

NO. 07-0052

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 87692

STATE OF OHIO,

Plaintiff-Appellee

-vs-

CURTIS SIMPKINS,

Defendant-Appellant

MERIT BRIEF OF APPELLEE

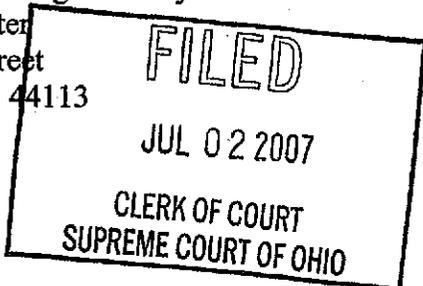
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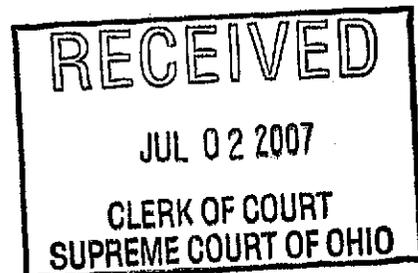


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STATE OF OHIO,

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-vs-

CURTIS SIMPKINS

Defendant-Appellant

MERIT BRIEF OF APPELLEE

INTRODUCTION AND SUMMARY OF ARGUMENT

Ohio Law very clearly and unambiguously provides that a criminal sentence that lacks a statutorily mandated postrelease control term is void, and provides that the proper remedy is to resentence the defendant prior to the expiration of the original prison term. See R.C. 2929.191; *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774, *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126; *State ex rel Cruzado v. Zaleski*, 111 Ohio St.3d 353, 856 N.E.2d 263.

Because the trial court derives its sentencing authority from the General Assembly, the concept of waiver should have no bearing on the trial court's ability to impose a lawful criminal sentence, or to correct a void criminal sentence. For that reason, the State respectfully requests that this Honorable Court reject a proposition of law that extends the doctrine *res judicata* to

criminal sentences that are void. The trial court's ability to correct an illegal criminal sentence should not depend on how it became aware of the problem, but rather upon its basic statutory duty to impose a lawful sentence. Thus, the trial court's authority to impose a lawful criminal sentence is not an error that is merely voidable at the request of one of the parties, but void ab initio (and subject to correction on the court's own motion or the motion of either party).

STATEMENT OF THE CASE AND RELEVANT FACTS

The State of Ohio substantially agrees with the Statement of the Case and Facts set forth in defendant-appellant's merit brief. The State would also note that the defendant in this case pled guilty to two counts of rape of a 10 year-old girl, and one count of gross sexual imposition involving a 6 year-old girl. According to the Department of Rehabilitation and Corrections Web Site, defendant's prison term expired on January 2, 2006, and he is currently serving his postrelease control term. See Offender Search, available at <http://www.drc.state.oh.us/OffenderSearch/Search.aspx> (last viewed June 25, 2007).

LAW AND ARGUMENT

DEFENDANT-APPELLANT'S PROPOSITION OF LAW: A defendant who has been sentenced to a term of imprisonment that does not include postrelease control may not be sentenced anew in order to add postrelease control unless the State has challenged the failure to include postrelease control in a timely direct appeal.

1. Ohio law allows the trial court to correct a felony sentence (that is void for lack of a mandatory postrelease control term) if the sentence has not yet expired.

Despite the trial court having advised defendant at the time of his guilty plea that he faced five years of postrelease control, defendant's original June 11, 1998 sentencing judgment lacked the statutorily mandated term of postrelease control (or "PRC"). Defendant pled guilty to rape and gross sexual imposition, both of which are felony sex offenses that require a mandatory five-year term of postrelease control pursuant to R.C. §2967.28(B)(1). In December, 2005, upon the

State's motion, the trial court resentenced defendant prior to the expiration of his sentence in order to include the mandatory postrelease control term.

The resentencing procedure is now well established for criminal defendants whose felony sentences lack the statutorily mandated PRC terms. See R.C. §2929.191¹ (providing a statutory procedure for resentencing where defendant's original, unexpired sentence lacked a PRC term). Because a trial court has a statutory duty to provide notice of post release control at the sentencing hearing, any sentence imposed without such notification is contrary to law. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶ 23, "[W]here a sentence is void because it does not contain a statutorily mandated term, the proper remedy is, likewise, to resentence the defendant." *Id.*, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774.

Defendant maintains that the "after the fact" resentencing examined in *Hernandez* measures from the original sentencing judgment (rather than the expiration of the journalized prison term). (Apt. Br. at 2). This Honorable Court's *Hernandez* opinion makes clear, however, that "after-the-fact" resentencing refers to the expiration of the inmate's original journalized prison term. *Id.*, at ¶ 31; see also *State ex rel Cruzado v. Zaleski*, 111 Ohio St.3d 353, 856 N.E.2d 263 at ¶ 23 ("* * * the trial court's noncompliance with the truth-in-sentencing provisions could not be cured by resentencing *after* the journalized prison term had expired * * *"). *Hernandez* therefore stands for the proposition that a sentencing court may no longer make changes or corrections to a sentence after the defendant has finished serving his original sentence. *Id.*, at ¶ 31. In *State ex rel Cruzado v. Zaleski*, *supra*, this Honorable Court explained that where a defendant's original sentence had not yet expired, resentencing was proper. "[C]ruzado's sentence had not yet expired when Judge Zaleski resentenced him. By contrast, in

¹ R.C. §2929.191 did not become effective until June 11, 2006, well after defendant had been resentenced in this case.

[*Hernandez, supra*], we emphasized that the defendant’s journalized sentence had already expired, and thus, resentencing was no longer option.” *Cruzado, supra*, at ¶ 27; see also *State v. Rutherford*, Champaign App. No. 06CA13, 2006-Ohio-5132, at ¶ 10 (“* * * the offender cannot be resentenced if he has completed his prison term because the omission in the sentence the court imposed is then no longer subject to correction. The correction must be made while the term of imprisonment continues and post-release sanctions are not yet available”). Applying *Jordan, supra*, *Hernandez, supra*, and *Zaleski, supra*, the trial court clearly had adequate legal justification to resentence a criminal defendant whose original prison sentence (which was void for lack of a mandatory PRC term) had not yet expired.

2. The trial court retains jurisdiction to correct a void felony sentence despite the State’s failure to appeal.

It should be axiomatic that a party to a criminal case cannot waive the Court’s authority to impose a valid felony sentence as prescribed by the General Assembly. Defendant argues that, under the doctrine of *res judicata*, the State’s failure to appeal the original sentence deprived the trial court of jurisdiction to correct his void sentence. (Apt. Br. at 3-5). The gravamen of defendant’s argument (failure to appeal forfeits the State’s “chance to have postrelease control included in the sentence”) implies that the trial court derives its jurisdiction to impose a valid felony sentence from the prosecutor’s appeal (or lack thereof). (Apt. Br. at 3). Defendant’s proposition of law lacks merit and should be rejected.

As explained above, a felony sentence that does not contain a statutorily mandated PRC term is invalid and void. See *Jordan, supra*, at ¶ 23. “The function and duty of a court is to apply the law as written.” *Id.* “A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law.” *State*

v. *Ramey*, Franklin App. No. 06AP-245, 2006-Ohio-6429, at ¶ 12, quoting *Colgrove v. Burns* (1964), 175 Ohio St.437, 438, 195 N.E.2d 811.

Ohio law clearly states that trial courts have no power to modify felony sentences except under very limited circumstances. “Once a valid sentence has been executed, a trial court no longer has the power to modify the sentence, except as provided by the General Assembly.” *State v. Addison* (1987), 40 Ohio App.3d 7, 530 N.E. 2d 1335, syllabus. “It has long been recognized that once the trial court has ordered into execution a valid sentence, it may no longer either amend or modify that sentence except under very limited circumstances.” *State v. Clark*, Cuyahoga App. No. 82519, 2003-Ohio-3969, at ¶ 20, citing *State v. Garretson* (2000), 140 Ohio App.3d 554, 558, 48 N.E.2d 560, and *Addison, supra*. “In one circumstance, a trial court retains jurisdiction to correct ‘void’ sentencing orders, which are defined as those made in an attempt ‘to disregard statutory requirements.’” *Clark, supra*, at ¶ 20, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d 774. In *Cruzado, supra*, this Honorable Court held that the trial court’s failure to include statutorily required PRC in a sentence falls under the first criteria outlined in *Garretson, supra*. *Cruzado, supra*, at ¶ 20. “In another, a trial court may correct clerical errors, which are mistakes of transcription or omission that exist in an order.” *Clark, supra*, at ¶ 20, citing Crim. R. 36, *State v. Garretson, supra* at 559, 748 N.E.560, and *State v. Brown* (2000), 136 Ohio App.3d 816, 819-820, 737 N.E.3d 1057.

Defendant nevertheless maintains that the State’s failure to appeal the original void sentence strips the trial court of jurisdiction to impose the statutorily correct sentence. The State submits that the trial court retains jurisdiction to correct a void sentencing judgment regardless of whether one of the parties has appealed. The trial court’s sentencing mistake—and the prosecutor’s failure to appeal an invalid sentence—should not become “* * * a game in which a

wrong move by the judge means immunity for the prisoner.” *Bozza v. United States* (1947), 33 U.S. 160, 166-67, 67 S.Ct. 345, 649. Instead, the trial court retains jurisdiction to correct invalid felony sentences because “society’s interest in enforcing the law, and in meting out the punishment the legislature has deemed just, must be served.” *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d 774. In *State v. Thomas* (1996), 111 Ohio App.3d 510, 676 N.E.2d 903, discretionary appeal not allowed (1996), 77 Ohio St.3d 1469, 673 N.E.2d 135, the Eighth District offered a well reasoned explanation why the prosecutor’s failure to appeal an invalid sentence does not affect the trial court’s ability to impose the statutorily correct sentence:

The issue then for our resolution is whether the prosecutor's failure to object to an erroneous sentence of less than the statutory minimum or raise the issue during the pendency of an appeal precludes the court from correcting such a sentence.

Here, we must examine the role of the trial court, which is to apply the law as written. R.C. 5145.01 states that a trial court shall impose no term of imprisonment “less than the minimum term provided for such felony.”

Clearly, the prosecutor's actions on an appeal cannot, in any manner, affect the duty of the trial court to impose sentence according to law. Whatever position the prosecutor assumed with respect to appellant's assignments of error on the first appeal of this case does not change the fact that the trial court did not impose sentence for the firearm specification *as mandated by law*.

We do not find any authority for the proposition that failure of a prosecutor to raise an issue, either before the sentencing court or on appeal, in any way changes the duty of the court to impose a mandatory sentence prescribed by the legislature. Accordingly, the trial court properly resentenced this appellant and we find no merit to this assignment of error.

Id., at 512-13; see also *Ramey, supra*, at ¶ 12 (rejecting the argument that the state’s failure to raise the sentencing error through an appeal meant that sentence correction was either waived or barred by *res judicata*). The holding in *Thomas, supra* (which concerned a trial court’s post-appeal resentencing in order to include imprisonment for a mandatory firearm specification) applies squarely to the facts of this case. Because the prosecutor cannot waive the trial court’s

duty to impose a valid sentence as required by the General Assembly, defendant's proposition of law should be rejected.

The trial court also resentenced defendant prior to the June 11, 2006 enactment of R.C. §2929.191, which the General Assembly passed following this Court's judgment in *Hernandez, supra*. "The General Assembly could create an exception to *res judicata* if it wished." *LaBarbera v. Batsch* (1967), 10 Ohio St. 2d 106, 111, 227 N.E.2d 55. Because R.C. §2929.191 contains an explicit provision allowing a trial court to resentence a criminal defendant whose original sentence lacked a postrelease control term, and does not condition that authority on whether the State appealed, it is clear that the General Assembly did not intend for the doctrine of *res judicata* to apply to PRC resentencings. The General Assembly's enactment of R.C. §2929.191 offers further evidence that the doctrine of *res judicata* has no application to a trial court's correction of a void and illegal sentence.

In his brief, defendant cautions against a principle of law that exempts void sentencing judgments from the doctrine of *res judicata*, which he claims would open "*** a Pandora's box that could cause defendants to re-open cases dating back to 1996, the advent of S.B.2." (Apt. Br. at 4). The question of whether a challenge to a void sentencing judgment would fall outside of R.C. §2953.21 (Ohio's postconviction statute) or *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus,² is not before the Court. Regardless, the door to this so-called "Pandora's Box" hinges on whether a sentence is voidable (and subject to an R.C. §2953.21 challenge) or simply void ab initio. In *State v. Peeks*, Franklin App. No. 05-AP-1370,

² "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant* *** on an appeal from that judgment." (emphasis added).

2006-Ohio-6256, at ¶¶ 9-10,³ the Tenth District explained the distinction between void and voidable sentencing errors:

{¶ 9} * * * A voidable error can be waived. See *State v. Barnes* (1982), 7 Ohio App.3d 83, 85 (failing to object to voidable order waived any error); *State v. Grimm* (Apr. 25, 1997), Miami App. No. 96CA-37 (failure to object to voidable defect waives issue on appeal); *Trotwood v. Wyatt* (Jan. 21, 1993), Montgomery App. No. 13319 (voidable defects waived on appellate review if not raised below). The distinction between void and voidable judgments is crucial to the resolution of this case.

{¶ 10} A void judgment is one rendered by a court lacking subject-matter jurisdiction or the authority to act. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶ 12; *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. A voidable judgment, on the other hand, is a judgment rendered by a court having jurisdiction/authority and, although seemingly valid, is irregular and erroneous. *State v. Montgomery*, Huron App. No. H-02-039, 2003-Ohio-4095, at ¶ 9. Generally, sentencing errors are not jurisdictional and, therefore, do not render the sentence void. See *State ex rel. Massie v. Rogers* (1997), 77 Ohio St.3d 449, 450; *Majoros v. Collins* (1992), 64 Ohio St.3d 442, 443 (noting that “[w]e have consistently held that sentencing errors are not jurisdictional * * *.”); *Johnson v. Sacks* (1962), 173 Ohio St. 452, 454 (“The imposition of an erroneous sentence does not deprive the trial court of jurisdiction.”).

(Emphasis added). As explained by this Honorable Court’s judgments in *Beasley, supra*, at 75, *Jordan*, at ¶ 23, and *Cruzado, supra*, at ¶ 20, the trial court’s failure to include a mandatory PRC term renders the sentence void because the it disregards the statutory requirements. Because a felony sentence that lacks a mandatory PRC term is simply void, it is proper that the trial court, upon its own motion or the motion of either party (at any time prior to the expiration of the original prison term), has jurisdiction to correct a void sentence within the meaning of *Beasley, supra*, *Jordan, supra*, and *Cruzado, supra*. As the Tenth District noted in *Ramey, supra*, “[a] trial court’s authority to correct a void sentence does not hinge upon how the court became aware

³ This Honorable Court has accepted jurisdiction of *Peeks*, and held it pending decision in 2006-1245 and 2006-1383, *State v. Payne*, Franklin App. No. 05AP-517, 2006-Ohio-2552. 10/04/06 *Case Announcements*, 2006-Ohio-5083. *Payne* deals with “[w]hether the lack of objection in the trial court waives or forfeits the *Blakely* issue for purposes of appeal when the sentencing occurred after the *Blakely* decision was announced.” *Id.*

of its illegality.” *Ramey, supra*, at 13, citing *State v. Bush* (Nov. 30, 1999), Franklin App. No. 99AP-4, 1999 WL 1072487.

Because the issue in this case solely concerns those cases with criminal sentences that are void due to a disregard for the statutory requirements, defendant’s “Pandaro’s Box” analogy tends to overstate both the problem and the solution. Defendant contends this would have the effect of resetting all time limits for every direct appeal and collateral attack in a criminal case. (Apt. Br. at 4-5). For those unique errors that might arise out of a separate and distinct resentencing procedure, a direct appeal or collateral attack could be the appropriate means to seek a remedy from the new resentencing error (as the defendant has done in this case). In *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, this Honorable Court explained that under the doctrine of *res judicata*, “[w]hen a defendant fails to appeal the sentence for a certain offense, he cannot take advantage of an error in the sentence for an entirely separate offense to gain a second opportunity to appeal upon resentencing.” *Id.*, at ¶ 19. Applying *Saxon* to this situation, when a trial court corrects a void sentence, only those errors that arise from the resentencing procedure itself should be subject to a new direct appeal or collateral attack. *Saxon* strongly suggests that any error that should have been raised earlier following the original judgment of conviction would be subject to *res judicata*. *Id.* The State therefore submits that any trial errors, or *voidable* (or non-jurisdictional) sentencing errors should still be subject to direct appeal or collateral attack from the time of the original judgment of conviction and sentence. Likewise, the State submits that a defendant’s failure to raise a trial error or *voidable* (non-jurisdictional) sentencing error within the time limit for direct appeal or collateral attack implicates *res judicata* doctrine as formulated in *State v. Perry, supra*.

Following *Jordan, supra*, and *Beasley, supra*, the trial court's original sentencing judgment was void, and the doctrine of *res judicata* did not strip the trial court of its jurisdiction to impose a valid sentence that included the statutorily mandated postrelease control term.

3. Applying the doctrine of *res judicata* to defeat the statutory requirements of Ohio felony sentencing law would be unjust.

This Honorable Court has previously declined to apply the *res judicata* doctrine where, under certain circumstances, it would be unjust to do so. See generally, *State v. Murnahan* (1992), 63 Ohio St.3d 60, 66, 584 N.E.2d 1204. If, as defendant urges, the prosecutor's failure to appeal a void sentence stripped the trial court of its power to impose a statutorily required sentence, the *res judicata* doctrine would defeat Ohio's felony sentencing laws. Society's "interest in enforcing the law, and in meting out the punishment the legislature has deemed just" would be wholly defeated whenever the trial judge makes a sentencing mistake and the prosecutor fails to appeal. See *Beasley, supra*, at 14 Ohio St.3d 75, 471 N.E.2d 775. The clear implication behind defendant's proposition is that one the parties can waive the basic statutory requirements of a lawful felony sentence. Instead, the State submits that neither party in a criminal case has the power to alter, through waiver or otherwise, the trial court's mandate to follow the law when imposing a criminal sentence.

This case will stand as precedent for every criminal defendant sentenced since 1996 whose felony sentence lacked the statutorily required PRC term. Elevating defendant's proposition to the status of law would give a windfall to all such criminal defendants, who will escape PRC's safety net of supervision and rehabilitation. If *res judicata* bars a trial judge from imposing a lawful sentence, it would also overcome the legislature's intent that offenders receive appropriate punishments and therefore defeat the ends of public justice. "Res judicata is not a

shield to protect the blameworthy.” *Ardary v. Stepien*, Cuyahoga App. No. 82950, 2004-Ohio-630, at ¶ 29. It has been observed that

The doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time, but rather a rule of fundamental and substantial justice, or public policy and of private peace. The doctrine may be said to adhere in legal systems as a rule of justice. Hence, the position has been taken that the doctrine of *res judicata* is to be applied in particular situations as fairness and justice require, *and that it is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice.*

Grava v. Parkman Twp. (1995), 73 Ohio St.3d 379, 386 653 N.E.2d 226 (Douglas, J. dissenting), quoting 46 American Jurisprudence 2d (1994), 786-787, Judgments, Section 522 (emphasis in original).

The General Assembly has appropriately determined that certain classes of offenders, such as the defendant in this case, *must be placed in postrelease control*. See R.C. 2967.28. The defendant in this case pled guilty to two counts of rape of a 10 year-old girl, and one count of gross sexual imposition involving a 6 year-old girl. If the trial judge lacks jurisdiction to include PRC in defendant’s sentence (as required by Ohio’s felony sentencing laws), this defendant will have absolutely no PRC accountability after his prison release. There is no question that, under the facts and circumstances of this case, the doctrine of *res judicata* would create a substantial injustice if it deprives the public of lawful and valid criminal sentence.

Accordingly, the State submits this case presents the rare set of circumstances where it would be unjust to apply the doctrine of *res judicata*. The State respectfully requests that this Honorable Court therefore reject defendant’s proposition of law.

- 4. The trial court did not implicate defendant’s due process or double jeopardy rights when it resentenced defendant to include a mandatory postrelease control term.**

Within his proposition of law, defendant also maintains that the trial court's resentencing judgment implicated his due process and double jeopardy rights by adding a postrelease control term. (Apt. Br. at 5-6). In *Beasley, supra*, this Honorable Court specifically held that the trial court does not violate a defendant's double jeopardy rights by correcting a void sentence:

Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void. The applicable sentencing statute in this case, R.C. 2929.11, mandates a two to fifteen year prison term and an optional fine for felonious assault. The trial court disregarded the statute and imposed only a fine. In doing so the trial court exceeded its authority and this sentence must be considered void. Jeopardy did not attach to the void sentence, and, therefore, the court's imposition of the correct sentence did not constitute double jeopardy.

Id., at 75; see also *Thomas, supra*, at 111 Ohio App.3d 514, 676 N.E.2d 905 (trial court that resentenced a defendant to include an omitted prison term for a firearm specification did not violate defendant's double jeopardy rights). In *State v. McColloch* (1991), 78 Ohio App.3d 42, 603 N.E.2d 1106, the Third District explained that "an invalid sentence for which there is no statutory authority is, likewise, a circumstance under which there can be no expectation of finality" for purposes of the Double Jeopardy clause. *Id.*, at 46.

Defendant contends that the trial court's resentencing (which took place after he had served most of his original sentence) deprived him of an expectation of finality, and therefore violated his due process rights. Both the Tenth and Second District have rejected similar due process claims brought after the trial court resentenced defendant to include a mandatory PRC term. See *Raney, supra*, at ¶¶ 18-19; *Rutherford, supra*, at ¶ 4. This Honorable Court has specifically held that a trial court may resentence a defendant to include a mandatory PRC term, if it does so prior to the expiration of the defendant's original prison sentence. *Cruzado, supra*, at ¶ 28 ("Because Cruzado's sentence had not yet been completed when he was resentence, Judge Zaleski was authorized to correct the invalid sentence to include the appropriate,

mandatory postrelease control term.”). In this cited passage from *Cruzado*, this Honorable Court also relied on *State v. Ramey*, 136 Ohio Misc.2d 24, 2006-Ohio-885, a Franklin County Court of Common Pleas case in which the defendant received his postrelease control resentencing one day prior to the expiration of his original prison term.

None of the cases cited by defendant in support of his due process claim have actually held that a trial court’s correction of an illegal sentence must be carried out within a specific time period prior to the expiration of the original prison term. Defendant cites to *DeWitt v. Ventetoulo* (C.A. 1, 1993), 6 F.3d 32, 35, a case in which the defendant had been released from prison and paroled several years after having his life sentence (improperly) suspended by a Rhode Island trial court. Eight months after his prison release, the Rhode Island prosecutor sought to have DeWitt’s life sentence reinstated after DeWitt was involved in another violent incident. *Id.*, at 33-4. The *DeWitt* Court held that DeWitt’s due process rights were violated when the trial court resentenced defendant to his earlier life sentence. *Id.*, at 35-6. Among other factors, the *DeWitt* Court emphasized the fact that DeWitt had already been released from prison (and had reestablished himself in the community) when the trial court increased his sentence by reimposing his life term. The *DeWitt* Court explained:

As we have said, there are numerous cases allowing a sentence to be increased after it was initially imposed in error. In virtually all that we have discovered, there has been some distinguishing circumstance that separates that case from DeWitt's, for example, **because (as is often true) the defendant was still in prison**, or the interval between the original sentence and its correction was brief, or because the defendant almost certainly knew or should have known that an error had been made. Conversely, we are completely satisfied * * * that due process must in principle impose an outer limit on the ability to correct a sentence after the event.

Id., at 36 (emphasis added). *DeWitt*, therefore, is more akin to *Hernandez, supra*, in which this Honorable Court held that a trial court retains authority to correct void sentencing orders as long

as the defendant has not finished serving his original prison term. *Hernandez, supra*, at ¶¶ 28-29.

The *DeWitt* Court explained that while “[t]he Constitution contains no general rule that prohibits a court from increasing an earlier sentence where the court finds that it was erroneous and that a higher sentence was required by law,” there must be some “outer limit” to the time in which a trial court can correct a void sentence. *Id.*, at 34. This Honorable Court has clearly and unambiguously set the expiration of the original prison term as the “outer limit” for a trial court to correct an illegal sentence in order to include a statutorily mandated PRC term. *Hernandez, supra*, at ¶ 28-9. *Hernandez* focused heavily on whether the inmate had notice of his term of supervision before he or she violates postrelease control. “When an offender violates community control conditions and that offender was not properly notified of the specific term that would be imposed, an after-the-fact reimposition of community control would totally frustrate the purpose behind [statutory] notification, which is to make the offender aware *before a violation* of the specific prison term that he or she will face for a violation.” *Hernandez, supra*, at ¶ 29. Consistent with *Hernandez*, the trial court’s resentencing of defendant prior to the expiration of his original prison term did not violate defendant’s due process rights.

Finally, defendant’s cites *Hudson v. United States* (1997), 522 U.S. 93, 98-99, in support of a brief argument that the trial court violated defendant’s fifth amendment protection against multiple punishments when it resentenced him to include a statutorily mandated PRC term. (Apt. Br. at 5). *Hudson* does not apply to the facts of this case. Instead, *Hudson* concerned whether a criminal prosecution that took place after the imposition of civil penalties for violations of federal banking statutes imposed multiple punishments for the same offense. *Id.*, at 95. It stands to reason that when the trial court has “exceeded its authority [so that] the sentence

must be considered void,” the resentencing judgment is not a multiple punishment, but instead is the only punishment. See *Beasley, supra*, at 75. Because jeopardy does not attach to a void sentence pursuant to *Beasley*, the State submits that defendant’s Fifth Amendment multiple punishment argument lacks merit and should be overruled. *Id.*

Accordingly, the State respectfully requests that this Honorable Court hold that a trial court that corrects a void sentence to include a statutorily mandated postrelease control term does not violate a defendant’s double jeopardy or due process rights.

CONCLUSION

Ohio Law very clearly and unambiguously provides that a criminal sentence that lacks a statutorily mandated postrelease control term is void, and provides that the proper remedy is to resentence the defendant prior to the expiration of the original prison term. See R.C. 2929.191; *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774, *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126; *State ex rel Cruzado v. Zaleski*, 111 Ohio St.3d 353, 856 N.E.2d 263.

Because the trial court derives its sentencing authority from the General Assembly, the concept of waiver should have no bearing on the trial court’s ability to impose a lawful criminal sentence, or to correct a void criminal sentence. For that reason, the State respectfully requests that this Honorable Court reject a proposition of law that extends the doctrine *res judicata* to criminal sentences that are void. The trial court’s ability to correct an illegal criminal sentence should not depend on how it became aware of the problem, but rather upon its basic statutory duty to impose a lawful sentence. Thus, the trial court’s authority to impose a lawful criminal sentence is not an error that is merely voidable at the request of one of the parties, but void ab initio (and subject to correction on the court’s own motion or the motion of either party).

Accordingly, the State respectfully requests that this Honorable Court decline to adopt defendant's proposition of law that would bar the trial court from correcting a void sentence if the prosecutor failed to file an appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellee was sent by regular U.S. Mail this 2th day of June, 2007 to David M. King, Esq., The Cuyahoga County Public Defender's Office, 1200 W. 3rd Street, Cleveland, Ohio 44113.



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