

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :

Defendant-Appellee, :

v. : Case No. 09-0897

LONDON K. FISCHER, : On Appeal from the

Plaintiff-Appellant. : Ninth Appellate District,

: Summit County

: Case No. CA24406

**MEMORANDUM OF AMICI CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER  
AND OHIO ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS IN SUPPORT OF  
RECONSIDERATION OF DENIAL OF JURISDICTION**

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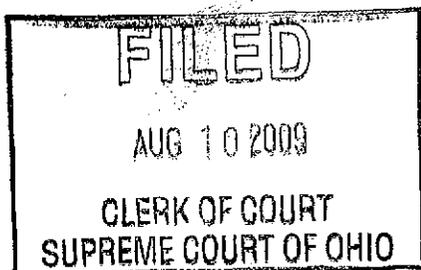


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## INTERESTS OF AMICI CURIAE

The Office of the Cuyahoga County Public Defender is legal counsel to more than one-third of all indigent persons indicted for felonies in Cuyahoga County. As such, the Office is the largest single source of legal representation of criminal defendants in Ohio's largest county.

The Ohio Association of Criminal Defense Lawyers (OACDL), founded in 1986, is a professional association with more than 500 members in the State of Ohio. OACDL is among the largest professional organizations of criminal practitioners in the State, OACDL is an advocate of progressive criminal laws and policies that are consistent with constitutional principles, limited governmental intrusion into the lives of Americans, and a free society.

### ARGUMENT

Your amici ask this Court to reconsider and accept jurisdiction over Proposition of Law I:

**A direct appeal from a void sentence is a legal nullity; therefore, a criminal defendant's appeal following a *Bezak* resentencing is the first direct appeal as of right from a valid sentence. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.**

Proposition of Law I is important. Analysis of this issue will enable the Court to harmonize a number of cases that have been decided in the past five years and provide further clarity to important legal and practical questions.

#### **Connection to Pending Case**

The opinion below, by holding that parties are precluded from even raising issues in a "second" appeal following a *Bezak* resentencing, has raised the law-of-the-case-doctrine to a principle of subject matter jurisdiction. The relation between the law-of-the-case-doctrine and subject matter jurisdiction is already before the Court as Proposition of Law III of *State ex rel. Cordray v. Marshall, Judge; and Rawlins*, Case No. 2009-25.

## **The Court's Recent Jurisprudence Regarding Sentences Without Post-Release Control**

The instant case has the ability to harmonize several of this Court's recent decisions, each of which has concerned a different aspect of the legal effect of a sentence that does not include post-release control. The genesis of this line of cases is *State v. Jordan* (2004), 104 Ohio St.3d 21, 2004-Ohio-6085. The Court in *Jordan* was confronted with opposing viewpoints about the effect of a prison term that did not include post-release control. The State argued that such a sentence was contrary to the General Assembly's clear intention that post-release control be a part of every sentence; thus, argued the State, fidelity to the sentencing statutes required a remand to add the missing post-release control term. Mr. Jordan argued that, because the Fifth Amendment's multiple punishment clause prohibited double punishment, a sentence without post-release control could not be reversed in order to add post-release control; thus, argued the defense, the post-release control term could not be imposed.

*Jordan* rejected both competing views and fashioned a remedy that was consistent with prior precedent, avoided constitutional pitfalls and still remained true to the General Assembly's intent. *Jordan* held that the original sentence, because it was missing an essential component, was illegal and thus void. Accordingly, under *Jordan*, the defendant could be returned to the lower court for a sentencing de novo.

*Bezak* made clear that the sentence contemplated by *Jordan* was truly the first sentence in the case. *Bezak* recognized that any prior sentence that did not include post-release control was a nullity and was to be treated "as if there had been *no judgment*." *Bezak* at par. 12 (emphasis added), quoting without internal citations from *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-68.

Following *Bezak*, this Court, in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, recognized again the truly de novo nature of a sentencing that followed a remand. In *Simpkins*, this Court held that a defendant whose original sentence lacked post-release control could be sentenced anew after serving eight years and 360 days of a void nine-year sentence. The Court further held that the defendant enjoyed no expectation of finality in the previously imposed sentence and could thus be subjected to a post-release control term that had never been contemplated almost nine years previously.

### **The Importance of Proposition of Law I to the Court's Previous Case Law**

The Ninth District, in the Opinion below, threatens to undermine the essence of the *Jordan-Bezak-Simpkins* line of cases by giving legal effect to the null and void “first sentence” that did not include post-release control. The opinion below treats the first sentence as having consummated a judgment from which an appeal can be taken. But, if this is the case, then *Jordan* and its progeny do not really stand for the proposition that the first sentence was a nullity. And, if the first sentence is not a nullity, then the imposition of post-release control at a “second” (i.e. first legally valid) sentencing after remand on appeal is a second punishment for the same offense. If the opinion below is correct, then sentences that include post-release control after remand are unconstitutional because they will impose a second punishment upon an already existing sentence – this is precisely the constitutional problem that *Jordan* traversed by holding that the original sentence was void.

Moreover, the notion that a void judgment could have any legal effect poses problems in other areas of the law. See, *Barnes v. University Hospitals of Cleveland*, 119 Ohio St.3d 173, 2008-Ohio-3344 (O'Donnell, Lundberg Stratton, JJ., dissenting) (jury trial by private judge renders entire proceeding void, comparing such action to an illegal sentence). In *Simpkins*, the

Court recognized its ongoing struggle with the “void”-“voidable” distinction. The opinion below muddies waters that the Court has been attempting to clarify.

### **Practical Problems With the Opinion Below**

Not only is the opinion below problematical legally, it is also impractical. A defendant who receives a short prison sentence without post-release control term may not choose to employ counsel to appeal the original verdict, knowing that he will be released from prison at or near the time the appeal would be resolved. But, if post-release control is later added (as *Simpkins* allows), the defendant may well want to appeal after all. The logic of the opinion below would dictate that the failure to take any appeal after the “first” sentence should also preclude raising trial issues on appeal following a “second” sentencing. This forces defendants to take appeals in cases where, depending upon whether post-release control has not been imposed, the defendant would just as soon leave well enough alone.

In the end, treating the appeal following the “second” sentence as an appeal de novo will not impede appellate courts. There is no reason why an appellate court will have to reinvent the wheel in dealing with the issues previously presented (after all, the court will have the benefit of its previous opinion and research). And the new issues presented were not considered before – and thus did not expend court time in the first instance. Any minimal duplication of effort by the appellate courts is well worth the price of keeping the *Jordan-Bezak* line of cases that avoids far greater constitutional problems.

### **Proposition of Law I is Fundamentally Fair**

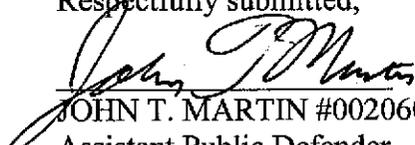
Finally, and perhaps most importantly, Proposition of Law I levels an otherwise uneven playing field. *Simpkins* has held that the defendant enjoys no expectation of finality in a void

sentence. But, if defendants cannot rely upon such a null and void judgment, then why can prosecutors and appellate courts? Either a judgment is void for everyone, or it is void for no one.

**Conclusion**

Wherefore, your amici pray that this Court reconsider and accept jurisdiction over Proposition of Law I.

Respectfully submitted,

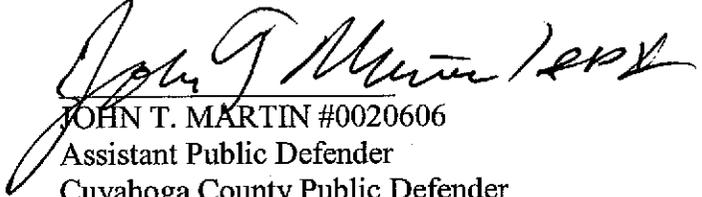
  
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was mailed to Sherri B. Walsh and or a member of her staff at 53 University Ave., 7<sup>th</sup> Floor, Safety Building, Akron, Ohio 44308 this 10<sup>th</sup> day of August, 2009.



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