

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio	:	Case No.:10-0639
Plaintiff-Appellant	:	On Appeal from the Franklin
	:	County Court of Appeals,
	:	Tenth Appellate District
	:	
VS.	:	Court of Appeals
	:	Case No. 09AO-1132
	:	No. 09AP-1133
Corey Hazel	:	No. 09AP-1156
Defendant-Appellee	:	No.09AP-1157

**MEMORANDUM IN RESPONSE OF DEFENDANT-APPELLEE OPPOSING
 JURISDICTION AND MEMEORANDUM IN SUPPORT OF JURISDICTION FOR
 CROSS APPEAL OF APPELEE-CROSS APPELLANT**

BARBARA FARNBACHER #0036862
 FRANKLIN COUNTY PROSECUTOR
 373 S. HIGH ST 13TH FLOOR
 COLUMBUS OHIO 43215

COREY HAZEL #546-846
 CHILLICOTHE CORR. INST.
 P.O. BOX 5500
 CHILLICOTHE OH 45601

COUNSEL FOR STATE OF OHIO

DEFENDANT-APPELLANT
 PRO-SE

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The instant case does not present any substantial Constitutional questions, nor of great public interest as would warrant further review by this court. The propositions of law presented in this appeal are indicative of a long line of precedential cases by this court regarding the proper imposition of post release control and thereby does not substantiate any further review. Simply put, the issues presented for review are not of any great public interest or present any questions of Constitutional substance that have not already been presented and resolved by this court. Moreover, the Tenth District Court of Appeals in its decision is merely following the line of Supreme Court controlling cases in this matter and therefore, it is respectfully submitted that jurisdiction in this case should be declined.

STATEMENT OF THE CASE AND FACTS

The procedural history of this case is contained in paragraphs one through eight of the Court of Appeals decision on March 31, 2010, and Appellants statement of the case and facts, which Appellee incorporates by reference with the following exceptions.

On March 8, 2007 the trial court proceeded to consolidate Appellee's sentencing hearing in cases 05CR-7105 and 06CR-4742, which is the basis of the instant appeal. Specifically, the transcript of the March 8, 2007 sentencing hearing accurately reflects the courts failure to impose PRC pursuant to R.C. 2929.19(B)(3)(d) and in case 06CR-4742, for the third degree felony.

Moreover, in case 05CR-7105, the trial court in its judgment entry failed to properly impose PRC pursuant to R.C. 2929.19(B)(3)(c) when it used the discretionary language "up to three years", instead of a definite period of three years for the felony two conviction. Also, Defendant's court appointed counsel failed to object to the error, and the State did not file a timely direct appeal to address the issue. On April 9, 2009, Appellee filed a Motion to Withdraw Guilty Pleas due to the trial courts complete failure to comply with R.C. 2943.032 and Crim. R.11(C)(2)(a) at the plea hearing. However, the trial court denied the motion (stating no manifest injustice occurred) on August 27, 2008. Within that decision, the court conceded that it only imposed PRC for the 05CR-7105 case at the sentencing hearing, and thereby failed to address the 06CR-4742 sentence,

which further substantiated Appellee's Motion for Resentencing and the subsequent vacation by the Tenth District. Also, within its decision to deny Defendant's motion for clerical mistake on December 2, 2009, the trial court on two occasions conceded that the erroneous language used in the judgment entry of "up to three years" was included in the imposition of PRC in the 05CR-7105 case. (See T.C.D. Dec. 2, 2009 pag.3, par.1)

On March 31, 2010, the Tenth District Court of Appeals determined that Defendants' sentences were void due to the trial courts failure to properly impose PRC and on that same day filed a judgment entry vacating the judgments of the Franklin County Court of Common Pleas and ordered the court to resentence Defendant.

Moreover, on April 5, 2010 Defendant filed a pre-sentence Motion to Withdraw Guilty Pleas along with a Motion for Appointment of Standby Counsel, a Separate Hearing and a PSI. However, on April 13, 2010, the State of Ohio filed a Motion to Stay Proceedings pending the appeal to the Ohio Supreme Court. On April 16, 2010 the trial court denied Defendants Motions, yet granted the State's Motion to Stay despite the Tenth District's mandate to vacate the judgments.

Appellee now presents the following arguments in this Memorandum opposing jurisdiction and requests this Court decline jurisdiction in the instant cause.

ARGUMENT

Response to Proposition Law One: When, in resolving multiple cases, a trial court advises a guilty pleading defendant at the sentencing hearing that he will be subject to post release control in one case, but fails to provide specific oral notification regarding a concurrent term of discretionary post release control, pursuant to R.C. 2967.28 and 2929.14, **the sentence is void due to the trial courts failure to properly impose post release control on the concurrent term.**

As the State concedes in its memorandum, the statutory requirements of R.C. 2967.28(B)(2) and (C), R.C. 2929.14(F)(1), and R.C. 2929.19(B)(3)(c), (d) and (e), mandate that trial courts that impose prison terms, *shall* notify the offender of PRC at the sentencing hearing, and include the appropriate notice within the subsequent judgment entry.

In the instant case, because the Defendant plead guilty and was subsequently sentenced to both cases at the same time, the State proposes that under concurrent

sentencing, the court is alleviated from the statutory requirement of imposing PRC for each sentence. a copy of the transcript of the March 8, 2007 sentencing hearing clearly shows that the court failed to advise the Appellant that he may be subject to a discretionary term of up to three years PRC for his felony three convictions. (see C.A.D.09AP-1132, 09AP-1133, 09AP-1156, 09AP-1157, page. 7, par. 16 March 31, 2010); citing *State v Scott*, No. E-09-048, Ohio App. 6 Dist. 2010-Ohio-297. Thus, his sentences for the felony three convictions are void. Scott @ par. 10.

The State also presents that pursuant to R.C. 2967.28(F)(4)(c), periods of PRC shall be served concurrently, and that because PRC was included in the signed plea form, the trial court's oral notification of only the mandatory term of PRC for the felony two conviction only was necessary, and the court need not advise a defendant of any subsequent discretionary terms of PRC. However, there are several inherent problems with this line of reasoning, and thus the State's argument has no merit.

First, the real issue here is not the failure of the imposition of PRC, but the courts failure to "notify" the defendant at the hearing. Thus, "[W]hen a trial court fails to notify an offender about PRC at the sentencing hearing, but incorporates that notice into its judgment entry, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and therefore the sentence must be vacated." *State v Jordan* 104 Ohio St. 3d 21, 817 N.E. 2d 864. Secondly, the law states that "[F]ailure to provide a notification of possible or required post release control will support reversal for resentencing". Griffin & Katz, Ohio Felony Sentencing Law (2008) 715 Section 2:256.

Furthermore, R.C. 2929.19(B)(3)(d) states in pertinent part: "****if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:****"[N]otify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth or fifth degree ****" By indicating that the sentencing court "shall do all of the following", the legislature clearly placed a mandatory duty upon the court rather than granting it discretion. *State v Jenkins* (March 14, 2000), Ohio App. 7th Dist. No. 98-502.

Therefore, although pursuant to R.C. 2967.28(F)(4)(c), periods of PRC shall be *served* concurrently, the trial court has no discretion regarding notification, and is required to notify the offender of PRC for *each* sentence. This Court addressed that very issue in its

March 18, 2010 decision in *State v Joseph*, ---N.E. 2d—2010 WL986511 (Ohio), 2010-Ohio-954, where it state: “When post release control is statutorily mandated—*thus leaving no discretion with the trial judge in regard to its imposition*—we have held that failure of the judge to notify the defendant on the record regarding post release control results in a void sentence, necessitating complete resentencing. *State v Simpkins* 117 Ohio St. 3d 420 2008-Ohio-1197, 884 N.E. 2d 568. This Court’s decision in *Simpkins* finds its roots in *State v Jordan* 104 Ohio St. 3d 21, 2004-Ohio-6085, 817 N.E. 2d 864. In *Jordan* this court pointed to the trial court’s statutory duty to authorize the executive branch to exercise post release control in holding that the failure to mention post release control in a sentencing hearing results in a void sentence. ¶22. First, this court noted that post release control statutes leaves no discretion with the trial court, the trial court *must* impose post release control: ‘Because a trial court has a statutory duty to provide notice of post release control at the sentencing hearing, any sentence impose without such notification is contrary to law.’ *Jordan* ¶23.

Fourth, the State erroneously applies *State v Amburgy* 10th Dist. 04AP-1332, 2006-Ohio-135, in that *Amburgy* dealt specifically with PRC notification at the *plea hearing*. Thus, *Amburgy* is dispositive and has no basis, as PRC notification at plea hearings are governed by Crim. R. 11 and R.C. 2943.032. *State v Duncan* (1998) 10 Dist. No.97AP-1044. Moreover, under R.C. 2976.28, governing PRC at the sentencing phase, “[e]ach sentence to a prison term *** shall include a requirement that the offender be subject to a period of post release control imposed by the parole board after the offender’s release from imprisonment.” *State v Bezak*, 114 Ohio St. 3d 94 868 N.E. 2d 961, par. 1 of the syllabus (when a defendant is convicted of or pleads guilty to one or more offenses and post release control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense.) thus, in order for trial courts to comply with the mandated statutory requirements of R.C. 2967.28 and R.C. 2929.19(B)(3)(c)(d) and (e), the court must properly notify the defendant of PRC for *each* sentence imposed.

Response to Proposition of Law II: When the trial court includes language that the defendant must serve a term of post release control of “up to three years” mandatory, for a second degree felony conviction, **the sentence is void due to the trial courts failure to comply with the statutory mandate of R.C. 2967.28(B)(2).**

Here the State attempts to differentiate the statutory requirement to impose PRC at the sentencing hearing and in the judgment entry. However, without both, the sentence is void. *State v Jordan* par. 1 of the syllabus (when sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about post release control and is further required to incorporate that notice into its journal entry imposing sentence) For example, the State argues that in *Hernandez* the sentencing entry did not include PRC. While this statement is correct, the real issue within *Hernandez* is that the “up to” language is not sufficient to comply with the statutory mandate of R.C.2967.28(B)(1). *Hernandez* states: “The court advised *Hernandez* at his sentencing hearing that he was “being sent to prison and placed on post release control by the Parole Board for a period of up to five years.” This notification was erroneous. Under R.C. 2967.28(B)(1), his offense warranted a mandatory post release control period of five year, not “up to” five years. The court also failed to incorporate its imposition of post release control into it sentencing entry.” *Hernandez v Kelly* 108 Ohio St. 3d 395 844 N.E. 2d 301 par. 2.

Furthermore, a trial courts failure to impose a statutory mandated requirement, voids the sentence it is an error which affects the jurisdiction of the court. *Simpkins* at par. 12. “Therefore, in circumstances in which the judge disregards what the law clearly commands, such as when a judge fails to impose a non-discretionary sanction required by a sentencing statute, a judge acts without authority.” *State v Beasley* 14 Ohio St. 3d @ 75, 14 OBR 511, 471 N.E. 2d 774. Such actions are not mere errors that render a sentence voidable rather than void. If a judge imposes a sentence that is unauthorized by law, the sentence is unlawful. “If an act is *unlawful* it is not erroneous or voidable, but it is wholly unauthorized and void.” (Emphasis sics.) *State ex rel. Kudrick v Meredith* (1922) 24 Ohio N.P. (N.S.) 120, 124 1922 WL2015, *3 *Simpkins* at par. 21. Thus, unlike mere sentencing errors which are not statutorily mandated by law, PRC is jurisdictional in nature. *Simpkins* par. 23 (a trial court’s jurisdiction over a criminal case is limited after it renders judgment, but it retains jurisdiction to correct a void sentence and is authorized

to do so) *State ex rel. Cruzado* 111 Ohio St. 3d 353, 2006-Ohio-5795 856 N.E. 2d 263 at par. 19; *Jordan* at par. 23. Therefore, the States cases of *State ex rel Massie v Rodgers, Majoros, and Johnson v Sacks*, (which were overruled due to the use of a Writ of Habeas Corpus to challenge a sentencing error) are dispositive of the instant case. “Although we commonly hold that sentencing errors are not jurisdiction and do not necessarily render a judgment void, see *State ex rel Massie v Rodgers* (1997) 77 Ohio St. 3d 449 450 674 N.E. 2d 1383; *Johnson v Sacks* (1962) 173 Ohio St. 452, 454 20 O.O. 2d 76 184 N.E. 2d 96 (the imposition of an erroneous sentence does not deprive the trial court of jurisdiction) there are exceptions to that general rule. The circumstances in this case-a courts failure to impose a sentence as required by law-present one such exception.” *Simpkins* @ par. 13.

Additionally, this case raises no Constitutional question of great interest as the precise error as founded in Appellee’s felony two conviction is not the mandatory nature, but the mandatory “term” of PRC. Term is defined as a fixed period covering a precise number of years (Black’s Law Dictionary 9th ed) Thus, pursuant to R.C. 2967.28(B)(2), when a defendant is sentenced for a second degree felony, the court must impose a *definite term* of PRC. Therefore, the use of the language “up to three years” in the judgment entry fails to impose the statutorily mandated “term” of mandatory PRC. *State v Steidl* 09CA0010-M Ohio App. 9th Dist. 2009-Ohio-5053; *State v Preston* No. 24595 Ohio App. 9th Dist. 2009-Ohio-4332; *State v Eberle*, 2001 WL71025, Ohio App. 12 Dist. Feb. 20, 2001; *State v Vu* Nos.07CA0094-M, 07CA0095-M, 07CA0096-M, 07CA0107-M, 07CA0108-M, Ohio App. 9th Dist. 2009-Ohio-2945; *State v Bloomer*, 122 Ohio St. 3d 200 909 N.E. 2d 1254 2009-Ohio-2462; *State v Berch* No. 08MA52, Ohio App. 7th Dist. 2009-Ohio-2895; *State v Osborne*, 116 Ohio St. 3d 1228, 2008-Ohio-261, 880 N.E. 2d 921; *State v Jones* No. 06MA17, Ohio App. 7th Dist. 2009-Ohio-794.

Furthermore, in *Osbourne*, the Ohio Supreme Court reversed the Appeal Court under *Bezak* and ruled on his proposition of Law V which states: “The trial court erred when it advised the defendant that he would be subject to PRC for “up to three years”. As a person convicted of a non-sexually oriented second degree felony, he is required to serve a full three year term of PRC. When a trial court misadvises the defendant in this way, the remedy is for the court to vacate the sentence and remand for a new sentencing hearing. *State v Bezak* the court of appeals did not have the benefit of *Bezak*, which

was decided two days after the opinion in this case was journalized. Instead, the court of appeals relied upon *Watkins v Collins* to reject this argument. The court of appeals misapplied *Watkins* which explicitly stated that its opinion was limited by the fact that the sentencing errors were presented via a writ of habeas corpus, and thus were not entitled to the same review and remedies as on direct appeal. *Bezak* is direct appeal and controls this case.” thus, in the instant case, the State of Ohio also has misapplied *Watkins* to argue that the sentences in this case are not void. (See also Hernandez @ par. 2; *State v Patterson*, the limited opinion of the court never addressed the “up to five years” language due to the habeas corpus remedy)

Proposition of Law III: Res Judicata does not apply in instances where there is a void judgment, as this court determined in *Simpkins*. The rationale is that where no statutory authority exists to support a judgment, res judicata does not bar a trial court from correcting the error. *Simpkins* @ par. 30; citing *State v Rodrigues* (1989) 65 Ohio App. 3d 151, 154 583 N.E. 2d 347 (if the appellants sentences are void, the doctrine of res judicata is inapplicable) Thus, res judicata cannot apply in this fact situation because if a sentence is void, there can be no final judgment. Further, “the doctrine of res judicata is a substantive rule of law that applies to a final judgment: *Indiana Ins. Co. v Farmers Ins. C. of Columbus, Inc.* No 2004AP07-0055 5th Dist. 2005-Ohio-1774 @ par. 38; *DiRando v City of Toledo* (June 30 1995) 6th Dist. No. L-94-312 (“the judgment was not a final appealable order and therefore the doctrine of res judicata was inapplicable; *Hopkins v Dyer*, 104 Ohio St. 3d 461 820 N.E. 2d 329, 2004-Ohio-6769 at par. 22)

Finally, because the court of appeals correctly determined that Defendants sentences were void due to the trial courts failure to impose the statutory mandated requirement under R.C. 2967.28(C) at the sentencing hearing in case 06CR4742, and failure to properly incorporate the definite “term” of three years PRC under R.C. 2967.28(B)(2) in the judgment entry in case 05CR7105, Appellant has not presented this Court with any Constitutional question of great public interest and should accordingly decline jurisdiction. This case was presented for the first time in a motion for resentencing on November 2, 2009 to the trial court, and as such any action prior to that date would be invalid, premature, and interlocutory *Columbus Mun. Airport Authority v Capital Leasing* No. 01AP—88 Ohio App. 10th Dist. 2002-Ohio-684; *Miami Valley*

Contractors, Inc. v Electronic Info & Comm Sys., No. 13107, 1992 WL245983 (Ohio App. 2 Dist.) Oct. 2, 1992; *In re Rains*, 428 F. 3d 893, C.A. 9 (Cal.), 2005 (if the order at issue is interlocutory, any appeal would be premature). As Appellee has never had a valid final appealable order from which to appeal, any attempt to file an appeal would be premature. Thus, the Tenth District Court of Appeals ruled appropriately, and the trial court erred when it granted a stay of proceedings. (See T.C.D. April 16, 2010 pg. 5 par. 1) of the Appeals Court March 31, 2010 judgment entry mandating the trial court to resentence the Defendant. Thus, as a stay of proceedings should have been filed (along with the request for bond) and determined by this Court Sup. Ct. Prac. R. 2.2(A)(3)(a)(i) and (ii) and the trial court has caused an undue delay in compliance with the court of appeals judgment. Subsequently, for the above mentioned reasons, this matter has no jurisdictional merit.

EXPLANATION OF WHY THE COURT SHOULD ACCEPT JURISDICTION OF APPELLEE-CROSS APPELLANTS PROPOSITION OF LAW IV

The issue presented in this cross appeal presents a question of Constitution substance warranting further review by this Court.

The question raised here regarding the prospective application of R.C. 2929.191 as it pertains to a vacated judgment not only has Constitution implications, but is of great public interest as Ohio Courts are divided on this matter.

This Court in its decision in *State v Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, presented a legal analysis regarding the remedy for a trial courts failure to properly impose PRC at the sentencing hearing. However, this application is Constitutionally vague especially as it pertains to cases which have been previously vacated and remanded for re-sentencing after July 11, 2006.

Therefore, for judicial consistency within Ohio Courts, Proposition of Law IV presents a Constitution question of great public interest regarding the correct legal analysis to be applied when an appeal court vacates a judgment and mandates a defendant for re-sentencing.

Thus, Appellee-Cross Appellant respectfully requests this Court accept jurisdiction over Proposition of Law IV in this case.

PROPOSITION OF LAW IV: O.R.C.2929.191 is retrospective and cannot be applied in cases where a superior court has vacated the void judgment.

With this enactment on July 11, 2006, Am. Sub. H.B. No. 137, R.C. 2929.191 limits its application to sentences imposed *prior* to the statute's effective date. R.C. 2929.191 provides: "(A)(1) If, *prior to the effective date of this section*, a court *imposed* a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison * * * the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison. "If, *prior to the effective date of this section*, a court *imposed* a sentence including a prison term of a type described in division (B)(3)(d) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison * * * the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison. If, *prior to the effective date of this section*, a court *imposed* a sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(e) of section 2929.19 of the Revised Code regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control * * *, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that if a period of supervision is imposed following the offender's release from prison, * * *, and if the offender violates that supervision * * * the parole board may impose as part of the sentence a prison term of up to one-half of the stated prison term originally imposed upon the offender." (Emphasis added.) R.C. 2929.191(C) makes clear that the statute applies only to "a judgment of conviction of a type described in division (A)(1) or (B)(1) of this

section” — that is, sentences imposed *prior* to the effective date of the statute. The General Assembly passed an unambiguous statute. It is inappropriate for the majority to employ unmodified statements of legislative intent to change the meaning of R.C. 2929.191. When a statute is unambiguous, a court construing the statute need look only to the language contained in the statute: “ ‘The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it.’ *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574, paragraph one of the syllabuses. This court may engage in statutory interpretation when the statute under review is ambiguous. *Id.* “ ‘But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.’ *Id.* at paragraph two of the syllabus.” *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 11-12. No statements of legislative intent are necessary to interpret R.C. 2929.191. It is crystal clear by its own terms. The majority attempts to breathe life into R.C. 2929.191 by claiming that since it has no legal effect for sentences imposed prior to its enactment, it must certainly apply prospectively. But R.C. 2929.191 was enacted to fix sentencing mistakes of the past – mistakes that gained practical relevance only after this court’s decisions in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, and *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, which established the consequences of a trial court’s failure to appropriately set forth postreleasecontrol sanctions in sentencing a defendant. Amendments made to other statutes amended by Am.Sub.H.B. No. 137, Baldwin’s Ohio Legislative Service Annotated (Vol. 4, 2006) L-1911 (“H.B.137”), make it clear that R.C. 2929.191 was intended to address past mistakes. The intent of H.B. 137 was to make prospective post release-control sentencing errors basically irrelevant. For example, R.C. 2929.14(F)(1) was amended by H.B. 137 to include this language: “If a court imposes a sentence including a prison term of a type described in this division on or after the effective date of

this amendment, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of section 2967.28 of the Revised Code.” The amendment to R.C. 2929.14(F)(1) then adds that R.C. 2929.191 applies to sentences imposed prior to the effective date of the act: “Section 2929.191 of the Revised Code applies if, prior to the effective date of this amendment, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.” H.B. 137, L-1929. H.B. 137 similarly amended R.C. 2929.19(B) and 2967.28(B). All of these amendments attempt to make prospective mistakes nonproblematic and employ R.C. 2929.191 to address past errors. For the General Assembly, the prospective application of R.C. 2929.191 was never a consideration.

Moreover, in *State v Fuller*, No. 2008-2343, 2010-Ohio-726, Justice Pfeiffer presented the following dissenting arguments: “[T]he fact of placement of a statement in a syllabus paragraph does not transform dictum into a conclusion of law.” *DeLozier v. Sommer* (1974), 38 Ohio St.2d 268, 271, 67 O.O.2d 335, 313 N.E.2d 386, fn. 2. Today this case is decided on the authority of paragraph two of the syllabus of *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, which is to say it is decided on the authority of nothing. The second syllabus paragraph of *Singleton* is pure dictum. “Obiter dictum” has been defined as “ ‘an incidental and collateral opinion uttered by a judge, and therefore (as not material to his decision or judgment) not binding.’ ” *State ex rel Gordon v. Barthalow* (1948), 150 Ohio St. 499, 505-506, 38 O.O. 340, 83 N.E.2d 393, quoting Webster’s New International Dictionary (2d Ed.). Black’s Law Dictionary defines it as “a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.” Black’s Law Dictionary (8th Ed.2004) 1102. The definition of “obiter dictum” in the *next* edition of Black’s Law Dictionary should read, “See *State v. Singleton*, paragraph two of the syllabus.” In *Singleton*, the question before us was “whether the de novo sentencing procedures detailed in decisions of this court or the remedial procedures set forth in R.C. 2929.191 * * *, which became effective July 11,

2006, should be used by trial courts to properly sentence an offender when correcting a failure to properly impose post release control.” *Singleton* at ¶ 1. The first syllabus paragraph answered the question for the defendant in *Singleton*: “For criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose post release control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio.” The second syllabus paragraph of *Singleton* purports to deal with cases in which sentences were imposed after the effective date of Am.Sub.H.B. No. 137, Baldwin’s Ohio Legislative Service Annotated (Vol. 4, 2006) L-1911 (“H.B. 137”). However, the sentence of the only defendant in *Singleton* was imposed prior to the effective date of H.B. 137. The second syllabus paragraph in *Singleton* is thus “a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.”

Further, the second syllabus paragraph in *Singleton* is not the product of a true majority of this court. Instead, it is cobbled together by only two of the five justices responsible for the judgment of the case, coupled with the two dissenters. There was only one judgment in *Singleton*: this court affirmed the judgment of the court of appeals because R.C. 2929.191 did not apply to the defendant. Justices Lanzinger and Lundberg Stratton dissented from the sole judgment in the case – how can they then be a part of any majority decision? *Singleton* did not involve two defendants; there were not two judgments such that a justice could be in the majority in one, both, or neither. A justice was either in the majority or not, and thus Justices Lanzinger and Lundberg Stratton as dissenters cannot be counted upon as part of the majority decision. If they are considered four votes of a majority but dissented from the judgment, that necessarily means that the law with which they agreed, the second syllabus paragraph, had no bearing on the judgment of the case. They concurred in dictum only. Do four judges concurring in dictum constitute a majority opinion? Whether they do or not, the dictum they agree to has no precedential value.

“Am.Sub.H.B. No. 137, effective July 11, 2006, amended R.C. 2929.19(B)(3)(c) and addressed the situation where a court imposing sentence for

an offense requiring post release control fails to notify the offender at the hearing that he is subject to post release control. Such a failure, according to the amended statute, ‘does not negate, limit, or otherwise effect the mandatory period of supervision that is required for the offender under division (B) of section 2967.28 of the Revised Code.’ This version of the statute applies to appellant's case in view of the fact that appellant's guilty plea and sentencing followed the effective date of the amended statute.

This court did not discuss the constitutionality of R.C. 2929.19(B)(3)(c) in *Singleton*. Even accepting *Singleton*'s dictum that R.C. 2929.191 applies prospectively, the curative portion of that statute is not mandatory. It reads, “On and after the effective date of this section, a court that *wishes* 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.” (Emphasis added.) R.C. 2929.191(C). Thus, although the second syllabus paragraph of *Singleton* may reflect the worthwhile intent to resolve all cases involving post release-control sentencing issues in one fell swoop, it does not succeed in its goal. Since R.C. 2929.191 says that a court *may* correct a sentencing error if it so *wishes*, a court is not required by statute to do so. That leaves unresolved the question that this case raises – is a properly imposed sentence necessary for the imposition by the Adult Parole Authority of post release control, i.e., can the General Assembly render post release-control sentencing errors meaningless by statute?

Finally, Defendant argues that when an appellate court issues a decision that reverses a judgment or a mandated to the trial court to act in conformity with the ruling on appeal, it is the responsibility of the trial court to enter the judgment or order as directed by the mandate of the reviewing court. *Bridge v Park Natl Bank Ohio App. 10th Dist Franklin Co. 2006 863 N.E. 2d 180.*

Therefore, when the court of appeals vacated Defendants judgments, the original sentence must be “treated as if it never existed.” *State v Mickens No.09AP-743, 744, 745, Ohio App. 10th Dist. 2009-Ohio-2554; citing State v Bezak, 114 Ohio St. 3d 94, 2007-Ohio-3250, (Black’s Law Dictionary [7th ed 1999] vacate means to “[t]o nullify or*

cancel; make void; invalidate; <the court vacated the judgment>”). However, the trial court on April 16, 2010, it its decision and entry determined that Defendants sentences were not void and that pursuant to State v Singleton, 124 Ohio St. 3d 173 2009-Ohio-6434, the trial court may “correct” the sentencing error. “at any time before defendant is released from prison”. (T.C.D. April 16, 2010 pg. 5, par. 1 2nd sent.)

Moreover, pursuant to a mandate from an appeal court, a trial court is bound to adherer to the decision, and the trial court is without authority to extend or vary the mandate given. Hubbard ex rel. Creed v Sauline, 659 N.E. 2d 7812.

Thus, a trial court cannot employ the “sentence correction mechanism” (Singleton at par. 27) where a sentence has been rendered void and vacated by a superior court. Further, when an appeal court vacates a void judgment “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.” Romito v Maxwill (1967) 10 Ohio St. 2d 266, 267-268, 227 N.E. 2d 223.

Subsequently, the “sentence correction mechanism” of Singleton regarding R.C. 2929.191, which attempts to “add” PRC on to an existing sentences has no application in cases where the judgment has been vacated by a superior court, and the trial court must conduct a full de novo hearing upon remand.

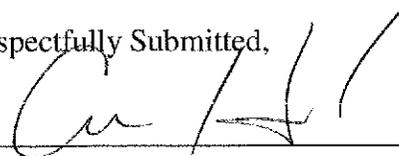
CONCLUSION

The propositions of law presented by the State of Ohio for review in this case are not of any great public interest or present any questions of Constitutional substance that have not already been presented and resolved by this Court. Moreover, the Tenth District Court of Appeals correctly applied the line of Supreme Court cases controlling in this matter, it is respectfully submitted that jurisdiction in this case be declined.

Therefore, for judicial consistency within Ohio Courts, Proposition of Law IV presents a Constitution question of great public interest regarding the correct legal analysis to be applied when an appeal court vacates a judgment and mandates a defendant

for re-sentencing. Thus, Appellee-Cross Appellant respectfully requests this Court accept jurisdiction over Proposition of Law IV in this case.

Respectfully Submitted,

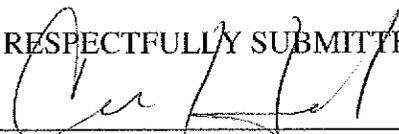


Corey Hazel #546-846
Chillicothe Correctional Inst.
Post Office Box 5500
Chillicothe, Ohio 45601

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT THIS FOREGOING MEMORANDUM IN RESPONSE OF DEFENDANT-APPELLEE OPPOSING JURISDCITION AND MEMEORANDUM IN SUPPORT OF JURISDICTION FOR CROSS APPEAL OF APPELEE-CROSS APPELLANT WAS SENT TO THE OHIO SUPREME COURT CLERK OF COURT 65 FRONT STREET, COLUMBUS OHIO 43215 AND BY ORDINARY MAIL TO COUNSEL FOR APPELLEES, BARBARA A. FARNBACHER, 373 S HIGH ST, 13TH FLOOR, COLUMBUS OHIO 43215 ON THIS 12TH DAY OF MAY, 2010.

RESPECTFULLY SUBMITTED,



COREY HAZEL 546-846
PO BOX 5500
CHILLICOTHE, OHIO 45601
COUNSEL PRO-SE