

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	:
Plaintiff-Appellee,	: Case No.
	:
v.	: On discretionary appeal from the
	: Muskingum County Court of Appeals,
JARYD W. MOORE,	: Fifth Appellate District,
	: Case No. CT2015-0027
Defendant-Appellant.	:

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
DEFENDANT-APPELLANT JARYD W. MOORE**

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

Ohio's lower courts need further guidance regarding what amounts to proper imposition of postrelease control in a sentencing entry. This Court has already taken on postrelease-control issues many times. *See, e.g., State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 6-18; *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 5, 7-8. Still, there are significant splits between Ohio's appellate districts regarding how to apply this Court's precedent. Here, the issue involves what a trial court needs to include in a sentencing entry regarding postrelease-control consequences in order for a subsequently imposed judicial sanction to be valid. Further, in the Fifth District Court of Appeals, there is an intra-district split that is not only unresolved, but that produced an absurd result in Jaryd W. Moore's case.

In 2012, Mr. Moore was sentenced to an 18-month prison term for fourth-degree-felony gross sexual imposition. Regarding the consequences of violating postrelease control or committing a new felony while on it, the sentencing entry merely stated:

*The Court further notified the defendant that “Post Release Control” is mandatory in this case for five (05) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Code §2967.28. The Defendant is ordered to serve as part of this sentence any term for violation of that post release control.*

(Emphasis sic.) After Mr. Moore was released from prison and placed on postrelease control, he was convicted of a new felony and given a 4.3-year judicial sanction, despite the substantially incomplete language regarding the consequences of non-compliance or reoffending.

As such, Mr. Moore asked the trial court to vacate the sanction. In doing so, he noted that the postrelease control that supported the sanction was void under this Court's precedent and that of the Fifth District and that he could not be sanctioned based on void postrelease control. *See, e.g., State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of

the syllabus (holding that trial courts are required to notify offenders about postrelease control both at the sentencing hearing and in the judgment entry); *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, ¶ 18 (holding that the Adult Parole Authority may not impose sanctions for violating void postrelease control); *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 77 (remanding to add consequences notice omitted from sentencing entry); *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, ¶ 2-14 (holding that a defendant cannot be convicted of escape for violating void postrelease control); *State v. Richard-Bey*, 5th Dist. Muskingum Nos. CT2014-0012, CT2013-0013, 2014-Ohio-2923, ¶ 17-19; *State v. Smalls*, 5th Dist. Stark No. 2013CA00086, 2013-Ohio-5674, ¶ 14; *State v. McCall*, 5th Dist. Muskingum No. CT2013-0014, 2013-Ohio-2653, ¶ 20; *State v. Provens*, 5th Dist. Stark No. 2011CA00089, 2011-Ohio-5197, ¶ 13; *see also* R.C. 2929.19(B)(2)(e).

Still, the trial court denied the motion without explanation. And inexplicably, the court of appeals affirmed the trial court's decision, ignoring this Court's precedent and the appellate court's own recent decisions. Rather, it cited to an aberrant and older case from its own district in deciding that Mr. Moore would have to serve out his judicial sanction. *See State v. Ball*, 5th Dist. Licking No. 13-CA-17, 2013-Ohio-3443 (referencing the applicable postrelease-control statutes in a sentencing entry provides an offender with sufficient notice of postrelease-control sanctions). The court of appeals refused to reconsider that decision.

Before the appellate court's original decision in Mr. Moore's case, it granted relief on identical facts in other cases. *See Richard-Bey* at ¶ 17-19; *State v. Kepler*, 5th Dist. Muskingum No. CT2015-0021, 2015-Ohio-3291 (State's application for en banc consideration granted on January 11, 2016, but court unable to concur in a decision). Less than two weeks after the appellate court's original decision in Mr. Moore's case, it granted relief on identical facts in two

other cases. *See State v. Grimes*, 5th Dist. Muskingum No. CT2015-0026, 2015-Ohio-3497 (State’s application for en banc consideration granted on January 11, 2016, but court unable to concur in a decision); *State v. Murphy*, 5th Dist. Muskingum No. CT2015-0023, 2015-Ohio-3598 (State’s untimely application for en banc consideration pending). And less than three weeks before this writing, the Fifth District granted relief on identical facts for yet another defendant. *See State v. (Robert E.) Moore*, 5th Dist. Muskingum No. CT2015-0028, 2015-Ohio-5514. But due to the en banc rulings, it appears that the Fifth District is now split 3-3 on the issue.

While the Fifth District’s treatment of this issue has been troublesome, particularly for Mr. Moore, it also conflicts with those of other districts. *See, e.g., State v. Young*, 11th Dist. Trumbull No. 2009-T-0130, 2011-Ohio-4018, ¶¶ 88, 96 (“Mr. Young’s sentence of conviction must be corrected to . . . state that the parole board may impose a prison term of up to one-half of his prison sentence for any violation.”); *State v. Love*, 8th Dist. Cuyahoga No. 102058, 2015-Ohio-1461, ¶ 10 (“Because postrelease control sanctions were not properly included in Love’s sentencing entry, any attempt to impose postrelease control is void.”); *but see State v. Clark*, 2d Dist. Clark No. 2012 CA 16, 2013-Ohio-299 ( holding postrelease control valid because “[i]n the sentencing entry, the court again imposed the proper lawful term of post-release control and ordered the defendant to serve any post-release control ordered by the Parole Board and any prison term for violation of that post-release control”). This Court’s guidance is necessary to harmonize the division between Ohio’s district courts.

In essence, a person’s opportunity to have a void judicial sanction vacated depends on which Ohio trial court levied the sentence and which appellate court reviews it. This cannot be what the General Assembly intended. Postrelease-control imposition and the consequences of

non-compliance and reoffending should be consistent across the State. But if this Court does not act, arbitrariness, not consistency, will prevail. That arbitrariness worked a terrible injustice for Mr. Moore. This Court should accept his case for review and ensure that further injustices do not occur.

### STATEMENT OF THE CASE AND FACTS

In 2012, Mr. Moore was sentenced by the Muskingum County Court of Common Pleas to an 18-month prison term for fourth-degree-felony gross sexual imposition. (Apr. 16, 2015, Motion to Vacate Judicial-Sanction Sentence, Ex. A). The sentencing entry contained the following language regarding postrelease control:

*The Court further notified the defendant that “**Post Release Control**” is **mandatory** in this case **for five (05) years**, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Code §2967.28. The Defendant is ordered to serve as part of this sentence any term for violation of that post release control.*

(Emphasis sic.) (*Id.*).

Mr. Moore completed his prison sentence and was released on July 21, 2013. (*Id.*, Ex. B). He was placed on postrelease control for five years at that time. (*Id.*).

In 2014, in Montgomery County Court of Common Pleas Case No. CR2013-0224, the trial court sentenced Mr. Moore to eight months in prison for failure to register his address. (Jan. 17, 2014, Sentencing Entry). The court also imposed a judicial-sanction sentence, to be served consecutively to the eight-month sentence, because Mr. Moore was on postrelease control for the 2012 case when the new felony was committed. (*Id.*). The judicial-sanction sentence was approximately 4.3 years. (Apr. 16, 2015, Motion to Vacate Judicial-Sanction Sentence, Ex. D). The trial court issued a nunc pro tunc sentencing entry on February 7, 2014 that did not affect the judicial-sanction sentence. (Feb. 7, 2014, Nunc Pro Tunc Sentencing Entry).

Mr. Moore completed his eight-month prison sentence and began serving only his judicial-sanction sentence. (*Id.*, Ex. D). Because the postrelease control that supported that sentence was void under binding precedent of this Court and the Fifth District Court of Appeals, Mr. Moore filed with the trial court a motion to vacate that sentence. (*See* Apr. 16, 2015, Motion to Vacate Judicial-Sanction Sentence). The State filed a response that same day. (Apr. 16, 2015, State’s Memorandum Contra). Less than two hours after Mr. Moore’s reply was filed, the trial court denied the motion in a one-sentence entry. (Apr. 20, 2015, Reply; Apr. 20, 2015, Journal Entry). The trial court gave no explanation of why it denied the motion. (*See* Apr. 20, 2015, Journal Entry).

Mr. Moore filed a timely notice of appeal. (May 19, 2015, Notice of Appeal). While the court of appeals had decided nearly identical cases in favor of defendants before (and indeed, after) Mr. Moore’s appeal, the court of appeals affirmed the trial court’s decision. *See State v. Moore*, 5th Dist. Muskingum No. CT2015-0027, 2015-Ohio-3435; *see also infra*.

Mr. Moore filed a timely motion for reconsideration, which was summarily denied. (Aug. 31, 2015, Motion for Reconsideration; Nov. 30, 2016, Judgment Entry).

Mr. Moore remains in prison solely on his void judicial-sanction sentence, and he is not scheduled to be released until September 2018. (Apr. 16, 2015, Motion to Vacate Judicial-Sanction Sentence, Ex. D).

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### PROPOSITION OF LAW

**The portion of a sentencing entry imposing postrelease control is void if it fails to properly notify the defendant of the consequences of violating postrelease control or of committing a new felony while on it. A judicial-sanction sentence based on such void postrelease control is also void.**

The trial court did not explain why it denied Mr. Moore's motion to vacate his void judicial-sanction sentence. (*See* Apr. 20, 2015, Journal Entry). But there can be no doubt that the motion was meritorious.

Trial courts are required to notify offenders about postrelease control both at the sentencing hearing and in the judgment entry. *Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, at paragraph one of the syllabus. As part of that notification, the trial court must inform the defendant that if he violates the conditions of postrelease control, "the parole board may impose a prison term . . . of up to one-half of the stated prison term originally imposed upon the offender." R.C. 2929.19(B)(2)(e); *Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, at ¶ 77. That notification was not included in the entry that purported to place Mr. Moore on postrelease control.

Failure to properly impose postrelease control renders that portion of the sentence void. *Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, at ¶ 2-14; *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, at paragraph one of the syllabus; *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 27, 69-71; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 6. Once an offender completes his prison term, he may no longer be resentenced to correct postrelease-control errors. *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 24; *State v. Bezak*, 114 Ohio St.3d 94, 2007-

Ohio-3250, 868 N.E.2d 961, ¶ 18; *Hernandez*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, at ¶ 29-32. And a defendant cannot be sanctioned based on void postrelease control. *See, e.g., Hernandez* at ¶ 18 (holding that Adult Parole Authority may not impose sanctions for violating void postrelease control); *Billiter* at ¶ 2-14 (holding that defendant cannot be convicted of escape for violating void postrelease control).

Again, in 2012, Mr. Moore was given an 18-month prison term for fourth-degree-felony gross sexual imposition. (Apr. 16, 2015, Motion to Vacate Judicial-Sanction Sentence, Ex. A). But the trial court was required to notify Mr. Moore that if he were to violate his postrelease control, “the parole board may impose a prison term . . . of up to one-half of the stated prison term originally imposed” upon him. R.C. 2929.19(B)(2)(e); *Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, at ¶ 77; *Richard-Bey*, 5th Dist. Muskingum Nos. CT2014-0012, CT2013-0013, 2014-Ohio-2923, at ¶ 17. And under R.C. 2929.141, Mr. Moore was subject to a prison term equal to the remainder of his time on postrelease control if he were to commit a new felony while on postrelease control. In addition to giving that notice orally at Mr. Moore’s sentencing hearing, the trial court was required to include the notice in its sentencing entry. *Jordan* at paragraph one of the syllabus.

But in the 2012 case, there was no inclusion of the specific consequences of violating postrelease control in the sentencing entry. The entry simply stated that “[t]he Court further notified the Defendant [of] . . . the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code §2967.28.” (Apr. 16, 2015, Motion to Vacate Judicial-Sanction Sentence, Ex. A). That language failed to notify Mr. Moore that he faced a prison term up to half his original sentence if he violated his postrelease control. R.C. 2929.19(B)(2)(e). The omission of the consequences from the sentencing entry rendered Mr.

Moore's postrelease control void. *Ketterer* at ¶ 77; *Richard-Bey* at ¶ 17. Moreover, because Mr. Moore completed his prison term in the 2012 case in July 2013, his postrelease-control sentence could not be corrected through resentencing or otherwise. (See Apr. 16, 2015, Motion to Vacate Judicial-Sanction Sentence, Ex. B); see also *Qualls* at ¶ 24; *Bezak* at ¶ 18. And importantly, Mr. Moore could not be subjected to a judicial-sanction sentence for committing a new offense while on void postrelease control. See *Hernandez* at ¶ 18; *Billiter* at ¶ 2-14.

In *Ketterer*, this Court remanded the defendant's case to the trial court so that it could add the consequences language omitted from the defendant's sentencing entry. *Ketterer* at ¶ 77. That was because such language is required and without it the sentencing entry could not be used as the basis for imposing postrelease control.

Despite all of that precedent, Ohio courts are split as to how to apply it in the context of what a trial court needs to include in a sentencing entry regarding postrelease-control consequences so that a judicial sanction is permissible. And as discussed *supra*, the Fifth District is now itself split (3-3) and that has kept Mr. Moore in prison while identically situated defendants have gone home.

In the decision below, the Fifth District broke sharply from its recent precedent on the exact same issue and pertinent facts. See *Richard-Bey*, 5th Dist. App. Nos. CT2014-0012, CT2014-0013, 2014-Ohio-2923, at ¶ 17-19; *Kepler*, 5th Dist. Muskingum No. CT2015-0021, 2015-Ohio-3291, at ¶ 12. The offending postrelease-control language used in the sentencing entry in this case, as well as in the cases most recently decided by the court of appeals on the same issue, was the following: “. . . as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code §2967.28.” See, e.g., *Kepler* at ¶ 12. That is, the specific consequences for violating postrelease control or committing a new

offense while on it were omitted. And this Court's decision in *Ketterer* was wholly ignored in Mr. Moore's case, while it was considered in other recent Fifth District cases. *See, e.g., Richard-Bey* at ¶ 17; *Kepler* at ¶ 14; *Grimes*, 5th Dist. Muskingum No. CT2015-0026, 2015-Ohio-3497, at ¶ 12.

Further, the appellate court's reliance on its aberrant decision in *Ball*, 5th Dist. Licking No. 13-CA-17, 2013-Ohio-3443, was misplaced. In *Ball*, the panel held:

Applying the foregoing, we find the language in Ball's 1999 sentencing entry, combined with the presumption of regularity with which we must accord the oral notification at Ball's sentencing hearing, was sufficient to give appellant notice of the post release control sanction. Therefore, the trial court in the present case did not err when it imposed a sanction for Ball's violation of his post release-control condition imposed in the prior criminal action.

*Id.* at ¶ 25. First, this Court's relevant decisions did not allow for the totality-driven decision in *Ball*.

Second, in the three years leading up to *Ball*, the Fifth District consistently held postrelease control to be void based on improper imposition in a defendant's sentencing entry alone. *See, e.g., McCall*, 5th Dist. Muskingum No. CT2013-0014, 2013-Ohio-2653 (postrelease control void when proper notice for first-degree felony given at hearing, but entry notified defendant of postrelease control "up to a maximum of five (5) years"); *State v. King*, 5th Dist. Muskingum No. CT2012-0009, 2012-Ohio-4580 (successful postrelease-control challenge based solely on entry notifying defendant of postrelease control "up to a maximum of five (05) years"); *Provans*, 5th Dist. Stark No. 2011CA00089, 2011-Ohio-5197 (successful postrelease-control challenge based solely on entry notifying defendant that postrelease control was "mandatory in this case up to a maximum of five (5) years"); *State v. Henderson*, 5th Dist. Ashland No. 10-COA-012, 2011-Ohio-1791 (declaring postrelease-control portion of sentences in four different case numbers void based on errors in sentencing entries); *State v. Green*, 5th Dist. Stark No.

2010CA00198, 2011-Ohio-1636 (postrelease control invalid due to entry notifying defendant that postrelease control was “mandatory in this case up to a maximum of 5 years”); *State v. Muff*, 5th Dist. Perry No. 10 CA 16, 2010-Ohio-6466 (postrelease-control notification in sentencing entry that defendant subject to “up to a maximum” of five years invalid when defendant was subject to five mandatory years of postrelease control); *State v. Crawley*, 5th Dist. Stark No. 2010-CA-00057, 2010-Ohio-5098 (defendant properly notified of mandatory three-year postrelease-control term for second-degree felony at sentencing hearing, but entry incorrectly imposed a five-year term).

Indeed, until the lower court’s decision in Mr. Moore’s case, its post-*Ball* cases continued its otherwise clear precedent of declaring postrelease control void based on sentencing-entry errors alone. *See e.g., Smalls*, 5th Dist. Stark No. 2013CA00086, 2013-Ohio-5674 (expressly overruling prior, contrary postrelease-control cases and declaring defendant’s postrelease control void based on errors in his sentencing entry, even though he received correct notice at his sentencing hearing); *Richard-Bey*, 5th Dist. Muskingum Nos. CT2014-0012, CT2013-0013, 2014-Ohio-2923 (postrelease control void due to omission of specific consequences language from sentencing entry).

Moreover, before the appellate court’s original decision in Mr. Moore’s case, it granted relief on *identical facts* in other cases. *See Richard-Bey* at ¶ 17-19; *Kepler*, 5th Dist. Muskingum No. CT2015-0021, 2015-Ohio-3291 (State’s application for en banc consideration granted on January 11, 2016, but court unable to concur in a decision). Within two weeks after the appellate court’s original decision in this case, the appellate court granted relief on identical facts in two other cases. *See Grimes*, 5th Dist. Muskingum No. CT2015-0026, 2015-Ohio-3497 (State’s application for en banc consideration granted on January 11, 2016, but court unable to concur in

a decision); *Murphy*, 5th Dist. Muskingum No. CT2015-0023, 2015-Ohio-3598 (State’s untimely application for en banc consideration pending). And less than three weeks before this writing, the Fifth District granted relief on identical facts for yet another defendant. *See (Robert E.) Moore*, 5th Dist. Muskingum No. CT2015-0028, 2015-Ohio-5514.

Further, the Fifth District’s decision here conflicts with those of other appellate districts. *See, e.g., Young*, 11th Dist. Trumbull No. 2009-T-0130, 2011-Ohio-4018, at ¶ 88, 96 (“Mr. Young’s sentence of conviction must be corrected to . . . state that the parole board may impose a prison term of up to one-half of his prison sentence for any violation.”); *Love*, 8th Dist. Cuyahoga No. 102058, 2015-Ohio-1461, at ¶ 10 (“Because postrelease control sanctions were not properly included in Love’s sentencing entry, any attempt to impose postrelease control is void.”); *but see Clark*, 2d Dist. Clark No. 2012 CA 16, 2013-Ohio-299 ( holding postrelease control valid because “[i]n the sentencing entry, the court again imposed the proper lawful term of post-release control and ordered the defendant to serve any post-release control ordered by the Parole Board and any prison term for violation of that post-release control”).

In Ohio, a person’s opportunity for relief from a void judicial sanction now depends on which court addresses the issue. That inconsistency creates fundamental unfairness, as demonstrated in Mr. Moore’s case. He would have been released from prison by now if his appeal had been decided in multiple other Ohio courts. This Court should accept his case for review and reverse the Fifth District’s decision.

## CONCLUSION

As demonstrated above, Ohio's appellate districts need further guidance regarding what amounts to proper imposition of postrelease control in a sentencing entry. Mr. Moore was given a more-than-four-year judicial-sanction sentence. That was despite the fact that the postrelease-control portion of the sentencing entry that led to the judicial sanction gave scant reference to the consequences of reoffending while on postrelease control. Mr. Moore remains incarcerated solely on his void judicial-sanction sentence, while identically situated defendants have been released. This Court should accept jurisdiction of this case and harmonize the treatment of this important issue by Ohio's courts.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT JARYD W. MOORE** was forwarded by regular U.S. Mail to D. Michael Haddox, Muskingum County Prosecutor, 27 North Fifth Street, P.O. Box 189, Zanesville, Ohio 43702, on this 13th day of January, 2016.

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IN THE SUPREME COURT OF OHIO

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**APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION OF  
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