**ORIGINAL**

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, | : | Case No. 10-2037 |
| Plaintiff-Appellee | : | |
| vs. | : | On Appeal From Cuyahoga County Court of Appeals Eighth Appellate District |
| NABIL N. JAFFAL, | : | |
| Defendant-Appellant. | : | C.A. No. 93214 |

# MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT NABIL N. JAFFAL


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

This appeal presents two critical issues with respect to (1) consecutive sentencing and (2) the application of Crim.R. 32(A) to *de novo* sentencing procedures.

First with respect to consecutive sentencing, recently this Court accepted jurisdiction in State v. Hodge, Supreme Court Case No. 2009-1997 wherein oral argument were held on September 30, 2010.

Appellant herein posits that like Hodge, he too must receive a new sentencing hearing that complies with Ohio's consecutive-sentencing law, R.C. §§ 2929.14(E)(4) and 2929.41(A). This Court erroneously severed these statutes, *inter alia* as unconstitutional. State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, *overruled in part by*, Oregon v. Ice (2009), ___ U.S. ___, 129 S.Ct 711. These statutes were, and remain, constitutional and enforceable. Appellant argues that this Court should accept jurisdiction and hold it for the decision in Hodge accordingly as his case mirrors Hodge.

Appellant relies on the argument set forth by Hodge wherein counsel argued that "Members of this Court forecast the great public interest in the substantial constitutional issue in this case by calling for "repair [of] the damage done" to Ohio's sentencing law by this Court's previously decision in Foster. See, State v. Hariston (2008), 118 Ohio St.3d 289, 297 (Moyer, C.J., Pfeiffer and Lanzinger, JJ., concurring). Part of "the damage done" by Foster occurred when R.C. §§ 2929.14(E)(4) and 2929.41(A) were severed for violating the Sixth Amendment jury-trial guarantee. These statutes require specific judicial fact finding to overcome the presumption favoring concurrent sentences before consecutive sentences may be imposed. Foster's sole justification for the extraordinary act of severing laws approved by



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Ohio's coordinate branches of government was the conclusion that such judicial fact-finding was unconstitutional under Blakely v. Washington (2004), 542 U.S. 296, 299. Foster, at ¶¶ 65-67." (See, Memorandum in Support of Jurisdiction ("MISI") of Appellant Kenneth Hodge , filed November 2, 2009, Case No. 2009-1997).

In this case, Appellant Nabil N. Jaffal ("Jaffal") received consecutive sentences post-Foster, after a *de novo* sentencing to correct the flawed imposition of post-release control. Specifically, Jaffal was convicted of four offenses, two of which contained a repeat violent offender ("RVO") specification. Because these offenses were committed as part of the same act or event the trial court ran the sentences for the base offenses concurrent. However, the trial court ran the two RVO specifications consecutively to each other, and consecutive to the underlying offenses. While it is axiomatic that an RVO specification is to be served consecutively to an underlying offense(s), the two RVO specifications in Jaffal's case were attached to offenses that were committed as part of the same act or event. Therefore, the two RVO specifications should have been merged with each other. The trial court's imposition of the two RVO specifications consecutive to each other effectively increased Jaffal's prison term from thirteen to sixteen years.

Assuming *arguendo* that the trial court *was* permitted to run the RVO specifications consecutive with each other regardless of the fact that they were attached to offenses that were committed as part of the same act or event and run concurrent, Foster nevertheless stripped Jaffal of the statutory presumption favoring concurrent sentences, and denied him the specific judicial fact-findings required to justify the stacked sentences. Jaffal's case exemplifies Foster's damage to Ohio's sentencing plan. As further argued by counsel for Hodge, "[t]he aggregate harm is significant:



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> Consecutive prison terms are much more likely today than at any point in recent Ohio history as a result of removing the statutory cap on consecutive sentences, making stacking offense easier without placing an offender in double jeopardy, *eliminating the presumption of concurrent terms and the findings previously required to support consecutive terms*, and reducing [the] likelihood that lengthy cumulative terms could be found to violate the 8th Amendment."

(See, MISJ of Appellant Hodge, filed November 2, 2009, Case No. 2009-1997, p. 2, citing Diroll (2009), "Monitoring Sentencing Reform: Survey of Judges, Prosecutors, Defense Attorneys and Code Simplification," at p. 27 (emphasis added). The Ohio Department of Rehabilitation and Correction ("ODR&C") also cite Foster as causing "substantial inflationary pressure from increased length of stay" and requiring thousands of additional prison beds. (See, MISJ of Appellant Hodge, p. 2, citing Martin (2009), "Ohio Prison Population Projections and Intake Estimates: FY 2010 – FY 2018," at pp. 8-9).

Oregon v. Ice, however, repaired the "damage done" by Foster, at least with respect to consecutive sentencing. Ice held that the Sixth Amendment allows judicial fact-finding as the basis for imposing consecutive sentences. Ice eliminated the sole justification for Foster's severing R.C. §§ 2929.14(E)(4) and 2929.41(A). Ice rendered that severance a nullity. The effect is not that the severance "was bad law, but that it never was the law." See, Peerless Electric Co. v. Bowers (1995), 164 Ohio St. 209, 210. The General Assembly never repealed these statutes post-Foster. Instead, the Legislature retained them in ***eleven*** amendments, including two post-Oregon.

Remanding this case for sentencing under R.C. §§ 2929.14(E)(4) and 292941.(A) would be but another step in acknowledging that Ice partly overruled Foster. A Sixth Circuit panel has already ruled that Ice bars attacks on consecutive sentences that are based on



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judicial fact-finding. Evans v. Hodge, 575 F.3d 560, 566 (6th Cir. 2009). This Court conceded in Foster that it is "constrained by the princicples of separation of powers and cannot rewrite the statutes." Id. 109 Ohio St.3d at 30. This Court acknowledged that Foster conflicted with the legislative intent of S.B.2, "particularly with respect to reducing sentencing disparities and promoting uniformity." Id. The Hariston concurrence also noted that the nearly "unfettered" post-Foster discretion in consecutive sentencing implicated prison overcrowding concerns and subjects Ohio's elected judges to community pressure, 118 Ohio St.3d at 297 – pressure that is too often driven by victim's socioeconomic status. See, Spohn & Hemmens, Courts: A Text/Reader (2009), at 434.

Across Ohio, judges are waiting for this Court's green light to enforce Ohio's lawfully-enacted consecutive-sentencing statutes. Nine of Ohio's twelve appellate courts have been asked if Ice requires judicial fact-findings to stack sentences. Most recognize that Ice contradicts Foster on this point. But two judges were confused by State v. Elmore, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 35. In Elmore, this Court refused to address the constitutionality of Ohio's consecutive sentencing laws despite the state's urging a decision "sooner rather than later" to benefit Ohio's "courts, prosecutors, and defendants[.]" Id. Those two judges read Elmore to indicate that Ice did not overrule Foster on this point. State v. Eaton, 8th Dist. No. 92048, 2009-Ohio-4564, ¶ 25. In a partial dissent, however, Judge Ann Dyke reasoned that Ice binds all Ohio courts, and required a new sentencing hearing under the consecutive-sentencing statutes. Id. ¶¶ 32-36.

The message from Ohio judges is clear. Absent this Court's explicit instruction, the legality of post-Foster consecutive sentences is in limbo. Such uncertainty may inhibit judges from imposing consecutive sentences to avoid future reversal. The "damage done" by Foster



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continues to mount. Quick action from this Court will clear up the confusion and prevent another Foster-style backlog of re-sentencing cases. On these issues, this Court should reverse the appellate court's decision *per curiam* and order a new sentence and merger of the RVO's. In the alternative, this Court should reverse the appellate court's decision *per curiam* under Ice and order re-sentencing pursuant to R.C. § 2929.14(E)(4) and R.C. § 2929.41(A), or appoint counsel and order briefing and argument on this substantial constitutional question and stay this case pending the decision in Hodge.

Secondly, this appeal implicates Rule 32(A) of the Ohio Rules of Criminal Procedure, which requires trial courts to sentence criminal defendants without unnecessary delay. This Court's jurisprudence has established that the effect of a void sentence is as though *the proceedings never occurred* and the parties are in the same position as if there had been no judgment. It stands to reason therefore that in such circumstances where a *de novo* sentencing hearing is conducted and a sentence is imposed, it is a criminal defendant's **first** and **only** sentencing hearing and sentence in the case.

In Ohio, a court has the duty to impose sentence upon a criminal defendant convicted of a felony offense *without unnecessary delay*. Where a "reasonable" delay does not invalidate a sentence, it must be inferred that an "unreasonable" delay does. Thus, Crim.R. 32(A) is implicated and an undue delay exists between a criminal defendant's conviction and the *de novo* sentencing proceedings simply because the statutes governing a trial court's duty to impose mandatory post-release control were well established by Ohio's Legislature at the time of appellant's conviction, and the trial court's failure to impose mandatory post-release control creates the lack of a sentencing hearing and sentence. Such failure falls within the very definition of unnecessary and cannot be characterized as reasonable, which divests the



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trial court of jurisdiction to imposed any sentence in an attempt to correct a void sentence due to the unreasonable delay between a criminal defendant's conviction and the *de novo* sentencing. The exercise of authority by a trial court that has no authority to act is a blatant violation of due process.

Because Ohio's appellate courts continue to pigeon hole this court's jurisprudence, with respect to the *effect* of a void judgment, thereby subjecting tens of thousands of criminal defendants to sentences trial courts were without the authority to impose, due to the *unnecessary delay*, Jaffal respectfully requests this Court reverse the decision of the appellate court on this issue, or in the alternative, appoint counsel and order briefing and argument on this substantial constitutional question.

## STATEMENT OF THE CASE AND FACTS

This discretionary appeal arises from Jaffal's appeal of the *de novo* sentencing hearing held by Cuyahoga County Common Pleas Court on March 18, 2009. Upon appeal, the Eighth District Court of Appeals set forth the following Statement of Case and Facts:

> {¶ 2} In 1998, Jaffal was charged with aggravated burglary, vandalism, failure to comply with the order of a police officer, and two counts of felonious assault. The aggravated burglary and felonious assault charges were accompanied by repeat violent offender ("RVO") specifications. The matter proceeded to a trial by jury and the jury convicted Jaffal of aggravated burglary with the RVO specification, vandalism, failure to comply with the order of a police officer, and one count of felonious assault with the RVO specification. In April 1999, the trial court sentenced Jaffal to a total of sixteen years in prison. Jaffal appealed and we affirmed his conviction on appeal. *State v. Jaffal* (July 21, 2000), Cuyahoga App. No. 76473, appeal not allowed by 90 Ohio St.3d 1468, 738 N.E.2d 381.
>
> {¶ 3} In 2008, Jaffal filed a pro se motion to correct a void sentence, claiming that because the trial court failed to properly advise him of postrelease control at his 1999 sentencing, his



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sentence was void.

Prior to the *de novo* sentencing hearing, almost 10 years had elapsed since Jaffal conviction. The trial court conducted a *de novo* hearing in 2009 and sentenced Jaffal to a total of sixteen years in prison and advised him of postrelease control. Upon appeal, Jaffal presented five assignments of error. Ultimately, the court of appeals found: (1) the trial court was permitted to run the two RVO specifications consecutive to each other and did not abuse its discretion in doing so, and (2) the trial court did not lack jurisdiction to sentence him due to an unreasonable 9 + year delay between his conviction and the *de novo* sentence.

Jaffal maintains that the court of appeals erred in its decision. In support of his position on these issues, he presents the following arguments.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. I**: When repeat violent offender (RVO) specifications are attached to offenses that are committed as part of the same act or event, those specifications must merge with each other for the purposes of sentencing.

Jaffal must received a new sentencing hearing wherein the two RVO specifications are merged with each other. Jaffal was convicted, *inter alia*, of aggravated burglary and felonious assault. Each of these offenses contained an attending RVO specification. The trial court ran the offense concurrent, but imposed two additional three year terms of imprisonment for each of of the RVO's and ran them consecutive to each other for a total a six years. The trial court then ran the six-year term consecutive to the base offenses. Jaffal argues that it was proper for the trial court to run the RVO's consecutive to the base offenses; however, the two three-year terms for the RVO's should have been merged with each other for a total of *three*-years on the RVO specification enhancement. Thus, Jaffal's aggregate



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sentence should have been *thirteen* years as opposed to sixteen years.

Referencing the additional prison term(s) to be imposed upon offenders convicted of RVO specification, R.C. § 2929.14(D)(2)(c) as enacted by 152 v S 220, § 1, effective 09-30-2008 was the effective statute at the time of Jaffal's *de novo* sentencing hearing, which read in relevant part:

> "For purposes of division (D)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered on offense and that offense shall be the offense with the greatest penalty."

In Foster, only the offending portion of R.C. §2929.14(D)(2)(c) was severed. Consequently, the imposition of an additional penalty for the RVO specification is constitutional. However, the portion of this statute that particularly dealt with merger, with respect to offenses committed at the same time or as part of the same act or event, was left entact.

In the instant case, the offenses committed by Jaffal were all part of the same act or event. Hence, the trial court ran the sentences for the underlying offenses concurrent. Under R.C. § 2929.14(D)(2)(c), both of the RVO specifications should have been merged into one three year additional term of imprisonment. Therefore, Jaffal must receive a new sentencing hearing wherein the two RVO specifications are merged with each other.

Accordingly, this Court should accept jurisdiction on Proposition of Law No. I

> **Proposition of Law No. II**: Before imposing consecutive sentences, Ohio trial courts must make the findings of fact specified by R.C. § 2929.14(E)(4) to overcome the presumption favoring concurrent sentences in R.C. § 2929.41(A)

**A. *Ohio's Consecutive-Sentencing Statutes Were, and Remain, Constitutional.***

Assuming *arguendo* that the RVO specifications in Jaffal's case did not automatically



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require merger (which they did), Jaffal must receive a new sentencing hearing governed by R.C. § 2929.14(E)(4) and R.C. 2929.41(A). As argued by counsel in the Memorandum in Support of Jurisdiction submitted on behalf of Hodge, which this Court granted, this Court's decision in Foster to sever those statutes as unconstitutional under Blakely was in error. The U.S. Supreme Court decision in Ice upheld the constitutionality of judicial fact-finding as prerequisite to consecutive sentencing. Ice expressly cited Foster as an example of Sixth Amendment analysis that the Court rejected. Ice held that Blakely applies to individual, discrete offenses, and does not apply to consecutive sentencing. In so ruling, Ice deferred to the "historical practice and the authority of States over administration of their criminal justice systems." Specifically, Ice deferred to state legislatures and the "salutary objectives" of sentencing statutes, like S.B. 2, including the reduction of sentence length and disparity. 129 S.Ct. At 715-19 & n.7.

Ice binds this Court on the constitutionality of Ohio's consecutive-sentencing law under the Sixth Amendment. See, Minnesota v. National Tea Co. (1940), 309 U.S. 551, 557 (U.S. Supreme Court ruling are dispositive on issues of federal constitutional law); Deposit Bank v. Frankfort (1903), 191 U.S. 499, 517 (same). See also, State v. Storch, 66 Ohio St.3d 280, 291, 1993-Ohio-38 (this Court "ignore[s] the words of the United States Supreme Court at our peril...we must assume that the [U.S.] Supreme Court meant what it said."). With respect to consecutive sentencing, Ice rendered Foster a nullity. See, Peerless Electric Co. v. Bowers (1955), 164 Ohio St. 209, 210. See also, MISJ of Appellant Hodge, filed November 2, 2009, Case No. 2009-1997, p. 6-7 (chart demonstrating that Ice overruled Foster with respect to consecutive sentencing).

Foster erred in severing statutes that remained constitutional, were never repealed,



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and were retained in eleven separate post-Foster amendment by the General Assembly.[1] It is not to demean the seriousness of the offenses for which Jaffal is convicted, however, Foster interfered with the General Assembly's intent to reduce sentencing length and to conserve scarce resources for incarcerating Ohio's worst offenders. Thus, Foster interfered with the General Assembly's intent to promote consistency and proportionality in sentencing.

Because the trial never found facts required to justify consecutive sentences with respect to the two RVO specifications Jaffal was convicted of, he must receive a new sentencing hearing in the which the presumption of concurrent sentences applies under R.C. § 2929.41(A), unless and until that presumption is overcome by the statutorily-specified, prerequisite fact-findings under R.C. § 2929.14(E)(4). See, Hicks v. Oklahoma (1980), 447 U.S. 343, 346 (due process protects liberty interests in state compliance with with prescribed sentencing procedures).

**B. *Foster Conflicted with the General Assembly's Legislative Intent in S.B. 2***

Ice lauded the "salutary objectives" of promoting proportional sentencing and "reducing disparities in sentence length[,]" Id. 129 S.Ct. At 719, which was precisely the Ohio General Asembly's intent in S.B. 2. See, Griffin & Katz, Sent. Consistency: Basic Principles Instead of Numerical grids: The Ohio Plan (2002), 53 Case W. Res. L. Rev. 1, 30.

Foster wreaked havoc on the legislature's "salutary objectives[,]" which according to the Ohio Sentencing Commission, Foster was to blame. See, Diroll supra, p. 27. ODR&C concurs. See, Martin, supra, pp.8-9. Nor has Foster's damage been limited to the increased burden on Ohio's corrections system. See, MISJ of Appellant Hodge, filed November 2,

1 Am.Sub.H.B. 95 (eff. 8-3-96); Am.Sub.H.B. 130 (eff.7-11-06); Am.Sub.H.B. 130 (eff. 8-3-06); Am.Sub.S.B. 260 (eff. 1-2-07); Am.Sub.S.B. 281 (eff.1-4-07); Am.Sub.H.B. 461 (eff. 4-4-07); Am.Sub.S.B. 10 (eff. 1-1-08); Am.Sub.S.B. 184 (eff. 9-9-08); Am.Sub.S.B. (eff. 9-30-08); Am.Sub.H.B. 280 (eff. 4-7-09); and Am.Sub.H.B. 130 (eff. 4-7-09).



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2009, Case No. 2009-1997, p. 8-11.

Article II of the Ohio Constitution gives the General Assembly the authority to address such disparities by promoting consistency and proportionality in criminal sentencing. This Court presumes that "an entire statute is intended to be effective." Foster, at 28; *see also*. R.C. § 1.47. Ohio's consecutive sentencing law survived Foster, as overruled by Ice, and must be enforced in Ohio's courts. Had R.C. §§ 2929.41(A) and 2929.14(E)(4) been enforced in the instant case, Jaffal would have benefited from a presumption that the sentences imposed for each of the RVO specifications would have been merged, and corresponding potential sentence reduction from sixteen years to thirteen. The judgment of the appellate court must be reversed and Jaffal must receive a sentence in compliance with Ohio's consecutive-sentencing law.

Accordingly, this Court should accept jurisdiction on Proposition of Law No. II, appoint counsel, order briefing and oral argument, and stay this case pending decision in Hodge.

> **Proposition of Law No. III**: Crim.R. 32(A) is applicable to divest the trial court of jurisdiction to impose any sentence where a "void" sentence exists and there has been an unnecessary delay between the conviction and *de novo* sentencing.

**A. *Crim.R. 32(A) applies to a "void" sentence.***

This Court's jurisprudence dictates that the effect of a "void" judgment is as though the proceedings have never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment. State v. Bezak, 114 Ohio St.3d 94, 868 N.E.2d 961, 2007-Ohio-3250, at ¶ 13, citing Romito v. Maxwell (1967), 10 Ohio St.2d 266, 267, 227 N.E.2d 223. Based on this jurisprudence it is clear that Jaffal's 1999 sentence



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hearing never occurred; that sentencing entry is a nullity; and the "position" that the parties are in is a position of having never had any sentencing hearing and sentencing judgment pursuant to Crim.R. 32(A).

Under Crim.R. 32(A) a trial court is under a duty to impose sentence without any unnecessary delay. Sup.R. 39(B)(4) mandates that provided the defendant is available, the trial court shall imposed sentence within fifteen days of the guilty verdict or receipt of a completed probation officer's pre-sentence investigation report. The rule further directs that any failure to meet this time standard shall be reported to the administrative judge, who shall take the necessary corrective action. See, City of Willoughby v. Lukehart, 39 Ohio App.3d 74, 529 N.E.2d 206 (11th Dist. Lake Cty. 1987) (holding that a sixteen month delay between a finding of guilty and opposing of sentence was unjustified, and therefore divested the trial court of the right to sentence the defendant).

In cases where a long delay exists between a finding of guilt and pronouncement of sentence, many Ohio courts have determined that the trial court loses jurisdiction to impose sentence when the delay is unreasonable. In State v. Mack, the Eighth District Court of Appeals has held that a trial court does in fact lack jurisdiction to impose sentence where there is an unreasonable delay between the conviction and the new sentencing hearing held in attempt to correct a void sentence. Id., 8th Dist. No. 92606, 2009-Ohio-6460. See also, State v. Owens, 181 Ohio App.3d 725, 910 N.E.2d 1059, 2009-Ohio-1508 (delay between a defendant's guilty plea and sentencing was unreasonable and attributable solely to the state, warranting vacation of sentence. The remedy for an unreasonable delay in sentencing is not a re-sentencing hearing; rather, it is the vacation of the sentence. Id.

For example, in Mack, the Eighth District Court of Appeals determined that sentences



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on two counts were void as a result of the trial court's failure to adhere to statutory requirements when originally attempting to impose sentence. Id., at ¶13, citing State v. Beasley (1984), 14 Ohio St.3d 74. The Mack court made a specific determination with respect to whether a trial court loses jurisdiction to correct a "void" sentence where there has been an unreasonable delay between the conviction and the new sentencing hearing.

The reasoning in Mack is that because the original sentence was void, Mack's December 2008 sentencing hearing was the **first** time he was sentenced. Id., ¶ 13. This resulted in an unnecessary delay between the finding of guilt and imposition of the new sentence. The Mack court determined that such error constituted a violation of Crim.R. 32(A). Id., at ¶14, citing Artiaga v. Money (July 11, 2006), N.D. Ohio No. 3:04CV7121, 2006 WL 1966612.

Like Mack, there has also been unnecessary delay between Jaffal's 1999 conviction and his first and only sentencing hearing and sentence held in December of 2009. In Jaffal's case the delay was 9 + years. Based on the reasoning in Mack, the trial court was in fact divested of jurisdiction to correct Jaffal's "void" sentence where there has been an unreasonable delay between the conviction and the new sentencing hearing.

The appellate court is incorrect with respect to its statement that Mack is distinguishable with Jaffal. State v. Jaffal, 8th Dist. No. 93142, 2010-Ohio-4999, ¶ 37. Particularly, the appellate court found that Mack was convicted, but never sentenced. Whereas, Jaffal was convicted and sentenced a month later. Id., ¶ 37. However, the appellate courts decision disregards this Court's jurisprudence with respect to the "effect" of a void sentence. Contrary to the appellate court's decision, Jaffal's 1999 sentencing hearing and journal entry was a nullity the moment the void sentence was imposed. Unlike a "voidable"



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sentence, which first requires taking the necessary steps to have its invalidity declared, a "void" sentence has always been a nullity from its inception. Tari v. State (1927), 117 Ohio St. 481, 493-94.

Again, taking this Court at its word, if it is as though Jaffal's 1999 sentencing proceedings have never occurred, then prior to the *de novo* March 2009 **Jaffal had never been sentenced**. Bezak, supra; " State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197. **Jaffal was not "re-sentenced"** in March of 2009 as the appellate court has described such proceedings his case. Rather, because Jaffal's March 2009 sentencing hearing was *de novo*, that hearing was Jaffal's **first** and **only** sentencing hearing and sentence pursuant to Crim.R. 32(A).

Following all of the aforementioned reasoning, there has in fact been an unreasonable delay in effecting a valid sentencing hearing and sentence pursuant to Crim.R. 32(A) in Jaffal's case. Because the statutes governing the trial court's duty to impose mandatory post-release control were well established by Ohio's Legislature at the time of Jaffal's conviction, the trial court's failure to conduct a valid sentencing hearing pursuant Crim.R. 32(A) and impose a legal sentence, thereby creating the lack of any sentencing hearing and sentence, falls within the very definition of unnecessary and cannot be characterized as reasonable. The trial court had no just cause for such disregard for statutory authority and such delay that derived from the error. Thus, where the previous 1999 sentencing hearing and sentencing attempt does not legally exist, the March 2009 was Jaffal's **first** and **only** sentencing hearing and sentence pursuant Crim.R 32(A).

Due to the inexcusable and unreasonable delay 9 + year between Jaffal's conviction and the 2009 sentencing, the trial court was divest of jurisdiction and right to impose



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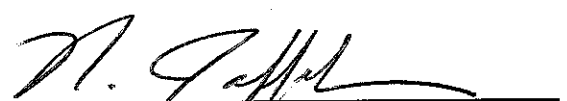
sentence. Mack, at ¶12-15. Therefore, Jaffal should have been discharged from further custody.

Accordingly, this Court should accept jurisdiction on Proposition of Law No. III, appoint counsel, order briefing and oral argument.

## CONCLUSION

For the foregoing reasons, Jaffal respectfully requests this Court to accept jurisdiction and reversed the decision of the appellate court in the following manner: (1) order him to be discharged from further custody, or (2) order a new sentencing hearing *per curiam* where the RVO specifications are merged, or (3) remand for a new sentencing hearing pursuant to R.C. §§ 2929.14(E)(4) and 2929.41(A) *per curiam* based on Ice, or in the alternative order briefing and oral argument on the issue of Ice's overruling Foster with respect to Ohio's consecutive sentencing statute, or, (4) stay this case pending the decision in Hodge.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Memorandum in Support of Jurisdiction of Appellant Nabil N. Jaffal* was sent via first class U.S. Mail to Lisa Reitz Williamson, Assistant Cuyahoga County Prosecutor, 1200 Ontario Street, 9th Fl., Cleveland, Ohio 44113 this 22nd day of November 2010.

BY:

**NABIL N. JAFFAL**



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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 93142**

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## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## NABIL N. JAFFAL

DEFENDANT-APPELLANT

---

**JUDGMENT:**
**AFFIRMED**

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Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-369065

**BEFORE:** Jones, J., Rocco, P.J., and Stewart, J.

**RELEASED AND JOURNALIZED:** October 14, 2010

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FILED AND JOURNALIZED
PER APP.R. 22(C)

OCT 14 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

LARRY A. JONES, J.:

Defendant-appellant, Nabil Jaffal ("Jaffal"), appeals the trial court's imposition of consecutive sentences. Finding no merit to the appeal, we affirm.

In 1998, Jaffal was charged with aggravated burglary, vandalism, failure to comply with the order of a police officer, and two counts of felonious assault. The aggravated burglary and felonious assault charges were accompanied by repeat violent offender ("RVO") specifications. The matter proceeded to a trial by jury and the jury convicted Jaffal of aggravated burglary with the RVO specification, vandalism, failure to comply with the order of a police officer, and one count of felonious assault with the RVO specification. In April 1999, the trial court sentenced Jaffal to a total of sixteen years in prison. Jaffal appealed and we affirmed his conviction on appeal. *State v. Jaffal* (July 21, 2000), Cuyahoga App. No. 76473, appeal not allowed by 90 Ohio St.3d 1468, 738 N.E.2d 381.

In 2008, Jaffal filed a pro se motion to correct a void sentence, claiming that because the trial court failed to properly advise him of postrelease control at his 1999 sentencing, his sentence was void. In 2009, the trial court resentenced Jaffal to a total of sixteen years in prison and advised him of postrelease control.

Jaffal now appeals, raising the following five assignments of error for our review:

"I. The trial court erred by sentencing appellant to serve consecutive sentences without submitting reasons in support pursuant to R.C. 2929.14(E).

"II. The trial court erred in sentencing the appellant to consecutive repeat violent offender specifications as the two specifications merged.

"III. The failure to specifically request a merger finding of the repeat violent offender sentencing enhancements deprived the appellant his right to effective assistance of counsel.

"IV. Ohio's former Repeat Violent Offender penalty enhancement in former R.C. 2929.14(D)(2)(b) violates the Sixth Amendment.

"V. Whether the original attempted 1999 sentence is void for failure to adhere to statutory requirements, the trial court lost jurisdiction to impose [a] new sentence due to the inexcusable 10[-] year delay between Appellant's 1999 conviction and his March 2009 sentencing hearing."[1]

Consecutive Sentences

In the first assignment of error, Jaffal claims the trial court erred by sentencing him to consecutive sentences without making the appropriate factual findings.

In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court, in a plurality decision, addressed the standard for reviewing felony sentencing. See, also, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Appellate courts must apply the following two-step

[1] The fifth assignment of error was filed pro se.

approach: "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Kalish* at ¶26.

Thus, in the first step of our analysis, we review whether the sentence is contrary to law as required by R.C. 2953.08(G). As the *Kalish* court noted, post-*Foster*, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentence." Id. at ¶11; *Foster,* paragraph seven of the syllabus. The *Kalish* court declared that although *Foster* eliminated mandatory judicial fact-finding, it left R.C. 2929.11 and 2929.12 intact. *Kalish* at ¶13. As a result, the trial court must still consider these statutes when imposing a sentence. Id., citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶38.

R.C. 2929.11(A) provides that:

> "[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing[,] * * * to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

R.C. 2929.12 provides a nonexhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

The *Kalish* court also noted that R.C. 2929.11 and 2929.12 are not fact-finding statutes like R.C. 2929.14. *Kalish* at ¶17. Rather, they "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence." Id. Thus, "[i]n considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purposes of Ohio's sentencing structure." Id.

In this case, and based on our disposition of the second assignment of error, we find that Jaffal's sentence was not contrary to law as it was within the permissible statutory range for his crimes.

Having satisfied the first step, we next consider whether the trial court abused its discretion. *Kalish* at ¶4 and 19. We find no evidence that the trial court abused its discretion. The trial court imposed the same sentence upon Jaffal that it had originally imposed in 1999.

Within this assignment of error, Jaffal argues that the trial court erred by imposing consecutive sentences because the trial court was required to make findings under R.C. 2929.14(E)(4). In *Foster*, the Ohio Supreme Court held, in relevant part, "that R.C. 2929.14(E)(4) and 2929.41(A) are capable of being severed. After the severance, judicial fact-finding is not required before

imposition of consecutive prison terms." Id. at ¶99. Jaffal maintains, however, that a recent decision by the United States Supreme Court "reinstated the Ohio statutory sentencing requirements," which were excised by *Foster*. See *Oregon v. Ice* (2009), 555 U.S. __, 129 S.Ct. 711, 172 L.Ed.2d 517.

In addition to determining the length of a prison sentence for each conviction, courts have the discretion to determine whether prison sentences are to be served consecutively or concurrently. See *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328. In *Ice*, the United States Supreme Court addressed the court's authority to impose consecutive sentences. The *Ice* court held that Oregon statutes requiring judicial fact-finding before imposing consecutive sentences do not violate the Sixth Amendment guarantee of a jury trial. Id. at 714.

The effect, if any, that *Ice* may have on Ohio's post-*Foster* sentencing scheme has not been fully addressed by the Ohio Supreme Court; thus, we continue to follow *Kalish* and *Foster* when reviewing felony sentencing issues.[2] See *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶29 (concluding that, in regard to *Ice*, "we decline to depart from the pronouncements in *Foster*, until the Ohio Supreme Court orders otherwise"); *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582 (acknowledging the *Ice* decision

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[2] Review of this issue is pending before the Ohio Supreme Court. See *State v. Hodge*, Ohio Supreme Court Case No. 2009-1997.

and holding that "*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so").

In sum, the trial court's imposition of a sixteen-year sentence is supported by the record and was not an abuse of discretion. Moreover, it was within the court's discretion to run a portion of Jaffal's prison sentence consecutively.

The first assignment of error is overruled.

Repeat Violent Offender Specification

In the second assignment of error, Jaffal argues that the trial court should have merged his two sentences for the RVO specifications. The court originally sentenced Jaffal in 1999. The court conducted a de novo resentencing hearing in 2009; thus, we look to the law at the time of the resentencing.

In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court reviewed the former RVO statutes, R.C. 2929.14(D)(2)(a) and R.C. 2929.14(D)(2)(b), and found that portions of the statute violated *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. The *Foster* court determined that subsection (D)(2)(b) violated *Blakely* because it required the trial court to make findings of fact before imposing the additional penalty. Id. at ¶73-78; see former R.C. 2929.14(D)(2)(b)(i),(ii), and (iii).

Although *Foster* excised judicial fact-finding from former R.C. 2929.14(D)(2), it did not eliminate the repeat violent offender specification. *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, 915 N.E.2d 292, cert. denied by *Hunter v. Ohio* (2010), 130 S.Ct. 1888, 176 L.Ed.2d 372.

A review of the record shows that Jaffal can be classified a RVO pursuant to R.C. 2929.14(D)(2) and the trial court used its discretion to resentence him to the RVO specifications. See *Foster* at ¶71 ("[u]nlike all other penalty-enhancing specifications, the court, not the jury, makes the necessary factual findings for convicting the offender of being a repeat violent offender"). Although the trial court did not make any specific factual findings, *Foster* excised the requirement that a trial court make findings of fact before imposing penalty enhancements for repeat violent offenders. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1. Thus, a trial court may impose an additional prison term pursuant to a RVO specification without conducting any judicial fact-finding. See *State v. Hill*, Cuyahoga App. No. 93379, 2010-Ohio-1670.

As to Jaffal's argument that his RVO sentences may not run consecutive, the Eleventh District was faced with the issue in *State v. Krug*, Lake App. No. 2008-L-085, 2009-Ohio-3815, appeal not allowed by 126 Ohio St.3d 1517, 2010-Ohio-3331, 930 N.E.2d 333. The *Krug* court held that "[o]ur reading of the statute indicates that while it is correct that the statute only authorizes a single

prison term for each RVO specification, nothing in the statute limits the number of specifications when, as in the instant case, the offender is charged with multiple counts of underlying offenses. Regarding the consecutive nature of the two additional prison terms for the RVO specifications, the trial court is vested with full discretion pursuant to *Foster* to impose consecutive sentences. That discretion extends to RVO." (Internal citations omitted). Id. at ¶174-175.

We agree that post-*Foster*, the trial court is vested with full discretion to impose consecutive sentences on RVO specifications.

Therefore, the second assignment of error is overruled.

Ineffective Assistance of Counsel

In the third assignment of error, Jaffal claims that his counsel at his 2009 resentencing hearing was ineffective for failing to object to the consecutive nature of the RVO specifications.

In order for this court to reverse a conviction on the grounds of ineffective assistance of counsel, we must find that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

Because we have rejected the claim of error that is the basis for Jaffal's claim that his trial counsel was ineffective, we likewise reject the assertion of

ineffective assistance of counsel that is premised upon that error. *State v. Henderson* (1988), 39 Ohio St.3d 24, 33, 528 N.E.2d 1237.

The third assignment of error is overruled.

Constitutionality of Former RVO Statute

Next, Jaffal argues that Ohio's former RVO statute was unconstitutional. But Jaffal was sentenced under the current RVO statute; therefore, he has no standing to challenge the former statute on appeal from his resentencing. Second, the doctrine of res judicata may be applied to bar the further litigation of issues that were previously raised or could have been raised through a direct appeal. See *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. If Jaffal wanted to challenge the constitutionality of the former RVO statute, he is required to have challenged the issue on direct appeal.

Therefore, the fourth assignment of error is overruled.

Delay Between Sentencing and Resentencing

In the final assignment of error, Jaffal challenges the time lapse between his original sentencing in 1999 and his resentencing in 2009.

In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, the Ohio Supreme Court held that: "[i]n cases in which a defendant * * * pleads guilty to [ ] an offense for which postrelease control is required but not properly included in the sentence, the sentence is void and the state is entitled to a new

sentencing hearing in order to have postrelease control imposed on the defendant unless the defendant has completed his sentence." Id. at the syllabus.

In *State v. Graves*, Cuyahoga App. No. 90080, 2008-Ohio-3037, we found that the trial court did not err by imposing postrelease control on the defendant at a new sentencing hearing while the defendant was still in prison. We held that the trial court was required to hold a de novo "hearing in order to notify felony offenders about postrelease control." Id. at ¶7. Merely issuing a nunc pro tunc entry will not suffice. Id.

"Ohio courts have consistently held that when a trial court fails to sentence an offender to postrelease control, the sentence for that offense is void and the offender must be resentenced." *Graves*, at ¶12, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. This "resentencing does not violate finality or double jeopardy restraints because jeopardy does not attach to a void sentence." Id. at ¶13, citing *Simpkins*.

A trial court is "'authorized to correct the invalid sentence to include the appropriate, mandatory postrelease-control term' where the defendant's sentence has not yet been completed." Id. at ¶17 citing *Simpkins*; *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263; *Bezak*.

To support his position, Jaffal cites to our decision in *State v. Mack*, Cuyahoga App. No. 92606, 2009-Ohio-6460, appeal not allowed by 124 Ohio St.3d 1540, 2010-Ohio-1557, 924 N.E.2d 844, but *Mack* is not applicable to this

case. In *Mack*, we held that the trial court lost jurisdiction to impose sentence when a two-year delay existed between a finding of guilt and pronouncement of sentence. In this case, there was not a long delay between the finding of guilty and the pronouncement of sentence. Jaffal was found guilty in March 1999 and sentenced one month later. He moved for resentencing in February 2008 and was resentenced in March 2009.

We note that Jaffal does not challenge the 13-month delay between the filing of his pro se motion to correct his void sentence and the time the court resentenced him. But even if he had, we would not find the delay unduly excessive. See *State v. Jackson*, Summit App. No. 24142, 2008-Ohio-6938 (holding that appellant's right to challenge the two-year delay between remand and resentencing was waived by appellant's appearance at resentencing hearing and failure to object or raise any challenge to the trial court's authority to sentence him).[3]

The fifth assignment of error is overruled.

Accordingly, judgment is affirmed.

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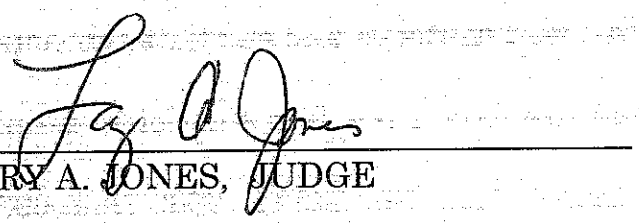
[3] This court is cognizant of the deluge of motions defendants have filed to correct void sentences following the issuance of the *Bezak* decision. Although it is expected that a trial court will expedite these motions, we will not hold the trial court to a strict timeline to resentence defendants. Of course, if Jaffal had already been released from prison, the court would have been without jurisdiction to resentence him. But Jaffal was still incarcerated at the time of resentencing.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR

KEYWORDS: