

No. 2016-0215

IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE
MUSKINGUM COUNTY COURT OF APPEALS,
FIFTH APPELLATE DISTRICT,
CASE NO. CT2015-0026

STATE OF OHIO,
Plaintiff-Appellant,

v.

BRADLEY E. GRIMES,
Defendant-Appellee.

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INTRODUCTION

This case is about an assault on the separation of powers—an attempt to permit the executive branch to usurp judicial authority by calculating and enforcing sentences not included in a judgment entry. Under the State’s theory, postrelease control is effective even if a court makes no mention of postrelease control in the judgment entry of sentence. As a result, the executive branch, without direction or authorization from a court, would apply the law to the facts of each case, and then decide how much postrelease control to enforce against any given defendant, as well as the consequences for any violations.

The State’s theory also violates the maxim that a court speaks only through its journal entries. Under the State’s theory, words spoken at the plea or sentencing hearing, by the judge, or sometimes even by defense counsel are sufficient to “notify” a defendant about postrelease control. The State is correct that notice of a sanction is important, but only a judgment entry can *impose* a criminal sanction.

This Court should affirm the Fifth District’s decision and hold that, to be enforceable, a trial court’s judgment entry of sentence must state the correct term of postrelease control, correctly describe the mandatory or discretionary nature of that sanction, and authorize the specific sanctions for any violation. Any other decision would transfer the judiciary’s authority to determine and impose criminal sentences to the executive branch.

STATEMENT OF THE CASE AND THE FACTS

The State's procedural and factual history is accurate, but Mr. Grimes respectfully submits that a more complete description of the proceedings below will assist this Court in deciding this case.

* * *

Mr. Grimes is sent to prison for robbery, but it's unclear whether he caused or threatened any physical harm.

In 2011, the Muskingum County Common Pleas Court sentenced Appellee Bradley E. Grimes to 18 months in prison for robbery through the use or threatened use of force, R.C. 2911.02(A)(3), a third-degree felony, as well as vandalism, R.C. 2909.05(B)(1)(a), a fifth-degree felony. Entry (Aug. 17, 2011), Ex. A to Motion to Vacate (Apr. 16, 2015). The trial court imposed a one-year prison term for the robbery, to be served consecutively to six months for the vandalism. *Id.* The trial court also imposed three years of mandatory postrelease control, and the trial court ordered Mr. Grimes to serve "any term for violation of that post release control." *Id.*

The record does not contain any information about the facts of the robbery or vandalism charges other than that restitution of \$585 was awarded to a Zanesville Dairy Mart, and \$104 to a Zanesville resident. *Id.* Accordingly, it's unclear whether Mr. Grimes caused or threatened to cause physical harm. In 2011, R.C. 2929.14(D)(1), 2929.19(B)(2)(c), and 2967.28(B)(3), required mandatory postrelease control for non-sex-offense, third-degree felonies if the defendant caused or threatened to cause physical

harm, and discretionary postrelease control if the defendant did not. Since the time of Mr. Grimes's offense, the Ohio General Assembly has amended R.C. 2967.28(B)(3) to make the line between discretionary and mandatory postrelease control for third-degree felonies whether the defendant was convicted of an "offense of violence." But R.C. 2929.14 and 2929.19 retain the harm/threatened harm dividing line.

The State never exercised its right to timely correct Mr. Grimes' unenforceable sentence.

The State did not exercise its right to appeal the 2011 entry to correct the failure to impose enforceable postrelease control. The State also did not exercise its right to seek a resentencing hearing to correct the void sentence while Mr. Grimes was in prison. Mr. Grimes finished his prison term in December 2012 and was released. DOTS Report, Ex. B., Motion to Vacate (Apr. 16, 2015).

Mr. Grimes commits a new offense, pleads guilty, and the court converts his remaining postrelease-control time to a judicial-sanction prison term.

Subsequently, Mr. Grimes admitted that in May 2013, when he was 20 years old, he had sexual relations with a 15-year-old, resulting in a pregnancy. Bill of Particulars (Sep, 19, 2013). Specifically, he pleaded guilty to illegal sexual conduct with a minor, a fourth-degree felony. Entry (Jan. 7, 2014). The record contains no allegation that the relations were anything but consensual. If Mr. Grimes were eight months younger, the offense would have been a first-degree misdemeanor. R.C. 2907.04(B)(2). If the victim had been four months older, this would not have been an offense. R.C. 2907.04(A).

In January 2015, the trial court sentenced Mr. Grimes to 12 months in prison for the new offense. Entry (Jan. 7, 2014). The trial court also ordered that the time remaining on his postrelease control from the robbery be converted to a judicial-sanction prison term pursuant to R.C. 2929.141. *Id.* The trial court did not specify the amount of postrelease control to be converted, but the Department of Rehabilitation and Correction imposed 1.97 years based on its own calculations. DOTS Report, Ex. D to Motion to Vacate (Apr. 16, 2015).

The Fifth District vacates the illegal judicial sanction prison term.

In April 2015 Mr. Grimes filed a motion to vacate his postrelease control, pointing out that the entry did not specify the consequences for violating the sanction. *Id.* The trial court denied the motion. Journal Entry (Apr. 20, 2015). The court of appeals reversed and vacated Mr. Grimes's postrelease control. *State v. Grimes*, 5th Dist. Muskingum No. CT2015-0026, 2015-Ohio-3497. Pursuant to the Fifth District's ruling, Mr. Grimes was released on August 27, 2015, with 368 days remaining on his contested judicial-sanction prison term, as calculated by the Department of Rehabilitation and Correction. If the State prevails in this case, Mr. Grimes would return to prison to complete those 368 days.

The Fifth District denied the State's motion to rehear the case en banc because a majority could not agree on a resolution. Apx. C to State's Merit Brief. This Court then accepted the State's discretionary appeal.

ARGUMENT

Proposition of Law:

Because a court speaks only through its journal entries, the executive branch has authority to enforce a criminal sanction only when specifically authorized to do so by a journal entry signed by a judge.

I. **This case can be resolved without creating new law.**

The State and its amici frame the issues in this case as novel and complicated, but this Court need not delve once more into the void/voidable distinction to resolve this case. Instead, as the panel decision below shows, this case can be resolved by a straightforward application of *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, and this Court's other postrelease-control decisions. Under those decisions, the Fifth District correctly held that Mr. Grimes's judicial sanction is void, and therefore unenforceable.

A. **The executive branch cannot enforce postrelease control unless a court properly imposes the sanction in a journal entry.**

Consistent with separation-of-powers principles, a trial court must actually impose postrelease control in order for it to become part of a defendant's sentence. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 19. And in order to impose postrelease control, the trial court must convey certain information in its oral advisement at the defendant's sentencing hearing *and* include that information in the judgment entry of sentence. *Jordan* at paragraph one of the syllabus; *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 69. Oral notice alone is not enough.

Jordan at paragraph one of the syllabus (trial court must both “notify the offender at the sentencing hearing” and “incorporate that notice into its journal entry”); *Bloomer* at ¶ 69 (trial court must notify defendant of postrelease control “and incorporate that notification into its entry”). That proper oral notice cannot make up for a deficient judgment entry is clear from this Court’s non-writ case law. For example, in *State v. Billiter*, based solely on defects in the sentencing entry, this Court held that the postrelease control portion of the original sentence was void. 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, ¶ 2, 8, and 12.

This Court has also specified that, in imposing postrelease control, the trial court must notify the defendant that violations can result in an APA-imposed prison term up to one-half of the defendant’s sentence. R.C. 2929.19(B)(2)(e). As with all required postrelease-control information, the possibility of a prison term must be stated in the defendant’s sentencing entry. *Ketterer* at ¶ 77 (omission of possibility of a prison term from entry was error, even where that information was provided at sentencing); *see also Jordan* at ¶ 6 (“A court of record speaks only through its journal and not by oral pronouncement”). If the entry does not include this information, postrelease control is not properly imposed and is void. *Bloomer* at ¶ 27, 71 (“In the absence of a proper sentencing entry imposing postrelease control, the parole board’s imposition of postrelease control cannot be enforced”).

B. *State v. Qualls* did not overrule the doctrine that a court speaks only through its journal entries.

Contrary to the State's argument, *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, does not change the holdings in *Ketterer*, *Jordan*, and *Bloomer*.

While *Qualls* explained that this Court has "focused" on oral notification, nothing in the opinion held that the Adult Parole Authority ("APA") could enforce postrelease control without a valid entry. Likewise, the State's reliance on this Court's writ cases is misplaced because those cases are "of little instructional value" because they applied the "standard of review in a habeas case[.]" *Ketterer* at ¶ 73. And while this Court noted that *Ketterer* was a capital case that triggered a heightened standard, nothing in the case distinguishes the standard applied in that case that of any of the discretionary appeal decisions. In fact, *Ketterer* applied the same standard as described in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. *Ketterer* at ¶ 63, 69.

It is also correct that Mr. Grimes has not provided a transcript of his sentencing hearing. As a result, he concedes that for the purposes of this case, he received at the sentencing hearing correct oral notice of postrelease control. But oral notice of a criminal sanction, standing alone, is not enough to authorize the executive branch to enforce the sanction. Because the trial court speaks only through its journal entries, the court also had to include the prison sanction information in its sentencing entry. The court indisputably failed to do so. As this Court made clear in *Ketterer*, the omission of

that information from his sentencing entry made the postrelease-control portion of Mr. Grimes's sentence void.

Because his sentencing entry did not properly impose postrelease control, that postrelease control could not be enforced. Mr. Grimes could not be sanctioned for committing a new felony while on unenforceable, void postrelease control. As a result, the Fifth District correctly concluded that Mr. Grimes's judicial sanction was void.

II. Systematic approach.

A. History of postrelease control.

If this Court wishes to accept the State's invitation to reenter the void/voidable fray, a brief history of postrelease control could help place this case in context.

1. Judges imposed indefinite sentences that used parole, not postrelease control.

Before 1996, Ohio had an indefinite sentence regime—judges set the minimum and maximum punishments, but the judiciary had no role in determining when any individual defendant would be released. *See State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 34. Determining actual release dates was the sole responsibility of the Parole Board. *State ex rel. Blake v. Shoemaker*, 4 Ohio St.3d 42, 43, 446 N.E.2d 169 (1983). And because parole was an act of grace—a relief from criminal punishment instead of a criminal punishment itself—few rules limited the Board's discretion. *Rose v. Haskins*, 21 Ohio St.2d 94, 95, 255 N.E.2d 260 (1970).

But from the General Assembly’s perspective, the pre-1996 statute had a flaw—it was impossible to know at sentencing how much time a defendant would serve. As a result, one goal of Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136, effective July 1, 1996 (“S.B. 2”), was “truth in sentencing.” *Foster* at ¶ 34. As this Court explained shortly after *Foster*:

As part of the General Assembly’s goal of achieving “truth in sentencing,” the new felony-sentencing law was intended to ensure that all persons with an interest in a sentencing decision would know precisely the sentence a defendant is to receive upon conviction for committing a felony. The goal is that when the prosecutor, the defendant, and victims leave the courtroom following a sentencing hearing, they know precisely the nature and duration of the restrictions that have been imposed by the trial court on the defendant’s personal liberty.

State ex rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 24.

2. The General Assembly wanted sentences to be fixed at the time of sentencing.

The parole system did not satisfy the truth-in-sentencing goal because at the time of sentencing, no one could know exactly when a defendant would be released. But imposing a flat prison term by itself lacked the carrot-and-stick approach that indeterminate parole allowed. So to approximate the incentives of parole, the General Assembly created “bad time” and postrelease control. Bad time was a short, additional prison term imposed by the Parole Board for behavior in prison the Board deemed criminal. *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 135, 729 N.E.2d 359 (2000). This Court struck down bad time because allowing the executive branch to inflict criminal

punishment without judicial authorization violated the separation of powers. *Id.* at 136. Specifically, this Court held that “the sentencing of a defendant convicted of a crime [is] solely the province of the judiciary.” *Id.*, citing *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 648, 4 N.E. 81 (1885); *Stanton v. Tax Comm.*, 114 Ohio St. 658, 672, 151 N.E. 760 (1926) (“the primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto”); and *Fairview v. Giffee*, 73 Ohio St. 183, 190, 76 N.E. 865 (1905) (“It is indisputable that it is a judicial function to hear and determine a controversy between adverse parties, to ascertain the facts, and, applying the law to the facts, to render a final judgment.”)

Soon after this Court struck down bad time, it upheld postrelease control specifically because a court had to authorize the sanction:

Under the above-mentioned order of providing more certainty in criminal sentencing, one of the overriding goals of SB 2 was “truth in sentencing,” meaning that the sentence imposed by the judge is the sentence that is served, unless altered by the judge.

Woods v. Telb, 89 Ohio St.3d 504, 508, 2000-Ohio-171, 733 N.E.2d 1103. So under S.B. 2, the sentencing hearing was the main event, and the sentencing entry documented that event and, critically, made it enforceable.

3. Numerous trial courts systemically failed to impose postrelease control, and prosecutors consistently failed to appeal the errors.

Some trial judges failed to impose the sanction properly (if at all), and many prosecutors failed to notice or appeal the errors. As a result, this Court has had to issue

numerous opinions informing lower courts that they have a duty to properly impose the sanction, and that without proper judicial imposition, the sanction is unenforceable. *See, e.g., State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301; *Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254; *Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958; *Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960; *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382; and *State v. Schleiger*, 141 Ohio St.3d 67, 2014-Ohio-3970, 21 N.E.3d 1033. For example, in *Hernandez* this Court held that postrelease control needed to be in the sentencing entry. *Bloomer* reiterated that it had to be properly imposed. *Jordan*, *Billiter*, and *Holdcroft* held that leaving out a required term made the sentence void. And *Schleiger* reiterated that postrelease control was a criminal punishment, so defendants are entitled to counsel at hearings even when only postrelease control is at issue.

4. The General Assembly tried to legislatively redraw the line separating judicial and executive power.

The General Assembly misperceived the constitutional support for postrelease control. In response to this Court's decisions, the General Assembly attempted to redraw the separation-of-powers lines set forth in this Court's decisions. Specifically, and in direct contradiction to *Woods*, *Jordan*, and *Hernandez*, the General Assembly enacted Am.Sub.H.B. No. 137, Baldwin's Ohio Legislative Service Annotated (Vol. 4, 2006) L-1911, L-1934 ("H.B. 137"), effective July 11, 2006, which amended R.C. 2929.14,

2929.19, and 2967.28, and enacted R.C. 2929.191. *See Singleton*, at ¶ 5. In addition to creating a mechanism for correcting sentences imposed before July 11, 2006, R.C. 2929.191, the new law, added identical language to R.C. 2929.14(D)(1), 2929.19(B)(2)(c), and 2967.28(B), stating that the executive branch could impose postrelease control in the absence of any judicial order:

If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, 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. . . .

The principal difficulty with this language is that it ignores this Court’s repeated rulings that, to survive a separation-of-powers challenge, a judge must properly impose postrelease control. Basically, this Court held that, as a matter of separation of powers, the executive branch could not enforce a criminal penalty without a judicial order, and the General Assembly responded by saying, “yes it can.”

This Court has consistently tried to preserve as much of the postrelease-control statutes as is consistent with the separation of powers. This Court’s case law has also consistently allowed the State to correct postrelease-control error while the defendant remains in prison. But trial courts have continued to fail to properly impose the sanction, and prosecutors have continued to fail to spot, appeal, or timely correct the errors.

5. The State now seeks to redraw the line separating judicial and executive power.

The State's solution is to redraw the lines regarding separation of powers. By contrast, Mr. Grimes asks this Court to clearly and unequivocally hold that for postrelease control to be enforceable, the term of years, the mandatory/discretionary nature of the sanction, and the consequences for violations, must be correctly stated from the bench at the sentencing hearing and correctly set forth in the judgment entry of sentence.

B. Postrelease control must be imposed by a court because it is a criminal punishment.

As this Court has explained, postrelease control is a criminal punishment. The "terms of postrelease control are 'part of the actual sentence' and . . . the court must inform the offender regarding these terms, because sentencing is a judicial function and a sentence cannot be imposed by the executive branch of government." *Schleiger* at ¶ 15, citing *Woods* at 511, 512, and *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 23 ("a judge must conform to the General Assembly's mandate in imposing postrelease-control sanctions as part of a criminal sentence").

This Court held that bad time was unconstitutional because the General Assembly had authorized the Parole Board to impose criminal punishments without specific judicial authorization. *Bray*, 89 Ohio St.3d at 135. But postrelease control was different because a court imposes the sanction. *Woods*, 89 Ohio St.3d at 511. Since then,

this Court has repeatedly held that, as a matter of separation of powers, only a court can authorize postrelease control. “[B]ecause the separation-of-powers doctrine precludes the executive branch of government from impeding the judiciary’s ability to impose a sentence, the problem of having the Adult Parole Authority impose postrelease control at its discretion is remedied by a trial court incorporating postrelease control into its original sentence.” *Hernandez v. Kelly*, 108 Ohio St.3d 395, at ¶ 20, quoting, *Jordan*, 104 Ohio St.3d 21, at ¶ 19, citing *Woods* at 512-513; see also *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 17; *State v. Bloomer*, 122 Ohio St.3d 200, at ¶ 4; *Risner v. Ohio Dep’t of Natural Res.*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 48 (O’Donnell, J., dissenting, joined by Pfeifer and Lanzinger, JJ.).

C. The General Assembly cannot redraw the line separating judicial and executive power.

Citing to R.C. 2929.14(D)(1), 2929.19(B)(2)(c), and 2967.28(B), the State and its amici correctly explain that the Ohio General Assembly has authorized the executive branch to impose postrelease control without any judicial authorization. But the statutes do not help the State because they violate the separation of powers.

The General Assembly does not have “the right or the power to enact legislation that purports to release itself from the binding effect of this court’s interpretation of the Ohio Constitution. While the General Assembly ‘is free to act upon its own judgment of its constitutional powers,’ it cannot . . . ‘require the courts to treat as valid laws those which are unconstitutional.” *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio

St.3d 451, 505-506, 715 N.E.2d 1062 (1999), quoting *Bartlett v. State*, 73 Ohio St. 54, 58, 75 N.E. 939 (1905). Likewise, the General Assembly cannot create a “scheme [that] vests the executive branch with authority to review judicial decisions.” *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 55. The General Assembly also cannot authorize the executive branch to impose a criminal sanction in the absence of a judicial order. See *State v. Gustafson*, 76 Ohio St.3d 425, 442, 668 N.E.2d 435 (1996) (license suspensions related to charges of driving while intoxicated).

For postrelease control to be enforceable, a court must impose the sanction. The General Assembly cannot legislatively redraw the line separating judicial and executive power.

D. Ohio Revised Code Section 2929.191 does not apply to this case.

Ohio Revised Code Section 2929.191 does not help the State because Mr. Grimes’s underlying sentence was imposed in 2011, and R.C. 2929.191 expressly applies only to sentences imposed before July 11, 2006. And while it is true that a plurality of this Court opined that R.C. 2929.191 applied prospectively, Justice Pfeifer was correct to note that, “by its own terms, R.C. 2929.191 limits its application to sentences imposed prior to the statute’s effective date.” *Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, at ¶ 39 (Pfeifer J., concurring in part and dissenting in part). Because Mr. Grimes was sentenced after July 11, 2006, R.C. 2929.191 is facially inapplicable to his case, and the State cannot make a valid statutory argument to the contrary.

E. A passing reference to a criminal sanction in a journal entry does not authorize the executive to decide how that sanction applies to any given case.

1. The State’s statutory argument rests on untenable middle ground.

The State’s argument that a judgment entry need only make a passing reference to postrelease control is on untenable middle ground because the State also relies on R.C. 2929.14(D)(1), 2929.19(B)(2)(c), and 2967.28(B), which say that *no* mention is required to authorize the executive branch to impose the sanction. To authorize the APA to enforce postrelease control, either the court need make no mention of postrelease control, or it must correctly and specifically impose the sanction. There is no rational middle ground.

2. Incorporation by reference is insufficient to impose a criminal sanction.

As the State points out, this Court held in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, that trial courts must “incorporate” postrelease-control information into the sentencing entry. *Jordan* at paragraph one of the syllabus. The State argues that by using “incorporate” instead of, for example, “include,” this Court intended to silently adopt an incorporation-by-reference standard for imposing postrelease control. Under that standard, trial courts need not include any specific information about a defendant’s postrelease-control term in his sentencing entry.

The State's argument relies upon a misreading of the definition. The definition of "incorporate" that the States cites says that the word means "to unite or work into something already existent so as to form an indistinguishable whole." Merriam-Webster Dictionary, <http://merriam-webster.com/dictionary/incorporate> (accessed July 8, 2016). As applied to this case, that means to work postrelease-control information into an already existent sentencing entry. In other words, to "incorporate" postrelease-control information merely means to *include* it in the sentencing entry. And that is precisely the "simple definition" that Merriam Webster provides, which is "to include (something) as part of something else[.]" *Id.*

In addition, a review of this Court's postrelease-control cases shows that "incorporate" simply means "include." Throughout those cases, this Court has used the two terms interchangeably. For example, in *Jordan*, this Court switched between the two terms in successive sentences, clarifying that they mean the same thing:

[A] trial court . . . is duty-bound to notify [an] offender at the sentencing hearing about postrelease control and to *incorporate postrelease control into its sentencing entry*, which thereby empowers the executive branch of government to exercise its discretion. *Stated differently*. . . , a sentencing trial court must notify the offender about postrelease control and *include it in its judgment entry*. (Emphasis added.)

Jordan at ¶ 22, citing *Woods*, 89 Ohio St.3d at 512-513.

This Court repeated that same usage pattern in *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254. First, the Court stated that precedent requires that trial courts "include in the sentencing entry" certain postrelease-control

information. *Bloomer* at ¶ 68. In the next paragraph, the Court rephrased this requirement as obligating a trial court to “incorporate that [postrelease control] notification into its sentencing entry.” *Id.* at ¶ 69. It seems unlikely that the *Bloomer* majority changed its mind about the proper standard for imposing postrelease control between paragraphs 68 and 69. The better explanation is that “incorporate” just means “include.”

3. A court speaks only through its journal entries.

Postrelease control is not an exception to the axiom that a “court of record speaks only through its journal entries[.]” *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, ¶ 30, quoting *State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, 800 N.E.2d 361, ¶ 20, and citing *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 455, 727 N.E.2d 907 (2000).

It may be correct that this Court’s “main focus in interpreting the sentencing statutes regarding postrelease control has always been on the notification itself and not on the sentencing entry[.]” but this Court has not overruled the doctrine that a court speaks only through its journal entries. *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 19. As this Court explained in *Qualls*: “although the court has the statutory duty to accurately notify a defendant of mandatory postrelease control, it is also axiomatic that “[a] court of record speaks only through its journal entries.” *Id.* at ¶ 34, quoting *Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, 800 N.E.2d 361, at ¶ 20; *see*

also *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 455, 727 N.E.2d 907 (2000); *Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625 (1953), paragraph one of the syllabus (“A court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum.”); *Indus. Comm. v. Musselli*, 102 Ohio St. 10, 15, 130 N.E. 32 (1921) (“Were the rule otherwise it would provide a wide field for controversy as to what the court actually decided.”); *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 6.

As a result, a trial court that notifies a defendant at the sentencing hearing of all aspects of postrelease control has performed a necessary, but not sufficient, step in authorizing the APA to enforce the sanction. For the sanction to be effective, the trial court must *impose* it in the judgment entry of sentence.

a) Journal entries must resolve the issues of a case with certainty.

The State’s position would permit the executive branch to enforce criminal penalties based on entries that do not clearly set forth a defendant’s sentence. But judgment entries must “so dispose of the matters at issue between the parties that they and such other persons as may be affected, will be able to determine with reasonable certainty the extent to which their rights and obligations have been determined.” *Licht v. Woertz*, 32 Ohio App. 111, 115, 167 N.E. 614 (8th Dist.1929), quoting Freeman on Judgments (5th Ed.), 176; see also *Short v. Short*, 6th Dist. Fulton No. F-02-005, 2002-Ohio-2290, ¶ 9-10, quoting 62 Ohio Jurisprudence 3d (1985), Judgments, Section 27 (a

“judgment must so dispose of the matters at issue between the parties that they * * * will be able to determine with reasonable certainty the extent to which their rights and obligations have been determined”); and *Burns v. Morgan*, 165 Ohio App.3d 694, 2006-Ohio-1213, 847 N.E.2d 1288, ¶ 10 (4th Dist.), quoting *Yahraus v. Circleville*, 4th Dist. Pickaway No. 00CA04, 2000 Ohio App. LEXIS 6315 (Dec. 15, 2000), quoting *Lavelle v. Cox*, 11th Dist. Trumbull No. 90-T-4396, 1991 Ohio App. LEXIS 1063 (Mar. 15, 1991) (Ford, J., concurring) (“In other words, the judgment entry must be worded in such a manner that the parties can readily determine what is necessary to comply with the order of the court.”).

b) Only the entry follows the defendant to prison.

Placing the correct sentence in the judgment entry, in addition to being a constitutional requirement, serves a practical purpose—it informs the executive branch of the punishment imposed. Only the indictment and the entry follow a defendant to prison. R.C. 2949.12. In most cases, no transcript is generated, and, even when it is, the transcript does not follow the defendant to prison. Accordingly, orally pronouncing the postrelease-control term at the sentencing hearing may provide notice to the defendant, but it does nothing to inform the executive branch of the specifics of the sentence.

- c) **Without the specific terms of postrelease control in the entry, the executive branch must speculate as to what happened at the sentencing hearing.**

Mr. Grimes's case demonstrates the need for placing the sentence in the journal entry. Under the versions of R.C. 2929.14(D)(1), 2929.19(B)(2)(c), and 2967.28(B)(3), in effect at the time of Mr. Grimes's underlying offense, he was subject to discretionary postrelease control if he did not cause or threaten harm, and mandatory postrelease control if he did. But his most serious underlying offense was robbery through use or threatened use of force. R.C. 2911.02(A)(3). Entry (Aug. 17, 2011), Ex. A to Motion to Vacate (Apr. 16, 2015). The proper sentence is unclear because it's possible to use force during a theft offense without causing or threatening physical harm. For example, a shoplifter could bump into a security guard on the way out of a store without harming that guard. *See, e.g., State v. Stargell*, 10th Dist. Franklin No. 95APA09-1157, 1996 Ohio App. LEXIS 1764, 6 (Apr. 30, 1996) ("a defendant's slight pushing or bumping the victim may constitute sufficient force"). Under the State's theory, the executive branch would be left to its own devices to determine whether the postrelease-control term was mandatory or discretionary.¹

Recent amendments do not clarify the matter. After Mr. Grimes's offense, the General Assembly amended R.C. 2967.28(B)(3) to state that all third-degree-felony

¹ The discretionary or mandatory nature of Mr. Grimes's postrelease control is not at issue in this case. He raises this argument only to demonstrate why a passing reference to postrelease control is not sufficient to authorize the sanction.

“offenses of violence” are subject to mandatory postrelease control, while third-degree-felony offenses that are not offenses of violence, are subject to discretionary postrelease control.² But R.C. 2929.14(D)(1) and 2929.19(B)(2)(c) retain the cause-or-threaten-physical-harm standard. Accordingly, under the State’s theory, the executive branch would not only have to delve into the facts, it would also have to decide which of three contradictory statutes to follow.

Further, as this Court’s precedents have shown, trial courts do not always properly impose postrelease control at the sentencing hearing, and, rarely, trial courts may have intentionally left the sanction out of a sentence. *See, e.g., Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301. And at least one lower court has held that postrelease control is properly imposed where the only mention of the duration of the sanction is a “notice” that the defendant signed after discussing it with his counsel. *State v. Quintanilla*, 10th Dist. Franklin No. 10AP-703, 2011-Ohio-4593, ¶ 3.

In addition, even where only one punishment is possible for an offense, say, a three-year firearm specification, this Court would never countenance an entry that simply sentenced a defendant to prison for the specification and then required the Department of Rehabilitation and Correction to calculate the proper prison term. R.C. 2929.14(B)(1)(a)(ii) and 2941.145. Counsel for Mr. Grimes could not find a single case

² This argument applies only to non-sex offenses. All felony sex offenses are subject to five years of mandatory postrelease control. R.C. 2967.28(B)(1).

where the State even tried to enforce any other criminal sanction without a specific judgment entry. This Court should not carve out a special rule for postrelease control.

F. Justice is served when void sentences can be revisited.

The State and its amici complain that revisiting illegal sentences injures finality. But finality is not the highest virtue in the legal system, and the parties have no interest in the finality of a void sentence, unless the defendant has completed the sentence imposed. *See, e.g., State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶¶ 12-18. Permitting courts to revisit illegal sentences while the defendant is serving the non-void portion of a sentence significantly extends the State's ability to revisit a judgment that has omitted a required punishment, such as a mandatory fine or a license suspension. *See, e.g., State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432; and *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509.

III. Response to arguments proffered by amici.

A. Amici cannot raise new arguments that were not raised below or were not made by the State in its merit brief.

The three amicus briefs in this case raise several arguments not raised in the State's brief and not raised below. This Court typically does not consider arguments raised solely by amici. *State ex rel. Toledo Blade Co. v. Henry Cnty. Court of Common Pleas*, 125 Ohio St.3d 149, 2010-Ohio-1533, 926 N.E.2d 634, ¶ 19, citing *Wellington v. Mahoning Cty. Bd. of Elections*, 117 Ohio St.3d 143, 2008-Ohio-554, ¶ 53, 882 N.E.2d 420. In addition, this Court does not consider arguments raised for the first time in this Court. *State v.*

Long, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 9, citing *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234 ¶ 26. Nevertheless, Mr. Grimes responds to several arguments raised solely by amici. This response is not a concession that these issues are properly before the court.

B. Habeas corpus is not the only remedy for a void sentence.

The Franklin County Prosecuting Attorney asserts that habeas corpus is the only proper avenue of relief. But Chief Justice O'Connor has rejected a habeas petition specifically because the defendant had the opportunity to file a motion to vacate his postrelease control in the trial court. *Bowen v. Sheldon*, 124 Ohio St.3d 551, 2010-Ohio-921, 925 N.E.2d 129, ¶ 15 (O'Connor, J., concurring), citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19, *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23, and *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 23. Further, this Court specifically directed a trial court to vacate improperly imposed postrelease control in *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 19.

Mr. Grimes prevails even if the trial court should not directly order a defendant discharged. Under *Holdcroft*, a trial court can vacate improperly imposed postrelease control. The defendant can then take the entry vacating postrelease control to the Department of Rehabilitation and ask for release. If the Department refuses, a habeas writ would be appropriate, but in the experience of undersigned counsel, the

Department will release an inmate from postrelease-control confinement or supervision when a court vacates the postrelease control, so no habeas petition is typically needed.

C. There is a difference between imposing a sentence in a journal entry and including facts supporting that sentence.

The Attorney General cites a number of cases that correctly hold that facts supporting a sentence need only be set forth in the final judgment when required by statute. Brief at 11, citing *State v. Patterson*, 4th Dist. Washington No. 97CA28, 1998 Ohio App. LEXIS 4491 (Sept. 21, 1998); *State v. Radcliff*, 10th Dist. Franklin Nos. 97APA08-1054 and 97APA08-1056, 1998 Ohio App. LEXIS 1012 (Mar. 17, 1998); *State v. Fincher*, 10th Dist. Franklin No. 97APA03-352, 1997 Ohio App. LEXIS 4623 (Oct. 14, 1997); *State v. Ditterline*, 4th Dist. Washington No. 96CA47, 1997 Ohio App. LEXIS 4174 (Sept. 5, 1997). But those cases hold only that *findings in support of a sentence* need not be in the judgment entry. None of the cases hold that the executive branch can enforce a criminal penalty that a trial court did not include in the journal entry of sentence.

D. County prosecutors and the Department of Rehabilitation can identify inmates with improper postrelease control before release.

The Cuyahoga County Prosecutor notes that the Department of Rehabilitation and Correction does not notify it when postrelease control is mentioned in the entry, but not properly imposed. But internal communication failures within the executive branch cannot confer the authority to create a criminal punishment that has not been properly imposed by a court. And while the Bureau of Sentence Computation at the

Department of Rehabilitation and Correction does its best to notify trial courts and prosecutors of potential errors in sentencing entries, the prosecutor should not shift its responsibility to review entries to non-lawyers in other parts of the executive branch.

Verifying the entries of incarcerated defendants would require some work on behalf of the State, but it's work that should have been done immediately after the sentencing judgments were journalized, so the State is not unfairly prejudiced. Further, if prosecutors make it a practice to verify entries immediately after issue, improperly imposed postrelease control can be quickly corrected.

E. This Court is not bound by the Adult Parole Authority's constitutional and statutory analysis.

The Cuyahoga County Prosecutor's Office correctly explains that the Adult Parole Authority interprets judicial entries to permit postrelease control based merely on vague references to the sanction. But the Adult Parole Authority is bound by this Court's interpretation of the Ohio Constitution, not the other way around.

CONCLUSION

“[T]he sentencing of a defendant convicted of a crime [is] solely the province of the judiciary.” (Citations omitted.) *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 136, 729 N.E.2d 359 (2000). Postrelease control is unequivocally a criminal sanction, so it must be imposed by a court like any other criminal sanction. This Court should decline the State’s invitation to permit the executive to calculate and impose criminal penalties not specifically set forth in a court’s judgment entry.

This Court should affirm the decision of the Fifth District.

Respectfully submitted,

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I certify that on this 12th day of July, 2016, a copy of the foregoing was forwarded
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