

ORIGINAL

IN THE SUPREME COURT OF OHIO
No. 2009-0935

09-0947

State of Ohio,

Appellee,

v.

Daniel Wilson,

Appellant.

On Appeal from the Cuyahoga
County Court of Appeals,
Ninth Appellate District

Court of Appeals
Case Nos. 09 CA 009562

Death Penalty Case

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

FOR DEFENDANT-APPELLANT:

DAVID L. DOUGHTEN, ESQ.
Ohio Reg. No. 0002847
4403 St. Clair Avenue
Cleveland, OH 44103
(216) 361-1112
FAX: (216) 881-3928

ALAN C. ROSSMAN, ESQ.
Assistant Federal Defender
Capital Habeas Unit
1660 West 2nd Street, Ste. 750
Cleveland, OH 44113
(216) 522-1950
FAX: (216) 522-1951

FOR PLAINTIFF-APPELLEE:

DENNIS WILL, ESQ.
Lorain County Prosecutor
TONY CILLO, ESQ.
Assistant Lorain County Prosecutor
225 Court Street, Third Floor
Elyria, Ohio 44035

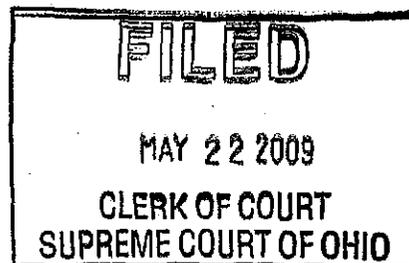


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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

Wilson previously filed a Memorandum in Support of Jurisdiction under this same case number. The request for relief in the previously filed Memorandum originated from a petition to vacate filed in the common pleas court. This request stems from Wilson's motion to the trial court to correct a void sentence, in this instance the death penalty, which was denied.

The federal courts invalidated the single statutory aggravating factor considered by the jury in the penalty phase of the appellant Dan Wilson's trial. Although the single statutory aggravating, R.C. §2929.04(A)(3) (avoid detection), was found to be unconstitutional, the federal courts found that under the federal habeas harmless error standard, Brecht v. Abrahamson, 507 U.S. 619, 641 (1993) a writ of habeas corpus should not be issued.

The argument below centered upon the nature of the Sixth Circuit ruling. On August 15, 2007, the Sixth Circuit Court of Appeals issued its opinion affirming the District Court's denial of Wilson's Petition for Writ of Habeas Corpus. Wilson v. Mitchell, 498 F.3d 491 (6th Cir. 2007). However, the Sixth Circuit noted that the District Court had concluded the kidnapping jury instruction, which the Ohio Supreme Court had "properly" determined to be unconstitutional, "was [also] unconstitutional as to the [sentencing phase] evading-kidnapping specification." Id., 498 F.3d at 500-501.

For purposes of the federal habeas appeal, and consistent with that District Court ruling, the Circuit properly "assume[d] that the instruction was erroneous with regard to the evading-kidnapping specification," and addressed only whether it was harmless under federal harmless error standards. Id., at 501.

The Sixth Circuit appeal thus proceeded upon the unchallenged position that the erroneous jury instruction effectively rendered the specification “invalid”:

Crucial to this habeas appeal is how [federal] harmless-error principles discussed above apply in the capital-sentencing context *when, as here, the jury considers an invalid aggravating factor when imposing a death sentence.*

Wilson, 498 F.3d at 504. (Emphasis added).

As the Sixth Circuit further stated: “The question here is a reviewing court's role when an invalid eligibility factor (i.e., evading kidnapping), in a weighing State like Ohio, skews the jury's balance of mitigating circumstances against that aggravating factor. Supreme Court decisions provide some reason to believe that a federal habeas court is simply not permitted to conduct harmless-error review-only a state court can do so.” Wilson v. Mitchell, 498 F.3d at 505.

Thus, while the Sixth Circuit acknowledged the sole specification weighed by Wilson's jury was “invalid,” as having “skew[ed] the jury's balance of mitigating circumstances against that aggravating factor,” the appellate court denied federal habeas relief based upon a finding that Wilson did not subsequently meet federal harmless error criteria.

Significantly, the Sixth Circuit did *not* consider the impact of invalidating the sole specification under Ohio law pursuant to Ohio's capital sentencing scheme. Federal courts do not interpret state law. The federal courts did not, and could not, review the error under Ohio law to determine whether it could be deemed harmless under state law.

The implications of an invalidation of the sole capital specification for purposes of state law formed the basis for Wilson's filing in the trial court and the basis for this appeal. Under Ohio's death penalty statutory scheme, the invalidation of the single considered statutory aggravation factor may not be harmless error. The invalidation causes Wilson to be no longer death eligible.

The trial judge always retains jurisdiction under Ohio law to correct a void or illegal sentence. Colegrove v. Burns, 175 Ohio St. 437, 438 (1964) This is the subject of the companion appeal being filed as a direct appeal merit brief and being filed under separate cover.

This Court is urged to accept jurisdiction of the matter to determine the effect of that invalidating of Wilson's R.C. §2929.04(A)(3) specification holds under Ohio law.

STATEMENT OF THE CASE AND FACTS

The procedural and factual basis in this case are fully stated in Wilson's Memorandum in Support of Jurisdiction from the denial of the postconviction petition and are incorporated here. It is also addressed within the argument of this document.

ARGUMENT

Proposition of Law I:

Under Ohio's death penalty statutory scheme, a defendant is no longer eligible for the death sentence if the single statutory aggravation factor considered by the jury in determining the appropriate sentence is found to be invalid by the federal courts.

The federal courts found that the single aggravating circumstance submitted to the jury in Wilson's case was invalidated. It further determined that the error did not require the issuance of a writ of habeas corpus under its interpretation of *federal law*. The federal court *did not* review the error under the *Ohio law*. The reason for this is obvious. Federal courts *may not* interpret state law. Federal courts are limited to determining the existence of federal error. Once a federal error is determined to have been present, the Ohio courts must review the error under the Ohio law, in this case, the Ohio death penalty statutory scheme.

Under Ohio law, the voidance of the only statutory aggravating factor renders a defendant ineligible for the death penalty. Ohio common pleas judges always retain jurisdiction to correct an illegal sentence. Wilson's death sentence is no longer countenanced under Ohio law. Ohio trial courts have jurisdiction to so find.

The Erroneous Jury Instruction and State Court Findings

At the end of the culpability phase evidence, the trial court improperly instructed the jury as to voluntary intoxication in relation to both the kidnapping count and the kidnapping specifications that accompanied the aggravated murder counts. Although the full instruction is set forth in the statement of the Case and Facts above, the pertinent part is listed here:

On this issue, the burden of proof is upon the Defendant to establish by a preponderance or greater weight of the evidence that at the time in question he was so influenced by alcohol that he was incapable of having the knowledge to commit the offense.

If you find by a [preponderance or greater weight of the evidence that the Defendant was incapable of having the knowledge to commit the offense, then you must find that the Defendant was not guilty of Kidnapping because knowledge is an essential element of the offense as I have previously instructed you.

There is no issue as to whether the above instruction was erroneous. This Court recognized that pursuant to In re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975), the above burden-shifting jury instructions *were* constitutionally improper and therefore erroneous. State v. Wilson, 74 Ohio St.3d 381, at 393-394 (1996). This Court addressed the error in the context of the principle Kidnapping count, and ruled the error to be harmless.

However, this Court did not apply the analysis to the penalty phase instruction. The harmless error determination applied only to the culpability phase instructions. This Court specifically stated, that Wilson had not argued that the kidnapping instruction error affected the death penalty in his

case. Specifically, this Court wrote the following:

In proposition of law twenty, Wilson further argues that the trial court erred in instructing the jury, over objection, that he had the burden of proof to establish that **[**306]** his intoxication negated the "knowledge" element in the kidnapping. ***This contention relates solely to the kidnapping conviction. Wilson makes no claim that any error affects the remaining charges or the death penalty.***

* * *

No other offenses are affected by this instructional deficiency, since this instruction on intoxication involved only the kidnapping. ***The felony-murder counts and kidnapping penalty specifications played no role at all in the penalty phase. The death penalty was imposed solely on Count I and specification one.***

Ohio v. Wilson, (1996) 74 Ohio St.3d 381, 393-94 (Emphasis added)

The problem is that specification one, avoiding detection for a crime, included the offense of kidnapping. It is accurate that the felony-murder specification and the kidnapping specification were not included in the jury consideration. The first specification clearly includes the element of kidnapping, as kidnapping was the offense from which Wilson sought to avoid detection or apprehension.

This Court clearly found that the error only applied to the principle charge of kidnapping and only addressed the error as such. ***"This contention relates solely to the kidnapping conviction. Wilson makes no claim that any error affects the remaining charges or the death penalty."*** *Id.*, p. 393.

Therefore, there was no harmless error finding as to the specification as this Court did not find that this particular aspect of the issue had been raised by Wilson.

The federal courts concurred that the particular claim had not been addressed in the Ohio Courts. There was not waiver of the claim by Wilson found at any federal level. The Warden did not so argue on appeal to the Sixth Circuit. The federal courts also did not find that the Ohio Courts

had addressed or implemented a harmless error standard for the issue. Thus, there was no bar to federal review of the issue on a *de novo* basis.

The gravamen of this argument is whether the federal court review resulted in an invalidation of the aggravation factor in question, R.C. §2929.04(A)(3). It must be noted again that the prosecutor elected prior to Wilson's penalty phase hearing to present to the jury only the above statutory aggravating factor. Thus, the jury did not consider any other aggravation factor that was included in the indictment or found by it during the culpability phase. This fact is crucial to understanding the federal court determination of this issue.

Judge David Dowd of the Northern District of Ohio District Court concluded Wilson's sole aggravator was improperly considered at trial based upon the improper jury instruction and the error was *not* harmless (under Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710 (1993) because it affected the outcome of the trial, quoting:

“Clearly, this trial error [,] which permitted the jury to find Wilson guilty of kidnapping and the single aggravating circumstance to Count One even if the State had not sustained its burden with respect to the knowledge element, had ‘a substantial and injurious effect or influence in determining the jury's verdict.’ ” Id. (quoting Brecht, 507 U.S. at 637, 113 S.Ct. 1710).

(District Court Memorandum and Opinion, discussion of Claim 10, p.100).

Judge Dowd explained further: “Had the jury been more clearly instructed as regards the burden of proof, it is possible that it might have concluded, in the face of all of the testimony and Wilson's assertion of intoxication, that the State could not prove beyond a reasonable doubt that Wilson had the requisite knowledge for either the kidnapping charge of the indictment or the kidnapping specification to the aggravated murder charge.” Id. at 96-97. Therefore, had “the kidnapping specification been the only specification for which Wilson had been found guilty,” the

district court stated that it “would probably be inclined to grant the writ on this claim because, finding a constitutional error, [the district court] would be left with the ‘grave doubt’ ” described in O’Neal v. McAninch, 513 U.S. 432, 435, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995), about whether that error is harmless. Id. at 98.

In other words, in Judge Dowd’s view, because the jury had found additional statutory aggravating, the writ should not be granted because had the prosecutor elected the arson specification which did not include the kidnapping element, the jury would have found death to be the appropriate penalty.

Wilson appealed on the grounds that a death sentence may not be based upon an aggravating factor not considered by the jury in the penalty phase. Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428,(2002). Nor is a federal judge permitted to re-weigh the mitigation against the unconsidered aggravating factor and determine what a jury would have concluded.

The Sixth Circuit agreed, but nevertheless decided that the writ should not issue. In Wilson v. Mitchell, 498 F.3d 491, 500-501 (6th Cir. 2007), the Circuit noted that the District Court concluded the kidnaping jury instruction, which the Ohio Supreme Court had “properly” determined to be unconstitutional, “was unconstitutional as to the [sentencing phase] evading-kidnapping specification.”

“Assumed” Error

For purposes of the federal habeas appeal, and consistent with that District Court ruling, the Circuit properly “assume[d] that the instruction was erroneous with regard to the evading-kidnapping specification,” and addressed only whether it was harmless under federal harmless error standards. Id., at 501. Part of the reason for this assumption is that the district court’s findings as

to the error were not challenged on cross-appeal by the Warden. The circuit appeal thus proceeded upon the unchallenged assumption that the erroneous jury instruction effectively rendered the specification “invalid”:

Crucial to this habeas appeal is how [federal] harmless-error principles discussed above apply in the capital-sentencing context *when, as here, the jury considers an invalid aggravating factor when imposing a death sentence.*

Wilson, 498 F.3d at 504. (Emphasis added).

As the Sixth Circuit further stated: “The question here is a reviewing court’s role when an invalid eligibility factor (i.e., evading kidnapping), in a weighing State like Ohio, skews the jury’s balance of mitigating circumstances against that aggravating factor. Supreme Court decisions provide some reason to believe that a federal habeas court is simply not permitted to conduct harmless-error review-only a state court can do so.” Wilson v. Mitchell, 498 F.3d at 505.

The Appellee below saw legal significance in the wording in the opinion “But we do not decide the question.” Wilson v. Mitchell, at 501. The Appellee argued that this wording means that the court did not decide the issue of the constitutionality of the disputed instruction. A closer look reveals that the Appellee is incorrect in the interpretation for two reasons. First, the question not decided was not whether the instruction was error but another matter. Second, and most important, there is no such animal in federal jurisprudence as an advisory or hypothetical opinion. For a harmless error analysis to be conducted by a federal circuit court, there must be recognized error.

As to the question not decided, the issue was whether a charged defendant could be not guilty of the commission of the kidnapping, (because of the lack of intent) but guilty of the specification that the defendant wanted to avoid detection of the kidnapping. The Court decided that it was not necessary to decide that specific question to in order to determine whether the writ should be issued.

The district court had found the error to be of a constitutional magnitude, but not one requiring the issuance of a writ of habeas corpus under federal law. Because the Circuit agreed with the district court that federal law did not require the issuance of the writ on the error, the question of whether kidnapping under a R.C. §2929.04(A)(3) specification is an element of that specification was rendered moot.

The bottom-line is that the federal district court did find the instruction to constitute constitutional error. As note above, the Warden did not contest the district court finding the constitutional error had occurred. The Sixth Circuit did not reverse the finding of the district court on the nature of the error. The issue became whether the writ should be issued based on that error. Because the Circuit did not deem the assumed error to require the issuance of a writ of habeas corpus under the Brecht Standard, the court found the determination of the hypothetical questions surrounding the claim to be moot.

The second reason for the Court to be unable to dismiss the federal court findings is that federal circuit courts are not permitted to engage in hypothetical opinions. Judgments of the federal courts must resolve a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Preiser v. Newkirk, 422 U.S. 395, 95 S. Ct. 2330 (1975); North Carolina v. Rice, 404 U.S. 244, 92 S. Ct. 402(1971). The federal district court found constitutional error because of the improper burden switching on the intoxication instruction. This finding was not reversed by the circuit court, or even challenged in cross-appeal.

Federal Courts Precluded From Addressing Harmless Error Under the Ohio Scheme

The Sixth Circuit did *not* consider the impact of invalidating the sole specification under

Ohio law pursuant to Ohio's capital sentencing scheme. Federal courts do not interpret state law. The federal courts did not, and could not, review the error under Ohio law to determine whether it could be deemed harmless under state law. As this Court has held that "[p]rinciples of comity require federal courts to defer to a state's judgment on issues of state law. . . ." Albrecht v. Treon, 118 Ohio St.3d 348, 355 (2008), citing Israfil v. Russell, 276 F.3d 768, 771 (6th Cir. 2001).

In Stringer v. Black, 503 U.S. 222, 237 (1992), the Supreme Court of the United States explained that an invalid aggravating factor "in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the *state* judicial system." (emphasis added). Additionally, in Richmond v. Lewis, 506 U.S. 40, 49 (1992), the Court stated, "Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the *state* appellate court or some other *state* sentencer must actually perform a new sentencing calculus." (emphasis added).

More recently, in Brown v. Sanders, 546 U.S. 212 (2006), the Supreme Court reiterated their earlier holdings. The Supreme Court first noted, that "[i]n a weighing State ... the sentencer's consideration of an invalid eligibility factor necessarily skewed its balancing of aggravators with mitigators." Sanders, 546 U.S. at 217 (citing Stringer, 503 U.S. at 232, 112 S.Ct. 1130). The Supreme Court then stated that, under Stringer, this skewing "required reversal of the sentence (unless a *state appellate court determined the error was harmless* or reweighed the mitigating evidence against the valid aggravating factors)." *Id.*

As noted, above, Ohio's statutory capital scheme mandates that a new resentencing be undertaken subsequent to the federal court finding that Wilson's sole capital aggravator was invalid based upon an improper jury instruction. State v. Penix (1987), 32 Ohio St. 3d 369; State v.

Williams (2004), 103 Ohio St. 3d 112.

B. The Trial Court Maintains Jurisdictional Authority to Correct an Illegal Sentence.

Because the federal habeas court has determined that Wilson's sole aggravator was improperly considered by his jury, under Ohio's statutory scheme it is legally improper for him to remain under a sentence of death. In denying a habeas writ, Wilson is now seeking this State Court to correct his illegal sentence.

A trial court always retains jurisdiction to correct an illegal sentence. Generally, any attempt by a court to impose a sentence *other* than one within the range of available statutory options is void for want of subject matter jurisdiction. Such a sentence may be set aside at any time because it is void *ab initio*. This Court in Colegrove v. Burns, 175 Ohio St. 437, 438 (1964), described the role of a trial judge in sentencing a convicted criminal:

. . . Crimes are statutory, as are the penalties therefor, and the only sentence which a trial judge may impose is that provided for by statute A court has no power to substitute a different sentence for that provided for by law.

Subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court. *See e.g., Louisville & Nashville R. R. Co. v. Mottley*, 211 U.S. 149 (1908); United States v. Cotton, 535 U.S. 625, 630 (2002).

Therefore, the trial court maintained the authority to resentence Wilson in accordance to Ohio's statutory scheme. The failure to remand this matter for a new sentencing hearing is violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Proposition of Law II:

A state court may not refuse to give effect to a federal courts' ruling that the sole statutory aggravating factor is invalid. The failure to honor the federal court finding violates the Supremacy Clause and the Full Faith and Credit Clause of the Constitution of the United States.

Article III, Section 2 to the Constitution of the United States provides, in relevant part: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States [and] to Controversies

The exercise of judicial power under Article III of the United States Constitution depends on the existence of a case or controversy, U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 113 S. Ct. 2173 (1993). Without an actual case or controversy a federal court does not have the power or jurisdiction to render a purely advisory opinion. Judgments of the federal courts must resolve a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Preiser v. Newkirk, 422 U.S. 395, 95 S. Ct. 2330 (1975); North Carolina v. Rice, 404 U.S. 244, 92 S. Ct. 402(1971).

Therefore, the Sixth Circuit's federal harmless error analysis premised upon an invalid specification must have been, by law, an actual case or controversy. Thus, the Sixth Circuit must have meant exactly what it said:

Crucial to this appeal is how harmless-error principles discussed above apply in the capital-sentencing context *when, as here, the jury considers an invalid aggravating factor* when imposing a death sentence.

Wilson v. Mitchell, 498 F.3d 491, 504 (6th Cir. 2007).

To argue that there was in fact no actual constitutional error underlying the federal harmless error analysis would necessarily mean that the Sixth Circuit issued an improper advisory opinion.

Article III, Section 1 to the Constitution of the United States provides, in relevant part:

The judicial Power of the United States, shall be vested in one Supreme Court, and *in such inferior courts* as the Congress may from time to time ordain and establish. (Emphasis added).

The requirement that a federal court's federal question judgment subsequently binds a state court is grounded in the authority of federal courts under Article III of the Constitution.

The principle is clearly established that a state court must give federal collateral estoppel effect to an earlier federal court's decision of a federal question. Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984).

Thus, the state courts are estopped from revisiting the federal habeas courts' ruling that Wilson's sole capital aggravator is invalid. This is necessary for preserving the power of federal

Whether rooted in the statute implementing the Full Faith and Credit Clause, 28 U.S.C § 1738, or judicial rule, the Supreme Court has regularly referred to the principle that "the judicial proceedings of the federal courts ... must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another state." Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30, 33 (1924). Instead of providing the *remedy*, the lower state courts in Wilson's case simply announced that there had been *no violation* of constitutional rights in the first place. Thus, the state court closed its eyes to the federal judgment and made rulings of law and fact directly contrary to the federal court's.

CONCLUSION

Pursuant to the preceding Propositions of Law, the defendant-appellant, Daniel Wilson, respectfully requests that this Honorable Court reverse the sentence in this matter and remand for

a new sentencing hearing.

Respectfully submitted,

David L. Doughten -
DAVID L. DOUGHTEN by Kathryn L Sanford
ALAN C. ROSSMAN #0063985
Counsel for Appellant per authorization

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served upon Dennis Will, Esq. Lorain County Prosecutor, 225 Court Street-3rd Floor, Elyria, Ohio, 44035 on this 22nd day of May, 2009.

David L. Doughten -
DAVID L. DOUGHTEN by Kathryn L Sanford
Counsel for Appellant #0063985
per authorization

APPENDIX

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

DANIEL WILSON

Appellant

C. A. Nos. 09CA009559 and
 09CA009562

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 91CR040383

DECISION AND JOURNAL ENTRY

Dated: May 21, 2009

MOORE, Presiding Judge

{¶1} Appellant, Daniel Wilson, appeals from the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} The procedural history of this case is long and complicated. The following facts provide an overview of the factual and procedural history necessary to understand the discussion of the narrow issues that follow.

{¶3} Appellant, “Daniel Wilson, killed Carol Lutz by locking her in the trunk of her car, puncturing the gas tank, and setting the car on fire. Wilson then walked away, allowing Carol Lutz to be baked alive.” *State v. Wilson* (1996), 74 Ohio St.3d 381, 381. Wilson was indicted on three aggravated murder counts: aggravated murder by prior calculation and design; felony-murder (kidnapping); and felony-murder (aggravated arson). Each aggravated murder count had three death specifications. Specification one charged murder to escape “detection,

apprehension, trial, or punishment” for kidnapping; specification two charged murder during kidnapping; and specification three charged murder during an aggravated arson. Wilson was also indicted for kidnapping and aggravated arson. *Id.* at 383.

{¶4} At trial, Wilson claimed intoxication as a defense. The jury found Wilson guilty on all counts. At the penalty phase, the State elected to proceed to sentencing only on the prior calculation and design count and only on the first death specification, evading detection or punishment for another offense in violation of R.C. 2929.04(A)(3). For purposes of sentencing, neither the trial court nor the jury considered the other aggravated murder counts or death specifications. *Id.* at 383. Following the penalty phase, Wilson was sentenced to death.

{¶5} Wilson appealed to this Court, which affirmed, *State v. Wilson* (Oct. 12, 1994), Lorain App.No. 92CA005396, and to the Ohio Supreme Court, which also affirmed. *Wilson* (1996), 74 Ohio St.3d 381. Relevant to the matter currently before this Court, the Ohio Supreme Court held that the trial court improperly instructed the jury during the guilt phase of the trial because the instruction on intoxication shifted the burden of proof from the State to Wilson. *Id.* at 394. The Supreme Court, however, found the error to be harmless. *Id.*

{¶6} Wilson then pursued other remedies. This Court affirmed the trial court’s denial of his petition for postconviction relief. *State v. Wilson* (1998), Lorain App.No. 97CA006683. This Court also denied Wilson’s motion to reopen his direct appeal. Wilson then sought federal habeas corpus relief.

{¶7} The United States District Court denied Wilson’s petition for writ of habeas corpus. The Sixth Circuit Court of Appeals affirmed the District Court’s judgment. *Wilson v. Mitchell* (C.A.6 2007), 498 F.3d 491. The Sixth Circuit reviewed a number of claims, but its

analysis of the jury instruction claim prompted Wilson to return to state court to again seek postconviction relief and to move for resentencing.

{¶8} In his federal habeas corpus action, Wilson argued that the intoxication jury instruction improperly shifted the burden of proof to him and that this error was not harmless. *Id.* at 499. The Sixth Circuit reviewed the instruction and the Ohio Supreme Court's analysis of it in Wilson's direct state appeal. *Id.* at 499-502. The Sixth Circuit considered this argument as it related not only to the *guilt*-phase instruction – as reviewed by the Ohio Supreme Court – but also as it related to the *penalty*-phase. *Id.* at 499. One sentence of the Sixth Circuit's decision forms the basis of Wilson's claims: "Instead, we assume that the instruction was erroneous with regard to the evading-kidnapping specification and address whether it was harmless." *Id.* at 501.

{¶9} In his petition for postconviction relief, and on appeal to this Court, Wilson argues that the Sixth Circuit's decision invalidated the only aggravating circumstance presented to the sentencing jury and, therefore, he is no longer eligible for the death penalty. Wilson further argues that the Sixth Circuit's decision is a new "fact" that he was unavoidably presented from discovering so that he may be permitted to file a successive, untimely petition for postconviction relief. R.C. 2953.23(A)(1)(a).

{¶10} Wilson also moved for resentencing. The trial court combined the motion for resentencing and petition for postconviction relief and considered them as one petition for postconviction relief. Wilson's resentencing argument, however, was that the Sixth Circuit invalidated the sole aggravating circumstance the jury considered so that he is no longer eligible for the death penalty. Wilson argued that he is now subject to a void sentence and the trial court always has jurisdiction to correct a void sentence.

{¶11} The trial court denied Wilson's petition and motion. Wilson filed two separate appeals, one challenging the denial of his petition for postconviction relief and another challenging the trial court's failure to resentence him. This Court consolidated the appeals. We first address the denial of the petition for postconviction relief and then consider the motion for resentencing.

II.

A. Postconviction Relief Appeal

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DISMISSING THE APPELLANT'S SUCCESSOR PETITION FOR POSTCONVICTION RELIEF PURSUANT TO R.C. 2953.21 AS WILSON MET THE GATEWAY REQUIREMENTS OF R.C. 2953.23(A)(1).

{¶12} Wilson argues that he met the requirements to file a successor postconviction relief petition. We do not agree.

{¶13} R.C. 2953.21 authorizes a person convicted of a criminal offense to petition the trial court to set aside the judgment or sentence. R.C. 2953.23 imposes limitations on a person's ability to seek postconviction relief:

"(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

"(1) Both of the following apply:

"(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, * * *.

"(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the

sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.”

Wilson acknowledges that he filed a successive petition for postconviction relief. He further recognizes that he must meet the requirements of R.C. 2953.23(A)(1) to proceed or the trial court could not consider the petition.

{¶14} Wilson argues that the Sixth Circuit’s decision is a new “fact” upon which he relies to present his claim for relief. According to Wilson, therefore, he falls under R.C. 2953.23(A)(1)(a) to allow the trial court to consider his successive petition.

{¶15} The Sixth Circuit’s decision is not a “fact” within the meaning of R.C. 2953.23(A)(1)(a). The court did not make a factual finding in deciding his appeal. Rather, the Sixth Circuit’s decision is based on facts that were available to Wilson and that Wilson argued in his initial state appeals. While the Sixth Circuit may have analyzed those facts in a different way than the Ohio Supreme Court, that does not mean that Wilson was unavoidably prevented from discovering the facts upon which he relies.

{¶16} Furthermore, we question Wilson’s reading of the Sixth Circuit’s decision. Wilson cited to the last sentence of a paragraph to support his argument in the trial court and in this Court. Reviewing the entire paragraph, however, puts the last sentence in context:

“We are not certain that an error regarding the knowledge element of a kidnapping offense necessarily translates into an error regarding the knowledge element of an *evading-kidnapping* specification. In other words, one might say it is conceivable that a person could lack the requisite knowledge to commit kidnapping, yet have the requisite knowledge to commit murder to evade detection for kidnapping—for example, where the person believes he has committed kidnapping (but actually has not, perhaps because of earlier intoxication), and then commits murder to *evade detection* for the kidnapping he (erroneously) believes took place. But we do not decide this question. Instead, we assume that the instruction was erroneous with regard to the evading-kidnapping specification and address whether it was harmless.” (Emphasis sic.) *Wilson*, 498 F.3d at 501.

This paragraph begins with the Sixth Circuit's recognition of its uncertainty that there even was an error that affected the specification. The paragraph concludes by *assuming* there was an error in order to address whether that assumed-error was harmless. Assuming the existence of an error for purposes of harmless error review is not the same as deciding, as a factual matter, that the instruction was erroneous and that Wilson's constitutional rights were violated. Assuming the existence of an error does not create a "fact" and it is not tantamount to a finding of fact. The Sixth Circuit reached a legal conclusion – that the assumed error was harmless – based on facts that were available in the record from the time of the trial.

{¶17} Wilson cannot show that he was unavoidably prevented from discovery of facts upon which he must rely to present the claim for relief, as required by R.C. 2953.23(A)(1)(a). Thus, he failed to meet the requirements of R.C. 2953.23(A)(1) to file a successive petition. The trial court properly denied the petition for postconviction relief. The assignment of error is overruled.

B. Motion for Resentencing Appeal

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY FAILING TO RESENTENCE THE APPELLANT FOR A CONVICTION OF AGGRAVATED MURDER WITHOUT A CAPITAL SPECIFICATION.

{¶18} Wilson argues that the trial court erred because it failed to resentence him. We do not agree.

{¶19} Wilson moved for resentencing because, according to his argument, the Sixth Circuit held that the sole aggravating specification was invalid, making his death sentence void. Following a hearing on the motion to resentence in the Common Pleas Court, Wilson petitioned for postconviction relief, as the trial court had suggested. Following a second hearing on both

the motion and the petition, the Common Pleas Court issued one journal entry that addressed the motion and petition together. As noted earlier, Wilson filed two separate appeals, one challenging the trial court's decision on the postconviction petition addressed above, and one challenging the trial court's ruling on his motion for resentencing, which we address now.

{¶20} Wilson succinctly stated his position in an overview of his argument: "Ohio trial courts have always maintained jurisdiction to correct an illegal sentence. If the burden-switching instruction was constitutional error, the capital specification was invalid. Without a valid statutory aggravating factor, the death penalty is no longer a legal sentence. Thus, the trial court maintains the inherent jurisdiction to correct the sentence." (Wilson's Brief at 7-8).

{¶21} We agree with Wilson's legal premise. The Ohio Supreme Court has held that "[a]ny attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. The Supreme Court has applied this standard a number of times in recent years. See, e.g., *State v. Boswell*, Slip Op.No. 2009-Ohio-1577; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197; and *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642.

{¶22} Although we agree with Wilson's statement of the law about void sentences, we disagree with its application in this case. As we discussed when reviewing his postconviction appeal, we do not agree with Wilson's argument that the Sixth Circuit Court of Appeals invalidated the aggravating circumstance that supported imposition of the death penalty. The Sixth Circuit assumed, for purposes of harmless error analysis, that there was error, but it did not decide – either as a matter of fact or as a matter of law – that there was error.

{¶23} The Sixth Circuit did not decide that Wilson's sentence was void because of an invalid aggravating circumstance. As that was the sole basis of his argument, Wilson failed to

demonstrate that his sentence is void. Accordingly, the trial court lacked jurisdiction to consider his motion for resentencing. The assignment of error is overruled.

III.

{¶24} Wilson's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

DAVID L. DOUGHTEN, Attorney at Law, for Appellant.

ALAN C. ROSSMAN, Assistant Federal Defender, for Appellant.

DENNIS WILL, Prosecuting Attorney, ANTHONY D. CILLO, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.