

IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellant/  
Cross-Appellee,

v.

Jason Singleton,

Defendant-Appellee/  
Cross-Appellant.

Case No. 2008-1255

On appeal from the Cuyahoga County  
Court of Appeals, Eighth Appellate  
District, Case No. 90042

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**Jason Singleton's Combined  
Memorandum Opposing Jurisdiction in the State's Appeal and  
Memorandum Supporting Jurisdiction in his Cross-Appeal**

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William D. Mason, 0037540  
Cuyahoga County Prosecutor

T. Allan Regas, 0067336  
Assistant Prosecuting Attorney  
(Counsel of Record)

Justice Center, 9<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800  
(216) 698-2270 - Fax

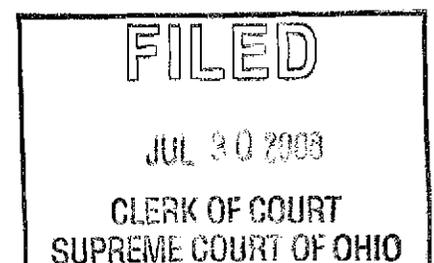
Counsel for Plaintiff-Appellant/  
Cross-Appellee, State of Ohio

Office of the Ohio Public Defender

By: Stephen P. Hardwick, 0062932  
Assistant Public Defender

8 East Long Street - 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 - Fax  
stephen.hardwick@opd.ohio.gov

Counsel for Defendant-Appellee/  
Cross-Appellant, Jason Singleton



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## Introduction

This Court has already acknowledged the importance of the proposition of law in Mr. Singleton's cross-appeal—is a plea valid when the trial court misinforms the defendant about postrelease control? In both State v. Sarkozy, 117 Ohio St.3d 86, 2008-Ohio-509, and State v. Clark, Case Nos. 2007-0983 and 2007-104, this Court has decided or agreed to decide a variation on this question. By contrast, the State's appeal raises an issue that even the State did not consider worthy of briefing in the court of appeals. The courts of appeals confronted with a sentence that is void under Beasley,<sup>1</sup> Jordan,<sup>2</sup> Hernandez,<sup>3</sup> Bezak,<sup>4</sup> and Simpkins<sup>5</sup> have followed those cases and ordered that the defendant be sentenced de novo. The courts of appeals have recognized, implicitly and explicitly, that R.C. 2929.191 simply does not remedy a void sentence.

Accordingly, this Court should refuse the State's appeal, accept Mr. Singleton's cross-appeal, and hold this case for the decision in State v. Clark.

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<sup>1</sup> State v. Beasley (1984), 14 Ohio St.3d 74.

<sup>2</sup> State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085.

<sup>3</sup> Hernandez v. Kelly, 108 Ohio St.3d 395, 2006-Ohio-126.

<sup>4</sup> State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250.

<sup>5</sup> State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197.

**Mr. Singleton's Cross-Appeal Presents this Court with a  
Question of Public or Great General Interest**

Unlike the State's appeal, Mr. Singleton's cross-appeal presents an issue that is important because it is directly relevant to the outcome of the case—is a plea valid when the court tells a defendant that the defendant he will face discretionary postrelease control when, in fact, the defendant faces mandatory postrelease control. This Court should hold the cross-appeal for the decision in State v. Clark, Case Nos. 2007-0983 and 2007-104, in which this Court is addressing the implications of misinformation about postrelease control.

During his plea colloquy, the trial court incorrectly told Mr. Singleton that he faced discretionary postrelease control. “[T]he parole authority has the power to place conditions upon you when you are released. Those conditions would last five years. . . . When you are released from prison, they can place conditions upon you.” T.p. 5. In fact, Mr. Singleton faces a mandatory five-year term of post. State v. Clark will address the implications of misinformation, as opposed to no information, about postrelease control in the plea colloquy, and that decision will likely control the result in this case.

Given the repetition of problems with correctly informing a defendant about postrelease control during the plea colloquy, trial courts and courts of appeals need guidance from this Court as to how to properly perform a plea colloquy and how to review errors in that colloquy. When issues are raised for the first time on appeal, everyone loses. Defendants must spend additional time in prison awaiting a decision. Victims face delays. And prosecutors must

retry an old case. Even if the decision in this case is correct, this Court should accept this case to set a clear rule for trial and appellate courts to follow.

**The State's Appeal does not Present this Court with a  
Question of Public or Great General Interest**

- 1. The State forfeited its right to assert its proposition of law by failing to brief the issue in the court of appeals.**

The State asks this Court to hear an issue that the State forfeited the right to appeal in the court of appeals. In the court of appeals, Mr. Singleton raised the issue the State now complains about—that the trial court should sentence Mr. Singleton de novo because his entry was void under Jordan and Bezak. Court of Appeals Brief at 14-15, Third Assignment of Error. But, instead of opposing the sentencing issue in Mr. Singleton's Third Assignment of Error, the State elected only to respond to Mr. Singleton's first two assignments of error concerning his plea. The State's memorandum in support of jurisdiction is the first document in which the State has addressed Mr. Singleton's void sentence claim or even cited to R.C. 2929.191.

This Court generally refuses to consider issues raised for the first time in this Court. See, e.g., Sherman v. Haines (1995), 73 Ohio St.3d 125, 126, n.1., 652 N.E.2d 698. Nothing in the State's memorandum attempts to excuse its failure to brief the void sentence issue that Mr. Singleton presented in the court of appeals. If the State believed that R.C. 2929.191 defeated Mr. Singleton's claim that he was entitled to a new sentence, the State should have made that argument in the court of appeals. Instead, the State remained silent and ignored Mr. Singleton's third assignment of error.

The State should not use a discretionary appeal to this Court as a substitute for briefing an issue in the court of appeals. It would be an unfortunate precedent to allow a party to bypass the court of appeals and then be rewarded with the privilege of presenting their argument to this Court for the first time.

**2. The courts of appeals have consistently and correctly applied this Court's decisions in Beasley, Jordan, Bezak, and Simpkins.**

As the State concedes, courts of appeals that have addressed the issue in this case has reached the same result. Those courts have faithfully applied this Court's rulings in Beasley,<sup>6</sup> Jordan,<sup>7</sup> Bezak,<sup>8</sup> and Simpkins<sup>9</sup> to require de novo resentencing hearings when a judgment is void due to the absence of postrelease control. State v. Bond, Hamilton App. No. C-060611, 2007-Ohio-4194; State v. Bock, Franklin App. No. 07AP-119, 2007-Ohio-6276, and State v. Bruner, Ashtabula App. No. 2007-A-0012, 2007-Ohio-4767.

The courts have thereby avoided running afoul of this Court's ruling in Woods v. Telb, 89 Ohio St.3d 504, 2000-Ohio-171, as well as Due Process and Double Jeopardy protections. There is no need for this Court to take yet another case to reaffirm its previous decisions.

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<sup>6</sup> State v. Beasley (1984), 14 Ohio St.3d 74.

<sup>7</sup> State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085.

<sup>8</sup> State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250.

<sup>9</sup> State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197.

**3. This is not a case in which a court of appeals has declared a statute unconstitutional. This is a case in which the court of appeals simply that the statute does not apply to the facts of the case.**

Revised Code Section 2929.191 mandates nothing. Instead, it creates a permissive remedy that trial courts may use if they choose. Specifically, the statute permits, but does not require, a trial court to “correct” a judgment entry that does not contain postrelease control so long as the defendant has not been released from prison. As the Eighth and Tenth District’s have correctly held, this Court’s holding in Bezjak and Simpkins that judgments without postrelease control are void does not contradict R.C. 2929.191’s discretionary authority to “correct” incorrect judgments.

Section 2929.191 is expressly discretionary—the provision does not require trial courts to do anything. The provision merely gives trial courts an option of how to correct an error when that court failed to orally notify a defendant of postrelease control or to impose the sanction in the judgment entry:

<b>Section</b>	<b>Permissive Authority to Act</b>
R.C. 2929.191(A)(1) (1 <sup>st</sup> unnumbered paragraph)	“the court <u>may</u> prepare and issue a correction to the judgment of conviction”
R.C. 2929.191(A)(1) (2 <sup>nd</sup> unnumbered paragraph)	“the court <u>may</u> prepare and issue a correction to the judgment of conviction”
R.C. 2929.191(B)(1)	“the court <u>may</u> prepare and issue a correction to the judgment of conviction”
R.C. 2929.191(C)	“ <u>a court that wishes</u> to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division.”

Further, nothing in R.C. 2929.191 states that it is the exclusive remedy to correct void judgments. The General Assembly knows how to declare that a remedy is exclusive. See, e.g., R.C. 2953.21(J) (“the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence”). The lack of a provision similar to that in R.C. 2953.21(J) demonstrates that the General Assembly did not intend for R.C. 2929.191 to be the exclusive remedy to “correct” sentences that are both illegal and void. See, Myers v. Toledo, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶24. (“The canon *expressio unius est exclusio alterius* tells us that the express inclusion of one thing implies the exclusion of the other”).

**4. Section 2929.191 is an insufficient remedy—it permits (but does not require) a trial court to correct only the failure to notify a defendant about postrelease control, not the failure to impose the sanction.**

The State conflates notice of postrelease control with imposition of postrelease control. A trial court must perform both functions. Section 2929.191 attempts to solve the notice problem, but the remedy is insufficient to correct the problem of inadequate imposition of postrelease control. The section concerns only the problem of notice at the sentencing hearing and the “fail[ure] . . . to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14. . . .” But, as this Court noted in Simpkins, when a trial court fails to impose postrelease control as required, “the sentence is void and the state is

entitled to a new sentencing hearing in order to have postrelease control imposed on the defendant unless the defendant has completed his sentence.” Simpkins at ¶6. “The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.” State v. Simpkins, 117 Ohio St. 3d 420, 424-425 (Ohio 2008), quoting Bezak, 114 Ohio St.3d 94, 2007 Ohio 3250, 868 N.E.2d 961, at 12, quoting Romito v. Maxwell (1967), 10 Ohio St.2d 266, 267-268.

A sentence that is “mere nullity” and that puts the parties “in the same position as if there had been no judgment” cannot be “corrected” with the additional notice that R.C. 2929.191 permits. Both the State and the defendant are entitled to a sentencing hearing to establish the correct sentence.

### **Conclusion**

Mr. Singleton’s cross-appeal presents an important variation on the issue that this Court is considering in State v. Clark, Case Nos. 2007-0983 and 2007-104—whether a plea is valid when a trial court tells a defendant facing mandatory postrelease control that he faces only discretionary postrelease control. Accordingly, this Court should take the cross-appeal and hold it for Clark.

But the State’s appeal presents an issue that the State forfeited by declining to contest it in the court of appeals. Further, the court of appeals correctly applied this Court’s precedent and declined to force the trial court to

use a discretionary statute that would not have remedied the harm. Mr. Singleton's sentence was void, so the court of appeals correctly ruled that only a de novo sentencing will fix the error.

### **Statement of the Case and the Facts**

Mr. Singleton accepts the Statement of the Case and the Facts in the State's jurisdictional memorandum, except that he adds the portion of the plea hearing that involved postrelease control because it is relevant to his cross-appeal:

The Court: . . . When you are [sent] to prison, Mr. Singleton, please keep in mind that the parole authority has the power to place conditions on you when you are released. Those conditions will last five years.

Do you understand that?

[Mr. Singleton]: No.

The Court: When you are release from prison they can place conditions upon you.

You have to speak up.

[Mr. Singleton]: Yes, your honor.

The Court: Those conditions would last five years.

Do you understand that?

[Mr. Singleton]: Yes, your honor.

The Court: If you violate any of their conditions you could find yourself back in prison and you can serve up to nine months for each incident, and for repeated violations up to one half of the maximum term.

Do you understand that?

[Mr. Singleton]: Yes, your honor.

The Court: Finally, one more thing. If you commit a new felony or felonies, Mr. Singleton, in addition to the time that you can receive for those they can, again, bring you back into prison on these charges and you could serve up to an additional one year in prison.

Do you understand that?

[Mr. Singleton]: Yes, your honor.

T.p. 5-6.

### **Argument**

#### **A. Mr. Singleton's Cross-Appeal**

##### **Cross-Appeal Proposition of Law:**

**Proposition of Law: A guilty plea to a sentence carrying mandatory postrelease control is not knowing, voluntary, and intelligent when the trial court tells the defendant that he or she will be subject to discretionary postrelease control during the plea colloquy.**

***Misinforming a defendant about postrelease control is a substantial mistake.***

A guilty plea is valid only if it is knowing, intelligent, and voluntary.

State v. Raglin (1998), 83 Ohio St.3d 253, 262; Boykin v. Alabama (1969), 395

U.S. 238. "Failure on any of those points renders a resulting conviction

unconstitutional." State v. Prom, 12th Dist. No. CA2002-01-007, 2003-Ohio-

6543, at ¶22, citing State v. Engle, 74 Ohio St.3d 525, 1996-Ohio-179. For a

plea to be knowing, intelligent and voluntary, the trial court must ensure that a

defendant "has a full understanding of what the plea connotes *and of its*

*consequence.*" Boykin, 395 U.S. at 244 (emphasis added). Here, the trial court

informed Mr. Singleton that he faced discretionary postrelease control when he actually faced mandatory postrelease control.

Substantial compliance with the requirements of Crim.R. 11 is generally sufficient. State v. Caplinger (1995), 105 Ohio App.3d 567, 572. But misinforming a defendant about the maximum penalty faced is not substantial compliance. State v. Carroll (1995), 104 Ohio App.3d 372, 379. “By erroneously advising [a defendant] that post-release control requirements are mandatory . . . and what terms of imprisonment might be imposed for their violation, the court inadvertently understated the maximum penalty that might apply to any re-incarceration after [the defendant’s] release.” Prom, 2003-Ohio-6543, at ¶27.

The trial court substantially misinformed Mr. Singleton about the nature of his postrelease control. See, e.g., State v. Belvin McGee, 8th Dist. No. 77463, 2001-Ohio-4238, at\*5 (“the record does not indicate the appellant was misinformed by the trial court”); State v. Davis (Sept. 28, 2000), 8th Dist. No. 76315, at \*7 (defendant was not “misled or misinformed him concerning the sentencing procedures and the parole board’s discretionary role”). In this case, the trial court’s statement that Mr. Singleton would be subject to postrelease control only at the discretion of the Adult Parole Authority was misinformation. As a consequence, Mr. Singleton “necessarily was unaware of the maximum penalty to which [he] was exposed by [his] plea.” Prom, 2003-Ohio-6543, at ¶29. The trial court erred in accepting his plea, see id. This Court should vacate the plea and remand his case for trial.

**B. Response to the State's Proposition of Law**

**Proposition of Law No. I:**

**A litigant cannot raise an issue in the Supreme Court of Ohio if the litigant has forfeited the issue by failing to brief the issue in the court of appeals.**

The State asks this Court to hear an issue that the State forfeited the right to appeal in the court of appeals. In the court of appeals, Mr. Singleton raised the issue the State now complains about—that the trial court should resentence Mr. Singleton because his entry was void under Jordan and Bezak. Court of Appeals Brief at 14-15, Third Assignment of Error. But, instead of opposing the sentencing issue in Mr. Singleton's Third Assignment of Error, the State elected only to respond to Mr. Singleton's first two assignments of error concerning his plea. The State's memorandum in support of jurisdiction is the first document in which the State has addressed Mr. Singleton's void sentence claim or even cited to R.C. 2929.191.

This Court generally refuses to consider issues raised for the first time in this Court. See, e.g., Sherman v. Haines (1995), 73 Ohio St.3d 125, 126, n.1., 652 N.E.2d 698. Nothing in the State's memorandum attempts to excuse its failure to brief the void sentence issue that Mr. Singleton presented in the court of appeals. If the State believed that R.C. 2929.191 defeated Mr. Singleton's claim that he was entitled to a new sentence, the State should have made that argument in the court of appeals. Instead, the State remained silent and ignored Mr. Singleton's third assignment of error. The State should not use a

discretionary appeal to this Court as a substitute for briefing an issue in the court of appeals.

**Proposition of Law No. II:**

**Revised Code Section 2929.191 provides a discretionary remedy that trial judges are not required to follow.**

Section 2929.191 does not require trial courts to do anything. The section is expressly discretionary and does not purport to be the exclusive remedy for a void sentence. Accordingly, the court of appeals did not violate the section when it ordered the trial court to hold a new sentencing hearing under Beasley, Jordan, Hernandez, Bezak, Simpkins.

**Proposition of Law No. III:**

**Notwithstanding R.C. 2929.191, “[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void and the state is entitled to a new sentencing hearing in order to have postrelease control imposed on the defendant unless the defendant has completed his sentence.” State v. Bezak, 117 Ohio St.3d 420, 2008-Ohio-1197.**

This Court has repeatedly held that sentences that fail to include a required term of postrelease control are void. Jordan, Hernandez, Bezak, Simpkins. As a result, the defendant must be resentenced if he is still in prison. Jordan, Hernandez, Simpkins. This rule avoids double jeopardy, separation of powers, due process, right to counsel, and other constitutional difficulties if trial courts exercised their R.C. 2929.191 discretion merely to tack postrelease control onto a non-void prison term.

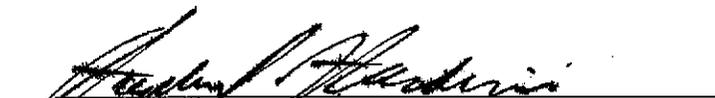
But the problems with R.C. 2929.191 are irrelevant to this case because Mr. Singleton will not be resentenced under the provision. The court of appeals correctly ordered that Mr. Singleton be resentenced.

**Conclusion**

This Court should dismiss the State's appeal. This Court should accept Mr. Singleton's cross-appeal and hold the case for the decision in State v. Clark, Case Nos. 2007-0983 and 2007-104.

Respectfully submitted,

Office of the Ohio Public Defender

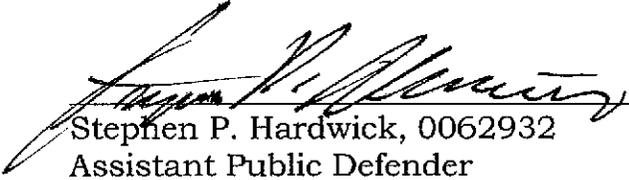
  
By: Stephen P. Hardwick, 0062932  
Assistant Public Defender

8 East Long Street, 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (Fax)

Counsel for Jason Singleton

**Certificate of Service**

I certify a copy of the foregoing **Jason Singleton's Combined Memorandum Opposing Jurisdiction in the State's Appeal and Memorandum Supporting Jurisdiction in his Cross-Appeal** has been sent by regular U.S. mail, postage-prepaid, to T. Allan Rogers, Assistant Cuyahoga County Prosecutor, Justice Center, 9<sup>th</sup> Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 30<sup>th</sup> day of July, 2008.

  
Stephen P. Hardwick, 0062932  
Assistant Public Defender

Counsel for Jason Singleton

#281959