

IN THE SUPREME COURT OF OHIO

Case No. 05-0338

STATE OF OHIO :
Appellee :
-vs- :
JACK BEZAK :
Appellant :

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 84008

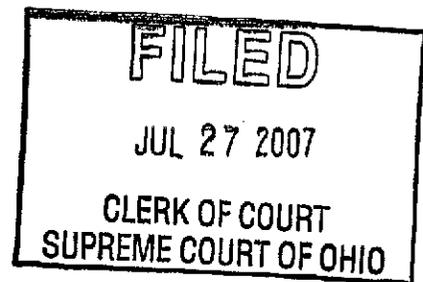
RESPONSE OF APPELLANT JACK BEZAK TO APPELLE STATE OF OHIO'S
MOTION FOR RECONSIDERATION

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ARGUMENT

The State contends that this Court's decision has effectively vacated numerous convictions entered since the advent of S.B. 2. This is incorrect. The opinion does not state that Mr. Bezak's conviction is vacated. This case has merely held that Mr. Bezak is subject to resentencing: however, because the sentence has been completely served, there is no reason to return to the trial court. This latter conclusion is consistent with this Court's previous holding in *Hernandez v. Kelly*, 106 Ohio St.3d 395.

This Court's decision in the instant case merely solidifies the precedent established by *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085. Just as *Jordan* did not invalidate convictions, neither does the instant case.¹ The State fails to adequately appreciate that, in rejecting the same principle of law that the State now urges this Court to adopt, *Jordan* was guided by constitutional considerations. *Jordan* recognized that simply remanding a case to add a post-release control term that was never imposed at sentencing was tantamount to imposing a second punishment for the same offense – in violation of the Fifth Amendment. In order to avoid this constitutional violation, yet still ensure that post-release control be imposed consistently with the will of the General Assembly, *Jordan* recognized that the previously imposed sentence that did not include post-release control was a nullity, because it was missing an essential component. As a

¹ Whether this Court's holding in the instant case would ever come to bear on cases long since closed is not even before the Court in this case because Mr. Bezak took a timely appeal of his sentence and this case was part of that direct appeal. As discussed *infra*, the State's concerns in this regard are exaggerated. That being said, this Court will soon be deciding *State v. Simpkins*, Case No. 07-0052, in which the State of Ohio attempted to resentence a defendant years after an original sentence that did not include post-release control. *Simpkins* is fully briefed and awaiting calendaring of argument. This Court need not use the instant case to generate dicta about issues that are already properly before it elsewhere.

nullity, the previous sentence did not constitute a separate imposition of punishment, thus allowing a new sentencing at which post-release control could be imposed.

Contrary to the State's argument, the instant case is not inconsistent with *State v. Evans*, 109 Ohio St.3d 176, 2006-Ohio-1245. *Evans* held that an error in the imposition of the sentence relating to a Repeat Violent Offender specification only required remanding the case to correct the punishment attributable to the specification, not the punishment for the underlying crime. *Evans* thus recognized that the underlying crime and the Repeat Violent Offender specification were not to be treated as a single "bundle." This is hardly surprising – the underlying offense and the specification have different elements of conviction from one another.

More importantly to the instant case, *Evans* did not confront the constitutional issue attendant to either *Jordan* or the instant case – because, in *Evans*, the respective punishments for the underlying crime and the specification *were imposed the first time*. In contrast, imposition of a post-release control term was *never* enunciated by the trial court at the original sentencing of either Bezak or Jordan. Rather *Jordan* and the instant case each involve an omission of a necessary component of a sentence.

Thus, this Court's jurisprudence remains consistent. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245 recognizes that errors in the imposition of a sentence are viewed count-by-count. *Evans* recognizes that, even within a single count, the erroneous imposition of punishment relating to specification only requires correcting that portion of the sentence attendant to the specification. But *Jordan* and the instant case draw the distinction between errors and omissions and hold that the *omission of a vital component of a sentence*, requires invalidating the entire sentence for that particular count. In so

doing, *Jordan* and the instant case comply with the Fifth Amendment. Finally, the instant case reiterates what this Court recognized in *Hernandez* – that post-release control can never be imposed after one leaves prison.

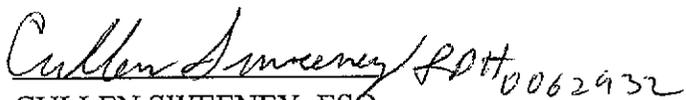
CONCLUSION

Contrary to the State’s argument, this Court has not allowed the instant case “to obstruct justice in countless others.” (State’s Motion at 10). Rather, this Court has arrived at a decision that is consistent with its previous precedent and continues to avoid constitutional pitfalls that the State’s argument fails to fully appreciate.

Wherefore, the State’s motion should be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was hand-delivered upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 27th day of July, 2007.


JOHN T. MARTIN, ESQ. 0062932