

OPINION NO. 90-090**Syllabus:**

1. An individual who is convicted, under R.C. 2907.02(A)(1)(b), on more than one count of forcible rape of a person less than thirteen years of age and who is sentenced to serve consecutive terms of imprisonment for life with respect to each count is not entitled, pursuant to R.C. 2929.41(E)(2), to an aggregate minimum term of imprisonment of fifteen years.
2. An individual who is convicted, under R.C. 2907.02(A)(1)(b), on more than one count of forcible rape of a person less than thirteen years of age and who is sentenced to serve consecutive terms of imprisonment for life with respect to each count is not eligible for parole, pursuant to R.C. 2967.13(F), after serving only ten full years' imprisonment. Before being eligible for parole, pursuant to R.C. 2967.13(F), he must serve ten full years' imprisonment on each count to which he has been sentenced to consecutive terms of imprisonment for life.

To: George W. Wilson, Department of Rehabilitation and Correction, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 21, 1990

I have before me your request for my opinion regarding the parole eligibility of an individual convicted and sentenced on more than one count of forcible rape of a juvenile. Specifically, you wish to know:¹

1. Is an individual who is convicted on more than one count of forcible rape of a person less than thirteen years of age and who is sentenced to serve a term of imprisonment for life with respect to each count entitled, under R.C. 2929.41(E)(2), to an aggregate minimum term of fifteen years, when the terms of imprisonment for life are to be served consecutively?
2. Is an individual, who is convicted on more than one count of forcible rape of a person less than thirteen years of age and who is sentenced to serve a term of imprisonment for life with respect to each count, eligible for parole, under R.C. 2967.13, in ten full years or must the individual serve ten full years with respect to each such term imposed, when the terms of imprisonment for life are to be served consecutively?²

The offense of, and penalty for, the forcible rape of a juvenile³ are set forth in R.C. 2907.02. Said section, in relevant part, provides:

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when either of the following apply:

....
 (b) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

....
 (B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(1)(b) of this section shall be imprisoned for life.

An individual convicted on a count of forcible rape of a juvenile, thus, must be sentenced to a term of imprisonment for life. R.C. 2907.02(B). *See generally State ex rel. Plain Dealer Publishing Co. v. Barnes*, 38 Ohio St. 3d 165, 167, 527 N.E.2d 807, 810 (1988) ("[t]he word 'shall' establishes a mandatory duty, absent a clear and unequivocal intent that it receive a construction other than its ordinary meaning" (citing *Dorrian v. Scioto Conserv. Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one))). Consequently, an individual convicted on more than one

¹ Pursuant to telephone conversations between members of our respective staffs, I have rephrased your specific questions.

² Your questions do not indicate whether the individual has been convicted of a specification charging him with having a firearm on or about his person or under his control, *see* R.C. 2929.71, or with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about his person or under his control, *see* R.C. 2929.72, while committing the forcible rapes. I will assume, therefore, that the individual has not been convicted and sentenced pursuant to either R.C. 2929.71 or R.C. 2929.72.

³ For purposes of this opinion, "juvenile" denotes a person less than thirteen years of age.

count must be sentenced to a term of imprisonment for life with respect to each count. These terms of imprisonment for life may be served either concurrently or consecutively. R.C. 2929.41.

I turn now to your first question which asks whether an individual who is convicted on more than one count of forcible rape of a juvenile and who is sentenced to serve a term of imprisonment for life with respect to each count is entitled, under R.C. 2929.41(E)(2), to an aggregate minimum term of fifteen years, when the terms of imprisonment for life are to be served consecutively. Under R.C. 2929.41(E)(2), "[c]onsecutive terms of imprisonment imposed shall not exceed...[a]n aggregate minimum term of fifteen years,...when the consecutive terms imposed are for felonies other than aggravated murder or murder." As indicated above, the offense of forcible rape of a juvenile is an aggravated felony. R.C. 2907.02(B). Hence, the plain language of R.C. 2929.41(E)(2) would appear to entitle an individual who is convicted on more than one count of forcible rape of a juvenile and who is sentenced to serve a term of imprisonment for life with respect to each count to an aggregate minimum term of fifteen years, when the terms of imprisonment for life are to be served consecutively. See generally *State v. Herbert*, 49 Ohio St. 2d 88, 94-95, 358 N.E.2d 1090, 1094 (1976) ("[i]t is a generally accepted rule that 'a court must first look to the language of the statute itself to determine the legislative intent,' and that the statute must be applied accordingly if its meaning is 'clear, unequivocal and definite'" (quoting *Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105-06, 304 N.E.2d 378, 381 (1973))).

The First District Court of Appeals in Ohio, however, in *State v. Gregory*, 8 Ohio App. 3d 184, 456 N.E.2d 839 (Ct. App. Hamilton County 1982) specifically held, where an individual is sentenced to two consecutive life terms for two convictions of forcible rape of a person less than thirteen years of age in violation of R.C. 2907.02(A)(3) (now R.C. 2907.02(A)(1)(b)),⁴ the fifteen-year limitation of R.C. 2929.41(E)(2)⁵ does not apply. In so holding, the court recognized that the language of then R.C. 2929.41(E)(2) did not specifically exclude the offense of forcible rape of a juvenile from its operation, that R.C. 2901.04(A) requires penalty statutes to be strictly construed against the state and liberally construed in favor of the accused, and that no individual can, in fact, serve two consecutive terms of imprisonment for life. *State v. Gregory*, 8 Ohio App. 3d at 185, 456 N.E.2d at 840-41. Notwithstanding these principles, the court, citing R.C. 1.51, stated that it was guided by the rule of statutory construction that a special provision prevails as an exception to a general provision. *Id.* at 185, 456 N.E.2d at 840. Specifically, the court found that R.C. 2907.02(B) is a special provision in that it imposes a term of imprisonment for life for the forcible rape of a juvenile, while R.C. 2929.41(E) is a general provision concerned with setting forth minimum aggregate terms when consecutive terms of imprisonment are imposed. *Id.* In addition, the court summarized:

Further, the penalty for forcible rape of a person under thirteen years has no minimum term; it is a full life term. Also, we believe that the legislative intent is manifest in the language of R.C. 2907.02(B): a person who forcibly rapes a child under thirteen years must serve a life term in prison without any minimum term. Such a rape is a special case. The offense is shocking, outrageous,

⁴ R.C. 2907.02(A)(3) was renumbered R.C. 2907.02(A)(1)(b) by 1985-1986 Ohio Laws, Part II, 4480 (Am. Sub. H.B. 475, eff. Mar. 7, 1986).

⁵ Pursuant to 1981-1982 Ohio Laws, Part I, 523 (Am. Sub. S.B. 199, eff. Jan. 1, 1983), R.C. 2929.41(E)(2) was renumbered R.C. 2929.41(E)(3). The General Assembly, however, in Am. Sub. S.B. 258, 118th Gen. A. (1990) (eff. Nov. 20, 1990) consolidated the provisions of R.C. 2929.41(E)(3) with R.C. 2929.41(E)(2). Hence, from January 1, 1983 to November 20, 1990 the fifteen year minimum term for consecutive sentences for felonies was set out in division (E)(3) of R.C. 2929.41.

abominable, and it has enduring effects on the child. A penalty equivalent to its enormity is imposed. Finally, logic says that if a man must serve a full life term for a single forcible rape of a child, then the legislature could not have meant that when he commits two such rapes, he is entitled to a fifteen-year minimum term. We hold that the consecutive life sentences are within the statutory authority granted by the legislature.

Id. at 185-86, 456 N.E.2d at 841.

A review of the foregoing, indicates that the opinion of the court in *State v. Gregory* is both well reasoned and persuasive. Accordingly, said opinion should be respectfully acknowledged and followed.⁶ See generally *Pilkington v. Saas*, 25 Ohio Law Abs. 663, 667 (Ct. App. Franklin County 1937) ("[d]ecisions of Courts of Appeal [sic] of other districts are not binding upon us, but in the interest of stability of law are to be followed, unless in our judgment the principles announced are inherently wrong"); *Dawson v. Kemper*, 1 Ohio Dec. 556, 561 (C.P. Hamilton County 1894) ("[w]hen a question of law has been directly decided by one of the circuit courts of Ohio, it should be followed by the other circuits, unless it clearly appears to the court that the decision is wrong" (quoting *State ex rel. Wentzell v. Fosdick*, 1 Ohio C.C. 265, 1 Ohio Cir. Dec. 145 (Cir. Ct. Hamilton County 1885) (syllabus))), *aff'd*, 11 Ohio C.C. 180, 5 Ohio Cir. Dec. 130 (Cir. Ct. Hamilton County 1896); *Marion Green Apts. v. Walter*, 40 Ohio Misc. 2d 1, 2, 531 N.E.2d 344, 345 (Marion Mun. Ct. 1988) ("[t]he Marion Municipal Court is not bound by the findings of the Tenth District Court of Appeals since Marion County is located in the Third Appellate District. We are, however, bound to consider the opinions of other appellate districts as 'persuasive authority'"); 1989 Op. Att'y Gen. No. 89-098 at 2-478 and 2-479 ("an Ohio Court of Appeals decision is given a great deal of respect and generally, unless inherently wrong, followed by the other [c]ourts of [a]ppeals in Ohio"). Consequently, an individual who is convicted, under R.C. 2907.02(A)(1)(b), on more than one count of forcible rape of a person less than thirteen years of age and who is sentenced to serve a term of imprisonment for life with respect to each count is not entitled, under R.C. 2929.41(E)(2), to an aggregate minimum term of fifteen years, when the terms of imprisonment for life are to be served consecutively. Accord *State v. Gregory*.

Your second question asks whether an individual, who is convicted on more than one count of forcible rape of a juvenile and who is sentenced to serve a term of imprisonment for life with respect to each count, is eligible for parole, under R.C. 2967.13, in ten full years or must the individual serve ten full years with respect to each such term imposed, when the terms of imprisonment for life are to be served consecutively. The language of R.C. 2967.13(F) provides, *inter alia*, that "[a] prisoner...serving a term of imprisonment for life for rape...becomes eligible for parole after serving a term of ten full years' imprisonment."

Therefore, under R.C. 2967.13(F), an individual convicted and sentenced, pursuant to R.C. 2907.02, to a term of imprisonment for life on a count of forcible rape of a juvenile is eligible for parole after serving ten full years' imprisonment. See generally *Ohio Dental Hygienists Ass'n v. Ohio State Dental Bd.*, 21 Ohio St. 3d 21, 23, 487 N.E.2d 301, 303 (1986) ("[a]bsent ambiguity, a statute is to be construed without resort to a process of statutory construction"); *State v. Herbert*. R.C. 2967.13, however, is silent as to the parole eligibility of an individual who is convicted on more than one count of forcible rape of a juvenile and

⁶ R.C. 2929.41 has been amended since the publishing of the First District Court of Appeals' decision in *State v. Gregory*, 8 Ohio App. 3d 184, 456 N.E.2d 839 (Ct. App. Hamilton County 1982). See Am. Sub. S.B. 258, 118th Gen. A. (1990) (eff. Nov. 20, 1990); 1987-1988 Ohio Laws, Part I, 1875 (Sub. H.B. 51, eff. Mar. 17, 1989); 1983-1984 Ohio Laws, Part I, 583 (Am. S.B. 210, eff. July 1, 1983); 1981-1982 Ohio Laws, Part I, 523 (Am. Sub. S.B. 199, eff. Jan. 1, 1983). The amendments to R.C. 2929.41, however, do not affect the interpretation of that section set out in *State v. Gregory*.

who is sentenced to serve a term of imprisonment for life with respect to each count, when such terms of imprisonment for life are to be served consecutively.

I note that the Fourth District Court of Appeals in Ohio addressed this very issue in *State ex rel. Gregory v. Stein*, No. 1572, slip op. at 5 (Ct. App. Scioto County 1986) (unreported) and stated that:

Although the rape provision in division (F) is silent as to whether the eligibility periods for consecutive terms should be added together, common sense dictates that a person serving two consecutive terms will be eligible for parole after serving two consecutive ten year parole eligibility terms. We find nothing contrary in the statute.

In reaching this conclusion, the court rejected the applicability of the language of R.C. 2967.13(F), which states, in pertinent part, "[a] prisoner...*serv*ing a minimum term or terms, whether consecutive or otherwise, of imprisonment longer than fifteen years, imposed under any former law of this state, becomes eligible for parole after serving a term of ten full years' imprisonment." (Emphasis added.) Instead, the court relied on the reasoning in *State v. Gregory* that an individual serving a term of life imprisonment for the forcible rape of a juvenile, is not serving a minimum term or terms, and, therefore, this portion of R.C. 2967.13(F) does not govern the individual's parole eligibility date. *State ex rel. Gregory v. Stein*, slip op. at 4. The court further found that this interpretation is supported by the language of "[d]ivisions (G), (H), and (I) [of R.C. 2967.13 which] provide that if a prisoner sentenced to life imprisonment under the new death penalty laws is also sentenced to another consecutive term or terms, the parole eligibility times must be added together." *State ex rel. Gregory v. Stein*, slip op. at 5.

The opinion of the court in *State ex rel. Gregory v. Stein*, however, is an unpublished opinion. As a result, the opinion is not considered controlling authority, "except between the parties thereto when relevant under the doctrines of the law of the case, res judicata or collateral estoppel or in a criminal proceeding involving the same defendant." Supreme Court Rules for the Reporting of Opinions, Rule 2(G)(1); see 1990 Op. Att'y Gen. No. 90-036 at 2-147; see also *State ex rel. Graves v. State*, 9 Ohio App. 3d 260, 262, 459 N.E.2d 913, 917 (Ct. App. Franklin County 1983). An unpublished opinion, however, "shall be considered *persuasive authority* on a court, including the deciding court, in the judicial district in which the opinion was rendered." Supreme Court Rules for the Reporting of Opinions, Rule 2(G)(2) (emphasis added); see Op. No. 90-036 at 2-147; cf. *Bumiller v. Walker*, 95 Ohio St. 344, 351, 116 N.E. 797, 800 (1917) ("[o]rdinarily this court does not regard its unreported cases as judicial authority, for the reason that it is generally impossible to ascertain the concrete legal propositions involved and decided; but where a single question was involved, and that succinctly stated and decided, it cannot be said that such unreported case is wholly without influence"); *Thompson v. Denton*, 95 Ohio St. 333, 338, 116 N.E. 452, 454 (1917), *overruled on other grounds sub nom. Forest City Inv. Co. v. Haas*, 110 Ohio St. 188, 143 N.E. 549 (1924). Additionally, when a court of appeals in Ohio has rendered a persuasive opinion, whether officially or unofficially published, or unpublished, on the interpretation and application of a statute, the interpretation of the statute by the court of appeals should be followed. See Supreme Court Rules for the Reporting of Opinions, Rule 2(G); Op. No. 90-036 at 2-147; cf. *Gustin v. Sun Life Assur. Co. of Canada*, 154 F.2d 961, 962-63 (6th Cir. 1946) (where an unreported opinion of a court of appeals of Ohio is the only available data as to what the state law is on the issue presented in a federal court case, and there is no reason to suppose that the court of appeals will depart from its ruling or that the Ohio Supreme Court will grant a review thereon, the federal court will follow such unreported opinion), *cert. denied*, 328 U.S. 866 (1946); *State v. George*, 50 Ohio App. 2d 297, 309, 362 N.E.2d 1223, 1231 (Ct. App. Franklin County 1975) ("[i]t seems to be a well established general rule that what a given court has stated in the past on a subject is important to the litigants, as well as to the court. In this regard, legal precedents provide a guiding principle in the presenting and arguing of cases, as well as in their decisions. We believe this to be so whether or

not a previously announced position concerning the law is contained in an officially reported case"). *But see* R.C. 2503.20.⁷

I find the opinion of the court in *State ex rel. Gregory v. Stein* persuasive and, therefore, the interpretation of R.C. 2967.13 set out in such opinion should be respectfully acknowledged and followed.⁸ Accordingly, an individual who is convicted, under R.C. 2907.02(A)(1)(b), on more than one count of forcible rape of a juvenile and who is sentenced to serve a term of imprisonment for life with respect to each count is eligible for parole, pursuant to R.C. 2967.13(F), after serving ten full years' imprisonment with respect to each such term imposed, when the terms of imprisonment for life are to be served consecutively.⁹

Therefore, it is my opinion and you are hereby advised that:

1. An individual who is convicted, under R.C. 2907.02(A)(1)(b), on more than one count of forcible rape of a person less than thirteen years of age and who is sentenced to serve consecutive terms of imprisonment for life with respect to each count is not entitled, pursuant to R.C. 2929.41(E)(2), to an aggregate minimum term of imprisonment of fifteen years.

⁷ R.C. 2503.20, which provides for the publication of court reports, provides, in pertinent part, "[a]ll such cases shall be reported in accordance with this section before they are recognized by and receive the official sanction of any court." As I stated in 1990 Op. Att'y Gen. No. 90-036 at 2-148 n.2, some courts have found the above quoted language of R.C. 2503.20, mandatory, *National Surety Corp. v. Blackburn*, 62 Ohio Law Abs. 158, 159, 106 N.E.2d 780, 780-81 (Ct. App. Franklin County 1951), *appeal dismissed mem. for the reason that no debatable constitutional question exists*, 154 Ohio St. 564, 97 N.E.2d 8 (1951); *Bevan v. Century Realty Co.*, 64 Ohio App. 58, 66, 27 N.E.2d 777, 781 (Ct. App. Mahoning County 1940), *appeal dismissed mem. for the reason that no debatable constitutional question exists*, 136 Ohio St. 549, 27 N.E.2d 148 (1940), while other courts have determined the language to be directory, *Gustin v. Sun Life Assur. Co. of Canada*, 154 F.2d 961 (6th Cir. 1946), *cert. denied*, 328 U.S. 866 (1946); *State v. George*, 50 Ohio App. 2d 297, 362 N.E.2d 1223 (Ct. App. Franklin County 1975). While expressing no opinion as to which line of cases is the appropriate interpretation of R.C. 2503.20, I noted in Op. No. 90-036 at 2-148 n.2, that the Ohio Supreme Court has, however, through the promulgation of the Supreme Court Rules for the Reporting of Opinions, expressly authorized the use of unofficially published and unpublished opinions in certain circumstances. *See* Supreme Court Rules for the Reporting of Opinions, Rules 2(G) and 2(H).

⁸ Since the rendering of the *State ex rel. Gregory v. Stein*, No. 1572 (Ct. App. Scioto County 1986) (unreported) decision, R.C. 2967.13 has been amended. *See* 1987-1988 Ohio Laws, Part III, 4853 (Sub. H.B. 708, eff. April 19, 1988); 1987-1988 Ohio Laws, Part II, 3100 (Am. Sub. H.B. 261, eff. Nov. 1, 1987); 1987-1988 Ohio Laws, Part I, 1761 (Am. H.B. 5, eff. Sept. 28, 1987). None of the aforementioned amendments, however, affects the interpretation of R.C. 2967.13 by the Fourth District Court of Appeals in Ohio in *State ex rel. Gregory v. Stein*.

⁹ I note that various sections of the Revised Code and Administrative Code provide provisions for the reduction of the parole eligibility time. *See, e.g.*, R.C. 2967.19; R.C. 2967.193; R.C. 5145.11; R.C. 5145.12; 9 Ohio Admin. Code 5120-2-04; 9 Ohio Admin. Code 5120-2-05; 9 Ohio Admin. Code 5120-2-06; 9 Ohio Admin. Code 5120-2-07; 9 Ohio Admin. Code 5120-2-08; 9 Ohio Admin. Code 5120-2-10; 9 Ohio Admin. Code 5120-2-12. Since you have not asked about their effect on the parole eligibility date, I express no opinion concerning their effect on such date.

2. An individual who is convicted, under R.C. 2907.02(A)(1)(b), on more than one count of forcible rape of a person less than thirteen years of age and who is sentenced to serve consecutive terms of imprisonment for life with respect to each count is not eligible for parole, pursuant to R.C. 2967.13(F), after serving only ten full years' imprisonment. Before being eligible for parole, pursuant to R.C. 2967.13(F), he must serve ten full years' imprisonment on each count to which he has been sentenced to consecutive terms of imprisonment for life.