ORIGINAL

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, | : | |
| | : | Case No. 2009-0897 |
| Plaintiff-Appellee, | : | |
| | : | On Appeal from the Summit County Court of Appeals Ninth Appellate District |
| vs. | : | |
| LONDEN K. FISCHER, | : | |
| | : | C.A. Case No. CA-24406 |
| Defendant-Appellant. | : | |

**BRIEF OF AMICI CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER AND OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT LONDEN K. FISCHER**


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## INTEREST 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 five hundred members in the State of Ohio. OACDL is among the largest professional organizations of criminal practitioners in Ohio, and advocates for progressive criminal laws and policies that are consistent with constitutional principles, limited governmental intrusion into the lives of Americans, and a free society.

## STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Case and Facts set out by Appellant in his merit brief.

## ARGUMENT

**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.**

### A. Introduction

Ultimately, this case requires nothing more than the straightforward application of this Court's extensive jurisprudence regarding the legal effect of sentences that lack a mandatory term of postrelease control. The parties agree that Mr. Fischer's original sentence was void, because it did not include a mandatory term of postrelease control. The parties also agree that Mr. Fischer took what purported to be a direct appeal from the void sentence, and that the Ninth District Court of Appeals purportedly affirmed his convictions. Additionally, the parties agree that Mr. Fischer was entitled to a de novo sentencing hearing, and that Mr. Fischer took a timely appeal from that sentencing. In fact, the only dispute between the parties concerns the effect of Mr. Fischer's "first" direct appeal. Mr. Fischer maintains that his first direct appeal was invalid, because it stemmed from a void sentence. The state argues that, despite the fact that the original sentence was a "legal nullity," it somehow created a final, appealable order. Therefore, according to the state, the court of appeals' decision in Mr. Fischer's direct appeal operates as a bar to litigation of any trial issues during his second appeal. In the proceedings below, the court of appeals adopted the position of the state. However, the Ninth District's opinion clearly imputes a legal effect to Mr. Fischer's original void sentence by using it as a bar to further litigation. Amici ask this Court to simply apply its well-settled rule regarding the legal effect of void sentences and hold that Mr. Fischer's first appeal was invalid because it stemmed from a void judgment.

The decision of the Ninth District in this case implicates fundamental legal and judicial principles. On its face, this case addresses the legal effect, if any, of a "void" judgment, but on a more fundamental level, this case concerns the deference that an appellate court should give to the decisions of this Court and the need for courts of appeals to avoid strained applications of the law-of-the-case doctrine. At its core, the decision of the Ninth District gives legal and binding effect to a proceeding, i.e., a sentence of imprisonment which does not include postrelease control, which this Court has repeatedly declared to be "legal nullity." Therefore, Amici urge this Court to reverse the decision of the court of appeals and remand this case for a full hearing on Mr. Fisher's appellate issues.

**B. The Court of Appeals' Decision Disregards this Court's Previous Decisions Holding that Failure to Properly Impose Postrelease Control Renders the Entire Sentence Void.**

This Court has unequivocally held that failure to properly include postrelease control in a criminal sentence renders that sentence void. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547; *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462; *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085; *State v. Beasley* (1984), 14 Ohio St.3d 74; *State v. Singleton*, Slip Opinion No. 2009-6434; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126; *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171. In this case, the court of appeals acknowledged that the trial court failed to properly impose postrelease control during Mr. Fisher's original sentencing hearing and that his first sentence was void pursuant to *Bezak*. Nonetheless, the court of appeals still gave legal effect to the "void" sentence by concluding that the original sentence somehow consummated a final judgment from which a valid appeal could

be taken.[1] If the legal theory underpinning the court of appeals' decision is an accurate statement of the law, then this Court's holdings in the eleven cases cited above have been seriously undermined, if not entirely abrogated.

**1. A void sentence cannot form the basis for a valid direct appeal, because the original conviction lacks a final, appealable order.**

It is indisputable that Mr. Fischer's original sentence was void; therefore, it was as if his sentencing never occurred. As a result, no final, appealable order existed to invoke the court of appeals' jurisdiction over Mr. Fischer's first appeal. It appears that neither the parties nor the court of appeals recognized this jurisdictional defect, but this does not alter the fact that the decision in the first appeal was itself void and without legal effect.

In the past five years, this Court has decided numerous cases addressing the legal effect of a sentence that does not impose postrelease control. In the first of a long line of cases, this Court considered opposing viewpoints about the effect of a criminal sentence that did not include a mandatory term of postrelease control. See *Jordan*, 2004-Ohio-6085. In *Jordan*, the State argued that such a sentence was contrary to the General Assembly's intention that postrelease control be a part of specified criminal sentences; therefore, the State argued that fidelity to the sentencing statutes required a remand to simply add the postrelease control term. On the contrary, the defense relied upon the Double Jeopardy Clause to argue that the addition of postrelease control constituted double punishment; therefore, the case could not be remanded to add postrelease control. Ultimately, this Court rejected both viewpoints and concluded that the original sentence was missing a statutorily mandated term, which rendered the original sentence

[1] In his merit brief, Mr. Fischer argues persuasively that the Ninth District has subsequently abandoned the reasoning which underlies its decision in this case. However, until this Court, or the Ninth District itself, overrules the decision, it remains good law in the Ninth District. Therefore, Amici have directed their arguments to the content of the Fischer decision itself.

void. Id. at ¶26. This Court then explained that the defendant could be returned to the lower court for a sentencing de novo. Id. at ¶23.

Three years later, this Court reaffirmed and emphasized its holding in *Jordan* that if a defendant is not properly sentenced to postrelease control then the sentence imposed by the trial court is void. *Bezak*, 2007-Ohio-3250, at ¶12. This Court reiterated that "the effect of determining that a judgment is void is well established. It is as though the proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as is there had been no judgment." Id. (internal citations omitted). Thus, *Bezak* left no question that the sentence following the de novo sentencing was truly the first sentence in the case.

In the intervening years, this Court has not retreated from the principle, first set out in *Jordan*, that sentences lacking a mandatory term of postrelease control are void. See, e.g., *Simpkins*, 2008-Ohio-1197, ¶20 (emphasizing the fundamental principle that "no court has the authority to substitute a different sentence for that which is required by law" and "[b]ecause no judge has the authority to disregard the law, a sentence that does so is clearly void"); *Boswell*, 2009-Ohio-3187, ¶¶12-13 (holding that the void sentence is "actually considered a nullity," and therefore, had to be vacated); *Singleton*, Slip Opinion No. 2009-6434, ¶26 (holding that all sentencing entries issued prior to July 11, 2006 that lack a mandatory term of postrelease control were "nullities at their inception" and "there is no existing judgment for a sentencing court to correct.").

Thus, this Court's jurisprudence from *Jordan* through *Singleton* relies upon one central principle—any sentence that fails to include mandatory postrelease control is void and without any legal effect. Unfortunately, in the instant case, the Ninth District disregarded this unequivocal rule of law by treating Mr. Fischer's void sentence as a "final, appealable order"

from which a valid direct appeal could be taken. This holding is wholly inconsistent with this Court's prior holdings that a void sentence has no legal effect.

Moreover, Mr. Fischer's first direct appeal suffers from the same infirmities as the original sentencing; therefore, the decision of the court of appeals in the first appeal is also a "void judgment," which has no independent legal effect. It is undisputed that a court of appeals lacks subject-matter jurisdiction to review a case in the absence of a final, appealable order. *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, at ¶18. When the court of appeals decided Mr. Fischer's first appeal, it acted without subject-matter jurisdiction because his original illegal sentence did not create a final, appealable order. See *Simpkins*, at ¶12. As a result, any action taken by the appellate court in Mr. Fischer's first direct appeal is itself void.

**2. Because the court of appeals' decision in Mr. Fischer's first appeal was itself void, the law of the case doctrine cannot operate as a bar to his appeal following his *Bezak* resentencing.**

On his appeal from his *Bezak* resentencing, i.e. his appeal from the only sentence that was legally valid and not a nullity, Mr. Fischer raised a meritorious issue related to his trial. However, the Ninth District refused to consider any issues other than those related to his sentence. The court of appeals held that the law-of-the-case doctrine prohibited Mr. Fischer from making arguments that were or could have been fully litigated in his first appeal. Such a rule cannot be harmonized with this Court's previous decisions, because it gives legal effect to Mr. Fischer's void sentence.

This Court has held that the law-of-the-case doctrine does not apply to decisions that the court had no power to make on the former review. *Russell v. Fourth Nat. Bank* (1921), 102 Ohio St. 248, 263-64. Therefore, the law-of-the-case doctrine could only be applied to Mr. Fischer's

second appeal if the Ninth District had the power to issue a decision in the first appeal. As discussed above, and in detail in Mr. Fischer's merit brief, the court of appeals had no power to act in Mr. Fischer's first appeal because it lacked subject-matter jurisdiction. As a result, the law of the case doctrine is inapplicable.

### C. The Court of Appeals' Decision Creates Substantial Constitutional and Practical Problems.

The decision of the court of appeals in this case is inconsistent with the precedent of this Court, but it also gives rise to serious constitutional attacks. First, the reasoning of the court of appeals resurrects the Double Jeopardy challenges this Court effectively addressed in *Jordan*. Second, the decision below is fundamentally unfair because it denies full appellate review following a *Bezak* sentencing only to those defendants who appealed their original void sentence. Finally, the decision of the court of appeals creates an absurd, and untenable, result because it suggests that a sentence is void for one party while the same sentence is not void for another party.

#### 1. The decision of the court of appeals creates serious double jeopardy problems.

Analysis of the multiple punishment issue begins with an examination of the Double Jeopardy Clauses at issue, which state, "[N]or shall any person be subject for the same offence to be put twice in jeopardy of life or limb," Fifth Amendment to the United States Constitution, and "No person shall be twice put in jeopardy for the same offense." Section 10, Article 1, Ohio Constitution. The Double Jeopardy Clause protects persons from (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce* (1969), 395 U.S. 711, 717. "A primary purpose served by [the Double Jeopardy Clause] is akin to that served by the

doctrines of *res judicata* and collateral estoppel-to preserve the finality of judgments." *Crist v. Bretz* (1978), 437 U.S. 28, 33.

The decision of the Ninth District in this case implicates the prohibition on multiple punishments, because it essentially allows the state to modify an existing sentence to add an additional punishment. This is precisely the constitutional problem that *Jordan* sought to avoid. In *Jordan*, this court held that resentencing to include postrelease control does not violate finality or double-jeopardy restraints, because jeopardy does not attach to a void sentence. *Jordan,* at ¶25. The *Jordan* Court further held that "an invalid sentence for which there is no statutory authority is . . . a circumstance under which there can be no expectation of finality to trigger the protections of the Double Jeopardy Clause." Id. (internal citations omitted).

Subsequent decisions from this Court have emphasized that, according to *Jordan*, a sentence is void if the court fails to follow the statutory mandates to impose postrelease control. *Bloomer*, 2009-Ohio-2462, at ¶3. In *Jordan,* this Court relied upon the fact that "jeopardy does not attach to a void sentence" in holding that the subsequent imposition of the statutorily required sentence cannot constitute double jeopardy. *Jordan*, at ¶25. Likewise, this Court has repeatedly held that "there can be no reasonable, legitimate expectation of finality in [a void sentence]." *Simpkins*, at ¶36, citing *United States v. Crawford* (C.A.5, 1985), 769 F.2d 253, 257-258.

These cases unequivocally demonstrate that the only reason double jeopardy is not implicated when a sentence is modified to include postrelease control is the fact that the original sentence is void and jeopardy could not attach. If the decision of the Ninth District is permitted to stand, the original sentences can no longer be considered void, because they were sufficient to create final, appealable orders. And if those sentences are not, in fact, void, then any

proceedings to add punishment to those existing sentences, once the time for direct review had run, would constitute double punishment. See *State v. Roberts*, 119 Ohio St.3d 294, 2008 -Ohio-3835 (holding that sentences subject to review have no expectation of finality for purposes of double jeopardy).

**2. The court of appeals' decision is fundamentally unfair.**

In addition to the numerous legal inconsistencies and problems noted above, the decision of the Ninth District in this case is, at its core, fundamentally unfair. First, it carves out a particular group of defendants who will be precluded from full litigation of their appellate issues following a *Bezak* sentencing—specifically, individuals who appeal from the original void sentence. Such a result arises because the law-of-the-case doctrine applies only to those defendants who appeal from their "first," albeit void, sentence. By definition, law of the case cannot apply to those defendants who do not take an appeal from the void sentence. Normally, res judicata would prohibit those defendants who did not appeal the first sentence from obtaining review following their *Bezak* sentencing, but this Court has explicitly held that res judicata does not apply to cases in which the sentence was void. *Simpkins*, at ¶30.

Consider, as an example, the following: Defendant A is sentenced and the trial court does not properly include postrelease control. Defendant A does not take a direct appeal. It is later discovered that Defendant A's first sentence is void due to the absent postrelease control term and Defendant A is resentenced under *Bezak*. Defendant A then files a timely direct appeal in which he raises issues related to both his trial and sentencing. Now, Defendant B has the exact same situation, except he does take a direct appeal from the original void sentence. According to the Ninth District, Defendant A is entitled to complete review of his appellate issues (because res judicata does not apply to void sentences), but Defendant B may only obtain review of those

issues related to his sentencing (because the law of the case doctrine does apply to void sentences). This result is untenable and should not be permitted to stand.

In addition, the decision of the court of appeals suggests that a judgment could be void for the defendant, but the same sentence would not be void for prosecutors and appellate courts. Thus, the State has the power to hale countless defendants back into court to increase their punishment by adding postrelease control precisely because the defendant "enjoyed no reasonable expectation of finality in a void judgment." *Simpkins*, at ¶36. But prosecutors and appellate courts can rely upon that very same "null and void" judgment to preclude litigation of appellate issues by pointing to a doctrine whose sole purpose is to preserve the finality of judgments—the law of the case doctrine. Clearly, this is not the result this Court intended when it held that there can be no reasonable expectation of finality in a void judgment. Notwithstanding the court of appeals' decision to the contrary, *Simpkins* can only be read to stand for the proposition that no one can rely upon a null and void judgment because there can be no reasonable expectation of finality in any such judgment. In the end, a judgment is either void for everyone or it is void for no one. Amici, therefore, urge this Court to reverse the decision of the Ninth District to prevent the further application of this unfair result.

The unfairness of the Ninth District's decision manifests itself in another, practical consideration. The defendant who is initially "sentenced" contrary to law to a brief period of incarceration with no postrelease control may desire to appeal certain issues relating to his or her conviction but not others. For example, in such circumstances, a defendant may only want to appeal issues that will result in complete vindication, such as the denial of a suppression motion (which, if successful, would effectively preclude a new trial and guarantee dismissal or acquittal) or the sufficiency of evidence (which, when successful, always results in acquittal). Similarly, a

defendant in such circumstances may only wish to appeal a sexual predator designation. But that same defendant may *not* want to appeal evidentiary issues at trial which would result in a new trial as opposed to an automatic acquittal -- the possibility of a new trial loses its attraction because the sentence will be virtually or completely served by the time the appeal is decided.

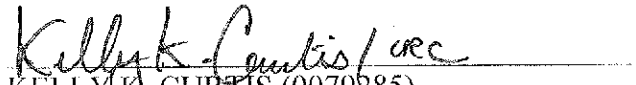
However, the defendant who only appealed a limited number of issues on appeal may later find him- or herself brought back to court pursuant to *Simpkins* and given a longer sentence with postrelease control. Under these new circumstances, the defendant may wish to appeal all alleged trial errors. According to the Ninth District, the defendant has lost that opportunity -- solely because he or she was involuntarily returned to court pursuant to *Simpkins*.

## CONCLUSION

Mr. Fischer's first sentence was void, because it lacked a statutorily required postrelease control advisement. His void sentence did not create a final, appealable order; this deprived the court of appeals of subject-matter jurisdiction to decide his first appeal. Mr. Fischer's "resentencing" was his first valid sentence; therefore, his "second" direct appeal must be treated as his only direct appeal as of right. As such, Mr. Fischer must be allowed to litigate any and all trial issues cognizable on direct appeal.

Respectfully submitted,

OHIO ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS



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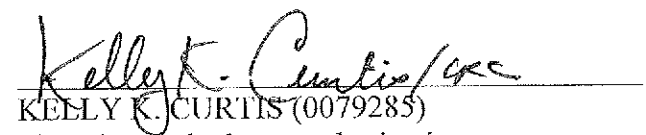
## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Amici Curiae Ohio Association of Criminal Defense Lawyers and the Cuyahoga County Public Defender in Support of Appellant Londen K. Fischer was forwarded by regular U.S. Mail, postage pre-paid, to Heaven DiMartino, Summit County Assistant Prosecutor, 53 University Avenue, 7th Floor, Safety Building, Akron, Ohio 44308, on this 29th day of December, 2009.



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