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# Appellate Review under the New Felony Sentencing Guidelines: Where Do We Stand

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### Recommended Citation

Mark P. Painter, *Appellate Review under the New Felony Sentencing Guidelines: Where Do We Stand*, 47 Clev. St. L. Rev. 533 (1999)  
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# APPELLATE REVIEW UNDER THE NEW FELONY SENTENCING GUIDELINES: WHERE DO WE STAND?

MARK P. PAINTER<sup>1</sup>

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When allegedly comprehensive new legislation is enacted, courts often struggle to define the parameters of the new laws. Terms undefined by the legislature need defining. The policies behind the laws need explanation. And standards of review need to be clarified. Inevitably, the new laws will cause some confusion in the courts—a confusion that may linger for many years.

Effective July 1, 1996, the Ohio legislature revised the state's felony-sentencing guidelines. Previously, there were almost no guidelines, only maximum and sometimes minimum penalties for offenses. The new legislation, which is commonly referred to as Senate Bill 2,<sup>2</sup> has received much attention in the courts. Scores of cases have interpreted various aspects of the guidelines. As might be expected, these interpretations have not been entirely consistent.

A case from the Ohio First District Court of Appeals in Hamilton County, on which I am a judge, illustrates some of the different interpretations of the new guidelines. The case, *State v. Mushrush*, involved Christopher Mushrush, an eighteen-year-old with a drug problem.<sup>3</sup> On April 23, 1998, he took a handful of pills, flipped out, and somehow ended up at a talent show at Oak Hills High School in Cincinnati. In his drug-induced state, he released pepper spray into a crowd of about four hundred people.<sup>4</sup>

As the cloud of spray spread through the auditorium, the crowd began to panic and rush to the exits. The spray affected two people in the crowd. One, a sixteen-year-old named Amanda Hartman, got the spray in her eyes and had difficulty

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<sup>2</sup>Am. Sub. S.B. 2; *see also* Am. Sub. S.B. 269 (amending Senate Bill 2).

<sup>3</sup>*State v. Mushrush*, 733 N.E.2d 252 (Ohio Ct. App. 1999); discretionary appeal not allowed, 716 N.E.2d 1168 (1999).

<sup>4</sup>*Id.* at 255.

breathing. The other, Anna Weber, had a seizure and went into convulsions as her three children watched.<sup>5</sup>

As the crowd scattered, Mr. Mushrush attempted to flee. The school's principal, James Williamson, grabbed him, but he got away after pushing Mr. Williamson. The push caused Mr. Williamson to reinjure a knee.<sup>6</sup> Ultimately, several people tackled Mr. Mushrush. A struggle followed. Mr. Mushrush bit the hand of Donald Weil, one of the people who had caught him, before he was finally detained and handed over to the police.<sup>7</sup>

Mr. Mushrush was charged with three counts of inducing panic, fourth-degree felonies. (Inducing panic is generally a first-degree misdemeanor, but the charges were elevated to fourth-degree felonies based on the physical harm to Ms. Hartman, Ms. Weber, and Mr. Weil.)<sup>8</sup> Also, he was charged with a fifth-degree-felony count of assault for his push of Mr. Williamson. (Assault is normally a misdemeanor, but because Mr. Williamson was a school administrator, it was elevated to a felony.)<sup>9</sup> Finally, he was charged with one count of felonious assault, a second-degree felony, for knowingly causing serious physical harm to Ms. Weber.<sup>10</sup>

Mr. Mushrush initially pleaded not guilty. But he later withdrew that plea and pleaded guilty to all the charges. The court accepted the guilty plea and sentenced him to ten and a half years' incarceration. Eight years were for the felonious assault, which was the maximum sentence for that offense. One year was for the assault, the maximum sentence for that offense. The remaining one and a half years were for the inducing-panic counts—the court gave the maximum time for two of the panic counts, one and a half years, but the terms were to run concurrently.<sup>11</sup>

On appeal, Mr. Mushrush argued that his sentence was excessive and that it violated the sentencing guidelines. He claimed that the trial judge's imposition of maximum jail time on the various counts was contrary to law. He also claimed that the court should not have ordered him to serve consecutive jail time for the felonious assault, assault, and inducing-panic counts.<sup>12</sup>

A three-judge panel decided the case. One judge wrote a lead opinion, with another judge concurring in judgment only. I dissented.

The lead opinion held that the record supported the trial judge's determination that Mr. Mushrush had committed the "worst forms" of the offenses, which made the imposition of maximum sentences permissible.<sup>13</sup> The lead opinion also held that the trial judge's imposition of consecutive sentences was permitted under the

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<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>OHIO REV. CODE ANN. § 2917.31(C)(3) (Anderson 1996) (codified under R.C. § 2917.31(C) when Mushrush committed the crimes).

<sup>9</sup>OHIO REV. CODE ANN. § 2903.13(2)(e).

<sup>10</sup>*Mushrush*, 733 N.E.2d at 255-56.

<sup>11</sup>The third inducing-panic count merged with the felonious-assault count. *Id.* at 256.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 259; OHIO REV. CODE ANN. § 2929.14(C) (Anderson 1996).

guidelines.<sup>14</sup> Its rationale for this holding was that Ms. Weber had been rendered unconscious as a result of Mr. Mushrush's actions, that people could have been crushed, and that deaths could potentially have resulted.<sup>15</sup> In coming to its conclusions, the lead opinion spoke of the importance of a trial judge's discretion in sentencing: "Taking away judicial discretion entirely turns judges into clerks. So long as the exercise of that discretion falls within the law, this court should not reverse a sentence, even if the sentence appears, as in the words of the sentencing judge in this case, 'Draconian' and 'harsh.'"<sup>16</sup> According to the lead opinion, the sentence could not be overturned unless the trial judge's findings were "not supported by clear and convincing evidence."<sup>17</sup>

I disagreed with the decision and with the determination that the trial judge's findings only needed to be supported by clear and convincing evidence. Under Senate Bill 2, abuse of discretion is no longer the standard; and courts of appeals now have an affirmative duty under the law to scrutinize sentences for compliance with the guidelines.<sup>18</sup> My dissent stressed that both the maximum sentence for felonious assault and the imposition of consecutive sentences for the various offenses were erroneous.<sup>19</sup>

I took exception to the conclusion that Mr. Mushrush's felonious assault on Ms. Weber was one of the "worst forms" of the offense. No weapon was involved, Ms. Weber was treated at the scene, and she did not even have to go to the hospital.<sup>20</sup> Considering that felonious assaults normally involve much more severe actions and consequences—things such as beating someone with a baseball bat or even shooting someone—I determined that Mr. Mushrush clearly did not commit the worst form of the offense, stating "[w]e may not be able to define what is not the 'worst form' of an offense, but we must know it when we see it. What we may not do is pretend to be blind."<sup>21</sup> Especially appalling was the fact that offenders in numerous more serious felonious assault cases had been sentenced under Senate Bill 2 to less prison time than the time received by Mr. Mushrush.<sup>22</sup>

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<sup>14</sup>*Mushrush*, 733 N.E.2d at 261-62; R.C. § 2929.14(E)(4).

<sup>15</sup>*Mushrush*, 733 N.E.2d at 261.

<sup>16</sup>*Id.* at 259.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* at 265 (Painter, J., dissenting).

<sup>19</sup>*Id.* at 264 (Painter, J., dissenting).

<sup>20</sup>*Id.* at 263 (Painter, J., dissenting).

<sup>21</sup>*Id.* at 266 (Painter, J., dissenting).

<sup>22</sup>*Id.* & n.17 (Painter, J., dissenting); *State v. Palmer*, No. C-980437, 1999 WL 235618 (Ohio Ct. App. Apr. 23, 1999) (repeatedly stabbing with a butcher knife: four years incarceration); *State v. Day*, No. C-971079, 1998 WL 735375 (Ohio Ct. App. Oct. 23, 1998) (concurrent sentences of two years incarceration for two counts of felonious assault, but case remanded for resentencing); *State v. Campbell*, No. C-970125, 1997 WL 778994 (Ohio Ct. App. Dec. 19, 1997) (assault in connection with a burglary: three years incarceration on a felonious-assault count); *State v. Gales*, 721 N.E.2d 497 (Ohio Ct. App. 1999) (shooting victim in head: concurrent sentences of four years incarceration for two counts of felonious assault); *State v. Van Deusen*, No. 2831-M, 1999 WL 239896 (Ohio Ct. App. Apr. 14, 1999)

Mr. Mushrush deserved to be punished. But ten and a half years' incarceration for a mace-spraying eighteen-year-old kid was completely out of proportion.<sup>23</sup> Since one purpose of Senate Bill 2 was to help equalize sentences, this case was an indication to me that it had failed.

Indeed, the *Mushrush* case—a case that received a fair amount of publicity, which is somewhat unusual for our court<sup>24</sup>—indicates that courts, and even judges within the same court, are far from agreement over certain aspects of the new sentencing guidelines. Now that it has been more than four years since Senate Bill 2 became effective, this is a good time to analyze the cases to see where courts stand in their interpretations of the guidelines. This article will review the case law and show how different courts have dealt with the legislation. My analysis concentrates on one aspect of the guidelines in particular: the standard of review that appeals courts have used to determine the propriety of sentences. To illustrate my points, I focus on the issue of when judges can impose maximum prison sentences under the guidelines, one of the most frequently litigated issues before our court. After initially analyzing the origins and development of Senate Bill 2, I will show that courts have not used consistent standards of review. This inconsistency, I argue, is especially problematic because it will result in inconsistent sentences for convicted felons, whose sentences

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(beating victim by slamming head into car: one year incarceration); *State v. Bair*, No. 72281, 1999 WL 195659 (Ohio Ct. App. Apr. 8, 1999) (repeatedly striking victim in back of head: seven years incarceration); *State v. Mullins*, No. L-98-1059, 1998 WL 904926 (Ohio Ct. App. Dec. 31, 1998) (striking victim's face and body to facilitate a robbery: seven years incarceration); *State v. Wagle*, No. L-98-1127, 1998 WL 904952 (Ohio Ct. App. Dec. 31, 1998) (repeatedly hitting victim with baseball bat and kicking her before kidnapping her: five years incarceration on a felonious-assault count); *State v. Drake*, No. 98AP-448, 1998 WL 890169 (Ohio Ct. App. Dec. 17, 1998) (placing gun to victim's head and knocking her down: three years incarceration on a felonious-assault count, but case remanded for resentencing); *State v. Keeton*, No. 98 CA 13, 1998 WL 852943 (Ohio Ct. App. Dec. 11, 1998) (striking victim three times with a support stand for a bumper jack: five years incarceration); *State v. Brooks*, No. 97APA11-1543, 1998 WL 514111 (Ohio Ct. App. Aug. 18, 1998) (beating victim with a car door: five years incarceration, but case remanded for resentencing); *State v. Lytle*, No. 97 CA 100, 1998 WL 429845 (Ohio Ct. App. July 31, 1998) (striking victim, causing a fracture of the left cheek, tripod bone, and orbital floor: three years incarceration); *State v. Jaap*, No. 18711, 1998 WL 332948 (Ohio Ct. App. June 24, 1998) (attacking a victim with a shovel during a "road rage" incident, causing a broken shoulder and severe lacerations to victim's head: three years incarceration); *State v. Davis*, No. 72820, 1998 WL 323611 (Ohio Ct. App. June 18, 1998) (assault with a golf club, causing "multiple contusion status post assault": two years incarceration, but case remanded for resentencing); *State v. Blondheim*, No. 18594, 1998 WL 281917 (Ohio Ct. App. May 27, 1998) (shaking baby, causing "retinal hemorrhages" and brain swelling: five years incarceration on a felonious-assault count); *State v. Wilson*, No. L-97-1197, 1998 WL 196283 (Ohio Ct. App. Apr. 17, 1998) (beating wife, causing a broken nose and contusions to her head, face, extremities, and left shoulder: five years incarceration); *State v. Longmire*, No. 97-P-0032, 1998 WL 156895 (Ohio Ct. App. Mar. 27, 1998) (striking victim with wine bottle, causing serious damage to victim's jaw: five years incarceration).

<sup>23</sup>*Id.* at 263 (Painter, J., dissenting).

<sup>24</sup>See, e.g., Kimball Perry, *Ruehlman's Sentence 'Travesty,' Painter Says*, CINCINNATI POST, June 19, 1999, at A1; Dan Horn, *Judges Argue 10½-Year Sentence for Spraying Mace*, CINCINNATI ENQUIRER, June 19, 1999, at B7.

will be greatly influenced by the section of the state, or appellate district, where their crimes occurred—just what Senate Bill 2 was designed to avoid.

#### I. SENATE BILL 2

In August 1995, Governor George Voinovich signed into law Senate Bill 2, the first comprehensive revision of Ohio's criminal code in more than twenty years. When it took effect on July 1, 1996, Senate Bill 2 completely overhauled Ohio's sentencing system.<sup>25</sup>

The bill was partly the result of growing concerns about prison overcrowding and the increasing need for additional prison space. Also, there was a notion that offenders received disparate sentences for the same crime in different sections of the state.<sup>26</sup>

Senate Bill 2's legislative history began with the creation of the Ohio Criminal Sentencing Commission. Chaired by the Chief Justice of the Supreme Court of Ohio, and including representatives from various aspects of the Ohio Bar, such as prosecutors and defense attorneys, the Commission was instructed to develop a sentencing policy "designed to enhance public safety by achieving certainty in sentencing, deterrence, and a reasonable use of correctional facilities, programs, and services" and to "achieve fairness in sentencing."<sup>27</sup> To reach such an end, the proposed policy was to provide for the following: sentences proportional to the seriousness of the offenses and the criminal histories of the offenders; procedures to ensure the imposition of uniform penalties for similar offenses and to match criminal penalties with available correctional services; a structure to control the use and duration of a full range of sentencing options; and retention of reasonable judicial discretion in applying that structure.<sup>28</sup>

Senate Bill 2 was the product of the Commission's recommendations to the 121st General Assembly in 1993.<sup>29</sup> All of its major proposals were included in the final draft of the legislation. This legislation has made significant changes in Ohio's previous sentencing structure.<sup>30</sup> For one thing, it is based on "truth in sentencing," the principle that the penalty that a judge imposes will be the penalty that is actually served, unless the judge changes it.<sup>31</sup> Under the new guidelines, with limited exceptions, indefinite prison terms are abolished. Judges are now required to impose definite terms.<sup>32</sup> Credit for "good time," which automatically reduced the minimum

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<sup>25</sup>BURT W. GRIFFIN & LEWIS R. KATZ, OHIO FELONY SENTENCING LAW 1 (1998).

<sup>26</sup>*Id.* at 501.

<sup>27</sup>*Id.* at 502 (quoting OHIO REV. CODE ANN. § 181.23(B)).

<sup>28</sup>*Id.* (citing OHIO REV. CODE ANN. § 181.24(B)).

<sup>29</sup>A Plan for Felony Sentencing in Ohio: A Formal Report of the Ohio Criminal Sentencing Commission (1993).

<sup>30</sup>GRIFFIN & KATZ, *supra* note 25, at 2; ROBERT H. GORMAN & AMY B. BRANN, *Senate Bill 2 and Senate Bill 269 Outline 279 app.* (Anderson's Ohio Criminal Practice and Procedure 1997).

<sup>31</sup>GRIFFIN & KATZ, *supra* note 25, at 14.

<sup>32</sup>*See* GORMAN & BRANN, *supra* note 30, at 279.

term of indefinite sentences, is eliminated.<sup>33</sup> And the power of the Ohio Parole Board has been reduced. Where previously the Parole Board had the power to review and modify sentences, the primary sentencing power now remains with the courts.<sup>34</sup>

To facilitate review, Senate Bill 2 attempts to provide enforceable sentencing guidelines. Appellate review of sentences, a hallmark of Senate Bill 2, is intended to ensure that offenders are sentenced consistently.

## II. FRAMEWORK

The framework of Senate Bill 2 is detailed, with an enumerated list of principles and presumptions, required considerations, and prison-term guidelines that must be followed by judges. No individual provision of the act may be read alone. Sections 2929.11 to 2929.14, when read together, provide the structure for felony sentencing, while appellate review serves to ensure that each sentence meets the legislation's requirements.

Section 2929.11, which is the key to the new sentencing standards, is where the sentencing process itself must begin. It contains two overriding purposes with which all criminal sentences must comport: (1) to protect the public by preventing future crime and (2) to punish offenders.<sup>35</sup> To achieve these purposes, a court should select an appropriate sanction by considering the need for incapacitation, deterrence, rehabilitation, and restitution.<sup>36</sup> A sentence imposed for a felony must be proportional to the seriousness of the offense and its impact on the victim, and it must be consistent with sentences for offenders in similar situations.<sup>37</sup>

Under section 2929.12, a court retains discretion to determine the most effective way to comply with the purposes and principles of sentencing. In exercising this discretion, the court is required to consider a series of factors that pertain to the seriousness of the offense and the recidivism of the offender. These factors include the injuries suffered by the victim,<sup>38</sup> the motivations of the offender,<sup>39</sup> the offender's prior convictions,<sup>40</sup> the offender's remorse,<sup>41</sup> and any mitigating factors.<sup>42</sup>

Only after taking account of these initial considerations may a court proceed to decide whether to imprison the offender and, if so, for what length of time. Section 2929.14 provides ranges of prison terms from which a judge is to select, based upon the degree of felony.<sup>43</sup> The section also outlines other conditions that a judge may

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<sup>33</sup>GORMAN & BRANN, *supra* note 30, at 280; GRIFFIN & KATZ, *supra* note 25, at 14-15.

<sup>34</sup>GORMAN & BRANN, *supra* note 30, at 280; GRIFFIN & KATZ, *supra* note 25, at 16.

<sup>35</sup>OHIO REV. CODE ANN. § 2929.11(A) (Anderson 1996).

<sup>36</sup>*Id.*

<sup>37</sup>§ 2929.11(B).

<sup>38</sup>OHIO REV. CODE ANN. § 2929.12(B)(1).

<sup>39</sup>§ 2929.12(B)(8).

<sup>40</sup>§ 2929.12(D)(2).

<sup>41</sup>§ 2929.12(D)(5).

<sup>42</sup>§ 2929.12(C)(4).

<sup>43</sup>§ 2929.14(A).

impose on an offender, such as when the offender can be given a maximum sentence of incarceration. Where the offender has not served a previous prison term, the court is to impose the shortest term authorized for the offense, unless the court finds, on the record, that “this will demean the seriousness of the offender’s conduct” or “not adequately protect the public.”<sup>44</sup> Maximum time is reserved for offenders who have committed the “worst forms of the offense” or for those who pose the “greatest likelihood of committing future crimes,” and for certain major drug offenders or repeat violent offenders.<sup>45</sup>

Before sentencing an offender, a judge is required to hold a sentencing hearing and to make findings.<sup>46</sup> The judge must consider the record, the testimony of any person presenting information, and, if one has been prepared, the pre-sentence investigation report.<sup>47</sup> If a defendant appeals his sentence, an appeals court may modify, vacate, or remand the sentence if it “clearly and convincingly” finds that the record does not support the sentencing court’s findings or that the sentence is otherwise contrary to law.<sup>48</sup>

### III. WHERE DO WE STAND?

Under the new guidelines, many trial judges had—and still have—difficulty adjusting to the changes in the laws. The judges, who were used to the wide discretion afforded to them before Senate Bill 2, have been frustrated with the more rigid guidelines imposed on them under the new sentencing framework. In sentencing a defendant before him, one judge proclaimed what were surely the feelings of many of his peers:

I think Senate Bill Two . . . is a violation of separation of powers. The legislature wants to tell me how to do my job, and I don’t think that’s appropriate. . . . My position is that it’s unconstitutional, a violation of separation of powers, and that the legislators are elected to perform proper legislative functions. They are not elected to dictate to me how I do my job and what considerations that I must take into account before imposing sentence.<sup>49</sup>

On appeal, the court stated that it fully understood the trial judge’s frustration. But the court, which concluded that the judge had ordered a harsh sentence based on his

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<sup>44</sup>§ 2929.14(B).

<sup>45</sup>§ 2929.14(C).

<sup>46</sup>OHIO REV. CODE ANN. § 2929.19(A); *but see* State v. Edmonson, 715 N.E.2d 131 (Ohio 1999), syllabus (“R.C. 2929.14(B) does not require that the trial court give its reasons for its finding that the seriousness of the offender’s conduct will be demeaned or that the public will not be adequately protected from future crimes before it can lawfully impose more than the minimum authorized sentence.”).

<sup>47</sup>§ 2929.19(B)(1).

<sup>48</sup>OHIO REV. CODE ANN. § 2953.08(G)(2).

<sup>49</sup>State v. Grant, No. 97APA12-1673, 1998 WL 514131, at \*5 (Ohio Ct. App. Aug. 18, 1998).



displeasure with the legislature, reversed and remanded for resentencing because the judge had not complied with the guidelines.<sup>50</sup>

In the time since Senate Bill 2 became effective, courts have helped refine the law and clarify various issues that may not have been readily apparent from the language of the guidelines themselves. For instance, regarding the requirement that maximum sentences may only be imposed on offenders who have committed the “worst forms of the offense,”<sup>51</sup> courts have attempted to clarify what that phrase means. Although the term “worst forms” can never be defined with precision as the very concept of the worst form of an offense is nebulous, courts have consistently stressed that because the word “form” is phrased in the plural, the legislature recognized that more than one scenario for which a given offense can qualify.<sup>52</sup> Since it may always be possible for a court to envision a worse scenario than the one before it, this makes sense. Otherwise, no defendant would ever be sentenced to maximum time under the “worst forms” clause.

Another instance of clarification, and perhaps the most important, is that courts have consistently stressed the necessity of following the framework set forth by the legislature. The courts are not hesitant to reverse sentences where trial judges did not properly state their findings or where judges sentenced offenders based on factors not set forth in the guidelines. By way of example, in a First District case, *State v. Johnson*, an offender guilty of three counts of theft had failed to appear at his original sentencing hearing.<sup>53</sup> As punishment for not showing up, the trial judge imposed consecutive sentences on two of the counts. On appeal, we empathized with the judge’s decision and stated that we would have preferred that the judge had the discretion to punish the offender for his failure to appear. But, under the sentencing guidelines, punishment for failure to appear at a sentencing hearing is not a factor for imposing consecutive sentences. Because the sentence in *Johnson* was not based on the appropriate predicate factors for imposing consecutive sentences, we reversed.<sup>54</sup>

Other issues under Senate Bill 2, though, are not as straightforward. One issue, in particular, involves the degree of review that appeals courts need to give to sentences. This was an area where the legislature initially provided little guidance. As a result, case law on the issue was not consistent.

The debate regarding appellate review was whether appeals courts should have applied a deferential abuse-of-discretion standard when reviewing trial courts’

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<sup>50</sup>*Id.*

<sup>51</sup>R.C. § 2929.14(C).

<sup>52</sup>*See, e.g.,* *State v. Simpson*, No. CA99-07-078, 2000 WL 342135, at \*4 (Ohio Ct. App. Apr. 3, 2000); *State v. Garrard*, 707 N.E.2d 546, 548-51 (Ohio Ct. App. 1997); *State v. Pickford*, No. 97-JE-21, 1999 WL 126931, at \*9 (Ohio Ct. App. Feb. 22, 1999); *State v. Kershaw*, 724 N.E.2d 1176, 1179 (Ohio Ct. App. 1999); *State v. Dunwoody*, No. 97CA11, 1998 WL 513606, at \*3 (Ohio Ct. App. Aug. 5, 1998); *see also* *State v. Moore*, No. 19544, 2000 WL 422412, at \*9 (Ohio Ct. App. Apr. 19, 2000) (“worst forms” is not unconstitutionally vague).

<sup>53</sup>*State v. Johnson*, Nos. C-980013 & C-980014, 1998 WL 735409 (Ohio Ct. App. Oct. 23, 1998).

<sup>54</sup>*Id.*

sentences, or whether the courts should have applied a more stringent standard. Initially after Senate Bill 2 was enacted, courts did not seem to pay much attention to the subject. Appellate courts, probably out of habit, mentioned the discretion of trial judges without ever really analyzing the significance of their words under the new framework. In fact, at one time or another, appeals courts from every district suggested that there was an abuse-of-discretion standard.<sup>55</sup> But gradually a split emerged.<sup>56</sup> Some courts maintained that abuse of discretion was the proper standard of review, while others rejected the abuse-of-discretion standard.

This split was recently resolved by the legislature, which, effective October 10, 2000, amended the appellate review section of the sentencing guidelines to state, “[t]he appellate court’s standard for review is not whether the sentencing court abused its discretion.”<sup>57</sup> The amendment is a key step to ending the inconsistent treatment that defendants were receiving in appellate districts throughout the state. But I predict that appellate courts will continue to take differing approaches to sentencing review.

#### A. Abuse-of-Discretion Standard

Prior to the amendment, the appellate courts that maintained an abuse-of-discretion standard focused on the section of the guidelines that outlines the seriousness and recidivism factors for sentencing. That section states that a sentencing court “has discretion to determine the most effective way to comply with the purposes and principles of sentencing” set forth in the guidelines.<sup>58</sup> According to the courts, the discretion of trial judges was somewhat limited in that Senate Bill 2 provided a framework that judges were constrained to follow in sentencing offenders. But the courts held that, as long as sentencing judges acted within the framework, the sentencing judges had broad discretion in coming to their conclusions.<sup>59</sup> One court referred to the framework of Senate Bill 2 as a “statutory

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<sup>55</sup>See generally, e.g., *State v. Richmond*, No. C-970518, 1998 WL 107653 (Ohio Ct. App. Mar. 13, 1998); *State v. Church*, No. 98 CA 36, 1999 WL 252399 (Ohio Ct. App. Apr. 30, 1999); *State v. Jones*, No. 2-98-1, 1998 WL 405906 (Ohio Ct. App. July 22, 1998); *State v. Sams*, No. 98 CA 13, 1999 WL 1598 (Ohio Ct. App. Dec. 22, 1998); *State v. Laird*, No. 1997 CA 00211, 1998 WL 347105 (Ohio Ct. App. June 15, 1998); *State v. Collignon*, No. L-97-1189, 1998 WL 161012 (Ohio Ct. App. Mar. 31, 1998); *State v. Piergiovanni*, No. 97 C.A. 14, 1998 WL 775010 (Ohio Ct. App. Oct. 20, 1998); *State v. Byrd*, No. 72795, 1999 WL 148468 (Ohio Ct. App. Mar. 18, 1999); *State v. Wooden*, No. 18448, 1998 WL 78674 (Ohio Ct. App. Feb. 11, 1998); *State v. Epley*, Nos. 97APA11-1467 & 97APA11-1468, 1998 WL 542694 (Ohio Ct. App. Aug. 25, 1998); *State v. Wilson*, No. 98-L-267, 2000 WL 688724 (Ohio Ct. App. May 26, 2000); *State v. Stewart*, No. CA96-12-057, 1997 WL 716887 (Ohio Ct. App. Nov. 17, 1997).

<sup>56</sup>See *State v. Hamilton*, No. 1474, 1999 WL 301484, at \*3 (Ohio Ct. App. May 14, 1999) (“Courts have disagreed whether, by enacting Am. Sub. S.B. 2, the legislature changed the ‘abuse of discretion’ standard traditionally applied in reviewing sentencing decisions.”).

<sup>57</sup>OHIO REV. CODE ANN. § 2953.08(G)(2) (Ohio 1999).

<sup>58</sup>§ 2929.12(A).

<sup>59</sup>See, e.g., *State v. Northam*, Nos. 98AP-184 & 98AP-185, 1998 WL 655411, at \*3 (Ohio Ct. App. Sept. 24, 1998).

definition of abuse of discretion.”<sup>60</sup> Abuse of discretion was the standard under the old sentencing law,<sup>61</sup> and these courts concluded that Senate Bill 2 did not change it.<sup>62</sup> Old ways die hard.

Under an abuse-of-discretion standard, an appellant has a very high burden to obtain a reversal. An abuse of discretion is more than an error of law or judgment. It implies that the trial court’s attitude is “unreasonable, arbitrary or unconscionable.”<sup>63</sup> For the appellate courts that continued to apply an abuse-of-discretion standard, error was found when judges had not sentenced offenders in accordance with Senate Bill 2’s framework, such as in cases where judges had not made any findings.

But in the cases where judges had acted properly within the framework, no reviewing court using the abuse-of-discretion standard reversed a sentence based upon an abuse of discretion, at least regarding the imposition of the maximum term. No court, for instance, held that a judge abused his or her discretion in sentencing an offender to maximum prison time based on a determination that the offender committed the “worst forms of the offense.” And no court found that a trial judge abused his or her discretion in finding that the offender posed the “greatest likelihood of committing future crimes.”

The case coming closest to a reversal of a sentence based on abuse of discretion was one that involved an offender who raped and kidnapped his victim, and stole two dollars from her apartment as he left.<sup>64</sup> The trial judge sentenced the offender to maximum jail time for the theft of the two dollars, which was charged as a robbery. The judge based the sentence on a determination that the robbery had caused the victim serious physical and psychological harm. But, on appeal, the court determined that the rape and kidnapping, not the robbery, had caused the physical and psychological harm, because the victim was not aware of the theft until after the attack. Thus, the appeals court suggested that the trial court had abused its discretion on the sentence for the robbery. The court, though, held that any error was harmless: the robbery sentence was concurrent with the sentences for the other counts, and its length did not affect the overall time that the offender would spend in jail.<sup>65</sup>

In short, courts were reluctant to find abuses of discretion in sentencing. But not all courts applied that standard.

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<sup>60</sup>State v. Dunwoody, No. 97CA11, 1998 WL 513606, at \*1 (Ohio Ct. App. Aug. 5, 1998).

<sup>61</sup>See, e.g., State v. Polick, 655 N.E.2d 820, 821 (Ohio Ct. App. 1995).

<sup>62</sup>See, e.g., State v. Persons, No. 98 CA 19, 1999 WL 253527, at \*5-6 (Ohio Ct. App. Apr. 26, 1999); see also State v. Assad, Nos. 72648 & 72649, 1998 WL 308109, at \*3 (Ohio Ct. App. June 11, 1998).

<sup>63</sup>State v. Adams, 404 N.E.2d 144, 149 (Ohio 1980). Our court has suggested a better definition: an abuse of discretion implies that “there is no sound reasoning process” that would support a court’s decision. State v. Echols, No. 716 N.E.2d 728, 744 (Ohio Ct. App. 1998); see also State v. Chapple, 660 P.2d 1208, 1224 n.18 (Ariz. 1983).

<sup>64</sup>State v. Avery, 709 N.E.2d 875 (Ohio Ct. App. 1998).

<sup>65</sup>*Id.* at 885.

*B. The Plain-Language Approach*

The First District took the lead in specifically rejecting the abuse-of-discretion standard, a lead that at least four other districts followed.<sup>66</sup> In *State v. Sheppard*, we specifically stressed that we no longer reviewed sentencing under an abuse-of-discretion standard.<sup>67</sup> Instead, we followed the plain language of the sentencing guidelines that deals with appellate review of sentences. The section covering appellate review specifically states that an appeals court can modify, vacate, or remand a sentence if it “clearly and convincingly” finds that the record does not support the sentence or that the sentence is otherwise contrary to law.<sup>68</sup>

In the *Sheppard* case, the defendant, Scott Sheppard, was found guilty of attempted aggravated arson for setting a fire in a trash can at the University of Cincinnati and was sentenced to five years’ incarceration, the maximum time for the offense.<sup>69</sup> The sentence was based on the trial judge’s conclusion that Mr. Sheppard posed the “greatest likelihood of recidivism.”<sup>70</sup> But, on review, we explained that Mr. Sheppard’s only prior conviction was for solicitation, which did not indicate in any way the likelihood that he would attempt to set another fire. We also stressed that little damage was done by the fire and that, contrary to the trial judge’s finding, Mr. Sheppard did not set the fire because he was motivated by prejudice based on sexual preference.<sup>71</sup> (Mr. Sheppard had set the fire to hinder another person from pursuing him for sexual favors, not because he was prejudiced against that person.) Based on these factors, we clearly and convincingly found that the record did not support the trial judge’s sentence. We reduced Mr. Sheppard’s prison term to one year, the minimum sentence for the crime.<sup>72</sup> In a concurrence, I stated that we would not “hesitate to do our duty” in reviewing sentences for compliance with the guidelines.<sup>73</sup>

Following the *Sheppard* case, we continued to affirmatively review sentences. In most cases, we affirmed the sentences because we did not clearly and convincingly find that the sentences were not supported by the record—*i.e.*, under the definition of “clear and convincing,” we did not have a “firm belief or conviction” that the sentences were not supported by the record.<sup>74</sup> But, when merited, sentences were

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<sup>66</sup>See *State v. Simpson*, No. CA99-07-078, 2000 WL 342135, at \*2 (Ohio Ct. App. Apr. 3, 2000); *State v. Gibbons*, No. 1998CA00158, 2000 WL 502694, at \*15 (Ohio Ct. App. Mar. 30, 2000); *State v. Pickford*, No. 97-JE-21, 1999 WL 126931, at \*6 (Ohio Ct. App. Feb. 22, 1999); *State v. Cruz*, No. F-97-023, 1998 WL 102195, at \*5 (Ohio Ct. App. Feb. 27, 1998).

<sup>67</sup>*State v. Sheppard*, 705 N.E.2d 411, 412 (Ohio Ct. App. 1997); *cf.* *State v. Assad*, Nos. 72648 & 72649, 1998 WL 308109, at \*3-4 (Ohio Ct. App. June 11, 1998).

<sup>68</sup>§ 2953.08(G)(2).

<sup>69</sup>*Sheppard*, 705 N.E.2d at 412.

<sup>70</sup>*Id.* at 413.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* at 413-14.

<sup>73</sup>*Id.* at 414 (Painter, J., concurring).

<sup>74</sup>*Cross v. Ledford*, 120 N.E.2d 118, ¶ 3 of the syllabus (Ohio 1954) (defining “clear and convincing” as a “degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ . . . , and

reversed or modified. In *State v. Howard*, another case where a judge found that the offender posed the “greatest likelihood of recidivism,” we explained that the legislature’s use of the term “greatest” in the sentencing guidelines signified its intent to limit maximum prison terms “to the most incorrigible offenders.”<sup>75</sup> The offender in *Howard* had been convicted of three counts of felony nonsupport of a dependent, and the trial judge had sentenced him to maximum time, twelve months, on each count, to be served consecutively. In our review of the record, we found that the offender had no criminal history, that he was employed at the time of his sentencing hearing, and that he wanted to support his children but had failed to do so because of an injury. We concluded that the evidence was insufficient to support the sentencing finding. We also concluded that the judge had not complied with the guidelines in ordering consecutive sentences, and we modified the offender’s sentence to eleven months on each count, to be served concurrently.<sup>76</sup>

More recently, in *State v. Kershaw*, we reversed a sentence because the trial judge had improperly found that the offender had committed one of the “worst forms of the offense.”<sup>77</sup> Delores Kershaw was at her residence in November 1997, when, in the early morning hours, a woman named Leona Anderson came looking for Ms. Kershaw’s brother. Ms. Anderson was intoxicated and yelled obscenities outside the residence. After Ms. Kershaw called the police, Ms. Anderson left. Ms. Anderson returned at 3:00 or 4:00 in the morning. Ms. Kershaw took a gun and fired a warning shot to frighten Ms. Anderson. Ms. Kershaw then pursued Ms. Anderson onto a neighbor’s yard, and when Ms. Anderson began advancing toward her, she fired another shot in Ms. Anderson’s direction. Ms. Anderson said that she did not fear the gun and continued to advance. Finally, Ms. Kershaw fired a third shot that killed Ms. Anderson.<sup>78</sup>

Ms. Kershaw was convicted of voluntary manslaughter. The trial judge found that she had committed the worst form of the offense and sentenced her to ten years’ incarceration, the maximum time, plus three years’ incarceration on a gun specification. On appeal, however, we held that the facts in the record did not support the conclusion that the case involved one of the worst forms of the offense. The decision stressed that Ms. Anderson had threatened Ms. Kershaw at Ms. Kershaw’s own residence, and that Ms. Kershaw had attempted to contact the police before she resorted to violence. We also noted that the crime did not involve torture or other aggravating circumstances. We concluded that, although Ms. Kershaw’s retrieval of the gun and her threats to shoot Ms. Anderson suggested a degree of premeditation, “that circumstance alone [did] not render this the worst form of the offense.”<sup>79</sup> Therefore, we reversed the sentence. One of the judges on the appellate panel dissented. He stated, among other things, that Ms. Kershaw’s threats to use the

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which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established”).

<sup>75</sup>*State v. Howard*, No. C-971049, 1998 WL 597651, at \*3 (Ohio Ct. App. Sept. 11, 1998).

<sup>76</sup>*Id.* at \*4.

<sup>77</sup>*State v. Kershaw*, 724 N.E.2d 1176 (Ohio Ct. App. 1999).

<sup>78</sup>*Id.* at 1177-78.

<sup>79</sup>*Id.* at 1179.

gun and her pursuit of Ms. Anderson were sufficient reasons for the sentencing judge to have concluded that this was one of the worst forms of the offense.<sup>80</sup>

Most recently, in *State v. Mays*, we reversed a maximum sentence in an aggravated vehicular homicide case.<sup>81</sup> The defendant in that case, the driver of an automobile, had intended to “mess with” the victim, a pedestrian, by “nudging” him with the automobile. But, instead of merely nudging the victim, the defendant had inadvertently run over him.<sup>82</sup> In reversing the imposition of a maximum sentence, we stressed that, although the defendant had exercised extremely poor judgment, our review of the record revealed that the defendant’s conduct did not constitute one of the worst forms of the offense. We concluded that there was no indication that the defendant harbored any malice toward the victim. We stated that the record indicated that the defendant’s conduct “started as a reckless, poorly conceived prank and ended in tragedy,” and then added, “[w]hile we in no way wish to minimize the loss of a human life or to condone [the defendant’s] actions, this is not the type of conduct for which the legislature has reserved the maximum sentence.”<sup>83</sup> Further, we stressed that the defendant took steps to get emergency help for the victim and that the defendant surrendered to authorities and confessed to the crime.<sup>84</sup>

In a dissent, one judge on the appellate panel stated that the defendant’s conduct could have constituted one of the worst forms of the offense. The dissent stated that, because the “worst form” of an offense is a vague concept, great deference should be given to the trial court’s findings. The dissent then stressed the senselessness of the victim’s death and that the defendant had compounded the offense by leaving the scene of the collision before calling for emergency aid.<sup>85</sup>

The dissents in *Kershaw* and *Mays*, as well as my dissent in *Mushrush*, exemplify the disagreements that have arisen regarding the interpretation of the sentencing guidelines.<sup>86</sup> Because the guidelines contain certain ambiguous terms—and concepts—such as “worst forms of the offense”—these disagreements are not surprising. But, ultimately, certain fundamental disagreements should be resolved to achieve more consistency in sentencing.

#### IV. WHAT’S NEXT?

With the recent amendment to the sentencing guidelines that an “appellate court’s standard for review is not whether the sentencing court abused its discretion,” the

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<sup>80</sup>*Id.* at 1182 (Hildebrandt, J., dissenting).

<sup>81</sup>*State v. Mays*, No. C-000003, 2000 WL 1033098 (Ohio Ct. App. July 28, 2000) (also reversing consecutive sentences). *See also* *State v. Green*, No. C-990771, 2000 WL 1235960 (Ohio Ct. App. Sept. 1, 2000) (holding that the record did not support the trial court’s finding that the offender posed the “greatest” risk of recidivism).

<sup>82</sup>*Id.* at \*1.

<sup>83</sup>*Id.* at \*2.

<sup>84</sup>*Id.*

<sup>85</sup>*Id.* at \*3 (Hildebrandt, P.J., dissenting).

<sup>86</sup>*See also* *State v. Shackelford*, No. C-980980, 1999 WL 1263520 (Ohio Ct. App. Dec. 30, 1999) (Painter, J., dissenting) (arguing that a “get-away driver” charged with robbery did not commit the worst form of the offense).

debate is over regarding whether abuse of discretion remains the standard of review. The legislature has clearly indicated that appeals courts must actively review sentences, not merely defer to the determinations of trial judges. Because a primary purpose of Senate Bill 2 is to eliminate disparate sentencing for similar offenses, it seems only logical that appellate courts must take a more active role in reviewing sentences than that allowed under the deferential abuse-of-discretion standard. A more active review process is the only effective way to ensure that trial judges are properly and consistently applying the guidelines.<sup>87</sup> Otherwise, Senate Bill 2, which was intended to overhaul felony sentencing with appellate courts playing an active role in ensuring consistency, would be meaningless.

But the debate is not necessarily over. Although it is clear that abuse-of-discretion is no longer the standard of review, an issue still remains regarding how intense the standard of review should be—will it be on the deferential end of the continuum, or will it be on the other end, such as a *de novo* review? Admittedly, my court has not been consistent. Some cases have stated that there is no *de novo* review,<sup>88</sup> while other cases have suggested the opposite.<sup>89</sup> Possibly in the near future, this issue will be resolved. Certainly the bench, bar, and citizens of Ohio have a right to know.

#### V. AFTERWORD

As things turned out, Mr. Mushrush ended up serving less than two years of his sentence. Though Mr. Mushrush was not eligible for judicial release, in an arguably prohibited—but not appealed—procedure, the trial judge had Mr. Mushrush withdraw his original guilty plea and plead guilty again to the felonious assault, assault, and inducing panic charges. The judge then sentenced him to five years of probation and drug monitoring before releasing him. This was done after Mr. Mushrush's attorney questioned the trial judge concerning the judge's cousin's possible involvement in the original case.<sup>90</sup>

While some might say that the “system works” because the trial judge eventually relented and released Mr. Mushrush (though he was not eligible for judicial release), the later proceeding here only illustrates the problem of the appellate court's refusal

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<sup>87</sup>Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of Koon v. United States*, 58 OHIO ST. L.J. 1697, 1703 (1998) (stating in regard to the federal sentencing guidelines that “appellate review was conceived as a crucial mechanism for promoting consistency and fairness by aiding in the evolution of sentencing doctrine on which judges could rely when making sentencing decisions”).

<sup>88</sup>See *State v. Shyrock*, No. C-96111, 1997 WL 1008672, at \*2 (Ohio Ct. App. Aug. 1, 1997); *Shackelford*, 1999 WL 1263520, at \*2; see also *State v. Mushrush*, 733 N.E.2d 252 (Ohio Ct. App. 1999).

<sup>89</sup>See *State v. Kershaw*, 724 N.E.2d 1176, 1178 (1999); *State v. Goetz*, No. C-970503, 1998 WL 735358, at \*4 (Ohio Ct. App. Oct. 23, 1998); *State v. Richmond*, No. C-970518, 1998 WL 107653, at \*1 (Ohio Ct. App. Mar. 13, 1998).

<sup>90</sup>See Kimball Perry, *Ruehlman Sets Teen Free Early*, CINCINNATI POST, June 22, 2000, at 14A, available at <<http://www.cincypost.com/news/ruehl062200.html>>; Kimball Perry, *Judge Sets Free Teen who Disrupted School Talent Show*, CINCINNATI POST, June 20, 2000, at 9A, available at <<http://www.cincypost.com/news/mush061900.html>>.

to act. If the appellate court had done its job, there would have been no need to resort to legal legerdemain to right this wrong.