

DEFENDANT'S MOTION FOR APPROPRIATION OF FUNDS FOR A SENTENCING ANALYSIS REPORT

Defendant, through counsel, respectfully moves this Court for an order authorizing defense expenditures of \$750.00 (Seven Hundred and Fifty) dollars payable to Lawstata enabling Defendant to obtain a comparative sentencing report to enable the court's compliance with the sentencing requirements of ORC 2929.11 and to enable defense counsel to effectively prepare for sentencing and vindicate the defendants Due Process and Fair Trial rights at sentencing.

MEMORANDUM IN SUPPORT

Defendant stands before this Court [having plead guilty, having been found guilty of violating] [insert ORC sections]. To guarantee the reliability and fairness of Defendant's sentence, it is essential that defense counsel be provided with the funds to obtain the data regarding similarly situated Defendants whom were sentenced regarding similar charges in prior cases.

RELEVANT SENTENCING REQUIREMENTS

R.C. 2929.11(B) reads in pertinent part:

“(B) A sentence imposed for a felony shall be reasonably calculated to achieve the three overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and **consistent with sentences imposed for similar crimes committed by similar offenders.**” Emphasis added.

As scholars have noted, “[a]n obstacle to appellate review for consistency of individual sentences under [R.C. 2929.11(B)] is the current lack of acceptable sentencing data and records from which to determine the mainstream sentencing range for specific offenses. Although the Ohio Criminal Sentencing Commission is apparently engaged in a pilot project to collect computerized data to assess consistency, the program has not yet been implemented. Absent such a data bank, however, appellate courts can still compare similar cases for consistency in sentencing.” *Griffin and Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan* (2002), 53 Case W. L.R.Rev. 1. With its unmatched resources, State’s counsel obviously benefits from its ability to compile its own list of similar cases. It will continue to benefit from, the assistance of many law enforcement officials who conduct investigations into this data to assist the prosecution including the probation departments, prosecutorial investigative units and the Attorney General’s Office. It would be fundamentally unfair and unconstitutional to deny Defendant reasonable funds needed to obtain comparative sentencing data to assist defense counsel in sentencing preparation.

Defendant needs the court to grant \$750.00 in funds to obtain a comparative sentencing report from Lawstata. (www.lawstata.com). Lawstata is an Ohio based company which uses proprietary technology to constantly gather, clean, analyze and compile sentencing data. This is the most comprehensive and complete sentencing data set available in the State of Ohio. Any information from this report to be used at sentencing will include case numbers enabling all parties and the court to

confirm that data for accuracy and completeness along with its relevance to the facts of this case for the purposes of meeting the obligations under R.C. 2929.11(B).

Defendant asks this Court to authorize an appropriation of funds in the amount of \$750.00. This one time request no doubt reflects far less money typically appropriated for various other purposes connected with sentencing including psychiatric evaluation and recidivism analysis.

These funds are “reasonably necessary” to protect Defendant’s constitutional rights. *State v. Mason*, 82 Ohio St.3d 144, syllabus (1998).

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee Defendant the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Defense counsel must have access to relevant sentencing data in order to provide a defendant with effective representation. *Id.* at 691-92.

Further, the Sixth Amendment guarantees Defendant the right to compulsory process, which includes the “right to present the defendant’s version of the facts” at every phase of a prosecution, including sentencing. *Washington v. Texas*, 388 U.S. 14, 19 (1967). Without access to this relevant sentencing data, Defendant will be unable to effectively present his case.

The constitutional right to due process entitles Defendant to a “fair and adequate opportunity” to present relevant sentencing data to rebut prosecution arguments regarding proper sentencing. *Chambers v. Mississippi*, 410 U.S. 284, 294, 302 (1973). Without such relevant data, a criminal defendant could be denied

“meaningful access to justice.” *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985). The constitutional right to equal protection also requires that such data, given its relevance to sentencing requirements in R.C. 2929.11, be provided in this case. See *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (“[T]he State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.”).

Effective preparation is the keystone to effective representation. In turn, effective assistance of counsel is central to the exercise of all other constitutional rights which protect defendants from arbitrary and capricious convictions and sentences. U.S. Const. amends. V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20.

Independent state law also supports the need for this sentencing data and the appropriate of funds for both the trial phase and the sentencing phase of the proceedings. *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984).

DEFENDANT’S FAILURE TO RAISE THIS ISSUE WAIVES IT

“[T]rial courts are limited in their ability to address the consistency mandate, and appellate courts are hampered in their review of this issue, by the lack of a *reliable body of data upon which they can rely.*” *State v. York*, Champaign App. No. 2009-CA-03, 2009-Ohio-6263. Emphasis added. “[A]lthough a defendant cannot be expected to produce his or her own database to demonstrate the alleged inconsistency, *the issue must at least be raised in the trial court and some evidence,*

however minimal, must be presented to the trial court to provide a starting point for analysis and to preserve the issue for appeal.” Id. Emphasis added.

When the consistency issue is not raised in the trial court, a defendant cannot argue on appeal “that the sentence imposed by the trial court was inconsistent with those imposed on similar offenders.” *Id.* The appropriation of these funds, therefore, is vital to preserving Defendant’s right to raise a potential appeal issue. Without granting this request for funds, Defendant is effectively prevented by the state from raising an issue that the state law, R.C. 2929.11 in particular, entitles him to raise where appropriate and punishes him if he fails to raise it. In *Miller*, the court found that the Defendant “has forfeited his ability to raise the issue on appeal.” *Id.*; see, also, *State v. Cantrell*, Champaign App. No.2006 CA 35, 2007-Ohio-6585, ¶10-14; *Rollins*, *supra*, at ¶16.

EIGHTH DISTRICT HAS HELD DEFENDANT’S MUST PRESENT DATA TO
PRESERVE ARGUMENT UNDER R.C. 2929.11

“Although R.C. 2929.11(B) directs trial courts to impose felony sentences which are ‘consistent with sentences imposed for similar crimes by similar offenders,’ the legislature has not identified the means by which the courts should attain this goal. *Neither individual practitioners, government attorneys, trial courts nor appellate courts have the resources to assemble reliable information about sentencing practices throughout the state.” State v. Coleman*, 2004 Ohio 234 - Ohio: Court of Appeals, 8th Appellate Dist. 2004. Citing *State v. Haamid*, Cuyahoga App. Nos. 80161, and 80248, 2002-Ohio-3243 (Karpinski, J., concurring). Emphasis

added. With this modest request for funds and the proprietary database developed by Lawstata, this data is now within reach of Defendants.

“Identification of the data and factors which should be compared in deciding whether a crime or an offender is ‘similar’ in itself would be a massive task, yet the identification of such data would be essential even to begin to build a database. Unless and until someone undertakes this daunting task, ‘appellate courts will be able to address the principle of consistency only to a very limited degree.’” *Id.* at ¶23.

Despite this recognition by appellate courts that, in the past, such sentencing data did not exist, it does now. Further, the *Coleman* court and others have held that “when a criminal defendant has failed to present any argument, however minimal, regarding sentences imposed for similar offenders” he waives that argument on appeal. See *State v. Armstrong*, Cuyahoga App. No. 81928, 2003-Ohio-5932 (McMonagle, J., concurring). “Although a defendant cannot be expected to produce his or her own database to demonstrate the alleged inconsistency, the issue must at least be raised in the trial court and some evidence, however minimal, must be presented to the trial court to provide a starting point for analysis and to preserve the issue for appeal.” *Id.* at ¶29; cf. *State v. Douse*, Cuyahoga App. No. 82008, 2003-Ohio-5238 (McMonagle, J., concurring in part and dissenting in part); *State v. Crayton*, Cuyahoga App. No. 81257, 2003-Ohio-4663 (McMonagle, J., concurring in part and dissenting in part).

The Eighth District has held that it is “not unreasonable for a criminal defendant to at least submit some evidence, however minimal, for the trial court to consider until such a time that a better system is in place that tracks consistency in sentencing.” *Coleman, infra.*

Therefore, counsel requests authorization to expend court funds in the amount of \$750.00 (Seven Hundred and Fifty) dollars payable to Lawstata to obtain critical sentencing data to enable counsel to provide effective assistance during the sentencing phase of this matter. This data is also mandatory to enable Defendant to preserve his appellate argument, if any, regarding the ultimate sentence imposed. *Id.*