.

Because the state defended a motion to suppress in the trial court without ever asserting that the defendant lacked Fourth Amendment standing, it waived the right to raise the standing issue for the first time on appeal. As Fourth Amendment standing is not a jurisdictional question, it need not be addressed before the court decides other aspects of a Fourth Amendment claim. Since the burden on the defendant to demonstrate Fourth Amendment standing is triggered only when the government argues that the defendant lacks a protected privacy interest affected by the search or seizure, the defendant does not have an obligation to put on evidence of standing when the government does not raise the issue.

Warrant Exceptions

***Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1982)**
Search incident to lawful arrest: After a lawful arrest, officers can search the arrestee's person and the area within their immediate control or grabbing area.

***Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)**
Automobile searches: Officers may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of its compartments, or if it is reasonable to believe the vehicle contains evidence of the offense of arrest.

***Kentucky v. King*, 563 U.S. 452, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011)**
Exigent circumstances allow police to enter a home in hot pursuit or to stop the destruction of evidence, but not when the police create the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment.

***Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.208 (2006)**
Police officers may search jointly occupied premises if one of the occupant's consents. However, the consent of one occupant is insufficient when another occupant is present and objects to the search.

***Fernandez v. California*, 571 U.S. 292, 134 S.Ct. 1126, 188 L.Ed.2d 25 (2014)**
In the context of consent to a warrantless search, an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason.

***Navarette v. California*, 572 U.S. 393, 134 S. Ct. 1683, 188 L.Ed.2d 680 (2014)**
Under the "totality of the circumstances" test, the court held that the police had reasonable suspicion to stop a car based upon an anonymous 911 tip regarding the caller's claim that another car had run her off the road. In so holding, the court relied on the short time between the incident and the call, the fact that the police spotted the vehicle in the same area as the incident, and that 911 calls are recorded and traceable, making false claims less likely. The court held that the stop was reasonable, despite the fact that the police followed the car for several miles without incident. A vigorous dissent argued that the majority opinion set the totality-of-the-circumstances, reasonable-suspicion threshold too low.

Good Faith Exception

***U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)**
Good faith exception: Evidence seized based on invalid search warrant unsupported by probable cause is admissible if issued by a neutral, detached magistrate, and if police acted in objectively reasonable, good-faith reliance.

***Herring v. U.S.*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)**
Evidence obtained pursuant to a search incident to lawful arrest not excluded even though, because of mistake by police personnel in another county, the arrest was actually pursuant to a recalled warrant. Question turned on culpability of police and potential to deter.

***Davis v. United States*, 564 U.S., 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)**
Exclusionary rule does not apply when police conduct a search in objectively reasonable reliance on judicial precedent.

***Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)**
The exclusionary rule does not apply to evidence obtained by police who act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, which is subsequently found to violate the Fourth Amendment.

***L.A. County v. Rettele*, 550 U.S. 609, 127 S.Ct. 1989, 167 L.Ed.2d 974 (2007)**
Entry into incorrect home pursuant to proper warrant was reasonable, despite difference in race between occupants and suspects. Deputies were justified in ordering the residents from bed and refusing to allow them to dress for a brief period, in order to ensure that no weapons were concealed in the bedding or elsewhere.

***Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995)**
The exclusionary rule does not require suppression of evidence seized in violation of the Fourth Amendment when the erroneous information resulted from clerical errors of court employees.

Hearsay

Statements other than ones made by the declarant while testifying are inadmissible hearsay if offered to prove the truth of the matter asserted. But there are many exceptions. Statements are offered to prove the truth of the matter asserted when the proponent of the statements wants the factfinder to believe that the content of the statements is true. Hearsay statements may be admissible if they are offered for some other purpose, such as to explain why a police officer pursued a certain course of conduct.

The most common types of inadmissible hearsay statements are police reports and statements of third parties recalled by witnesses. Prior statements by a witness are also inadmissible unless one of the enumerated exceptions applies. (Statements that are admissible under the hearsay rules may nevertheless be barred by the Confrontation Clause.)

Relevant Rules:
Evid.R. 801 - Definitions
Evid.R. 802 - Hearsay generally not admissible
Evid.R. 803 - Hearsay exceptions
Evid.R. 804 - Hearsay when witness is unavailable
Evid.R. 805 - Hearsay within hearsay
Evid.R. 806 - Attacking and supporting credibility of declarant
Evid.R. 807 - Hearsay exceptions, child statements

CASES

Note: Hearsay challenges are very fact-specific and there is extensive litigation regarding each purpose and exception. Additionally, Crawford challenges are often closely tied to hearsay challenges.

***Crawford v. Washington*, 543 U.S. 1095, 125 S.Ct. 961, 160 L.Ed.2d 909 (2005)**
The Confrontation Clause bars testimonial hearsay evidence unless the witness is unavailable and there has been a prior opportunity to cross-examine.

***State v. Shelton*, 51 Ohio St.2d 68, 364 N.E.2d 1152 (1977)**
A statement of a conspirator, made after the actual commission of the crime, may be admissible against any co-conspirator if it was made while the conspirators were still concerned with the concealment of their criminal conduct or their identity.

***State v. Kidder*, 32 Ohio St.3d 279, 513 N.E.2d 311 (1987)**
The evidence in favor of conviction, absent the hearsay, must be so overwhelming that the admission of those statements was harmless beyond a reasonable doubt.

***State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834**
For purposes of determining whether a statement is testimonial, if the questioner of a sexual-assault victim is not a law enforcement officer or agent thereof, the court applies the objective witness test, not the primary purpose test.

***State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944**
Hearsay statements of a child victim of sexual assault, made to doctors and counselors, were not testimonial, and thus were admissible under Evid.R. 803(4), because they had been made to medical personnel in the course of medical diagnosis and treatment.

***State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775**
Statements made to interviewers at child-advocacy centers that serve primarily a forensic or investigative purpose are testimonial and are inadmissible pursuant to the Confrontation Clause when the declarant is unavailable for |ross-examination.

Statements made to interviewers at child-advocacy centers that are made for medical diagnosis and treatment are nontestimonial and are admissible without offending the Confrontation Clause.

Both types of statements can be made during the same interview, depending on the circumstances.

***State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181**
In order for testimony offered to explain police conduct to be admissible as non-hearsay, the conduct to be explained should be relevant, equivocal, and contemporaneous with the statements; the probative value of statements must not be substantially outweighed by the danger of unfair prejudice; and the statements cannot connect the accused with the crime charged.

***State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984)**
Discussing operation of the hearsay rule and citing cases supporting the court's conclusion that statements at issue were offered for a non-hearsay purpose.

Indictments

In Ohio, all felonies punishable by death or life imprisonment must be prosecuted by indictment. For other felonies, a defendant may waive their right to indictment and be prosecuted by information. The indictment or information must give the defendant notice of the offense(s) charged. Amendments to an indictment or information are allowed, provided that they do not mislead or prejudice the defendant, and provided that their rights will be fully protected by proceeding with trial.

Relevant Provisions:
Fifth Amendment, United States Constitution
Article I, Section 10, Ohio Constitution
R.C. Chapters 2935
R.C. Chapters 2941
Crim.R. 3, 6, and 7

CASES

***Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)**
Except for prior convictions, any fact which increases the penalty for a crime beyond the statutory maximum must be charged and proved beyond a reasonable doubt at trial.

***Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)**
Except for prior convictions "any fact that increases the mandatory minimum is an 'element' [of the crime] that must be submitted to the jury [and found beyond a reasonable doubt]."

***Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)**
An indictment need not charge any component part of the offense.

***State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787, 905 N.E.2d 151**
Indictment placed defendant on notice that they could be convicted of a lesser included offense, and the degree of the offense would depend upon the "special findings" of value of property stolen.

***State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26**
An indictment that charges an offense by tracking the language of a criminal statute is not defective for failure to identify a mental state if the statute itself fails to specify a culpable mental state.

***State v. Whiting*, 84 Ohio St.3d 215, 702 N.E.2d 1199 (1998)**
When moving to dismiss for pre-indictment delay, the defendant bears the initial burden of showing prejudice caused by the delay, after which the state bears the burden of establishing a justifiable reason for the delay.

***State v. Allen*, 29 Ohio St.3d 53, 506 N.E.2d 199 (1987)**
Where the existence of a prior conviction enhances the penalty for a subsequent offense, but does not elevate the degree thereof, the prior conviction is not an essential element of the subsequent offense, and need not be alleged in the indictment or proved as a matter of fact.

***State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609**
Crim.R. 7(D) does not permit the amendment of an indictment when the amendment changes the penalty or degree of the charged offense; amending the indictment to change the penalty or degree changes the identity of the offense.

***State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920**
A defendant may plead guilty to an indictment that was amended to change the name or identity of the charged crime when the defendant is represented by counsel, has bargained for the amendment, and is not prejudiced by the change.

***State ex rel. Morris v. Leonard*, 86 Ohio St.3d 624, 716 N.E.2d 208 (1999)**
Guilty plea to charge contained in information waives any claimed right to an indictment.

***State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, 951 N.E.2d 1025**
A complaint that meets the requirements of Crim.R. 3 invokes the subject-matter jurisdiction of a trial court. When a criminal complaint and affidavit are signed by a private citizen but are not reviewed by a reviewing official before filing, the defect is not jurisdictional but may be the subject of a Crim.R. 12(C) motion before trial.

***State v. Stratton*, 5 Ohio App.3d 228, 451 N.E.2d 520 (6th Dist.1982)**
Duplicity results when more than one offense is stated in a single count; multiplicity occurs when one offense is stated in several counts of the indictment. If multiplicity exists and the counts are tried separately, double jeopardy bars subsequent prosecution.

Ineffective Assistance at Trial and Post-Conviction Petitions

In 1965, the state legislature passed Ohio's post-conviction statutes, R.C. 2953.21 et seq. The law was originally enacted as an emergency measure to provide a new procedure to protect constitutional rights and provide an orderly method of hearing such matters. The right to postconviction relief is set forth in R.C. 2953.21(A)(1):

> Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

Any person who has been convicted of a criminal offense or adjudicated a delinquent child in Ohio, and whose rights have been infringed under the Ohio or federal constitutions, may seek relief under the Ohio post-conviction statutes. The deadline for filing a postconviction petition is one year from the date the defendant's trial transcript is filed with the court of appeals. If no appeal is taken, or if a delayed appeal is filed (and even if the delayed appeal is granted), the petition may be due to be filed one year after the deadline for filing an appeal, which is 30 days after the date the sentencing entry was filed. (This issue is currently pending before the Supreme Court of Ohio).

When a person has pleaded guilty, a defendant may claim that trial counsel was ineffective for failing to explain a legal concept to the defendant, thereby making the defendant's plea unknowing and involuntary. In order to obtain relief, a defendant raising such a claim must first show that counsel's advice was not within the range of competence demanded of attorneys in criminal cases. The second, or "prejudice" requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, they would not have pleaded guilty and would have insisted on going to trial.

When a defendant has gone to trial, a common post-conviction claim is that a specific witness should have testified, but did not. A claim such as this, in which trial counsel may have failed to obtain testimony from a potential witness, is an ineffective-assistance-of-counsel claim. In order to prevail under such a claim, the defendant must demonstrate that their trial attorney's investigation was deficient, and that this deficient investigation prejudiced the outcome of the defendant's trial.

Relevant Provisions:

Sixth Amendment, United States Constitution
Article I, Section 10, Ohio Constitution
R.C. 2953.21 - Postconviction relief petition
Crim.R. 35(A) - Postconviction Petition

CASES

***Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)**

The two-prong test for ineffective assistance of counsel: 1) deficient performance by counsel so serious as to deprive the defendant of counsel as required by the Sixth Amendment and 2) prejudice caused by the deficient performance. Counsel's performance will be reviewed based on prevailing professional norms, and there is a presumption of

reasonable assistance. To establish prejudice, defendant must show that there is a reasonable probability that, but for the counsel's deficient performance, the result of the proceeding would have been different.

***State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989)**
Counsel's performance will not be deemed ineffective unless counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance.

***State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980)**
In order to receive an evidentiary hearing on postconviction claims, a petitioner must meet the initial burden of submitting evidentiary documents that contain sufficient operative facts to demonstrate a constitutional violation. Broad assertions, without further demonstrating prejudice, do not warrant a hearing for postconviction petitions. Furthermore, general conclusory allegations to the effect that a petitioner has been denied a constitutional right are inadequate as a matter of law to grant an evidentiary hearing. Prejudice is presumed when trial counsel completely abdicates their responsibility to investigate mitigating factors during sentencing.

***State v. Swortcheck*, 101 Ohio App.3d 770, 656 N.E.2d 732 (8th Dist.1995)**
When determining whether there are substantive grounds for postconviction relief that would warrant a hearing, the affidavits offered in support of the petition should be accepted as true. The affidavit or affidavits in support need only present sufficient prima facie evidence to warrant a hearing. The credibility of witnesses and any conflict in evidence are properly resolved at the postconviction hearing, not before. But *see State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905 (determining that a trial court does not abuse its discretion by denying a hearing after discounting the credibility of the defendant's supporting affidavits).

***State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978)**
Claims that are supported by evidence outside of the record are not permitted to be raised in a direct appeal. Therefore, the doctrine of res judicata does not apply to such arguments in a postconviction petition.

***Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012)**
Where counsel's ineffective advice led to an offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed.

***Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012)**
Counsel has a duty to communicate any formal plea offers by the prosecutor that are favorable to the defendant. If the offer lapses or is rescinded due to counsel's failure to inform, the defendant must establish prejudice by showing that there is a reasonable probability that: 1) they would have accepted the favorable offer; 2) the state would have gone through with the offer; and 3) the court would have accepted the plea bargain.

***Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)**
Counsel must advise non-citizen clients about the risks of deportation when pleading guilty. Subsequently, remedy for failure to give such advice hinges on proof of prejudice, which the Padilla court does not address.

Jail-Time Credit

Some defendants cannot afford bond or are denied bond. As a result, some defendants spend time confined before they receive actual prison sentences. Without credit for time spent in confinement, those defendants serve longer sentences. As such, defendants have a right under the Equal Protection Clauses to credit for time served before sentencing. It is the sentencing court's duty to include a calculation of time served in the sentencing entry, and it is the Ohio Department of Rehabilitation and Correction's job to reduce a defendant's sentence by the amount of time served.

Only time in "confinement" can be credited against a sentence. This means that time spent in jail, a community based correctional facility, or other manner of confinement, counts as confinement. But time spent in a halfway house or treatment facility counts only if the defendant was "confined" there. Time served for other convictions, time on community control, time spent while detained for another case, and time spent in jail before the current case began will not be credited against a sentence.

Relevant Provisions:
Equal Protection Clause of the Fourteenth Amendment, United States Constitution
Equal Protection Clause of Article I, Section, 2, Ohio Constitution
R.C. 2967.191 - Reduction of prison term or parole eligibility date for related days of confinement
R.C. 2929.19(B)(2)(g) - Describing the process of challenging incorrect jail-time credit by motion
R.C. 2945.38(I) - Credit given for time spent in confinement to determine competence to stand trial

CASES

***State v. Napier*, 93 Ohio St.3d 646, 758 N.E.2d 1127 (2001)**
Defendants are entitled to jail-time credit for all time spent while confined in a community based correctional facility.

***State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440**
When a defendant is sentenced to concurrent prison terms for multiple charges, jail-time credit pursuant to R.C. 2967.191 must be applied toward each concurrent prison term. The practice of awarding jail-time credit, although now covered by state statute, has its roots in the Equal Protection Clauses of the Ohio and United States Constitutions.

***State ex rel. Rankin v. Mohr*, 130 Ohio St.3d 400, 2011-Ohio-5934, 958 F.3d 944**
The Supreme Court of Ohio limited Fugate to cases in which the defendant was held for both cases prior to sentencing.

District-specific case law is developing. Be sure to research the law in the appropriate district before raising jail-time credit claims.

***State v. Thompson*, 147 Ohio St.3d 29, 2016-Ohio-2769, 59 N.E.3d 1264**
An order denying a motion to correct jail-time credit is an order that affects a substantial right, and is therefore a final, appealable order.

***State v. Cupp*, 156 Ohio St.3d 207, 2018-Ohio-5211, 124 N.E.3d 811**
A defendant is not entitled to jail-time for pre-sentence detention time when held on a bond when, during that same period of time, the defendant was serving a sentence on an unrelated case because the defendant could not have been released on bond until their unrelated confinement was over.

***State v. Moore*, 154 Ohio St.3d 94, 2018-Ohio-3237, 111 N.E.3d 1146**
The plain language of the specification provision requires that jail-time credit not be applied toward prison terms for firearm specifications.

***State v. Reed*, 162 Ohio St.3d 554, 2020-Ohio-4255, 166 N.E.3d 1106**
A defendant is not entitled to jail-time credit for the days they were under house arrest and electronic monitoring because the legislature expressed the intent that credit was to be given only for the time a defendant was confined in a public or private facility; and confinement in a personal residence did not qualify under the statute.

Jury Instructions

A criminal defendant is entitled to have the trial court give the jury complete and accurate instructions on all of the issues of law raised by the evidence. A defendant is also entitled to have the trial court give a curative instruction when the jury has heard or been shown improper evidence. Jury instructions must not include mandatory presumptions whereby the jury must infer any fact from other facts, unless the parties have stipulated to the fact. Jury instructions may not relieve the state of its burden of production or persuasion. Under certain circumstances, a defendant is entitled to instructions on lesser included offenses or offenses of inferior degree. When the defense fails to object to a jury instruction, it waives all but plain-error review on appeal. The law surrounding self-defense, and as a result self-defense jury instructions, has recently changed in Ohio. See the self-defense section for more information.

Relevant Provisions:

Sixth and Fourteenth Amendments, United States Constitution
Article I, Section 16, Ohio Constitution
R.C. 2938.08M - Defendant presumed innocent
R.C. 2938.11 - Order of trial
R.C. 2945.10 - Order of proceedings at trial
R.C. 2945.11 - Charge to the jury as to law and fact
Crim.R. 30 - Instructions
Ohio Jury Instructions - Part II - Criminal Instructions

CASES

***Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)**

A jury instruction that the law presumes a person intends the ordinary consequences of their voluntary acts violates the defendant's Fourteenth Amendment right to have the state prove every element of the offense beyond a reasonable doubt and relieves the state of its burden of production and persuasion.

***Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981)**

Upon request, the trial court must instruct the jury that the defendant's failure to testify cannot be considered for any purpose.

***Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)**

A jury instruction that creates a mandatory presumption whereby the jury must infer the presumed fact if the state proves certain predicate facts violates the Due Process Clause if it relieves the state of the burden of persuasion on an element of an offense.

***Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986)**

The court relied on its analysis in *Bruton* to reverse a conviction where both codefendants made confessions that were admitted at trial. The ruling in *Bruton* illustrates the extent of the court's concern that the admission of this type of evidence will distort the truth-finding process. In *Bruton*, the court held that the Confrontation Clause rights of the petitioner were violated when his codefendant's confession was admitted at their joint trial, despite the fact that the judge in the case had carefully instructed the jury that the confession was admissible only against the codefendant. The court based its decision in *Bruton* on the fact that a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied.

***Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)**
Mandatory language in jury instruction stating that the jury "shall" impose a sentence of death if aggravating factors outweigh mitigating factors did not violate the Eighth Amendment or Fourteenth Amendment.

***Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)**
The failure to provide a proper instruction on reasonable doubt violates the Sixth Amendment and is structural error.

***State v. Barron*, 170 Ohio St. 267, 164 N.E.2d 409 (1960)**
Under R.C. 2945.10(E), it is not mandatory upon a trial court to give any instructions to the jury in a criminal case before argument, but, if requested special instructions, reduced to writing, are correct, pertinent and timely presented, they must be included, at least in substance, in the general charge.

***State v. Price*, 60 Ohio St.2d 136, 398 N.E.2d 772 (1979)**
A single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge.

State v. Doran, 5 Ohio St.3d 187, 449 N.E.2d 1295 (1983)
A jury instruction which fails to allocate any burden of proof on the affirmative defense of entrapment is inherently misleading and confusing and is prejudicial error.

***State v. Howard*, 42 Ohio St.3d 18, 537 N.E.2d 188 (1989)**
The traditional *Allen* charge (*Allen v. United States*, 164 U.S. 492 (1896)) is not a proper supplemental charge to be given to juries in Ohio which have become deadlocked on the question of conviction or acquittal.

In place of the traditional *Allen* charge, we approve the following supplemental instruction: "The principal mode, provided by our Constitution and laws, for deciding questions of fact in criminal cases, is by jury verdict. In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquiescence in the conclusion of your fellows, each question submitted to you should be examined with proper regard and deference to the opinions of others. You should consider it desirable that the case be decided. You are selected in the same manner, and from the same source, as any future jury would be. There is no reason to believe the case will ever be submitted to a jury more capable, impartial, or intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side. It is your duty to decide the case, if you can conscientiously do so. You should listen to one another's arguments with a disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you are convinced it is erroneous. If there is disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached. Jurors for acquittal should consider whether their doubt is reasonable, considering that it is not shared by others, equally honest, who have heard the same evidence, with the same desire to arrive at the truth, and under the same oath. Likewise, jurors for conviction should ask themselves whether they might not reasonably doubt the correctness of a judgment not concurred in by all other jurors."

***State v. Wolons*, 44 Ohio St.3d 64, 541 N.E.2d 443 (1989)**
A party does not waive their objections to the court's charge by failing to formally object thereto (1) where the record affirmatively shows that a trial court has been fully apprised of the correct law governing a material issue in dispute, and (2) the requesting party has been unsuccessful in obtaining the inclusion of that law in the trial court's charge to the jury.

***State v. Williford*, 49 Ohio St.3d 247, 551 N.E.2d 1279 (1990)**
A criminal defendant has a right to expect that the trial court will give complete jury instructions on all issues raised by the evidence.

***State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990)**
1. Before the taking of evidence, a trial court may give preliminary instructions to the jury appropriate for the jury's guidance in hearing the case. A court may also give cautionary instructions throughout the trial.

2. After arguments are completed, a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.

***Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990)**
"A presumption always exists that the jury has followed the instructions given to it by the trial court." (*State v. Fox*, 133 Ohio St. 154, 10 O.O. 218, 12 N.E. 2d 413 (1938); *Browning v. State*, 120 Ohio St. 62, 165 N.E. 566 (1929), approved and followed.)

***State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991)**
Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction. Therefore, where the jury is properly and adequately instructed as to the standards for reasonable doubt a special instruction as to circumstantial evidence is not required.

***State v. Lessin*, 67 Ohio St.3d 487, 620 N.E.2d 72 (1993)**
When a criminal charge arises from conduct that encompasses both a constitutionally protected act and an act that is not constitutionally protected, failure of the trial court to instruct the jury that it may not consider evidence of the constitutionally protected act as proof of the defendant's guilt is reversible error.

***State v. Kirk*, 72 Ohio St.3d 564, 651 N.E.2d 981 (1995)**
Where a defendant is not entitled to call a witness to the stand because of the witness' intention to assert the Fifth Amendment privilege against self-incrimination, the defendant is entitled to request an instruction that the jury should draw no inference from the absence of the witness because the witness was not available to either side.

***State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643**
The failure of the trial court to maintain written jury instructions with the 'papers of the case' in violation of R.C. 2945.10(G) is not a structural error.

***State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45**
The trial court failed to instruct not only on the culpable mental state of the underlying offense of trespass, but also on all the elements required to establish the underlying offense of assault. As a general rule, a defendant is entitled to have the jury instructed on all elements that must be proved to establish the crime with which they are charged, and, where specific intent or culpability is an essential element of the offense, a trial court's failure to instruct on that mental element constitutes error.

***State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980)**
However, in Adams, the court held that the failure to instruct on each element of an offense is not necessarily reversible as plain error. Rather, an appellate court must review the instructions as a whole and the entire record to determine whether a manifest miscarriage of justice has occurred as a result of the error in the instructions.

***State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995**
Although Crim.R. 31(A) requires juror unanimity on each element of the crime, jurors need not agree to a single way by which an element is satisfied. *Richardson v. United States* (1999), 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985. Applying the federal counterpart of Crim.R. 31(A), *Richardson* stated that a "jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime."

***State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207**
The defendant, who had presented an "all or nothing" defense, did not have the right to prevent the trial court from instructing the jury on lesser included offenses. The trial court, after reviewing the evidence, was to determine whether an instruction on lesser included offenses was appropriate. An instruction was required when under any reasonable view of the evidence it was possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense.

***State v. Griffin*, 141 Ohio St.3d 392, 2014-Ohio-4767, 24 N.E.3d 1147**
The entire jury charge in this case comprises over 46 pages of transcript. The portion relevant to this case comprises three pages. The definitions given to the jury for "enterprise," "pattern of corrupt activity," and "corrupt activity" quote subsections of R.C. 2923.31.

We are convinced that the jury instructions, when read and understood together, adequately convey the entirety of the substantive law that Griffin would have incorporated from another source. Griffin asked for a definition of "enterprise" based on *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), or *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009), to convey that "enterprise" requires that the people in the organization have acted in concert and with a common purpose. It is difficult to summarize certain legal principles into terms that lay people can use to reach factual conclusions. There are times when more information is not better. There are times when more information is more likely to confuse than to inform a jury.

***State v. Beverly*, 143 Ohio St.3d 258, 2015-Ohio-219, 37 N.E.3d 116**
As was true in the instruction reviewed in *Griffin*, the definitions of "enterprise" and "pattern of corrupt activity" are quoted from R.C. 2923.31. The essence of the jury charge appears early in the instructions when the court stated that the state must prove beyond a reasonable doubt that Beverly, "while employed by or associated with any enterprise conduct[ed] or participate[d] in, either directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity."

Again, as in *Griffin*, the instructions in this case could have been differently, perhaps even better, stated. Nevertheless, it is clear in reviewing the instructions in this case that they are substantially similar to the instructions that we approved in *Griffin*. Accordingly, we summarily reverse the lower court's judgment that the jury instructions were insufficient as a matter of law.

***State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939**
Reviewing appellate court's reversal of on-duty police officer's felonious-assault conviction, the Supreme Court of Ohio held that the jury instructions were potentially misleading, because without a proper instruction on the use of deadly force and justification, the trial court did not give the jury the instructions necessary to weigh the evidence and discharge its duty as factfinder.

Jury Selection

Trial by jury has been established by the United States Constitution as the normal and preferable mode of disposing of issues of fact in a criminal case. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. Ohio guarantees a right to a jury trial for all offenses other than minor misdemeanors or violations, offenses that involve fines of less than $1,000 and no possibility of incarceration. For petty offenses, a defendant must affirmatively demand a jury trial in writing.

The venire panel must be drawn from a source that represents a fair cross-section of the defendant's community. Both the prosecution and defense may challenge the ability of individuals to sit on a jury, and both parties have unlimited challenges "for cause," meaning that there is a specific reason the person shouldn't serve on the jury such as a conflict of interest or a stated belief that is incompatible with a fair trial. Additionally, both parties have limited peremptory challenges, which may be used for any reason other than to exclude a juror based upon membership in a set of protected classes (race, gender, religion, among others). In a joint trial with multiple co-defendants, each defendant has their own peremptory challenges, and the prosecution has the total amount that all defendants get.

Relevant Provisions:

Sixth and Fourteenth Amendments, United States Constitution
Article I, Section 16, Ohio Constitution
18 U.S.C. §243 - Exclusion of jurors on account of race or color
Crim.R. 23 - Trial by jury or by the court
Crim.R. 24 - Trial jurors
R.C. 2945.25 - Causes for challenging of jurors

CASES

***Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965)**

A defendant's only federal constitutional right concerning the method of trial is to an impartial trial by jury. Although a defendant may waive their right to trial by jury, there is no constitutional impediment to conditioning a waiver of that right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees.

***Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)**

A criminal defendant is denied equal protection when they are put on trial before a jury from which members of their race have been purposefully excluded. The court created a three-part test for determining whether a prosecutor's use of a peremptory challenge is racially motivated.

1. The defendant must make a prima facie case showing that the prosecutor has exercised peremptory challenges on the basis of race.

2. Once the defendant establishes a prima facie case of discrimination, the burden shifts to the prosecutor to articulate a race-neutral explanation for the peremptory challenge related to the particular case to be tried.

3. The trial court must determine whether the defendant has carried their burden of proving purposeful discrimination.

***Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)**
Under the Equal Protection Clause, a defendant has the right to be tried by a jury whose members are selected by nondiscriminatory criteria and has standing to assert third-party claims.

(This case was successfully argued by the late Robert L. Lane, the only Ohio Assistant Public Defender to appear before the Supreme Court of the United States. Sparring with Justice Scalia, Lane explained, "This court cannot tolerate racial discrimination simply because the defendant is not of the same race as the jurors. As Justice Kennedy stated in his opinion in Holland v. Illinois, citizens cannot be denied the duty and honor of jury service on the basis of race just because the defendant is not of the same race as those jurors. That need is the same regardless of the defendant's race. The need is the same regardless of the juror's race.")

***Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)**
Sixth Amendment right to a jury trial is fundamental and applies to the states through the Fourteenth Amendment.

***Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992)**
A criminal defendant's racially discriminatory exercise of peremptory challenges inflicts the harms addressed by *Batson*. Regardless of whether it is the state or the defense who invokes them, discriminatory challenges harm the individual juror by subjecting them to open and public racial discrimination and harm the community by undermining public confidence in this country's system of justice.

***Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973)**
To require a judge to allow questions of the jury about racial prejudice, there needs to be a significant likelihood that racial prejudice might infect the trial.

***Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)**
Systematic exclusion of women from a venire violates defendant's Sixth and Fourteenth Amendment rights. Venires can be challenged on the basis of discriminatory outcome.

***J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994)**
Batson also applies to gender.

***State v. Fulton*, 57 Ohio St.3d 120, 566 N.E.2d 1195 (1991)**
Sets forth elements of an equal protection challenge to a grand jury array as well as to a petit jury array.

Jury Verdicts and Forms

Jury verdict forms must state either the degree of the charge or the aggravating circumstances of which the defendant was found guilty, otherwise the defendant is guilty only of the least degree of the crime. A jury's verdict must be unanimous, but it need not be unanimous regarding the specific method used in committing the crime.

Relevant Statute: R.C. 2945.75 - Degree of offense; charge and verdict; proof of prior conviction

CASES

***State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735**
A verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.

***State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891**
Even if a verdict form does not specify an aggravating circumstance of a crime, it is not plain error if the jury hears testimony of the aggravating circumstances, and the court provides clear instructions as to what the jury must find to convict the defendant. But *see McDonald*, below.

***State v. McDonald*, 137 Ohio St.3d 517, 2013-Ohio-5042, 1 N.E.3d 374**
Reaffirming *Pelfrey*: In cases involving offenses for which the addition of an element or elements can elevate the offense to a more serious degree, the verdict form itself is the only relevant thing to consider in determining whether the dictates of R.C. 2945.75 have been followed. If a verdict form does not state the degree of the offense, it must state the elements that distinguish it from a lesser-degree offense.

***State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31**
A jury need not agree that a specific means was used in committing an offense for a guilty verdict to be unanimous with regard to that offense.

Sufficiency and Manifest Weight of the Evidence

While often considered together, sufficiency-of-the-evidence and manifest-weight-of-the-evidence reviews are different.

Sufficiency-of-the-evidence review involves a determination of whether the evidence regarding each element of the offense is legally sufficient to support a jury verdict—i.e., whether the state met its burden of proving each element of the offense beyond a reasonable doubt. A determination by a court of appeals that a conviction was not supported by sufficient evidence bars retrial regarding that charge. Such a determination by a court of appeals does not need to be unanimous.

Manifest-weight-of-the-evidence review involves a determination of whether a reasonable jury could reach a verdict of guilty beyond a reasonable doubt – i.e., whether the state has met its burden of persuasion. In essence, a court of appeals sits as the thirteenth juror and considers whether the jury lost its way. To prevail on a manifest-weight claim, the appellate court's decision to reverse a verdict must be unanimous. Reversal based on a manifest-weight claim does not bar retrial.

Relevant Provisions:
Due Process Clause of the Fourteenth Amendment, United States Constitution
Due Process Clause of Article I, Section 16, Ohio Constitution
Article IV, Section 3(B)(3), Ohio Constitution—all three appellate-court judges on the panel must concur to reverse on the weight of the evidence
Crim.R. 29 - Motion for Acquittal

CASES

***Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)**
When reviewing a claim that there was insufficient evidence to sustain a conviction, a court must determine whether "after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

***Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982)**
Double jeopardy bars retrial when a case is reversed because of insufficiency of the evidence, but not when reversal is because conviction is against the manifest weight of the evidence.

***Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)**
Before the state may obtain a conviction for any offense, it must prove every element of that offense beyond a reasonable doubt.

***Newman v. Metrish*, 543 F.3d 793 (6th Cir.2008)**
For circumstantial evidence supporting a conviction to meet the standard of due process, it must have been adequate for a rational trier of fact to have made a "permissible inference" of guilt, as opposed to a "reasonable speculation" of guilt.

***State v. Apanovitch*, 33 Ohio St.3d 19, 514 N.E.2d 394 (1987)**
[There are] eight factors in determining whether a decision is against the manifest weight of the evidence. These include whether the evidence was uncontradicted, whether a witness was impeached, what was not proved, that the reviewing court is not required to accept the incredible as true, the certainty of the evidence, the reliability of the evidence, whether a witness' testimony is self-serving, and whether the evidence is vague, uncertain, conflicting, or fragmentary.

***State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997)**
Sufficiency is a determination of whether the case may go to the jury or whether the evidence is legally inadequate to support the verdict as a matter of law. "[A] conviction based on legally insufficient evidence constitutes denial of due process." In contrast, a review of weight involves the appellate court's review of the entire record, "the evidence and all reasonable inferences, and . . . the credibility of witnesses," with the court acting as a "thirteenth juror."

To reverse a trial court judgment based on sufficiency of the evidence, a concurring majority of the court of appeals is necessary. To reverse a trial court judgment based on weight of the evidence, after a jury trial verdict, a unanimous concurrence the court of appeals panel reviewing the case is required.

***State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038**
The test for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.

***State v. Stevens*, 139 Ohio St.3d 247, 2014-Ohio-1932, 11 N.E.3d 252**
Based upon the foregoing analysis, we conclude that in order to obtain a conviction for engaging in a pattern of corrupt activity, R.C. 2923.31(I)(2)(c) and 2923.32(A) must be construed so that the stated threshold amount applies to each individual, and not to the enterprise as a whole.

***State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888**
A witness need not physically point out the defendant in the courtroom as long as there is sufficient direct or circumstantial evidence proving that the defendant was the perpetrator.

***State v. Beverly*, 143 Ohio St.3d 258, 2015-Ohio-219, 37 N.E.3d 116**
The existence of an enterprise, sufficient to sustain a conviction for engaging in a pattern of corrupt activity under R.C. 2923.32(A)(1), can be established without proving that the enterprise is a structure separate and distinct from a pattern of corrupt activity.

***State v. Darling*, 139 Ohio App.3d 610, 744 N.E.2d 1256 (4th Dist.2000)**
When the facts have been stipulated to, sufficiency of the evidence may be challenged, but weight and credibility may not.

***State v. Henry*, 4th Dist. Gallia No. 10CA20, 2012-Ohio-371**
"The fact that a permanent or temporary habitation has been burglarized does not give rise to the presumption that a person was present or likely to be present." *In re D.P.*, Lucas App. No. L-10-1054, 2011-Ohio-285, at ¶11, citing (1979), 58 Ohio St.2d 52, 59-60, 388 N.E.2d 745; *State v. Fowler* (1983), 4 Ohio St.3d 16, 4 Ohio B. 14, 445 N.E.2d 1119. "Merely showing that people dwelled in the residence is insufficient; the state must adduce specific evidence that the people were present or likely to be present at the time of the burglary." *In re D.P.* at ¶11, citing Fowler at 18 (other citation omitted). In prosecuting the two burglary counts, the state failed to adduce specific evidence on the present-or-likely-to-be-present issue. And based on the state's evidence, there was no reasonable presumption that a person other than an accomplice was present or likely to be present. Accordingly, we find that insufficient evidence supports Henry's two burglary convictions under R.C. 2911.12(A)(2).

Miranda v. Arizona and the Fifth Amendment

In *Miranda v. Arizona*, 384 U.S. 436, 461, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court of the United States determined that the right against self-incrimination "is fully applicable during a period of custodial interrogation." The *Miranda* court further determined that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." *Id.* at 469. The court also held that, prior to custodial interrogation, a suspect must be informed of these rights, now commonly known as the *Miranda* rights. Id. at 444 ("Prior to any questioning, the person must be warned that they have a right to remain silent, that any statement they do make may be used as evidence against them, and that they have a right to the presence of an attorney, either retained or appointed."). The *Miranda* court noted that "[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."

If a defendant unambiguously asserts their right to an attorney or right to remain silent, further interrogation is prohibited until an attorney is present. Generally, a defendant's silence may not be used against them. But, because the *Miranda* protections only apply to custodial interrogations, pre-arrest silence may be used against a defendant absent the defendant's assertion of their right against self-incrimination.

The state bears the burden of proving that a defendant knowingly, voluntarily, and intelligently waived their rights.

Constitutional Provisions:
Fifth Amendment, United States Constitution
Article I, Section 10, Ohio Constitution

CASES

The Review of a Suppression Ruling
***State v. Mills*, 62 Ohio St.3d 357, 582 N.E.2d 972 (1992)**
The review of a suppression ruling presents a mixed question of law and fact.

***State v. Hackett*, 171 Ohio App.3d 235, 2007-Ohio-1868, 870 N.E.2d 235 (6th Dist.)**
During a suppression hearing, the trial court assumes the role of the trier of fact and is, therefore, in the best position to resolve factual questions and evaluate the credibility of witnesses.

An appellate court must then independently determine without deference to the trial court's legal conclusions whether, as a matter of law, evidence should be suppressed.

***State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991)**
A court of appeals is bound to accept the trial court's findings of fact if those findings are supported by competent, credible evidence.

***Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971)**
Statements elicited from a defendant in violation of Miranda can be used to impeach the defendant's credibility, provided the jury is properly instructed not to consider them as evidence of guilt.

Custodial Interrogation
***Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)**
A custodial interrogation is defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of their freedom of action in any significant way.

***State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253 (1995)**
The duty to advise a suspect of Miranda rights does not attach until questioning rises to the level of a custodial interrogation. In judging whether an individual has been placed into custody the test is whether, under the totality of the circumstances, a reasonable person would have believed that they were not free to leave.

***United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)**
An interrogation is noncustodial if a reasonable person in the suspect's position would believe that they were free to leave.

***State v. McCrary*, 2d Dist. Montgomery No. 18885, 2002-Ohio-396**
The following factors have been used to assess whether a person is in custody:

1. What was the location where the questioning took place—i.e., was the defendant comfortable and in a place a person would normally feel free to leave? For example, the defendant might be at home as opposed to being in the more restrictive environment of a police station;

2. Was the defendant a suspect at the time the interview began (bearing in mind that Miranda warnings are not required simply because the investigation has focused);

3. Was the defendant's freedom to leave restricted in any way;

4. Was the defendant handcuffed or told they were under arrest;

5. Were threats made during the interrogation;

6. Was the defendant physically intimidated during the interrogation;

7. Did the police verbally dominate the interrogation;

8. What was the defendant's purpose for being at the place where questioning took place? For example, defendant might be at a hospital for treatment instead of being brought to the location for questioning;

9. Were neutral parties present at any point during the questioning;

10. Did police take any action to overpower, trick or coerce the defendant into making a statement.

***Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)**
Interrogation under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Knowing, Voluntary, and Intelligent Waiver

Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)

The inquiry as to whether a defendant knowingly, voluntary, and intelligently waived their *Miranda* rights has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

***Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)**
Whether a suspect's waiver of *Miranda* rights is a knowing and intelligent relinquishment or abandonment of a known right or privilege is a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

***Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)**
A court must examine the totality of the circumstances to determine whether a suspect's waiver was knowing and intelligent, including inquiries into the suspect's age, experience, education, background, and intelligence, and into whether they have the capacity to understand the warnings given to them, the nature of their Fifth Amendment rights, and the consequences of waiving those rights.

***Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987)**
The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege, but does require that a suspect know that they may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time.

***Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)**
The waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

***Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004)**
The technique of successive interrogations, first unwarned and then warned, violates a defendant's *Miranda* rights.

Ohio Rules of Evidence 401-404

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid.R. 401. Under Evid.R. 402, all relevant evidence is admissible, except as otherwise provided by law, and evidence that is not relevant is not admissible. Rule 403 provides balancing tests for determining whether relevant, prejudicial evidence is admissible. And Evid.R. 404 provides standards for excluding or admitting character evidence. It also prohibits, with many exceptions, the admission of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action that conforms with that character.

A trial court has broad discretion regarding the admission of evidence. Generally, if the admission of evidence was properly objected to at trial, a reviewing court reviews the trial court's decision for abuse of discretion. If no objection was made a plain-error review applies.

Relevant Provisions:

R.C. 2945.59 - Proof of defendant's motive
Evid.R. 401 - Definition of "Relevant Evidence"
Evid.R. 402 - Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible
Evid.R. 403 – Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay
Evid.R. 404 - Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

CASES

Rules 401 and 402

***State v. Mann*, 19 Ohio St.3d 34, 482 N.E.2d 592 (1985)**

A videotape which shows the actual events immediately prior to defendant's arrest is relevant in defense against a charge of resisting arrest and is admissible provided the probative value is not substantially outweighed by the grounds for exclusion set forth in Evid.R. 403.

***State v. Moore*, 40 Ohio St.3d 63, 531 N.Ed.2d 691 (1988)**

Relevant evidence is not limited to merely direct evidence proving a claim or defense. Rather, circumstantial evidence bearing upon the probative value of other evidence in the case can also be of consequence to the action. For example, the evidence establishing or impeaching the credibility of witnesses is of consequence to the action because it might determine whether the jury believes a particular witness.

***State v. Lyles*, 42 Ohio St.3d 98, 537 N.E.2d 221 (1989)**

Evid.R. 401 defines relevant evidence as that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The question of whether evidence is relevant is ordinarily not one of law but rather one which the trial court can resolve based on common experience and logic.

***State v. Sanders*, 92 Ohio St.3d 245, 750 N.E.2d 90 (2001)**

Trial courts have broad discretion in determining the relevance or irrelevance of evidence.

***State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506**

Testimony about defendant's gang participation was irrelevant, prejudicial, and improperly admitted. But under the facts of the case, the error was harmless.

***State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91**
Relevance under Evid.R. 401 is the first hurdle to clear. Generally, battered woman syndrome testimony is relevant and helpful when needed to explain a complainant's actions, such as prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse. Such seemingly inconsistent actions are relevant to a witness's credibility. Because the victim's credibility can be attacked during cross-examination of the victim or even during opening statements, the prosecution need not wait until rebuttal to present expert testimony on battered woman syndrome. Rather, such testimony may be presented as rehabilitative evidence during the state's case-in-chief.

***State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596**
The Supreme Court of Ohio held that testimony during a murder trial that defendant often wore red was irrelevant under Evid.R. 401 and was erroneously entered under Evid.R. 403 because it implied that the defendant was a member of a gang, and no evidence was admitted linking the murders to gang activity. But given the substantial evidence against the defendant, the improper admission of the evidence was harmless.

Rule 403
***State v. Creech*, 150 Ohio St.3d 540, 2016-Ohio-8440, 84 N.E.3d 981**
Where defendant was charged with violating R.C. 2923.13 by possessing a firearm after being convicted of two felonies and while under indictment, the trial court abused its discretion by not allowing him to stipulate to his prior convictions and the indictment and by admitting the full record of his prior offenses—felonious assault with a deadly weapon and trafficking crack cocaine near a school—because this created a risk of unfair prejudice to him. Supreme Court of Ohio adopting Supreme Court of the United States holding in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)

***State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987)**
The Supreme Court of Ohio held that the victim's testimony regarding their intention to remain a virgin was of little relevance and that potential prejudice rendered the testimony inadmissible.

***State v. Morales*, 32 Ohio St.3d 252, 513 N.E.2d 267 (1987)**
Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number.

***State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989)**
The Supreme Court of Ohio held that in a prosecution for aggravated murder, graphic testimony of a police officer regarding the condition of the victim's body was properly admitted and consistent with Evid.R. 403(A).

***State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302**
Exclusion on the basis of unfair prejudice involves more than a balance of mere prejudice. If unfair prejudice simply meant prejudice, anything adverse to a litigant's case would be excludable under Rule 403. Emphasis must be placed on the word "unfair."

***State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948**
The Supreme Court of Ohio held that the defendant's convictions were appropriate because the demonstrative evidence was relevant to the defendant's claim that he accidentally killed the victim, and it was not unfairly prejudicial. The defendant's demonstration directly aided the jury in assessing his credibility. Further, use of a doll during rebuttal aided the medical examiner's understanding of the defendant's version of the events, and thus aided the jury.

***State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051**
Evidence is relevant, and therefore generally admissible under Evid.R. 402, if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. A trial court may exclude relevant evidence if "its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Evid.R. 403(B). Further, a court must exclude evidence when its "probative value is substantially outweighed by the danger of unfair prejudice." Evid.R. 403(A). Contrary to Mammone's suggestions, neither the Rules of Evidence nor this court's precedents make "necessity" a prerequisite for admissibility.

Rule 404
***State v. Hector*, 19 Ohio St.2d 167, 249 N.E.2d 912 (1969)**
As a general rule, the introduction of evidence tending to show that a defendant has committed another crime wholly independent of the offense for which they are on trial is prohibited.

Exceptions to such rule are made where the prior offense is part of a common plan or scheme or where it tends to prove motive, intent, knowledge or identity, not because the prior acts prove that defendant is crime prone, but *in spite of* such fact, on the theory that the circumstances involved in the prior offense or offenses comprise substantial probative evidence of guilt of the particular offense in question.

To make such evidence relevant to the issue of *identity*, the evidence must indicate that essentially the same plan, system or method has been followed.

The legal determination, by comparison of the plan, system or method employed in a prior crime with the plan, system or method employed in the crime in question, of whether the former is relevant to the issue of identity of the perpetrator of the latter, must be made without consideration of the fact that eyewitnesses have identified the same person as the perpetrator of both crimes.

While ordinarily the credibility of a witness may be attacked by proof of conviction of crime but not by proof of indictment, this rule is subject to the exception that a witness in a criminal case may be asked if they are under indictment for a crime if such fact would reasonably tend to show that their testimony might be influenced by interest, bias, or a motive to testify falsely.

***State v. Mann*, 19 Ohio St.3d 34, 482 N.E.2d 592 (1985)**
Prosecution evidence that a defendant has committed other crimes, wrongs or acts independent of the offense for which they are on trial is not generally admissible to demonstrate that the defendant has a propensity for crime or that their character is in conformity with the other acts. Evid.R. 404(B).

***State v. Smith*, 49 Ohio St.3d 137, 551 N.E.2d 190 (1990)**
Pursuant to R.C. 2945.59 and Evid.R. 404(B), evidence of other acts to prove intent to commit a crime and the identity of the perpetrator is admissible where two deaths occur under almost identical circumstances.

***State v. Lowe*, 69 Ohio St.3d 527, 634 N.E.2d 616 (1994)**
To be admissible to prove identity through a certain *modus operandi*, other acts evidence must be related to and share common features with the crime in question.

***State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528**
Violations of Evid.R. 404 are subject to review under an abuse-of-discretion standard.

***State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278**
Evid.R. 404(B) is in accord with R.C. 2945.59 in that it precludes the admission of evidence of other crimes, wrongs, or acts offered to prove the character of an accused in order to show that the accused acted in conformity therewith, but it does not preclude admission of that evidence for other purposes.

***State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153**
In determining whether to grant a new trial as a result of the erroneous admission of evidence under Evid.R. 404(B), an appellate court must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record.

***State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651**
A trial court's limiting instruction to a jury regarding its consideration of other-acts evidence should be narrowly tailored to state the specific purpose for which the evidence is being offered.

***State v. Smith*, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123**
The protection against double jeopardy provided by Article I, Section 10 of the Ohio Constitution does not categorically bar the use of other-acts evidence relating to past criminal charges for which a criminal defendant was acquitted—Other-acts evidence must be probative of a proper particular purpose for which it is offered and must not be premised on asking jurors to draw improper character inferences—Other-acts evidence must be excluded under Evid.R. 403(A) when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Prosecutorial Misconduct

While prosecutors are encouraged to be zealous advocates, a prosecutor's improper conduct may be grounds for reversible error when it prejudices the defendant's rights to a fair trial. Improper remarks during trial, such as during opening and closing arguments or examination of the witnesses, can constitute prosecutorial misconduct. However, isolated or individual comments may be deemed harmless error unless particularly egregious. Other examples of prosecutorial misconduct include failure to disclose exculpatory evidence to the defense (*Brady* violation) and the knowing use of perjured testimony.

Relevant Provisions:
Fifth and Fourteenth Amendments United States Constitution
Article I, Section 16, Ohio Constitution
R.C. 2945.79 - Causes for new trial
Crim.R. 33(A)(2) - New trial

CASES

***Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)**
The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.

***Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)**
A prosecutor may not adversely comment on a defendant's failure to testify at trial.

***State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335**
Use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. The state generally may not use a defendant's post-arrest, post-*Miranda* silence against the defendant at trial, either as impeachment or as substantive evidence.

***State v. Smith*, 14 Ohio St.3d 13, 470 N.E.2d 883 (1984)**
An attorney is not to allude to matters which will not be supported by admissible evidence, and a lawyer should not make unfair or derogatory personal references to opposing counsel. The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.

***State v. Fears*, 86 Ohio St.3d 329, 715 N.E.2d 136 (1999)**
The test for prosecutorial misconduct is whether the conduct complained of deprived the defendant of a fair trial.

***State v. Treesh*, 90 Ohio St.3d 460, 739 N.E.2d 749 (2001)**
A reviewing court evaluates a prosecutor's improper remarks in the context of the entire trial. An improper comment does not affect a substantial right of the accused if it is clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments.

***State v. Liberatore*, 69 Ohio St.2d 583, 433 N.E.2d 561 (1982)**
The court may not permit the state, by continued questioning of the witness, which questions go unanswered, to get before the jury innuendoes and inferences of facts, conditions, and circumstances which the state could not get before the jury by direct testimony of the witness.

***Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)**
It is not enough that the prosecutor's remarks were undesirable or even universally condemned. The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

***Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)**
A prosecutor's statement may be sufficiently ambiguous and not so clearly prejudicial as to be uncorrectable by a curative instruction.

***State v. Keenan*, 66 Ohio St.3d 402, 613 N.E.2d 203 (1993)**
Courts must consider the effect the misconduct had on the jury in the context of the entire trial. One factor relevant to the due-process analysis is whether the misconduct was an isolated incident in an otherwise properly tried case. The closing argument must be reviewed in its entirety to determine if the prosecutor's remarks were prejudicial.

Right to the Effective Assistance of Counsel

The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel. To that end, counsel has the duty to provide a level of representation that is on par with prevailing professional norms. While there is no checklist to be effective, counsel must conduct reasonable investigation, preparation, and presentation of the defense. Moreover, so long as an attorney's conduct is objectively reasonable, counsel is free to use any trial strategy they deem fit based on the circumstances. To establish a claim of ineffective assistance of counsel, the two-step process established by the Supreme Court of the United States requires the defendant to show: 1) specific actions or omissions by counsel that fall below an objective standard of reasonableness and 2) a reasonable probability that the result would have been different but for the deficient performance of counsel. There is a strong presumption that counsel was effective. However, actual conflict of interest and complete failure to investigate leads to a presumption of prejudice.

Relevant Provisions:
Sixth Amendment, United States Constitution
Article I, Section 10, Ohio Constitution
R.C. 2935.20 - Right to Counsel

CASES

***Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)**
The right of an indigent defendant in a criminal case to have the assistance of counsel is a fundamental right guaranteed by the Sixth and Fourteenth Amendments.

***Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)**
The Sixth Amendment guarantees a defendant the right to self-representation at trial. (See self-representation section).

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)
The right to counsel is fundamental and is a requirement for anyone accused of a crime and who stands in jeopardy of life or liberty.

The determination of whether the waiver of counsel is knowing and informed is to be based on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.

***Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)**
The two-prong test for ineffective assistance of counsel: 1) deficient performance by counsel so serious as to deprive the defendant of counsel as required by the Sixth Amendment and 2) prejudice caused by the deficient performance. Counsel's performance will be reviewed based on prevailing professional norms, and there is a presumption of reasonable assistance. To establish prejudice, defendant must show that there is a reasonable probability that, but for the counsel's deficient performance, the result of the proceeding would have been different.

***United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)**
The right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive meaningful adversarial testing. When a true adversarial criminal trial has been conducted, the kind of testing envisioned by the Sixth Amendment has occurred.

The Sixth Amendment requires not merely the provision of counsel to the accused, but assistance for their defense. The core purpose of the counsel guarantee was to assure assistance at trial when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.

If no actual assistance for the accused's defense is provided, then the constitutional guarantee has been violated.

If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

***State v. Johnson*, 24 Ohio St.3d 87, 494 N.E.2d 1061 (1986)**
Prejudice is presumed when trial counsel completely fails to investigate mitigating factors during sentencing.

***State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948**
The doctrine of res judicata that prevents the same parties relitigating a settled claim does not bar a claim of ineffective assistance of counsel that was not previously raised in an appeal if the same counsel represented defendant on appeal.

***Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)**
Trial counsel must review all files available, especially any material that they expected the prosecutor to use. In this case, trial counsel's failure to review client's former prosecution file prevented counsel from discovering and developing mitigating factors of client's trouble childhood, mental illness, and alcoholism.

***State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227**
Trial courts must substantially comply with Crim.R. 44(A). If substantial compliance is demonstrated, then failure to file written waiver under 44(C) is harmless error. In order for waiver of counsel to be valid, waiver must be made with an understanding of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses to the charges and circumstances in mitigation, and all other facts essential to a broad understanding of the whole matter.

In Ohio, a criminal defendant has the right to representation by counsel or to proceed pro se. A court may appoint standby counsel but is not required to do so. These two rights are independent of each other and may not be asserted simultaneously. There is no right to hybrid representation in Ohio.

***United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)**
Trial court's wrongful denial of a defendant's choice of retained counsel is structural error, and the violation is not subject to harmless-error analysis.

***United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)**
Counsel must be present where counsel's absence might take away from the accused's right to a fair trial. This occurs when there is a potential risk of substantial prejudice to a defendant's rights and counsel is required to avoid that result.

***State v. Milligan*, 40 Ohio St.3d 341, 533 N.E.2d 724 (1988)**
Under the Ohio Constitution, the accused's right to counsel impliedly includes the right to consult privately with their attorney.

Right to Direct Appeal

When a state implements a process of appellate review, that state must comply with due process and equal protection requirements. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). Additionally, a state that provides for an appeal as of right must also ensure that indigent defendants receive the effective assistance of counsel on appeal. Sixth and Fourteenth Amendments, United States Constitution; *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *State v. Howard*, 42 Ohio St.3d 18, 23, 537 N.E.2d 188 (1989). Because Ohio provides criminal defendants an appeal as of right, the appellate procedure must be available to all persons similarly situated. *Griffin v. Illinois*, 351 U.S. at 18-19. As mandated by the Supreme Court of the United States, indigent defendants in Ohio are entitled to the appointment of counsel on appeal. *Id.*

Ohio Appellate Rule 4(A) requires that a party seeking to appeal must file the notice of appeal within thirty days of the entry of the judgment. However, Ohio has also established a system of delayed appeals by leave of court. Ohio Appellate Rule 5(A) allows a criminal defendant to file a motion for leave to appeal after the expiration of the thirty-day period provided by Appellate Rule 4(A). The motion must set forth the reasons for the failure of the defendant to perfect an appeal as of right. *See State v. Wilbur*, 10th Dist. Franklin Nos. 05AP-960 and 05AP-961, 2005-Ohio-6213, at ¶2 (a defendant has the burden of demonstrating a reasonable explanation for the failure to perfect a timely appeal).

Relevant Provisions:
Sixth Amendment, United States Constitution
Crim.R. 32(B) - Notification of Right to Appeal
App.R. 4(A) - Appeal as of Right
App.R. 5(A) - Appeals by Leave of Court in Criminal Cases
App.R. 26(B) - Application for Reopening

CASES

***Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963)**; ***Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)**; ***State v. Howard*, 42 Ohio St.3d 18, 537 N.E.2d 188 (1989)**.
Because Ohio provides a criminal defendant an appeal as of right, the appellate procedure must be available to all persons who are similarly situated. A convicted person is entitled to the effective assistance of appellate counsel on a first appeal as of right.

***Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)**
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) provides the proper framework for evaluating a claim that counsel was constitutionally ineffective for failing to file a notice of appeal.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Counsel's performance is deficient for failing to file a notice of appeal in one of two instances. First, trial counsel's performance is deficient when a consultation between trial counsel and defendant occurs, and the attorney disregards specific instructions from the defendant to file a notice of appeal. *Roe v. Flores-Ortega*, 528 U.S. at 477, citing *Rodriquez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969); *Peguero v. United States*, 526 U.S. 23, 119 S.Ct. 961, 143 L.Ed.2d 18 (1999). Second, trial counsel's performance is deficient if a consultation regarding appellate rights and procedures between trial counsel and defendant did not occur but should have. *Roe v. Flores-Ortega*, 528 U.S. at 478.

When trial counsel does not properly consult with their client as to whether an appeal should be filed and perfected, the next issue to be determined is whether counsel should have consulted with their client. *Roe v. Flores-Ortega*, 528 U.S. at 480.

Trial counsel should consult with a convicted defendant about an appeal when there is reason to think either:

(1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that they were interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. (focusing on the totality of the circumstances). Although not determinative, a highly relevant factor will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings.

To demonstrate prejudice there has to be]a reasonable probability that, but for counsel's failure to consult with the defendant about an appeal, he would have appealed.

Reopening a Direct Appeal Under App.R. 26(B)

***Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)**
Due process requires the effective assistance of counsel on a first appeal of right. Proper appellate review is necessary to ensure that a criminal conviction has been obtained through a reliable process.

***Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)**; ***State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456 (1996)**
Appellate counsel is ineffective if appellate counsel's performance is objectively unreasonable, and if appellate counsel's deficient performance substantially prejudices the defendant's appeal.

***State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992)**
Claims of ineffective assistance of appellate counsel are not cognizable in postconviction proceedings pursuant to R.C. 2953.21. Claims of ineffective assistance of appellate counsel may be raised in an application for reconsideration in the court of appeals. (Appellate rules later amended to provide specific method to reopen an appeal based on ineffective assistance of appellate counsel).

***Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988)**
Appellate counsel has a duty to review the record of the trial court proceedings and to conduct a conscientious examination of the case.

***Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)**
While appellate counsel does not need to raise every nonfrivolous argument on appeal, counsel must exercise reasonable professional judgment.

***Banks v. Reynolds*, 54 F.3d 1508 (10th Cir.1995)**
Counsel frequently will winnow out weaker claims in order to focus effectively on those more likely to prevail.

***State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456 (1996)**
However, the failure to raise a constitutional claim that has a reasonable likelihood of success constitutes the ineffective assistance of appellate counsel.

Self-Defense

On March 28, 2019, Ohio's self-defense law changed. Before that date, in order to make a self-defense argument, the defendant would have to prove it was more likely than not all elements of self-defense applied. The defendant would have to prove it was more likely than not that they were not at fault in creating the situation, had reasonable grounds to believe they were in immediate danger of death or serious bodily harm, believed (even if mistaken) they were in immediate danger of death or serious bodily harm, did not violate a duty to retreat or escape to avoid the danger, and used a reasonable (not excessive) amount of force to prevent the immediate risk of death or serious bodily harm.

As of March 28, 2019, a defendant does not have to prove their innocence by arguing self-defense. Instead, if the facts tend to show self-defense applies, the state has the burden of proof. Under the new law the state must prove beyond a reasonable doubt that one of the self-defense elements does not apply.

If the states proves beyond a reasonable doubt any one of the following: 1) the accused was at fault in creating the situation; 2) the accused did not have reasonable grounds to believe they were in immediate danger of death or serious bodily harm; 3) the accused did not believe they were in immediate danger of death or serious bodily harm; 4) the accused did not use reasonable force, self-defense does not apply.

The new self-defense rules apply to all pending and new trials occurring on or after the effective date of the legislation enacting the new rules. (March 28, 2019).

On April 4, 2021, Ohio's new "stand your ground law" went into effect. That law removed the duty to retreat in most situations, as long as you had a legal right to be in the location when you used force in self-defense.

Relevant provisions:

R.C. 2901.05 – Burden and degree of proof; presumption concerning self-defense or defense of another; jury instructions concerning reasonable doubt

R.C. 2901.05 – When there is no duty to retreat before using force in self-defense, defense of another, or defense or residence

CASES

***State v. Messenger*, 171 Ohio St.3d 227, 2022-Ohio-4562**

The state's rebuttal of a defendant's claim of self-defense was not subject to review under the sufficiency-of-the-evidence standard; instead, R.C. 2901.05(B)(1) provides that the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense.

Self-Representation

The decision to represent yourself and proceed pro-se is a waiver of the right to counsel. It must be done knowingly, intelligently, and voluntarily. The court may require a defendant to proceed with the assistance of standby counsel and may require standby counsel to take over if the defendant is not complying with court rules or is obstructing procedure. However, there is no right to standby counsel, and no right to hybrid representation, where a defendant works as co-counsel with an attorney. Generally, a pro-se defendant must have ordinary and reasonable access to documents and transcripts. They have the right to control their own defense and to give the jury the perception that they are representing themself.

Relevant Provisions:
Sixth Amendment, United States Constitution
Article I, Section 10, Ohio Constitution
R.C. 2935.20 - Right to Counsel
Crim.R. 44(C) - Waiver of Counsel

CASES

***Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)**
Waiver of counsel requires an intentional relinquishment of a known right or privilege; must be done voluntarily, timely, and unequivocally; and the defendant must be aware of the consequences of giving up the right.

There will be a hearing about waiving counsel. Standby counsel may be appointed even over objection of the defendant. The court may end self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. Defendants have the right to be present at all stages of trial where their absence might frustrate the fairness of the proceedings. Defendants has two core rights: To control the organization and conduct of their own defense; and to give the jury the perception that they are representing themselves.

***Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938)**
Courts indulge every reasonable presumption against waiver of constitutional rights. A waiver is an intentional relinquishment of a known right or privilege. Determination of whether waiver is competent and intelligent depends on the facts and circumstances of the case, including the background, experience, and conduct of the accused.

***Von Moltke v. Gilles*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948)**
To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

***State v. Wellman*, 37 Ohio St.2d 162, 309 N.E.2d 915 (1974)**
Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless represented by counsel at trial.

***State v. Gibson*, 45 Ohio St.2d 366, 345 N.E.2d 399 (1976)**
In order to establish an effective waiver of right to counsel, the trial court must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right. Defendant knowingly, voluntarily, and intelligently elected to represent themself and had sufficient warning from the trial judge that self-representation was a dangerous course of action, and of the maximum penalty.

***Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977)**
Fundamental constitutional right of access to courts requires prison authorities to assist appellants in preparation and filing of meaningful legal papers by providing incarcerated people with adequate law libraries or adequate assistance from persons trained in the law. This opinion has been limited by later supreme court cases.

***Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)**
Bounds requires an actual injury. In other words, an appellant demonstrates deficiencies in the prison's legal assistance facilities or is so stymied by inadequacies of the law library that they were unable even to file a complaint or the case was dismissed for failure to meet a procedural rule caused by the inadequacy.

***State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81**
A defendant in a state criminal trial has an independent constitutional right of self-representation and may proceed to defend themself without counsel when they voluntarily, and knowingly and intelligently elects to do so.

If a trial court denies the right to self-representation, when properly invoked, the denial is per-se, reversible error.

To establish an effective waiver of the right to counsel, the trial court must make a sufficient inquiry to determine whether the defendant fully understands and intelligently relinquishes that right.

A defendant has no right to a "hybrid" form of representation wherein they are represented by counsel, but also acts simultaneously as their own counsel.

The constitutional right of self-representation is waived if it is not timely and unequivocally asserted.

***State v. Reese*, 106 Ohio St.3d 65, 2005-Ohio-3806, 831 N.E.2d 983**
Standby counsel does not act in a representative capacity for defendant and thus would not violate *Faretta* even if the defendant did not want standby counsel.

Speedy Trial

The Speedy Trial Clause of the Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution, guarantee a criminal defendant the right to a speedy trial. The Ohio General Assembly has codified those protections at R.C. 2945.71 through R.C. 2945.73, and R.C. 2941.401. While constitutional speedy-trial claims and statutory speedy-trial claims are often related, the standards of review for those claims are quite different.

A defendant who is already in prison on another charge has a statutory right to be tried on other pending charges within 180 days from the date of demand, provided that they properly invoke that right. Defendants also have the right to face indictment without undue delay.

For statutory speedy-trial purposes, the speedy-trial countdown starts when the defendant is arrested and held, or the state has brought forth charges either through indictment or information and ends when the trial begins. However, the countdown can be tolled for many reasons, including delays caused by the defendant, the state, and the trial court. Typically, a defendant who is held in jail before trial is entitled to three days of credit toward the speedy-trial limit for each day that the defendant spends in jail.

If the state has not tried the case by the deadline, the defendant can seek to dismiss the charges. For indigent defendants, this ensures that the defendants do not unduly suffer from pretrial incarceration because they could not afford the bond. This also ensures a fair trial by allowing the defendant to present their defense while the evidence is still fresh.

Relevant Provisions:
Fifth and Fourteenth Amendments, United States Constitution
Speedy Trial Clause of the Sixth Amendment, United States Constitution
Article I, Section 10, Ohio Constitution
Article I, Section 16, Ohio Constitution
R.C. 2945.71 - Time for trial
R.C. 2945.72 - Extending time for hearing or trial
R.C. 2945.73 - Delay in hearing or trial
R.C. 2941.401 - Request for a final disposition on pending charges by prisoner

Constitutional Speedy Trial
***Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)**
On a case-by-case basis, the following four factors must be used to determine whether the trial delay prejudiced the defendant: 1) length of the delay; 2) reason for the delay; 3) the time and manner in which the defendant asserted their right to a speedy trial; and 4) the degree of prejudice to the defendant caused by the delay.

***United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982)**
In addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim. *Dillingham v. United States*, 423 U.S. 64 (1975). Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment, *see United States v. Lovasco*, 431 U.S. 783, 788-789 (1977), or to a claim under any applicable statutes of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending.

***Vermont v. Brillon*, 556 U.S. 81, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009)**
Primarily at issue here is the reason for the delay in Brillon's trial. In applying *Barker*, the Court has asked "whether the government or the criminal defendant is more to blame for th[e] delay," *Doggett v. United States*, 505 U.S. 647,

651, 112 S.Ct. 2686, 120 L.Ed.2d 520. Delay "to hamper the defense" weighs heavily against the prosecution, *Barker*, 407 U.S., at 531, 92 S.Ct. 2182, 33 L.Ed.2d 101, while delay caused by the defense weighs against the defendant, *id.*, at 529, 92 S.Ct. 2182, 33 L.Ed.2d 101. Because "the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation," delay caused by the defendant's counsel is charged against the defendant. *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S.Ct. 2546, 115 L.Ed.2d 640. The same principle applies whether counsel is privately retained or publicly assigned, for "'[o]nce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.'" *Polk County v. Dodson*, 454 U.S. 312, 318, 102 S.Ct. 445, 70 L.Ed.2d 509. Unlike a prosecutor or the court, assigned counsel ordinarily is not considered a state actor. Pp. 6-8.

***State v. Meeker*, 26 Ohio St.2d 9, 268 N.E.2d 589 (1971)**
The constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution, as well as to unjustifiable delays after indictment.

***State v. Triplett*, 78 Ohio St.3d 566, 679 N.E.2d 290 (1997)**
A 54-month delay between the indictment and arraignment was permissible because the delay was caused by the defendant's failure to claim certified mail informing them of the indictment.

***State v. Selvage*, 80 Ohio St.3d 465, 687 N.E.2d 433 (1997)**
Statutory periods of limitations are not relevant to a determination of whether an individual's constitutional right to a speedy trial has been violated by an unjustified delay in prosecution.

Statutory Speedy Trial
***State ex rel. Williams v. Court of Common Pleas*, 42 Ohio St.2d 433, 329 N.E.2d 680 (1975)**
The time limits set forth in R.C. 2945.71(C) apply only to "[a] person against whom a charge of felony is pending . . . ." A juvenile who has lodged against them an affidavit alleging that they are delinquent because they committed an act which, if committed by an adult, would constitute a felony is not a person against whom a charge of felony is pending. *See In re Agler* (1969), 19 Ohio St.2d 70, 249 N.E.2d 808; *Cope v. Campbell* (1964), 175 Ohio St. 475, 196 N.E.2d 457 (paragraph one of the syllabus); *In re Darnell* (1962), 173 Ohio St. 335, 182 N.E.2d 321; *Prescott v. State* (1869), 19 Ohio St. 184. The juvenile becomes such a person and is, therefore, included within the scope of R.C. 2945.71(C) only if and when the Juvenile Court relinquishes jurisdiction over the case and transfers it to the appropriate "adult" court.

***State v. MacDonald*, 48 Ohio St.2d 66, 357 N.E.2d 40 (1976)**
The triple-count provision applies only to defendants held in jail solely on the pending charge.

***State v. Singer*, 50 Ohio St.2d 103, 362 N.E.2d 1216 (1977)**
A defendant's failure to object to a trial date scheduled outside the 90-day limitation period of R.C. 2945.71(C)(2) and (D), before the expiration of that period, does not amount to acquiescence in the trial date.

***State v. Wentworth*, 54 Ohio St.2d 171, 375 N.E.2d 424 (1978)**
An order, although entered within the 90-day time period prescribed for trial by R.C. 2945.71(B)(2), continuing a case for trial to a date more than double such 90-day period and stating the continuance was necessary for the reason of a crowded docket, without further explication of such reason appearing in the record, is insufficient to extend the R.C. 2945.71(B)(2) time limitation for trial as a "reasonable continuance granted other than upon the accused's own motion" pursuant to R.C. 2945.72(H).

***State v. Siler*, 57 Ohio St.2d 1, 384 N.E.2d 710 (1979)**
The Supreme Court of Ohio determined that a standardized entry form completed by the trial court is insufficient to support a sua sponte continuance order substantially extending the date of trial beyond the mandatory time limitations.

***State v. Spratz*, 58 Ohio St.2d 61, 388 N.E.2d 751 (1979)**
The time within which an accused must be brought to trial by virtue of R.C. 2945.71 is tolled by the accused's plea of not guilty by reason of insanity, whether such plea contemplates insanity at the time of arraignment or insanity at the time the crime was committed.

***State v. Pachay*, 64 Ohio St.2d 218, 416 N.E.2d 589 (1980)**
The statutory speedy trial provisions, R.C. 2945.71 *et seq.*, constitute a rational effort to enforce the constitutional right to a public speedy trial of an accused charged with the commission of a felony or a misdemeanor and shall be strictly enforced by the courts of this state.

***State v. King*, 70 Ohio St.3d 158, 637 N.E.2d 903 (1994)**
For the reasons that follow, we hold that a defendant's waiver of their right to a speedy trial must be either written or made on the record in open court. We also reaffirm our holding in *Mincy*, *supra*, that any *sua sponte* continuance must be reasonable, and must be accompanied by a journal entry which is made prior to the expiration of the statutory time limit and explains the reasons for the continuance.

It is well-settled law that an accused may waive their constitutional right to a speedy trial provided that such a waiver is knowingly and voluntarily made. *Barker v. Wingo* (1972), 407 U.S. 514, 529, 92 S.Ct. 2182, 2191, 33 L.Ed.2d 101, 116. Consistent with this principle, this court has found the statutory speedy trial provisions set forth in R.C. 2945.71 to be coextensive with constitutional speedy trial provisions. *State v. O'Brien* (1987), 34 Ohio St.3d 7, 516 N.E.2d 218. Thus, we have held that an accused's express written waiver of their statutory rights to a speedy trial, made knowingly and voluntarily, also constitutes a waiver of their speedy trial rights guaranteed by the United States and Ohio Constitutions. *O'Brien*, *supra*, paragraph one of the syllabus. Furthermore, this court has held that, for purposes of trial preparation, a defendant's statutory right to a speedy trial may be waived, with or without the defendant's consent, by the defendant's counsel. *State v. McBreen* (1978), 54 Ohio St.2d 315, 8 O.O.3d 302, 376 N.E.2d 593, syllabus.

***State v. O'Brien*, 34 Ohio St.3d 7, 516 N.E.2d 218 (1987)**
Following an express, written waiver of unlimited duration by an accused of their right to a speedy trial, the accused is not entitled to a discharge for delay in bringing them to trial unless the accused files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time.

***State v. Adams*, 43 Ohio St.3d 67, 538 N.E.2d 1025 (1989)**
When an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver.

***State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991)**
A plea of guilty waives a defendant's right to challenge their conviction on statutory speedy trial grounds pursuant to R.C. 2945.71(B)(2).

***State v. Broughton*, 62 Ohio St.3d 253, 581 N.E.2d 541 (1991)**
For purposes of computing how much time has run against the state under R.C. 2945.71 *et seq.*, the time period between the dismissal without prejudice of an original indictment and the filing of a later indictment, based upon the same facts as alleged in the original indictment, shall not be counted unless the defendant is held in jail or released on bail pursuant to Crim.R. 12(I).

The arrest of a defendant, under a later indictment which is based on the same underlying facts alleged in a previous indictment, is the proper point at which to resume the running of the speedy-trial period.

***State v. Baker*, 78 Ohio St.3d 108, 676 N.E.2d 883 (1997)**
In issuing a later indictment, the state is not subject to the speedy-trial timetable of the initial indictment, when additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment.

***State v. Palmer*, 84 Ohio St.3d 103, 1998-Ohio-507, 702 N.E.2d 72 (1998)**
Pursuant to R.C. 2945.72(B), the time within which an accused must be brought to trial is tolled from the date the accused files a motion challenging their competency to stand trial.

The tolling of R.C. 2945.72(B) continues until the trial court makes a competency determination and does not end when a competency examiner fails to issue a report within the time limits imposed by former R.C. 2945.371(D).

***State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159**
A demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E).

***State v. Hull*, 110 Ohio St.3d 183, 2006-Ohio-4252, 852 N.E.2d 706**
R.C. 2945.71 does not apply to criminal convictions that have been overturned on appeal.

The time limit for bringing a person to trial whose conviction has been overturned on appeal is governed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

When an appellate court vacates a first-degree misdemeanor conviction entered pursuant to a plea of no contest and remands the case for further proceedings, the adjudication of the case 149 days thereafter is not presumptively prejudicial and is constitutionally reasonable.

***State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283**
A detainer filed by the United States Bureau of Immigration and Customs Enforcement that does not purport to hold the defendant in custody does not nullify the triple-count provision of Ohio's speedy-trial statute.

A motion in limine filed by a defendant tolls speedy-trial time for a reasonable period to allow the state an opportunity to respond and the court an opportunity to rule.

***State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, 859 N.E.2d 532**
For purposes of calculating speedy-trial time pursuant to R.C. 2945.71(C), a charge is not pending until the accused has been formally charged by a criminal complaint or indictment, is held pending the filing of charges, or is released on bail or recognizance. The defendant had been arrested, photographed, and fingerprinted, but was released before charges were filed. The speedy-trial clock did not begin to run until after the defendant had been indicted and rearrested.

***State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011**
The failure of a criminal defendant to respond within a reasonable time to a prosecution request for reciprocal discovery constitutes neglect that tolls the running of speedy-trial time under to R.C. 2945.72(D).

The tolling of statutory speedy-trial time based on a defendant's neglect in failing to respond within a reasonable time to a prosecution request for discovery is not dependent upon the filing of a motion to compel discovery by the prosecution.

A trial court shall determine the date by which a defendant should reasonably have responded to a reciprocal discovery request based on the totality of facts and circumstances of the case, including the time established for response by local rule, if applicable.

***State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, 863 N.E.2d 1032**
When multiple charges arise from a criminal incident and share a common litigation history, pretrial incarceration on the multiple charges constitutes incarceration on the "pending charge" for the purposes of the triple-count provision of the speedy-trial statute, R.C. 2945.71(E).

Criminal charges arising out of the same criminal incident and brought simultaneously will always be deemed to have a "common litigation history" for the purposes of establishing incarceration solely on the "pending charge" within the meaning of R.C. 2945.71(E), even if they are prosecuted in separate jurisdictions.

***State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319**
In calculating the time within which a criminal defendant must be brought to trial under R.C. 2945.71, periods of delay resulting from motions filed by the defendant in a previous case also apply in a later case in which there are different charges based on the same underlying facts and circumstances of the previous case.

Pre-indictment Delay
***Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)**
The delay between Doggett's indictment and arrest violated his right to a speedy trial. His claim meets the *Barker v. Wingo*, 407 U.S. 514, 530, 33 L.Ed.2d 101, 92 S.Ct. 2182, criteria for evaluating speedy trial claims. First, the extraordinary 8 1/2-year lag between his indictment and arrest clearly suffices to trigger the speedy trial enquiry. Second, the government was to blame for the delay.

***State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984)**
An unjustifiable delay between the commission of an offense and a defendant's indictment therefor, which results in actual prejudice to the defendant, is a violation of the right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

***State v. Whiting*, 84 Ohio St.3d 215, 702 N.E.2d 1199 (1998)**
We confirm today our earlier pronouncement in *State v. Luck*, 15 Ohio St.3d 150, 15 Ohio B. Rep. 296, 472 N.E.2d 1097 (1984), that where a defendant moves to dismiss an indictment and presents evidence establishing substantial prejudice resulting from preindictment delay, the state bears the burden of producing evidence of a justifiable reason for the delay.

R.C. 2941.401
***Jackson v. Wilson*, 100 Ohio St.3d 315, 2003-Ohio-6112, 798 N.E.2d 1086**
Ohio Revised Code Section 2941.401 is unambiguous and applies to anyone incarcerated in the State of Ohio. To remedy a speedy-trial issue, the defendant should file a motion in the trial court for dismissal of the charge for denial of a speedy trial under R.C. 2941.401.

***State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471**
Ohio Revised Code Section 2941.401 does not place a reasonable-diligence duty on the state to determine the location of an incarcerated defendant against whom charges are pending.

***State v. Dillon*, 114 Ohio St.3d 154, 2007-Ohio-3617, 870 N.E.2d 1149**
A defendant's awareness of a pending indictment and of their right to request trial on the pending charges does not satisfy the notification requirements of R.C. 2941.401, which requires a warden or prison superintendent to notify a defendant "in writing of the source and contents of any untried indictment" and of their right "to make a request for final disposition thereof."

Void v. Voidable

Until recently, portions of a sentence that were imposed incorrectly, meaning not in line with the statutes governing criminal sentences, were considered void. Void sentences could be challenged at any time, and not just on direct appeal. Other types of errors were considered voidable, meaning that they could only be raised on direct appeal. However, the Supreme Court of Ohio recently issued a number of opinions greatly restricting what is considered void. As a result, almost all sentencing issues must now be raised on direct appeal.

This area of the law grew out of challenges to the imposition of post-release control. Before the court's recent decisions, post-release control errors could be challenged at any time, and if they were challenged after someone was released from prison, the mistake could not be corrected, meaning the post-release control would be vacated. However, that is no longer possible. This reasoning is very likely to be applied to any sentence that does not comply with the applicable sentencing statutes. As a result of this change in the law, when a case is within a court's subject-matter jurisdiction and the accused is properly before the court, any error in the exercise of that jurisdiction in imposing a sentence renders the court's judgment voidable, permitting the sentence to be set aside only if the error has been successfully challenged on direct appeal.

However, this new rule applies to both parties. If a sentencing error occurred in the defendant's favor and the state did not file a direct appeal, the defendant gets the benefit of the error.

This area of the law is still developing. There may be ways to correct a merely voidable sentence when failing to do so would involve a manifest injustice. But what would constitute a manifest injustice, and how would it be litigated outside of a direct appeal are currently unanswered questions.

CASES

***State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248**
Because the court overruled its precedent to the extent that it held that the failure to properly impose post-release control in the sentence rendered that portion of a defendant's sentence void, any claim that the trial court had failed to properly impose post-release control in the sentence had to be brought on appeal from the judgment of conviction or the sentence would be subject to res judicata, the rule prohibiting the same parties relitigating a settled claim. Because defendant here could have raised his argument that the trial court failed to properly impose post-release control on appeal, it was now barred by the doctrine of *res judicata*.

***State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776**
There was no dispute that the trial court's sentence was unlawful where the defendant should have received an indefinite sentence of 15-years-to-life and the court failed to impose that sentence. The state had an opportunity to object to or challenge the trial court's sentence and did not. Because the sentencing error rendered the sentence voidable, the state's attempt to correct the error in a postconviction motion for resentencing was improper. R.C. 5145.01 could not transform a definite sentence imposed by adding an indefinite tail to that sentence. The state could not seek to correct defendant's unlawful sentence through a postconviction motion filed 18 years after the sentence was entered where the trial court originally sentenced defendant to a definite 15-year sentence, plus an additional three years for a firearm specification.