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Criminal Law: Actual Incareration: The Ohio Supreme Court Throws Away the Key

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CASENOTES

CRIMINAL LAW: ACTUAL INCARCERATION: THE OHIO SUPREME COURT THROWS AWAY THE KEY — *State v. Smith*, 42 Ohio St. 3d 60, 537 N.E.2d 198 (1989).

I. INTRODUCTION

Section 2929.01 of the Ohio Revised Code provides that "[i]f a person is sentenced to a term of actual incarceration, the court shall not suspend his term of actual incarceration, and shall not grant him probation . . . ."[1] This section of the Ohio Revised Code is silent on the question of whether it prevents the trial judge from suspending only the term of actual incarceration or whether it prohibits the judge from suspending any other part of a sentence which does not include a term of actual incarceration. The Ohio Supreme Court chose the latter interpretation in *State v. Smith*.[2] In deciding this case, the supreme court held that when an offender, otherwise eligible for probation, is sentenced to a mandatory term of actual incarceration, the trial court cannot suspend any portion of the offender's sentence and cannot place the offender on probation subsequent to the service of the mandatory term of actual incarceration.[3] In reaching this decision, the supreme court disregarded legislative intent and reached a conclusion contrary to that reached in lower court opinions.

The purpose of this casenote is to analyze the supreme court's decision in *State v. Smith*. It will examine the reasoning behind the decision of the appeals court in the case, the reasoning of the Supreme Court of Ohio, and the reasoning of the Hamilton County Court of

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1. OHIO REV. CODE ANN. § 2929.01 (Anderson Supp. 1989). This section defines actual incarceration as follows:

> "Actual incarceration" means that an offender is required to be imprisoned for the stated period of time to which he is sentenced that is specified as a term of actual incarceration. If a person is sentenced to term of actual incarceration, the court shall not suspend his term of actual incarceration, and shall not grant him probation or shock probation, pursuant to section 2929.51, 2947.061 [2947.06.1], 2951.02, or 2951.04 of the Revised Code . . . .

OHIO REV. CODE ANN. § 2929.01 (Anderson Supp. 1989).

2. State v. Smith, 42 Ohio St. 3d 60, 64, 537 N.E.2d 198, 203 (1989).

3. *Id.*

Appeals, in a similar case, *State v. Ruth*,[4] which conflicted with the appellate court ruling in *State v. Smith*[5] and gave the supreme court recourse to review the case. This note will propose that the Supreme Court of Ohio improperly decided the *Smith* case and suggest changes to be made to the applicable statute to bring the statutory language into agreement with the supreme court's decision.

II. FACTS AND HOLDING

Appellee, Kenneth K. Smith, was arrested for selling marijuana on or about February 28, 1985.[6] He was indicted under sections 2925.03(A)(1),[7] 2925.03(A)(7),[8] and 2925.13(A),[9] of the Ohio Revised Code.[10]

Smith, after waiving his right to a jury trial, was found guilty under sections 2925.03(A)(1) and 2925.03(A)(7) on September 3, 1985.[11] The trial judge imposed a sentence of two to fifteen years for the violation of section 2925.03(A)(7), which included a six month term of actual incarceration as mandated by statute, and a sentence of one year of imprisonment for the violation of section 2925.03(A)(1), to be served concurrently with the sentence imposed under section 2925.03(A)(7).[12] The trial judge suspended both sentences and placed Smith on probation for five years to be effective after he served the six month sentence of actual incarceration at the Ohio State Reformatory.[13]

The State appealed the sentence[14] and Smith cross appealed the

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4. No. C-820355 (Ohio Ct. App. Mar. 16, 1983) (LEXIS, States library, Ohio file).

5. State v. Smith, No. 85 CR 521 (Ohio Ct. App. Mar. 26, 1987) (LEXIS, States library, Ohio file).

6. *Id.*

7. OHIO REV. CODE ANN. § 2925.03(A)(1) (Anderson 1987). This section provides that: "No person shall knowingly do any of the following: (1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount as defined in section 2925.01 of the Revised Code." *Id.*

8. OHIO REV. CODE ANN. § 2925.03(A)(7) (Anderson 1987). This section provides that: "No person shall knowingly do any of the following: (7) Sell or offer to sell a controlled substance in an amount equal to or exceeding three times the bulk amount." *Id.*

9. OHIO REV. CODE ANN. § 2925.13(A) (Anderson 1987). This section provides that: "No person, being the owner, operator, or person in charge of a [vehicle] . . . shall knowingly permit such vehicle to be used for commission of a felony drug abuse offense." *Id.*

10. State v. Smith, 42 Ohio St. 3d 60, 60, 537 N.E.2d 198, 199 (1989).

11. *Id.*

12. *Id.*

13. *Id.*

14. The state's appeal consisted of one assignment of error. The state argued that, since the sentence included a term of actual incarceration, the trial judge had no authority to suspend that portion of Smith's sentence in excess of the period of actual incarceration. State v. Smith, No. 85 CR 521 (Ohio Ct. App. Mar. 26, 1987) (LEXIS, States library, Ohio file).

conviction.[15] The Court of Appeals for Montgomery County denied both appeals.[16] Upon discovering that its finding concerning actual incarceration was in opposition to that of the Court of Appeals for Hamilton County in *State v. Ruth*,[17] the Montgomery County Court of Appeals certified the case to the Supreme Court of Ohio.[18] The supreme court declared that a trial judge does not have the authority to suspend any portion of a sentence when a term of actual incarceration is mandated by statute.[19]

III. BACKGROUND

A. *Statutes*

The statutes are silent on the question of whether a trial judge may suspend that portion of a sentence in excess of the term of actual incarceration. Section 2929.01(C) of the Ohio Revised Code, which defines actual incarceration, states that the "court shall not suspend [the offender's] term of actual incarceration, and shall not grant him probation . . ." if the offender is sentenced to a term of actual incarceration.[20] One commentator on probation, however, has interpreted the statutory language of the criminal code as allowing a judge to suspend the excess portion of the sentence.[21]

Section 2951.02 of the Code, which sets forth the criteria for and against the granting of probation, contains a more definitive prohibition against granting probation when a term of actual incarceration is mandated.[22] Division (F)(5) of this section states: "[a]n offender shall not be placed on probation or otherwise have his sentence of imprisonment suspended pursuant to division (D)(2) or (4) of section 2929.51 of the Revised Code when any of the following applies: . . . (5) The offender is . . . sentenced to a term of actual incarceration."[23] It is this division

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15. Smith appealed the conviction on the basis that the court's verdict did not specify whether the amount possessed by him was equal to three times the bulk amount thereby making him guilty of only a fourth degree felony. *Id.* The Montgomery County Court of Appeals declared that it was unnecessary that the verdict specify the exact amount as long as the verdict made reference to the indictment, thus overruling his assignment of error. *Id.*

16. *Id.*

17. State v. Ruth, No. C-820355 (Ohio Ct. App. Mar. 16, 1983) (LEXIS, States library, Ohio file) (finding that a term of actual incarceration prohibits a trial judge from suspending that portion of an offender's sentence which is in excess of the period of actual incarceration).

18. 42 Ohio St. 3d at 60, 537 N.E.2d at 199-200.

19. *Id.* at 64, 537 N.E.2d at 203.

20. OHIO REV. CODE ANN. § 2929.01(C) (Anderson 1987).

21. *See* Leggett, *An Introduction to Probation in Ohio*, 9 CAP. U.L. REV. 639, 649 (1980) (presenting a comprehensive overview of the statutory requirements regarding the probationary process in Ohio).

22. *See* OHIO REV. CODE ANN. § 2951.02 (Anderson 1987).

23. *Id.*

that the Ohio Supreme Court uses in *Smith* as a vehicle for its denial of probation in all cases where actual incarceration is mandated by statute. These statutes, however, fail to offer a definitive statement on whether a trial judge may suspend that portion of a sentence in excess of the term of actual incarceration. The legislative history therefore becomes another method for understanding these statutes.

B. Legislative History

The legislative history of "actual incarceration" provides some insight into the purposes and intent behind its enactment. The provision was a part of House Bill 300 (H.B. 300), which was introduced in the Ohio Legislature on February 6, 1975[24] and became effective July 1, 1976.[25] H.B. 300 was drafted by the Ohio Attorney General's Office, both to deter the commission of certain drug offenses and to ensure the safety of society while the offender is in prison, by specifying a certain minimum term of imprisonment.[26] In written testimony to both the House and Senate Judiciary Committees, the Attorney General's Office explained that the "periods of actual incarceration were minimum sentences while maximum sentences were to be determined by the degree of the felony."[27] The required period of actual incarceration is to serve only as the minimum term of imprisonment in an indeterminate sentence.[28]

The Attorney General declared that the actual incarceration provisions should be interpreted in pari materia[29] with other provisions of the criminal code "including . . . the provisions on indeterminate sentencing (R.C. Chapters 2929 and 2967)."[30] The actual incarceration statute should be interpreted to effectuate the legislative intent, "to avoid absurd results, and *to be harmonious with other interrelated provisions of the criminal law.*"[31] In an opinion released in 1977, the Attorney General stated that actual incarceration applies only to the time an offender must be incarcerated "without possibility of release."[32] Cit-

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24. 1976 Ohio Op. Att'y. Gen. No. 059, 2-194 (1976) (advising that the period of actual incarceration is meant to be the minimum term of a sentence of imprisonment, when the trial court fails to specify a maximum or minimum sentence).

25. OHIO REV. CODE ANN. § 2929.01 (Anderson 1987).

26. 1976 Ohio Op. Att'y Gen. No. 059 at 2-198 to -199.

27. *Id.* at 2-199.

28. *Id.* at 2-194.

29. *Id.* at 2-198. "In pari materia" has been defined as: "Upon the same matter or subject. Statutes in pari materia are to be construed together; are those relating to the same person or thing or having a common purpose." BLACK'S LAW DICTIONARY 711 (5th Ed. 1979).

30. 1976 Ohio Op. Att'y Gen. No. 059 at 2-198.

31. *Id.* (emphasis added).

32. 1977 Ohio Op. Att'y Gen. No. 067 at 2-241 (clarifying 1976 Opinion No. 059 by stating that where a minimum sentence is longer than the period of actual incarceration, the longer

ing an example of an offender convicted under section 2925.03(A)(7) and given a minimum term of two years, the Attorney General stated that after serving the mandated six months of actual incarceration, the offender would be "eligible for a suspended sentence, parole or probation, if applicable, for [the] time remaining on the minimum sentence."[33] Section 2925.03(A)(7) is the same provision under which Smith was convicted.[34] Thus, the Attorney General, the author of the legislation, uses an example which parallels Smith's case and supports the proposition that the trial court was correct in granting Smith probation for that portion of the sentence which did not include the actual incarceration.

C. *Case Law*

Previous Ohio Supreme Court opinions render no aid in the interpretation of actual incarceration and its limits on probation. The supreme court in *State v. Fisher*[35] declared, in dicta, that a term of actual incarceration makes an offender ineligible for shock probation,[36] but did not specify if shock probation would be allowed for a portion of a sentence other than the period of mandated actual incarceration.[37] In *State v. Oxenrider*,[38] the Ohio Supreme Court determined that a prisoner sentenced to a term of actual incarceration was ineligible for the "split-sentencing" modification allowed under section 2929.51(A).[39]

Several Ohio appellate courts have spoken specifically to the issue in question and have come to differing conclusions. The Lucas County, Trumbull County, Hamilton County, and Franklin County appellate courts have ruled that a term of actual incarceration precludes the granting of probation.[40] The Montgomery County and Greene County

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period is the minimum sentence).

33. *Id.*

34. State v. Smith, 42 Ohio St. 3d 60, 62, 537 N.E.2d 198, 199 (1989).

35. 35 Ohio St. 3d 22, 517 N.E.2d 911 (1988).

36. *Id.* at 23, 517 N.E.2d at 912. The conditions for shock probation are established in Ohio Revised Code § 2947.061. "The theory is that the offender's initial time in jail will act as shock therapy, causing him to mend his criminal ways." Leggett, *supra* note 21, at 642.

37. *Fisher*, 35 Ohio St. 3d at 23, 517 N.E.2d at 912.

38. 60 Ohio St. 2d 60, 396 N.E.2d 1034 (1979).

39. *Id.* at 62, 396 N.E.2d at 1035. The split-sentencing modification requires the offender "to serve a definite term of imprisonment of not more than six months in a county jail or workhouse, which term may be served in intermittent confinement." OHIO REV. CODE ANN. § 2929.51(A) (Anderson 1987). Intermittent confinement allows the offender "to serve his sentence . . . overnight, or on weekends, or both, or at . . . times that will allow him to continue at his occupation or care for his family." OHIO REV. CODE ANN. § 2929.51(D)(3) (Anderson 1987). *Oxenrider* was the first case to offer an interpretation of the actual incarceration provision and has been used by courts on both sides of the issue as a foundation for their respective arguments. *See* State v. Smith, No. 85 CR 521 (Ohio Ct. App. Mar. 26, 1987)(LEXIS, States library, Ohio file).

40. State v. Fellhauer, No. L-85-336 (Ohio Ct. App. Lucas County Apr. 18, 1986)

appellate courts have supported the view that a term of actual incarceration does not prevent the trial court from granting probation when a term of actual incarceration is mandated by statute.[41]

The Greene County Court of Appeals looked to *Oxenrider* and Ohio Attorney General Opinion No. 77-067 in deciding *State v. Abney*.[42] The court pointed to a footnote in *Oxenrider* which stated that a person could be placed on conditional probation "after completion of any period of actual incarceration which may be required by Chapter 2925."[43] The court then stated that because the sentencing statutes concerned similar subject matter, they should be interpreted in pari materia.[44] The court agreed with the Attorney General that the actual incarceration statute was consistent with "the general statutory formula."[45] The court concluded that to effectuate the "clear and reasonable" purpose expressed by the legislature, sentencing provisions must be construed together to achieve the result intended.[46]

Judge Weber, of the Montgomery County Court of Appeals, addressed the issue in a concurring opinion[47] one year before that court's decision in *Smith*. Judge Weber stated that probation could not take effect until after the term of actual incarceration had been served.[48] He further stated "the issue of whether to grant probation . . . to take effect after the defendant serves his mandatory sentence should be re-

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(LEXIS, States library, Ohio file) (finding that a trial court has the discretion to sentence an offender to a term of actual incarceration under a statute which declares that the minimum term of an indeterminate sentence may be imposed as a term of actual incarceration); State v. Fisher, 26 Ohio App. 3d 197, 198, 499 N.E.2d 344, 346 (1985) (Trumbull County) (an offender is ineligible for parole until his term of actual incarceration expires); State v. Ruth, No. C-820355 (Ohio Ct. App. Hamilton County Mar. 16, 1983) (LEXIS, States library, Ohio file) (holding that a term of actual incarceration does prohibit a trial judge from suspending that portion of an offender's sentence which is in excess of the period of actual incarceration); State v. Cramer, No. 82AP-458 (Ohio Ct. App., Franklin County, Dec. 21, 1982) (LEXIS, States library, Ohio file) (finding that a term of actual incarceration does not constitute cruel and unusual punishment or encroach upon judicial authority).

41. State v. Smith, No. 85 CR 521 (Ohio Ct. App., Montgomery County, Mar. 26, 1987) (LEXIS, States library, Ohio file) (actual incarceration statute does not prohibit a trial judge from suspending that portion of an offender's sentence which exceeds the period of actual incarceration); State v. Boggs, No. 8358 (Ohio Ct. App., Montgomery County, Jan. 19, 1984) (LEXIS, States library, Ohio file) (actual incarceration statute prohibits a trial judge from granting shock probation while the term of actual incarceration is being served); State v. Abney, No. 1157 (Ohio Ct. App., Greene County, May 4, 1981) (LEXIS, States library, Ohio file) (actual incarceration is consistent with the indeterminate sentencing statutes of the Ohio Revised Code).

42. *Abney*, No. 1157 (LEXIS, States library, Ohio file).

43. *Id.* (quoting *Oxenrider*, 60 Ohio St. 2d at 62, 396 N.E.2d at 1035 (1979).

44. *Id.*

45. *Id.*

46. *Id.* at 4.

47. State v. Boggs, No. 8358 (Ohio Ct. App. Jan. 19, 1984) (LEXIS, States library, Ohio file).

48. *Id.*

manded to the trial court for its determination."[49] In making this statement, Judge Weber endorsed the view that the trial court does have the power to suspend that portion of the sentence in excess of the period of actual incarceration.[50]

The Montgomery County Court of Appeals elaborated on Judge Weber's opinion in its decision in Smith's appeal.[51] The court, recognizing that its power to place an offender on probation pursuant to section 2929.51[52] was curtailed by section 2951.02(F)(5), found that section 2951.02 had to be interpreted in pari materia with section 2929.51(A) so that the "clear and reasonable purpose" of the legislature could be realized.[53] The court characterized the essence of the state's appeal as asserting that, due to inconsistencies between sections 2951.02(F)(5) and 2929.51(A), the former repeals the sentence modification conditions of the latter.[54] The court of appeals denied the state's proposition by saying that an in pari materia interpretation of the two provisions made them compatible.[55] Looking to *Oxenrider*, which the appeals court interpreted as holding that a sentencing judge has no power to modify a term of actual incarceration "by implementing [section] 2929.51(A),"[56] the court decided that a "release from custody under probation cannot take effect" until the term of actual incarceration has been served.[57]

Three of the courts which decided that a mandated period of actual incarceration precludes the granting of probation set forth their decisions without any supporting reasoning.[58] Upholding the trial court's decision, the Franklin County Court of Appeals stated that the

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49. *Id.*

50. *See id.*

51. State v. Smith, No. 85 CR 521 (Ohio Ct. App. Jan. 19, 1984) (LEXIS, States library, Ohio file).

52. OHIO REV. CODE ANN. § 2929.51(A) (Anderson 1987). This section provides that:

> [a]t any time after compliance with the procedures contained in division (C) of this section, if compliance with procedures is required by that division, and before an offender is delivered into the custody of the institution in which he is to serve his sentence; or at any time between the time of sentencing, if compliance with the procedures contained in division (C) of this section is not required by that division, and the time at which an offender is delivered into the custody of the institution in which he is to serve his sentence, when a term of sentence for felony is imposed, *the court may suspend the sentence and place the offender on probation* pursuant to section 2951.02 of the Revised Code . . . .

OHIO REV. CODE ANN. § 2929.51(A) (Anderson 1987)(emphasis added).

53. *Smith*, No. 85 CR 521 (LEXIS, States library, Ohio file).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *See* State v. Fellhauer, No. L-85-336 (Ohio Ct. App. Apr. 18, 1986)(LEXIS, States library, Ohio file); State v. Fisher, 26 Ohio App. 3d 197, 198, 499 N.E.2d 344, 345 (1985); State v. Cramer, No. 82AP-458 (Ohio Ct. App. Dec. 21, 1982)(LEXIS, States library, Ohio file).

trial court was correct in deciding that "it did not have the power to suspend defendant's sentence and place her on probation" due to the mandatory nature of the sentencing.[59] The Lucas County Court of Appeals, addressing a different issue, did state that a defendant sentenced to a term of actual incarceration was not subject to the probation provisions of the Ohio Revised Code.[60] The Trumbull County Court of Appeals, in the lower court decision of *State v. Fisher*,[61] decided that a trial judge has no discretion to grant probation because a term of actual incarceration prohibits the grant of probation.[62]

Only the Hamilton County Court of Appeals has concentrated on the side of the issue which prohibits a grant of probation. In deciding *State v. Ruth*,[63] the court mentioned nothing of the in pari materia rule. The court instead focused on the lack of a trial court's inherent power to suspend a sentence.[64] The court, after declaring the intent of the legislature to be "clearly and unambiguously expressed" in section 2929.11,[65] defined imprisonment to mean "confinement in a state penal or reformatory institution if the offense is a felony."[66] The court then declared that the power to modify or suspend a sentence must be explicitly stated in a statute and must be interpreted strictly.[67] After discussing the two instances in which a suspension of a sentence is authorized under section 2929.51,[68] the court stated that no other provisions of that section were applicable to the case.[69] Finally, the court interpreted actual incarceration "to mean that a person is required to be imprisoned . . . for the stated period notwithstanding any other provisions for suspension . . . of sentence."[70] The court used the holding in *State v. Oxenrider*[71] as further support for the proposition that a period of actual incarceration prohibits the trial court from granting probation

59. *Cramer*, No. 82AP-458 (LEXIS, States library, Ohio file).

60. *Fellhauer*, No. L-85-336 (LEXIS, States library, Ohio file).

61. *Fisher*, 26 Ohio App. 3d at 197, 499 N.E.2d at 344.

62. *Id.* at 198, 499 N.E.2d at 345.

63. State v. Ruth, No. C-820355 (Ohio Ct. App. Mar. 16, 1983) (LEXIS, States library, Ohio file).

64. *Id.* Stephen Ruth was found guilty on one count of trafficking in marijuana under section 2925.03(A)(7) and section 2925.03(E)(3) of the Ohio Revised Code. He was sentenced to a term of actual incarceration of six months and an indeterminate sentence of two to fifteen years. *Id.* His only assignment of error was that the trial court erred in deciding it did not have the power to suspend that portion of his sentence which exceeded the term of actual incarceration. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* (citing OHIO REV. CODE ANN. § 2929.51 (Anderson Supp. 1989)).

69. *Id.*

70. *Id.*

71. 60 Ohio St. 2d at 60, 396 N.E.2d at 1034 (holding that prisoners sentenced to a term of actual incarceration are ineligible for split-sentencing modification).

for that part of the sentence which exceeds the period of actual incarceration.[72]

D. *Supreme Court Opinion*

The Ohio Supreme Court found that a trial judge has no power to suspend that portion of an offender's sentence which is in excess of the period of actual incarceration.[73] The court first re-emphasized the position that the power to suspend a sentence is not inherent in the trial court.[74] The court then dismissed the Montgomery County court's and consequently the Hamilton County court's reliance on *Oxenrider* by stating that, although *Oxenrider* presents a similar issue, it does not specifically address the issue of the case under consideration.[75] The court declared that section 2951.02(F)(5) means that "a defendant sentenced to a term of actual incarceration is ineligible for probation," thus refusing to construe the statute in pari materia because it was "clear and unambiguous."[76]

IV. ANALYSIS

A. *Interpretation*

Ohio case law has established the limitations on the use of the in pari materia rule of statutory construction.[77] Courts in Ohio cannot ignore the plain and unambiguous language of a statute by applying rules of statutory construction.[78] Statutes should be construed in pari materia only when they relate to the same subject matter, in a case that calls for the application of both.[79] This rule is to be used only

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72. *Ruth*, No. C-820355 (LEXIS, States library, Ohio file).

73. State v. Smith, 42 Ohio St. 3d 60, 64, 537 N.E.2d 198, 203 (1989).

74. *Id.* at 61, 537 N.E.2d at 200. In support of this position, the court cited Madjorous v. State, 113 Ohio St. 427, 149 N.E. 393 (1925), *cert. denied*, 270 U.S. 662 (1926). The *Madjorous* decision quoted extensively from *Ex parte* United States, 242 U.S. 27 (1916), which held that trial courts do not have "the inherent power to suspend a sentence in a criminal prosecution, except to stay" pending an appeal. *Madjorous*, 113 Ohio St. at 433, 149 N.E. at 394-95.

75. 42 Ohio St. 3d at 63, 537 N.E.2d at 202. The court stated that *Oxenrider* did not imply that the trial court had any power to "modify any part of a sentence other than the six-month period of actual incarceration." *Id.*

76. *Id.*

77. The supreme court has declared that the in pari materia rule should only be used when the terms of a statute are doubtful or ambiguous. State v. Loyal Order of Moose, 151 Ohio St. 18, 26, 84 N.E. 498, 503 (1949) (statutory offense of advertising a lottery is clear and unambiguous and therefore not construed in pari materia with statutes governing the selling of lottery tickets).

78. *See* Board of Education v. Fulton County Budget Comm., 41 Ohio St. 2d 147, 156, 324 N.E.2d 566, 571 (1975) (construing a code section applicable to real property taxation); Sears v. Weimer, 143 Ohio St. 312, 316, 55 N.E.2d 413, 415 (1944) (declaring that the Ohio General Code section concerning revival of service by publication applies only when the opposing party had been personally served).

79. *See* Volan v. Keller, 20 Ohio App. 2d 204, 206, 253 N.E.2d 309, 310 (1969) (concern-

when the statute is ambiguous and is not to be used to give the statute a meaning contrary to the intent of the legislators.[80]

The Ohio Supreme Court interpreted the statutory provisions for actual incarceration as repealing the trial judge's ability to modify any portion of an offender's sentence through the use of section 2929.51 of the Ohio Revised Code.[81] This ruling disregards the intent of the legislature. The legislature intended the actual incarceration provisions to be an assurance that convicted felons would serve a certain period of time physically within the confines of a state penal institution.[82] Nothing in the statutory definition of actual incarceration refers to a prohibition suspending that part of the sentence which exceeds the term of actual incarceration.[83] This section only states that an offender cannot be placed on probation when he is sentenced to a period of actual incarceration but does not specify whether "sentence of imprisonment" applies to the entire sentence or only the term of actual incarceration.[84] The supreme court ruling revokes the statutorily mandated provisions for probation[85] in instances where actual incarceration is prescribed by statute.[86]

Because several Ohio appellate courts have come to differing conclusions on the issue, it stands to reason that the statutory provisions regarding actual incarceration and its relation to probation are not as "clear and unambiguous" as the Ohio Supreme Court believes. The interpretation of section 2951.02(F)(5) in pari materia with section 2929.51 would not defeat the purpose of the legislature.[87] In both *State v. Abney* and *State v. Smith*, the appellate courts explicitly hold that these provisions should be interpreted in pari materia because both provisions are sentencing statutes which relate to the same subject matter.[88] These provisions are not in conflict because the "indeterminate sentence statute is a general law [whereas] the actual incarceration statute refers to a specific penalty for a specific offense."[89] An in pari materia interpretation of these provisions would allow a trial judge to

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ing the interpretation of two code sections applicable to a worker's compensation case).

80. *Loyal Order of Moose*, 151 Ohio St. at 26, 84 N.E.2d at 503.

81. State v. Smith, 42 Ohio St. 3d 60, 63-64, 537 N.E.2d 198, 202-03 (1989).

82. *See* 1976 Ohio Op. Att'y Gen. No. 059 at 2-194.

83. *See* OHIO REV. CODE ANN. § 2929.01 (Anderson 1987).

84. *Id.*

85. OHIO REV. CODE ANN. § 2929.51 (Anderson 1987).

86. State v. Smith, 42 Ohio St. 3d 60, 63, 537 N.E.2d 198, 202 (1989).

87. *Id.*; State v. Abney, No. 1157 (Ohio Ct. App. May 4, 1981) (LEXIS, States library, Ohio file).

88. *Smith*, No. 85 CR 521 (LEXIS, States library, Ohio file); *Abney*, No. 1157 (LEXIS, States library, Ohio file).

89. *Abney*, No. 1157 (LEXIS, States library, Ohio file).

suspend that portion of an offender's sentence in excess of the period of actual incarceration. This interpretation is not inconsistent with the previously stated intent of the legislators and is consistent with the stated intent of the Attorney General who authored the actual incarceration provision.[90] This interpretation would also give full effect to both sections without having one section infringe upon the validity or authority of the other.[91]

B. Analogous State Statutes

Several states have similar statutes which serve as examples of more carefully drawn statutes that would have avoided the interpretational problems of Ohio's actual incarceration provision. Nevada avoids Ohio's dilemma by inserting prohibitions against suspending a sentence and granting probation in both its statute dealing with criminal punishment[92] and its statute concerning a court's power to grant probation.[93] Section 176.185.1 of the Nevada Revised Statutes provides the following:

> Whenever any person has been found guilty in a district court of a crime . . . the court, except in cases of murder of the first or second degree, kidnap[p]ing in the first degree, sexual assault, *or an offense for which the suspension of sentence or the granting of probation is expressly forbidden*, may by its order suspend . . . the sentence imposed and grant probation . . . .[94]

The statute providing for an additional penalty when a deadly weapon is used in the commission of a crime provides that "[t]he court shall not grant probation to or suspend the sentence of any person who is convicted of" any of the enumerated offenses.[95]

Kentucky avoids the problem presented in the Ohio statutes with a blanket prohibition against probation. "Notwithstanding other provisions of applicable law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provision of this section be stricken for" anyone who falls within one of the enumerated provi-

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90. *See supra* text accompanying notes 26-34.

91. *See Smith*, No. 85 CR 521 (LEXIS, States library, Ohio file); *Abney*, No. 1157 (LEXIS, States library, Ohio file).

92. NEV. REV. STAT. § 193.165.4 (Michie 1986).

93. NEV. REV. STAT. § 176.185.1 (Michie Supp. 1989).

94. *Id.* (emphasis added).

95. NEV. REV. STAT. § 193.165.4 (Michie 1986). This statute "demonstrates generally the legislature's concern regarding the increased use of deadly weapons . . . and its belief that such proscription will serve" as a deterrent and to reduce the "possibility of death or injury." Anderson v. State, 95 Nev. 625, 630, 600 P.2d 241, 244 (1979) (unarmed accomplice is subject to § 193.165.4, if fellow perpetrator is using a deadly weapon).

sions.[96] Kansas tackles the problem in a similar manner. Section 21-4618 of that state's code provides that "[p]robation . . . or suspension of sentence shall not be granted to any defendant who is convicted of [the enumerated crimes] and such defendant shall be sentenced to not less than the minimum sentence of imprisonment . . . ."[97]

Problems similar to those present in Ohio's statute can be found in the statutes of California, Illinois, and Alabama. California's statute, which deals with the use of destructive devices in the commission of a crime, provides that "[n]o person convicted of a violation of this chapter shall be granted probation, and the execution of the sentence imposed upon such person shall not be suspended by the court."[98] The section does not state whether an offender, convicted of one crime for which the applicable statute prohibits probation and a second for which the statute does not prohibit probation, would be allowed to have his sentence suspended on the second. Nor does the statute indicate whether the offender would not be allowed to have the sentence on the second offense suspended because the first offense disallows suspension of both. The Illinois statute[99] causes the same problem. That statute provides that "[a] period of probation, a term of periodic imprisonment or conditional discharge shall not be imposed for the [enumerated] offenses."[100] Finally, the Alabama Code states that "imposition of sentence shall not be suspended . . . nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment . . . ."[101] This statute leaves open the question of whether a trial judge

96. KY. REV. STAT. ANN. § 532.045(1) (Baldwin 1984). "This statute prohibits probation eligibility for certain convicts . . . ." Owsley v. Commonwealth, 743 S.W.2d 408, 410 (Ky. Ct. App. 1988) (section 532.045 does not violate either the equal protection clause of the fourteenth amendment or the one subject rule of the Kentucky Constitution).

97. KAN. STAT. ANN. § 21-4618 (1988). The purpose of this statute is to ensure that the offender will serve some amount of time in prison as a deterrent to use of a firearm. State v. Keeley, 236 Kan. 555, 560, 694 P.2d 422, 427 (1985) (interpreting section 21-4618 and declaring its purpose). When it applies, this statute prohibits the grant of probation and suspension of sentence. State v. Stuart, 223 Kan. 600, 606, 575 P.2d 559, 565 (1978) (section 21-4618 requires that a sentence be imposed therefore making a suspended sentence inapplicable).

98. CAL. PENAL CODE § 12311 (West 1982). This section prevents the trial court from granting probation for "certain unlawful acts." People v. Himmelsbach, 186 Cal. App. 3d 524, 540, 239 Cal. Rptr. 890, 901 (1986) (§ 12311 precludes the use of Penal Code § 654, which allows a court to sentence a defendant under alternate sections of the code when there are multiple offenses arising from the same act).

99. ILL. ANN. STAT. ch. 38, para. 1005-5-3(c)(2) (Smith-Hurd Supp. 1989).

100. *Id.* This statute prohibits the granting of probation for the specified offenses and requires the trial court to impose a sentence. *See* People v. Butler, 154 Ill. App. 3d 227, 229, 507 N.E.2d 56, 57 (Ill. App. Ct. 1987) (holding that para. 1005-5-3(c)(2) overrides the statutory provision which allows a trial judge to grant probation to a convicted sex offender in certain situations).

101. ALA. CODE § 20-2-81 (1984). "The legislature obviously intended that all persons convicted of trafficking would receive a minimum mandatory sentence . . . and that the sentence

can place an offender on probation pursuant to his service of the mandatory minimum term.

Drawing on these examples, making one change in Ohio Revised Code section 2929.01(C), which defines "actual incarceration,"[102] would bring the section into conformity with the supreme court's opinion. The change consists of deleting the phrase "his term of actual incarceration" from the second sentence and replacing it with "any portion of his sentence." That section would then read as follows:

> (C) "Actual incarceration" means that an offender is required to be imprisoned for the stated period of time to which he is sentenced that is specified as a term of actual incarceration. If a person is sentenced to a term of actual incarceration, the court shall not suspend *any portion of his sentence*, and shall not grant him probation or shock probation, pursuant to [the following sections].

This change would then bring section 2951.02(F)(5) into harmony with section 2929.51(A). Had this corrected statute been in effect in Smith's case, the trial court would have been precluded from granting probation.

C. *Effects*

This decision of the supreme court has several damaging effects. Justice Brown, in his dissenting opinion in *State v. Smith*, proffered one of the damaging effects of the decision: "In multiple-count cases, where offenses requiring actual incarceration are combined with those not requiring actual incarceration, the rule adopted by the majority becomes especially aberrational."[103] This holding will increase the bargaining power of a prosecuting attorney in a plea bargaining situation. Because the judge will not be able to suspend any portion of a sentence, the prosecuting attorney can use the threat of a term of actual incarceration as a lever to ensure that a defendant will plead guilty to a lesser included offense that does not require a term of actual incarceration. This decision also reduces the sentencing discretion of a trial court judge who has had an opportunity to observe a defendant over the course of a trial and determine the most appropriate form of sentence. Finally, this holding will contribute to further overcrowding at the presently overcrowded prisons in the state of Ohio[104] and overload the-

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would be served." *Ex parte* Jones, 444 So.2d 888, 890 (1983) (section 20-2-81 does not bar a trial judge from granting bail pending appeal).

102. OHIO REV. CODE ANN. § 2929.01(C) (Anderson 1987).

103. State v. Smith, 42 Ohio St. 3d 60, 64, 537 N.E.2d 198, 203 (1989) (Brown, J. dissenting).

104. The present prison population in the State of Ohio as of September 10, 1990 stands at 31,782. This represents a 9.7% increase over the previous year's population, which was 28,958 on

Adult Parole Authority.[105]

V. CONCLUSION

The Ohio Supreme Court has interpreted the actual incarceration statute to be clear and unambiguous, thus prohibiting a trial judge from suspending any portion of a sentence of an offender sentenced to a term of actual incarceration. This decision is contrary to previous case law and to the intent of the legislature. The supreme court should have avoided this result by interpreting the actual incarceration statute[106] and the statute concerning probation[107] in pari materia thus giving full effect to each and avoiding a clash between the two.

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Sept. 1, 1989. Figures available by phone from the Ohio Department of Corrections.

105. The majority opinion in *Smith* states that after a prisoner's term of actual incarceration has expired, he may apply for shock parole or parole, if he is eligible. 42 Ohio St. 3d at 64, 537 N.E.2d at 202.

106. OHIO REV. CODE ANN. § 2951.02(F)(5) (Anderson 1987).

107. OHIO REV. CODE ANN. § 2929.51(A) (Anderson 1987).