

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: J.S.,

A Minor Child,

Case No. 2012-0118

On Appeal from the Cuyahoga  
County Court of Appeals  
Eighth Appellate District

Court of Appeals  
Case No. 96637

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**MEMORANDUM IN OPPOSITION OF JURISDICTION  
OF APPELLEE J.S.**

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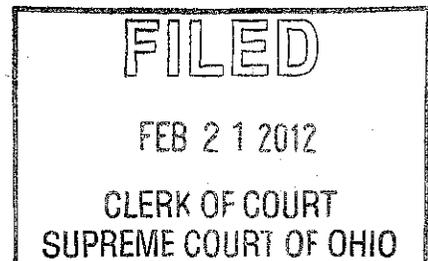
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**EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST AND DOES NOT INVOLVE  
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This Court should not accept this case, because the Eighth District properly applied well-settled law. This case does not present a new question of law; does not involve a substantial constitutional question; and is not of public or great general interest.

At J.S.'s (James) initial dispositional hearing, the Cuyahoga County Juvenile Court imposed a SYO disposition and prison terms which were not authorized by law. Neither party appealed<sup>1</sup>. After a collateral attack on the judgment, the Eighth District Court of Appeals held that the sentence was not authorized by law, and remanded the case for a de novo resentencing. The juvenile court imposed an entirely new sentence—the first legally valid sentence in the case. Then, the juvenile court relied on conduct that predated the first legally valid sentence to invoke the adult portion of the new sentence. The court of appeals recognized that the legal effect of a void sentence and subsequent de novo resentencing means that an adjudication that occurred years before, during the pendency of the void sentence, cannot serve as the predicate offense to invoke the new sentence.

The State wants this Court to believe that if the court of appeals' decision stands, it will have a "chilling effect" on juvenile courts imposing SYO dispositions. That is not true. This is not a case about misuse or misapplication of the SYO law. This is a case in which the sentencing errors were significant, such that the juvenile court imposed a void judgment that was contrary to law. The court of appeals properly considered the void judgment to have no legal effect. If the juvenile court had properly followed the SYO statute and the criminal sentencing statutes, and

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<sup>1</sup> The State suggests that this case is "akin" to *In re J.V.*, Supreme Court Case No. 2011-0107, which is pending before this court. However, the error in *J.V.* is predicated on improper imposition of post-release control. Post-release control is not at issue here, and was not the basis for the court of appeals' remand.

imposed a disposition and criminal sentence that were authorized by law, there would have been no collateral attack, no appeal, no resentencing, and no instant appeal. The court of appeals properly applied this Court's holding in *Romito v. Maxwell*, 10 Ohio St.2d 266, 267, 227 N.E.2d 223 (1967), stating, "In Ohio, the effect of determining that a judgment is void is well established. '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.'" *J.S. II* at ¶13, quoting *Romito* at 267. The instant appeal does not involve a new question or application of law, and this Court should decline jurisdiction and dismiss the appeal.

### **STATEMENT OF THE CASE AND OF THE FACTS**

After an incident that occurred on May 21, 2006, then fourteen year-old James S. was charged with committing one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), and a first-degree felony if committed by an adult; and two counts of rape, one count of kidnapping, and one count of aggravated robbery, in violation of R.C. 2907.02(A)(2), 2907.02(A)(1)(c), 2905.01(A)(4), and 2911.01(A)(1), respectively, each a first-degree felony if committed by an adult. Each of the charges carried firearm specifications under R.C. 2941.141 and R.C. 2941.145, as well as specifications that James was a Serious Youthful Offender (SYO).

On December 28, 2006, the Cuyahoga County Juvenile Court found James not delinquent of one count of rape, but delinquent of each of the other offenses and specifications. Because the offenses were committed when he was fourteen years-old, James' SYO disposition was discretionary. R.C. 2152.11(D).

On January 10, 2007, the juvenile court committed James to the Department of Youth Services (DYS), found him to be a SYO, and imposed indefinite adult prison terms, as follows:

<b>Charge</b>	<b>Juvenile Disposition</b>	<b>SYO Disposition</b>
Count 10, Rape	None	3 – 10 year prison term
Count 12, Kidnapping	None	3 – 10 year prison term
Count 13, Aggravated Robbery	2-year minimum DYS commitment, consecutive to 3-year firearm specification [or, see Count 14]	3 – 10 year prison term
Count 14, Aggravated Robbery	2-year minimum DYS commitment, consecutive to 3-year firearm specification [unclear from entry whether the disposition is for Count 13 or 14]	3 – 10 year prison term

On February 22, 2008, the State filed a Motion to Invoke Adult Portion of Sentence, pursuant to R.C. 2152.14, after James was adjudicated delinquent for one count of rape, in Delaware County Juvenile Court. On April 12, 2008 the juvenile court purported to grant that motion, terminate the juvenile portion of James’ sentence, and order the adult portion of his sentence into effect. On May 9, 2008, the juvenile court filed a nunc pro tunc entry ordering that James serve a total prison term of nine years.<sup>2</sup>

On April 22, 2010, James filed a motion in the juvenile court to vacate his void sentence, and on June 7, 2010, the court overruled that motion. James appealed, and the Eighth District Court of Appeals remanded James’ case to the juvenile court for resentencing, stating, “Because there are a number of inconsistencies within the SYO disposition journal entry along with sentences that are not authorized by law, we remand this matter for resentencing.” *In re J.S.* Cuyahoga App. No. 95365, 2010-Ohio-6199, ¶6, (*J.S. D.*). The court further stated, “Where a sentence contains portions that are not authorized by law, the appropriate procedure to correct the error is a remand for sentencing de novo.” *Id.* at ¶7.

<sup>2</sup> The hearing on the SYO invocation was held April 8, 2008, and that is the date to which this Court refers in the nunc pro tunc, but the entry was journalized April 12, 2008.

On February 28, 2011, the Cuyahoga County Juvenile Court held a new dispositional hearing, and imposed the following disposition de novo:

<b>Charge</b>	<b>Juvenile Disposition</b>	<b>SYO Disposition</b>
Count 10, Rape	12-month minimum DYS commitment	3-year prison term; consecutive 3-year gun specification
Count 12, Kidnapping	12-month minimum commitment, to merge with Count 10	3-year prison term, to merge with Count 10
Count 13, Aggravated Robbery	12-month minimum DYS commitment, consecutive to Count 10; 1-year consecutive gun specification	3-year prison term, concurrent with Count 10
Count 14, Aggravated Robbery	12-month minimum DYS commitment, consecutive to Count 13; 1-year consecutive gun specification	3-year prison term, concurrent with Count 10; consecutive 3-year gun specification

The juvenile court stated in its entry that the parties agree to a minimum DYS commitment of five years, and a suspended, aggregate prison term of nine years.

On March 1, 2011 the State filed a new motion to invoke the SYO portion of James' sentence, relying on the October 9, 2007 Delaware County Juvenile Court adjudication. The Cuyahoga County Juvenile Court conducted a hearing, and invoked the SYO portions of the March 8, 2011 disposition. James timely appealed, and argued that the 2007 Delaware County adjudication could not serve as the predicate offense to invoke the new, suspended adult prison term, because it occurred long before the first legally-valid sentence in the case. James argued that the Delaware County adjudication still stands, and he would certainly be subject to a juvenile disposition on that adjudication, but that 2007 adjudication cannot be used to invoke a sentence that was imposed in 2011. The court of appeals agreed, and reversed the invocation of

his sentence. *In re J.S.*, Cuyahoga App. No. 96637, 2011-Ohio-6280, ¶22, (*J.S. II*). The State filed a timely appeal.

### **RESPONSE TO THE STATE'S PROPOSITION OF LAW**

#### **STATE'S PROPOSITION OF LAW I: A Sentencing Error That Is Not Timely Appealed, And Is Unrelated To A Juvenile Court's Decision To Invoke An Adult Prison Sentence Against A Serious Youthful Offender, Cannot Be Used To Nullify The Adult Portion Of The Juvenile's Blended Sentence.**

Throughout its memorandum in support of jurisdiction, the State refers to the juvenile court's initial SYO disposition as a "sentencing error" in need of correction. That is not legally accurate. James' initial disposition was void. The juvenile court did not follow R.C. 2152.13 (the SYO statute) or R.C. 2929.14 (the criminal sentencing statute) when it imposed the SYO sentence in January 2007. The court only imposed a DYS commitment as to one count, and ordered suspended, indefinite prison terms of "3 - 10" years as to each of the counts. In 2008, the juvenile court purported to invoke the suspended sentence and ordered a nine-year prison term, though it did not specify as to which count. In *J.S. I*, the court of appeals held "Because there are a number of inconsistencies within the SYO disposition journal entry along with sentences that are not authorized by law, we remand this matter for resentencing." *In re J.S.* Cuyahoga App. No. 95365, 2010-Ohio-6199, ¶6, (*J.S. I*). The court further stated, "Where a sentence contains portions that are not authorized by law, the appropriate procedure to correct the error is a remand for sentencing de novo." *Id.* at ¶7. James' sentence was void, and so it had no legal effect.

This Court has held that when a sentence is unauthorized by law, the court's judgment is void. *State v. Beasley*, 14 Ohio St.3d 74, \*4 (1984). "The effect of determining that a judgment is void is well established. 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.’ (Citations omitted.)” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶19, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868, ¶12, quoting *Romito v. Maxwell*, 10 Ohio St.2d 266, 267-268 (1967). Because James’ prior disposition had no legal effect, his first valid disposition was ordered on March 11, 2011.

The juvenile court imposed a valid, suspended adult sentence on March 8, 2011, and then improperly invoked it for conduct that occurred prior to the valid sentence. A juvenile court may only invoke the adult portion of an SYO sentence if the court finds by clear and convincing evidence that a juvenile offender is “in the institutional custody, or an escapee from the custody, of the department of youth services” and “is serving the juvenile portion of the serious youthful offender dispositional sentence.” R.C. 2152.14(A)(1)(b) and (c); 2152.14(E). Then, the court must find that the juvenile committed an act that would be a felony or first-degree misdemeanor offense of violence if committed by an adult, or engaged in conduct that creates a substantial risk to the safety or security of the institution, community, or victim. R.C. 2152.14(A)(2). James was not in the institutional custody of DYS, or an escapee from custody, at his March 8, 2011 invocation hearing. More importantly, the juvenile court relied on an October 2007 Delaware County adjudication as the predicate offense to invoke the new adult sentence, but James was not serving the juvenile portion of a valid SYO sentence when that offense occurred.

In January 2007, at James’ first dispositional hearing, the juvenile court imposed a juvenile disposition for aggravated robbery, though it was not clear from the record whether that disposition was for Count 13 or 14; the court did not impose a juvenile disposition for rape or kidnapping. The court ordered suspended, indefinite adult prison terms of three-to-ten years in each of the four counts. Under Senate Bill 2, prison terms for these offenses must be definite

terms of years. At James' February 2011 resentencing, the juvenile court imposed a completely different disposition and SYO prison term in each of the four counts in this case. (See charts included in the Statement of the Case, above). The court imposed twelve-month minimum DYS commitments in each count, and one-year firearm specifications in both counts 13 and 14. And, the court imposed three-year concurrent prison terms in each count, and three-year firearm specifications in counts 10 and 14. The juvenile court's March 11, 2011 judgment entry of invocation sentenced James to prison terms that had not been imposed when he committed the October 2007 offense in Delaware County. The Cuyahoga County Juvenile Court could not invoke the new, 2011 prison terms by relying on the 2007 Delaware County adjudication. R.C. 2152.14(D).

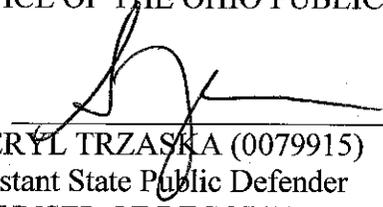
The State's proposition of law suggests that the adult portion of James' sentence is "nullified." That is not true. At James' resentencing, the adult portion was properly imposed, and properly suspended. It is the invocation that is not proper. If the juvenile court had followed the SYO and criminal sentencing statutes at James' initial disposition, or at the invocation hearing after resentencing, James would be serving a legally valid sentence. This case will not lead to any chilling effect on Ohio's SYO law. Rather, this case simply demonstrates that the Cuyahoga County Juvenile Court made such significant sentencing errors its judgment was void. James was adjudicated delinquent in a separate case in Delaware County Juvenile Court in 2007; that adjudication stands, and James is subject to a juvenile disposition in that case. James is also subject to the SYO sentence that the juvenile court imposed in March 2011. However, James' 2007 Delaware County adjudication cannot serve as the basis for invoking a prison term that did not exist until the Cuyahoga County Juvenile Court resentenced him in March 2011.

**CONCLUSION**

The State has not set forth issues that will be broadly applicable through Ohio courts, nor issues that those courts require guidance in addressing. Therefore, James S. respectfully asks that this Court decline to accept jurisdiction, and dismiss the State's appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing MEMORANDUM IN OPPOSITION OF JURISDICTION OF APPELLEE J.S. was sent by regular U.S. Mail, postage prepaid, to Kristen Sobieski, Assistant Prosecuting Attorney, 1200 Ontario Street, Cleveland, Ohio 44113, this 21<sup>st</sup> day of February, 2012.

  
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