In the

Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2018-1144
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
ANDRE D. HARPER,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 17AP-762
	:	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLANT STATE OF OHIO

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INTRODUCTION

Few questions have captured this Court's attention as much as whether an error in imposing postrelease control makes the judgment entry absolutely "void" or merely "voidable." This distinction is important for the finality of criminal judgments because defendants can challenge "void" sentences at *any time*, but they generally must challenge "voidable" sentences on *direct appeal*. *See, e.g.*, *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642 ¶¶ 27-30. Traditionally, most sentencing errors fell into the "voidable" category. *See State v. Fischer*, 128 Ohio St. 3d 92, 2010-Ohio-6238 ¶ 7. More recently, however, the Court has expanded the sentences that it treats as "void" in the postrelease-control context. *Id.* ¶ 8. From the outset, some Justices have cautioned that this expanding class of void judgments would "undermine the principles of res judicata" and allow challenges to be raised years later. *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250 ¶ 31 (Lanzinger, J., dissenting). The sheer number of postrelease-control cases that the Court has confronted since this expansion proves the validity of these concerns. The Court should use this case as an opportunity to provide lasting postrelease-control guidance—both on the merits and on the remedy. *Cf. State v. Grimes*, 151 Ohio St. 3d 19, 2017-Ohio-2927 ¶ 30 (DeWine, J., concurring in judgment) (calling for a broader examination of the Court's precedent because "[o]ur work in this area has been neither clear nor consistent").

On the merits, the Court has at times said that trial courts need only follow the plain language of the sentencing statute (R.C. 2929.19) to avoid sentencing-related errors. *State v. Gordon*, 153 Ohio St. 3d 601, 2018-Ohio-1975 ¶¶ 9, 12. At other times, however, the Court has made statements suggesting that trial courts must follow additional requirements that are not found in R.C. 2929.19. *Grimes*, 2017-Ohio-2927 ¶ 1. Here, relying on language from *Grimes*, the Tenth District found a sentencing error because—even though the court notified Andre

Harper at his *sentencing hearing* about the consequences for violating the terms of postrelease control (as required by R.C. 2929.19(B)(2)(e))—the *judgment entry* did not adequately convey those consequences. *State v. Harper*, 2018-Ohio-2529 ¶¶ 3, 14 (10th Dist.) (App. Op.). But R.C. 2929.19(B)(2)(b) states what that judgment entry must include, and it nowhere mentions the consequences for violating the terms of postrelease control. As in *Gordon*, therefore, the Court should hold that the judgment entry did not contain an error because, even if it could have been "more thorough," it "nevertheless satisf[ied] the statutory requirements." 2018-Ohio-1975 ¶ 9.

On the remedy, even assuming Harper's judgment entry violated a judge-made requirement from *Grimes*, the Court should hold that the failure to follow such a rule makes a judgment merely voidable, not void. As a result, Harper forfeited his claim by not raising it on direct appeal years ago. The Court's current jurisprudence supports this result, and, regardless, the Court should reassess its jurisprudence in this area.

Since *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, the Court's cases have highlighted a critical fact that renders a sentence void—that the trial court failed to comply with *statutory* mandates. *See, e.g.*, *Fischer*, 2010-Ohio-6238 ¶ 8. Here, however, no provision in R.C. 2929.19(B) requires a judgment entry to identify the consequences for violating the terms of postrelease control; instead, any such requirement flows, if at all, from this Court's common-law power. Thus, because Harper's sentence did not violate a statutory command, his sentence is merely voidable. More broadly, the Court's *statutory* approach for distinguishing void from voidable sentences allows the General Assembly to decide the types of errors that make a sentence void. And, after *Jordan*, the General Assembly amended the statutes to clarify that the failure to include a statement about postrelease control in a judgment entry "does not negate, limit or otherwise affect the mandatory period of supervision that is required for the offender."

R.C. 2967.28(B). This modification of statutory commands shows that judgment-entry errors like those alleged by Harper do not render a sentence void.

More importantly, the Court should reassess its recent cases and return to the traditional view about the types of errors that make a judgment void, not just voidable. Many of the Court's decisions expanding the categories of void sentences were wrong when they were decided, and those decisions have defied practical workability—as shown by the later cases interpreting, limiting, or otherwise attempting to apply them. *See Westfield v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849 syl. ¶ 1. Returning to an approach that treats most erroneous sentences as voidable also poses no hardship and will in fact result in greater certainty for all parties—defendants, prosecutors, and courts alike. This case starkly shows the need for this reassessment: Something is wrong with a jurisprudence in which a fundamental constitutional defect in a criminal judgment does not render the judgment void, *Payne*, 2007-Ohio-4642 ¶¶ 27-30, but a harmless technical error in that same judgment does, App. Op. ¶ 14.

STATEMENT OF AMICUS INTEREST

The Attorney General has a duty to defend the laws passed by the General Assembly and an interest in ensuring that those laws are interpreted and enforced by the courts as written. Additionally, as Ohio's chief law officer, *see* R.C. 109.02, the Attorney General has an interest in ensuring that courts interpret Ohio's postrelease-control statutes in a way that promotes the finality of criminal judgments, protects the community, and facilitates the rehabilitation of offenders following their release from prison.

STATEMENT OF THE CASE AND FACTS

In April 2012, Andre Harper attempted to steal about $1,800 worth of merchandise from Macy's. App. Op. ¶ 2. The store's loss-prevention officers apprehended Harper, but not before he bit one of them on the shoulder and another on the hand and face. *Id.* Ultimately, Harper

agreed to plead guilty to third-degree robbery with a recommended sentence of three years' imprisonment in exchange for, among other things, the dismissal of a second-degree robbery charge. App. Op. ¶ 3. In February 2013, the trial court held a combined plea and sentencing hearing. *Id.* The judgment entry noted that "'[t]he Court also notified the Defendant of the applicable period of *3 years mandatory post-release control* pursuant to R.C. 2929.19(B)(3)(c), (d) and (e).'" App. Op. ¶ 5 (citation omitted). Harper did not appeal from this judgment.

Some four and a half years after Harper was sentenced, he filed a motion asking the trial court to vacate the postrelease-control portion of his sentence. Mot. to Vacate, July 7, 2017. Relying on *State v. Grimes*, 151 Ohio St. 3d 19, 2017-Ohio-2927, he argued that the judgment entry failed to cite R.C. 2967.28 or note that violations of the terms of postrelease control could subject him to the consequences listed in that statute. Mot. to Vacate, at 2. The alleged error, he continued, rendered the postrelease-control portion of his sentence void, which allowed him to raise that error at this late date. *Id.* Harper further argued that the court must vacate his postrelease-control sentence (rather than fix the judgment entry) because he had completed his term of imprisonment. *Id.* And since he was now incarcerated for violating his conditions of postrelease control, Harper concluded, the court must order his release. *Id.* Although Harper disputed whether his original sentencing court notified him at his sentencing hearing about postrelease control and the consequences for violating its terms, *see* Mot. To Vacate, at 4, his claims were contradicted by the sentencing-hearing transcript, App. Op. ¶¶ 3-4 & n.1.

The trial court denied Harper's motion. Trial Ct. Op. at 2. It noted that the "Entry of Guilty Plea" form that Harper signed in 2013 informed him in writing that he was subject to a mandatory three-year term of postrelease control. *Id.* at 1. The court added that the plea form advised him "that more restrictive [postrelease-control] conditions, and a possible additional

incarceration sanction of up to one-half the original prison term" could be imposed if he violated the terms of his postrelease control. *Id.* Rejecting Harper's argument that his judgment entry conflicted with this Court's decision in *Grimes*, the trial court held that *Grimes* applied only to decisions pending on direct appeal at the time it was decided. *Id.* at 2. It added that no court had held that *Grimes* was an exception to the general rule that judicial decisions should not apply retroactively to cases that had reached final judgment. *Id.*

The Tenth District reversed. It conceded that Harper was properly notified of postrelease control and of the consequences for violating its terms. App. Op. ¶ 10. Yet it interpreted *Grimes* to compel a statement in the judgment entry specifically "'to the effect that the Adult Parole Authority . . . will administer the postrelease control pursuant to R.C. 2967.28 and that any violation by the offender of the conditions of postrelease control will subject the offender to the consequences set forth in that statute.'" App. Op. ¶ 11 (quoting *Grimes*, 2017-Ohio-2927 ¶ 1). As applied here, it found that the judgment entry's citation of R.C. 2929.19(B)(3)(c), (d) and (e) did not suffice to meet this mandate, especially considering that the cited provisions had actually been moved to R.C. 2929.19(B)*(2)* by the time of Harper's sentencing. *Id.* ¶¶ 12-14.

Turning to the remedy, the Tenth District rejected the State's argument that *Grimes* does not apply retroactively to judgments that had become final before the decision. *Id.* ¶ 15. It reasoned that this Court had repeatedly indicated that postrelease-control errors render sentences void, and that traditional notions of finality and res judicata do not apply to void sentences. *Id.* The court added that, while "[the Tenth District] and others [had] previously raised questions about [this] 'voidness' doctrine," it felt bound by this Court's current law. *Id.* ¶ 15 n.4. Yet it rejected Harper's argument that, because he had finished his original prison term, courts could not now impose postrelease control. *Id.* ¶¶ 16-18. The court limited that principle to cases in

which courts failed to give *any* notice about postrelease control. *Id.* The court thus instructed the trial court to issue a nunc pro tunc entry on remand. *Id.* ¶ 19.

Judge Sadler dissented. Like the majority, the dissent too expressed disagreement with this Court's postrelease-control cases. *Id.* ¶ 22 n.5 (Sadler, J., dissenting). While acknowledging the controlling nature of that precedent, the dissent did not believe that "the voidness doctrine means that *Grimes* must be applied retroactively." *Id.* ¶ 22. Because Harper's sentencing entry complied with the law as it existed at the time that the entry was issued, the dissent would have affirmed. *Id.* ¶¶ 23-24.

ARGUMENT

***Amicus Curiae* Ohio Attorney General's Proposition of Law:**

> *A sentencing entry's failure to cite R.C. 2967.28 or otherwise include language referencing the "consequences" for violating the conditions of postrelease control does not make the resulting sentence erroneous—let alone void.*

This case, yet again, considers whether a judgment entry's flaws are so significant that they void the judgment imposed. But this question assumes that the entry at issue contained a flaw. It did not. Because Harper's entry contained sufficient information for the Adult Parole Authority to do its job, the Court could hold that the entry was not flawed. *See* Part A. Regardless, the Court can and should take this opportunity to retreat from its recent expansion of the category of void judgments. It should limit those cases or, better still, return to the traditional understanding of what constitutes a void judgment. *See* Part B.

A. The trial court did not commit legal error because it complied with R.C. 2929.19(B)(2) and provided sufficient details to permit the Adult Parole Authority to execute the postrelease-control portion of Harper's sentence.

Harper's sentencing entry did not contain an error because it comported with the statutory requirements for criminal judgments. The statutory scheme simply does not require that the sentence (or judgment) entry include notice of the consequences for violating postrelease control.

1. The sentencing statutes establish various requirements for sentencing courts to follow at sentencing hearings and in judgment entries.

R.C. 2929.19 and Crim.R. 32 contain the requirements that trial courts must follow when holding sentencing hearings and issuing criminal judgment entries. As for the sentencing hearing, trial courts must, among other things, give prosecutors, defendants, and victims the opportunity to present information pertinent to the sentence. R.C. 2929.19(A); Crim.R. 32(A). Trial courts must notify defendants of any right to appeal, Crim.R. 32(B), and of the number of days that they have served in jail that will count toward their prison term, R.C. 2929.19(B)(2)(f). Particularly relevant here, trial courts must tell defendants that they must serve, or may have to serve, a period of postrelease control after their prison term, R.C. 2929.19(B)(2)(c)-(d), and that, if they violate a condition imposed on postrelease control, the Adult Parole Authority may require them to serve additional prison time up to one half the prison time originally imposed, R.C. 2929.19(B)(2)(e). (Effective in March 2019, Amended Substitute Senate Bill No. 201 amends the law by, among other things, adding a new R.C. 2929.19(B)(2)(c) and moving R.C. 2929.19(B)(2)(c)-(e) to R.C. 2929.19(B)(2)(d)-(f). This brief cites the Revised Code as it existed before that change.)

As for the judgment entry, it must include the following items: (1) "the name and section reference to the offense or offenses"; (2) "the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms"; (3) "if sentences are imposed for multiple counts whether the sentences are to be served concurrently or consecutively"; and (4) "the name and section reference of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications." R.C. 2929.19(B)(2)(b). In addition, the judge must "sign the judgment and the clerk [must] enter it on the journal." Crim.R. 32(C); *State v. Lester*, 130 Ohio St. 3d 303, 2011-Ohio-5204 ¶¶ 11, 15.

This Court's cases have clarified these statutory requirements. To begin with, the Court has held that the statute requires notice *at the sentencing hearing* that the defendant must serve postrelease control. *See State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085 syl. ¶ 1. A court thus commits statutory error if it identifies the postrelease-control term only in the judgment entry without notifying the defendant about this aspect of the sentence at the hearing. *Id.* ¶¶ 17, 23. This error, the Court has added, requires a new hearing for the postrelease-control portion of the sentence. *State v. Fischer*, 128 Ohio St. 3d 92, 2010-Ohio-6238 ¶¶ 26-31 (partially overruling *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250 ¶¶ 12-13, 16).

The Court has likewise concluded that a sentencing court commits error when the statutory scheme requires the court to impose postrelease control, but the court *neither* notifies the defendant of the postrelease-control term *nor* includes the term in the judgment entry. *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197 ¶¶ 21-22. In that circumstance, the Court has held, the proper remedy turns on whether the defendant has completed the entire prison term identified in the sentencing entry. If so, the defendant may not be compelled to serve additional postrelease control. *Hernandez v. Kelly*, 108 Ohio St. 3d 395, 2006-Ohio-126 ¶¶ 30-32. If not, a court may hold a resentencing hearing at which the defendant receives the mandatory period of postrelease control. *Simpkins*, 2008-Ohio-1197 ¶ 6.

Furthermore, even if a defendant receives notice of postrelease control at a sentencing hearing, the Court has concluded that the statutory scheme also requires the *judgment entry* to include the postrelease-control term, which qualifies as part of "the sentence or sentences imposed." R.C. 2929.19(B)(2)(b). A court thus commits statutory error if it notifies the defendant of the postrelease-control term at the hearing, but fails to incorporate it into the entry. *State v. Qualls*, 131 Ohio St. 3d 499, 2012-Ohio-1111 ¶¶ 16-17. In that context, however, a

court may fix this mere clerical error in the judgment entry "at any time" under Crim.R. 36 through a nunc pro tunc order, rather than a new sentencing hearing. *Id.* ¶¶ 23-26; *see also State ex rel. Womack v. Marsh*, 128 Ohio St. 3d 303, 2011-Ohio-229 ¶¶ 13-15.

In *State v. Grimes*, 151 Ohio St. 3d 19, 2017-Ohio-2927, the Court further discussed what this judgment entry must say about postrelease control. *Id.* ¶ 9. There, the entry explained that the defendant would serve a mandatory three-year term of postrelease control and that the court had notified the defendant of "the consequences for violating conditions of post release control imposed by the Parole Board under [R.C.] 2967.28." *Id.* ¶ 2. The Court "conclude[d] that to validly impose postrelease control, a minimally compliant entry must provide the [Adult Parole Authority] the information it needs to execute the postrelease-control portion of the sentence." *Id.* ¶ 13. It then held that the specific entry in that case sufficed because it identified the mandatory postrelease-control term, cited R.C. 2967.28, and noted that this statute identified the consequences for violating postrelease control. *Id.* ¶¶ 17-19. The entry "empowered Grimes and other readers to consult the statute and determine what consequences the [Adult Parole Authority] could impose for any violations of the conditions of postrelease control." *Id.* ¶ 19. Finally, in its first paragraph summarizing the decision, *Grimes* stated that "the sentencing entry must contain the following information: (1) whether postrelease control is discretionary or mandatory, (2) the duration of the postrelease-control period, and (3) a statement to the effect that the Adult Parole Authority . . . will administer the postrelease control pursuant to R.C. 2967.28 and that any violation by the offender of the conditions of postrelease control will subject the offender to the consequences set forth in that statute." *Id.* ¶ 1.

Conversely, the Court has held that sentencing courts do not commit error when they fail to provide information at the sentencing hearing or in the judgment entry that is *not* required by

one of the sentencing statutes. *State v. Gordon*, 153 Ohio St. 3d 601, 2018-Ohio-1975 ¶¶ 9, 12. *Gordon* addressed R.C. 2929.19(B)(2)(e), which directs courts to notify a defendant that the *Adult Parole Authority* could impose additional prison time for violations of postrelease-control conditions. *Id.* ¶ 2. That case asked whether this provision required courts to explain that, if a defendant committed another crime while on postrelease control, *a court* may sentence the defendant to prison time for violating the postrelease-control conditions under R.C. 2929.141(A). *Id.* Recognizing that the Court must follow R.C. 2929.19(B)(2)(e)'s "plain and unambiguous" language, *id.* ¶ 8, it held that the statute nowhere instructed courts to notify defendants of this consequence, *id.* ¶ 11. As the Court explained, "when the notifications provided by a trial court could be more thorough but nevertheless satisfy the statutory requirements, the trial court does not err in deciding not to provide more thorough notification." *Id.* ¶ 9.

2. Harper's judgment entry satisfied all statutory requirements.

Harper cannot show that his judgment entry failed to comply with any of R.C. 2929.19(B)(2)'s requirements, so the Court could reject his challenge on that basis alone. The statute requires the judgment entry to include the "sentence or sentences imposed," which this Court has said includes the postrelease-control portion of the sentence. R.C. 2929.19(B)(2)(b) (identifying requirements for judgment entries); Crim.R. 32(C) (same); *Qualls*, 2012-Ohio-1111 ¶¶ 16-17. Here, Harper's judgment entry noted that he was sentenced to three years of mandatory postrelease control. App. Op. ¶ 5. In addition, R.C. 2929.19(B)(2)(e) requires a court to give notice *at the sentencing hearing* that the Adult Parole Authority may impose a prison term of up to one half of the original prison term for violations of postrelease-control conditions. Here again, Harper received this statutorily required notification. App. Op. ¶¶ 3-4 & n.1. That should end the matter. Even if the judgment entry could have been "more thorough," it "nevertheless satisf[ied] the statutory requirements." *Gordon*, 2018-Ohio-1975 ¶ 9.

To be sure, the Court spoke more broadly in *Grimes*. In the initial paragraph summarizing its opinion, *Grimes* stated that a judgment entry should also contain "a statement to the effect that the Adult Parole Authority . . . will administer the postrelease control pursuant to R.C. 2967.28 and that any violation by the offender of the conditions of postrelease control will subject the offender to the consequences set forth in that statute." *Grimes*, 2017-Ohio-2927 ¶ 1; *see also State v. Johnson*, __ Ohio St. 3d __, 2018-Ohio-4957 ¶ 6 (citing *Grimes*'s initial paragraph). While this statement accurately described the specific judgment entry in *Grimes itself*, it should not be read more broadly as establishing an absolute command in *all* cases. After all, the addition of such an element would go well beyond the judgment-entry requirements in the statute, R.C. 2929.19(B)(2)(b), and this Court has repeatedly emphasized that "judges are duty-bound to apply sentencing laws as they are written," *Fischer*, 2010-Ohio-6238 ¶ 22. The Court thus should clarify that this language in *Grimes* merely indicates what will make a judgment entry *sufficient*, and does not establish an *absolute command* even when a judgment entry lists all required information in other ways.

If anything, the sentencing entry in this case is more complete than the one in *Grimes*. *Grimes* noted that the sentencing entry there would have been "more thorough" had it recited the language of R.C. 2929.19. 2017-Ohio-2927 ¶ 19. But it found that the entry was "minimally compliant" because it cited R.C. 2967.28. *Id.* ¶ 13. Harper's sentencing entry, by comparison, identifies the preferred statute, R.C. 2929.19. *See* Jgmt. Entry; *see also* App. Op. ¶ 12.

In addition, *Grimes*'s first paragraph must be read in the context of the opinion as a whole. The Court repeatedly stated that an entry need only be "minimally complaint"; that is, it must provide the Adult Parole Authority with "the information it needs to execute the postrelease-control portion of the sentence." 2017-Ohio-2927 ¶ 13. It added that an entry

validly imposes postrelease control if the entry's language enables a reader to "consult the statute and determine what consequences the [Adult Parole Authority] could impose for any violation of the conditions of postrelease control." *Id.* ¶ 19. Here too, Harper's entry provided sufficient information to permit a reader to consult the applicable law and determine what consequences the Adult Parole Authority could impose for a violation of postrelease-control terms. The entry summarized the events of the sentencing hearing, and stated that "[t]he Court also notified the Defendant of the applicable period of 3 years mandatory postrelease control pursuant to R.C. 2929.19(B)(3)(c), (d), and (e)." Jgmt. Entry. By identifying the mandatory three-year term and citing R.C. 2929.19, the entry provides the Adult Parole Authority with enough information to execute the postrelease-control portion of the sentence and permits a reader to consult the relevant statutes to determine the possible consequences for violating any terms of postrelease control. *See Grimes*, 2017-Ohio-2927 ¶¶ 16, 19.

That the sentencing entry cited R.C. 2929.19(B)(3)—instead of (B)(2)—does not change the analysis. The incorrect statutory citation was the result of a clerical error arising out of statutory restructuring. App. Op. ¶ 6 (noting that the trial court "inadvertently" referenced former R.C. 2929.19(B)(3) rather than current R.C. 2929.19(B)(2)); *cf. State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795 ¶ 19 ("The term clerical mistake refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment." (quotations and citation omitted)). Even with the typo, Harper's entry was still minimally compliant; a reader seeking to determine the consequences that the Adult Parole Authority could impose, *see Grimes*, 2017-Ohio-2927 ¶ 19, would immediately realize that the entry cited the correct statute and only the wrong (nonexistent) subsections.

One last point. This Court has sometimes suggested that the separation of powers affected its interpretation of the sentencing statutes. *See, e.g.*, *Jordan*, 2004-Ohio-6085 ¶¶ 19, 22 (citing *Wood v. Telb*, 89 Ohio St. 3d 504 (2000)); *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434 ¶ 32; *State v. Bloomer*, 122 Ohio St. 3d 200, 2009-Ohio-2462 ¶ 71. Most notably, it has invoked the separation of powers when reading R.C. 2929.19(B)(2)(b)'s text (that the sentencing entry contain the "sentence or sentences imposed") to encompass the postrelease-control portion of the sentence. *Jordan*, 2004-Ohio-6085 ¶¶ 19, 22. Whatever the validity of these separation-of-powers concerns, *cf. Grimes*, 2017-Ohio-2927 ¶¶ 47-54 (DeWine, J., dissenting), the Court should not *extend* them to require the sentencing entry to identify the consequences for violating the terms of postrelease control. Nothing about the separation of powers compels a court to give notice of such *consequences* in the judgment entry in addition to at the sentencing hearing. Indeed, such a court-created mandate would itself raise serious separation-of-powers concerns because it would alter what the legislative branch has specified. *See Fischer*, 2010-Ohio-6238 ¶¶ 22-24.

B. Even if Harper's sentencing entry contained an error, that error did not render his sentence void and so he forfeited his claim by not raising it on direct appeal.

Although Harper's judgment entry was not erroneous, the Court need not reach that merits question. Because Harper challenges the entry based on an alleged sentencing error, he should have raised this challenge years ago on direct appeal. Res judicata now bars it. *See State v. Perry*, 10 Ohio St. 2d 175, syl. ¶ 9 (1967). Even applying this Court's expanded void-sentence cases, this alleged error does not render Harper's sentence void (and so permit his belated claim) because Harper has not shown that his judgment entry violated a statutory directive. More fundamentally, the Court should take this opportunity to reassess its cases in this area and hold that void sentences are only those imposed by a court without jurisdiction.

1. Even under the logic of the Court's current cases, a sentencing entry's failure to describe the consequences for violating a postrelease-control condition does not violate a statutory command and so cannot render a sentence void.

a. From *Jordan* through *State v. Williams*, 148 Ohio St. 3d 403, 2016-Ohio-7658, this Court's recent decisions finding sentences void have relied on a single principle: "[T]he power to define criminal offenses and prescribe punishment is vested in the legislative branch of government, and courts may impose sentences only as provided *by statute*." *Williams*, 2016-Ohio-7658 ¶ 22 (emphasis added). The Court has noted that "no court has the authority to substitute a different sentence for that which is required *by law*," *Simpkins*, 2008-Ohio-1197 ¶ 20 (emphasis added), and that "judges are duty-bound to apply sentencing laws as they are written," *Fischer*, 2010-Ohio-6238 ¶ 22. "As [the Court has] consistently stated, if a trial court imposes a sentence that is *unauthorized by law*, the sentence is void." *State v. Billiter*, 134 Ohio St. 3d 103, 2012-Ohio-5144 ¶ 10 (emphasis added).

Thus, in all of the postrelease-control cases in which this Court has found a sentence void, the Court has held that the sentencing court failed to follow a *statutory* mandate. In *Billiter*, for example, the court imposed a maximum three-year term of postrelease control in violation of R.C. 2967.28's command to impose five years. 2012-Ohio-5144 ¶¶ 8, 10. In *Simpkins*, the court failed to impose postrelease control at all even though it was mandated by R.C. 2967.28. 2008-Ohio-1197 ¶ 1. And, in *Fischer*, *Bezak*, and *Jordan*, the court failed to provide postrelease-control notice at the sentencing hearing as mandated by R.C. 2929.19(b)(2)(c), (d), and (e). *Fischer*, 2010-Ohio-6238 ¶ 3; *Bezak*, 2007-Ohio-3250 ¶ 3; *Jordan*, 2004-Ohio-6085 ¶¶ 2-3.

b. This reasoning shows that Harper's judgment entry, even if erroneous, is not void. For two reasons, the entry was not "unauthorized by law." *Billiter*, 2012-Ohio-5144 ¶ 10. *First*, Harper's judgment entry comported with all of the requirements in R.C. 2929.19. That section

requires courts to give notice of the consequences of violating the terms of postrelease control at the sentencing hearing, not in the judgment entry. R.C. 2929.19(B)(2)(e). The sentencing court provided that notice. App. Op. ¶ 3 n.1. The court thus adhered to the statute. If this Court interprets *Grimes* as broadly requiring courts to duplicate that notice in the judgment entry as well, that mandate would flow from the Court's common-law authority, not from any statutory command in R.C. 2929.19. But the violation of such a *judge-made* rule should not render a judgment void because the judgment would still be "in accordance with *statutorily mandated* terms." *Fischer*, 2010-Ohio-6238 ¶ 8 (emphasis added).

Indeed, this Court has reached a similar conclusion when discussing the statutorily required findings that allow sentencing courts to impose consecutive, rather than concurrent, sentences for multiple crimes. *State v. Bonnell*, 140 Ohio St. 3d 209, 2014-Ohio-3177 ¶ 15 (discussing R.C. 2929.14(C)(4)). There, the Court stated that sentencing courts should make these findings at the sentencing hearing and also put them in the judgment entry, even though no statute required that order of operations. *Id.* ¶ 29; *cf. id.* ¶ 38 (French, J., concurring in part and dissenting in part) ("No statute requires the sentencing court to make the findings at the sentencing hearing and then again in its sentencing entry."). Importantly, the Court clarified that "[a] trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence *contrary to law*." *Id.* ¶ 30 (emphasis added). Because the failure to include this information in the entry does not render the sentence "contrary to law," *id.*, that alleged error also does not satisfy the key requirement for rendering the sentence void, *see Fischer*, 2010-Ohio-6238 ¶ 23.

A postrelease-control case further supports this result. In *Watkins v. Collins*, 111 Ohio St. 3d 425, 2006-Ohio-5082, the Court denied habeas relief to defendants who claimed that the

postrelease-control portions of their judgment entries were defective. *Id.* ¶ 53. The Court held that the defendants should have raised these challenges on direct appeal and so could not raise them in habeas proceedings (which necessarily meant that their judgments were only voidable). *See id.* ¶ 51. To distinguish *Jordan* and *Hernandez*, the Court noted that those cases addressed whether the defendant was "properly notified about postrelease control at their sentencing hearings" *under the statute*. *Id.* ¶ 46. The sentencing courts in *Watkins*, by contrast, "did at least notify the [defendants] at their sentencing hearings that they could be subject to postrelease control" and the dispute was only about the judgment entry. *Id.*

Second, in 2006, the General Assembly modified the *statutory* postrelease-control requirements in response to this Court's decisions. 151 Ohio Laws (Part IV) 7622 (2006 Am. Sub. H.B. No. 137). This law added language to multiple sections of the Revised Code emphasizing that a failure to address postrelease control does not affect the validity of a sentence or the applicability of the postrelease-control requirement. The General Assembly amended R.C. 2967.28, for example, to clarify that a court's failure to notify a defendant about a statutorily required term of postrelease control or to refer to postrelease control in the judgment entry "does not negate, limit, or otherwise affect the mandatory period of supervision that is required." R.C. 2967.28(B); *see* R.C. 2929.14(D)(1) (noting that a failure "to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under" R.C. 2967.28(B)). In R.C. 2929.19, too, the General Assembly emphasized that a failure to discuss postrelease control at the sentencing hearing or in a judgment entry does not affect the term of postrelease control that a defendant must serve. *See* R.C. 2929.19(B)(2)(c), (e). Further, the General Assembly created a new streamlined remedy allowing courts to quickly correct

judgments that fail to include the required postrelease-control notices. *See* R.C. 2929.191(C); *Singleton*, 2009-Ohio-6434 ¶ 1.

These amendments show that a violation of the statutory postrelease-control requirements do not make the resulting judgments unauthorized by law (and so void). *Cf. Grimes*, 2017-Ohio-2927 ¶¶ 43-44 (DeWine, J., dissenting). This Court effectively reached that conclusion in *Singleton*. That case asked whether R.C. 2929.191's new remedy applied to judgments entered both before and after the law's 2006 enactment. 2009-Ohio-6434 ¶ 1. The Court initially held that this remedy could *not* apply to judgments that predated the 2006 amendments precisely because those judgments were void. *Id.* ¶ 26. Since the judgments were a "nullity," the Court held, sentencing courts should continue to undertake the de novo resentencing that its prior cases had required. *Id.* Critically, the Court then held that this broader remedy was *not* required for criminal judgments entered after the 2006 amendments. It "recognize[d] the General Assembly's authority to alter our caselaw's characterization of a sentence lacking postrelease control as a nullity and to provide a mechanism to correct the procedural defect by adding postrelease control at any time before the defendant is released from prison." *Id.* ¶ 26. It thus held that R.C. 2929.191 applied to defective judgments issued after the law's effective date. *Id.* ¶¶ 32-34. This holding that courts could apply the narrower statutory remedy to these later judgments rested on the conclusion that—with the statutory changes—postrelease-control errors no longer rendered criminal judgments a nullity (that is, void).

In sum, Harper's alleged judgment-entry error did not render his sentence void under the Court's current cases because that sentence was *authorized by law* despite the alleged error.

2. The Court should revisit its jurisprudence in the postrelease-control context and hold that a judgment qualifies as "void" only if it is imposed by a court that lacks jurisdiction.

Whether or not Harper's judgment qualifies as void or voidable under the Court's current cases, the Court should revisit those cases here. The Court "not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors." *Westfield v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849 ¶ 43. Far from treating its precedent as "sacrosanct," the Court will overrule prior decisions "where the necessity and propriety of doing so has been established." *Id.* ¶ 44. As many Justices have noted, the necessity and propriety exist here. *Johnson*, 2018-Ohio-4957 ¶¶ 14-19 (DeGenaro, J., concurring in judgment); *Grimes*, 2017-Ohio-2927 ¶ 27 (French, J., concurring in judgment); *id.* ¶¶ 28-63 (DeWine, J., concurring in judgment); *Williams*, 2016-Ohio-7658 ¶¶ 69-96 (Kennedy, J., dissenting). The Court's decisions expanding the scope of void judgments were wrong when they were decided, and the decisions have defied practical workability since that time—as shown by the many later decisions attempting to apply them. *Galatis*, 2003-Ohio-5849 syl. ¶ 1. Abandoning the Court's expanded jurisprudence, and returning to the traditional view of what makes a sentence void, also would create no hardships for those who have relied upon it. *Id.*

a. The Court's decisions creating an overbroad class of void sentences in the postrelease-control context were wrongly decided.

The Court's recent cases expanding the postrelease-control errors that render judgments void were "wrong at the time [they were] decided." *Galatis*, 2003-Ohio-5849 ¶ 48. Those cases conflict with the Court's jurisprudence in every other area of law, and they blossomed from stray language in a case in which this distinction did not matter to the result.

i. As this Court has long recognized, the finality of criminal and civil judgments "produces certainty in the law and public confidence in the system's ability to resolve disputes."

Miller v. Nelson-Miller, 132 Ohio St. 3d 381, 2012-Ohio-2845 ¶ 18 (quotations and citations omitted). The distinction between void and voidable judgments is critical to this finality. If a legal error renders a judgment only voidable, a party must assert that error through the proper judicial channels (typically, by preserving the challenge in the trial court and raising it on direct appeal). If, by contrast, a legal error renders a judgment void, the party may collaterally attack the judgment years after the fact, even if the party never previously raised the asserted error. *See, e.g.*, *Lingo v. State*, 138 Ohio St. 3d 427, 2014-Ohio-1052 ¶ 46; *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642 ¶¶ 27-30; *Tari v. State*, 117 Ohio St. 481, 494 (1927).

Traditionally, the Court recognized that most legal errors rendered a judgment voidable rather than void. That is because "[t]his court . . . long held that the question of whether a judgment is void or voidable generally depend[ed] on 'whether the Court rendering the judgment ha[d] jurisdiction.'" *Miller*, 2012-Ohio-2845 ¶ 12 (quoting *Cochran's Heirs' Lessee v. Loring*, 17 Ohio 409, 423 (1848)). As one case noted, simply because a lower court's decision is "wrong" does not thereby render it "void as being beyond the so-called jurisdiction of the tribunal." *Garverick v. Hoffman*, 23 Ohio St. 2d 74, 78-79 (1970). Instead, most legal errors make any resulting judgment "voidable *by proper judicial process*." *Id.* (emphasis added). The court rendering the judgment will have obtained "subject-matter jurisdiction" over the topic and personal "jurisdiction over the parties," and the error will concern merely the way in which the court exercised the jurisdiction that it properly acquired. *Miller*, 2012-Ohio-2845 ¶ 12.

Under this rubric, even a constitutional claim asserting that a judgment violated some fundamental principle in our founding charter renders the judgment merely voidable, so parties must raise that kind of claim in the proper fashion or risk forfeiting it. *Tari*, 117 Ohio St. at 494-95. The U.S. Supreme Court, for example, long ago held that due process barred the practice of

compensating judges only in cases that result in criminal convictions (and not acquittals). *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). But this Court held that judgments violating this principle were merely voidable because constitutional rights "are regarded as privileges which can be waived, and a failure to assert them at the earliest available opportunity amounts to a waiver." *Tari*, 117 Ohio St. at 495. The Court more recently reached the same result for violations of the Sixth Amendment's jury-trial right. *Payne*, 2007-Ohio-4642 ¶ 30.

Perhaps unsurprisingly given that this rule extends even to constitutional claims, the Court has likewise held that most statutory errors do not render a judgment void. Under R.C. 2945.05, for example, trial courts must follow various protocols to properly obtain a criminal defendant's jury-trial waiver. But defendants may challenge a trial court's failure to follow this statute's rules only on direct appeal. *State ex rel. Waver v. Gallagher*, 105 Ohio St. 3d 134, 2005-Ohio-780 ¶ 7. Likewise, when a defendant charged with a capital crime waives a jury trial, R.C. 2945.06 requires a three-judge panel to try the defendant. But "[t]he failure of a court to convene a three-judge panel, as required by R.C. 2945.06, does not constitute a lack of subject-matter jurisdiction that renders the court's judgment void ab initio and subject to collateral attack in habeas corpus." *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980 ¶ 24. And R.C. 2951.03(B)(1) requires a sentencing court to allow a defendant to read the presentence investigation report before the sentencing hearing. Just last year, the Court held that a court's violation of this statute would not render the judgment void. *See State ex rel. Hunter v. Binette*, __ Ohio St. 3d __, 2018-Ohio-2681 ¶ 13.

Even more relevant, the Court has "'consistently held that sentencing errors are not jurisdictional and are not cognizable in habeas corpus.'" *State ex rel. Sneed v. Anderson*, 114 Ohio St. 3d 11, 2007-Ohio-2454 ¶ 7 (quoting *Majoros v. Collins*, 64 Ohio St. 3d 442, 443

(1992)). In an early case, the Court held that when a trial court had "jurisdiction over the offense and its punishment" but "committed a manifest error and mistake in the award of the number of years of the punishment," "[t]he sentence was not void, but erroneous." *Ex parte Shaw*, 7 Ohio St. 81, 82 (1857). In another case, the judgment entry noted the offense but failed to include the "statutory maximum and minimum penalties" for the crime of conviction, and the Court held that this error could not be raised in a collateral attack. *Carmelo v. Maxwell*, 173 Ohio St. 569, 570-72 (1962). Many more cases reached similar results. *See, e.g.*, *Johnson v. Sachs*, 173 Ohio St. 452, 454 (1962) ("The imposition of an erroneous sentence does not deprive the trial court of jurisdiction."); *Ex parte Van Hagan*, 25 Ohio St. 426, 432 (1874) ("The punishment inflicted by the sentence, in excess of that prescribed by the law in force, was erroneous and voidable, but not absolutely void."); *see also, e.g.*, *Ex parte Winslow*, 91 Ohio St. 328, 329-30 (1915); *Hamilton v. State*, 78 Ohio St. 76, 83-86 (1908).

ii. The Court's recent cases expanding the postrelease-control errors that render a judgment void wrongly departed from this mountain of authority without sufficient justification. Indeed, that departure can be traced to mere dictum from *Jordan*, a case in which the distinction did not matter to the result. Since *Jordan*, the Court's voidness analysis has had a rocky existence, and the Court has never adequately justified its departure from traditional precedent.

Jordan held that sentencing courts violate R.C. 2929.19 when they do not notify defendants about postrelease control at their sentencing hearings. 2004-Ohio-6085 ¶ 17. When deciding to remand for resentencing in light of this error, the Court stated: "Where a sentence is *void* because it does not contain a statutorily mandated term, the proper remedy is . . . to resentence the defendant." *Id.* (citing *State v. Beasley*, 14 Ohio St. 3d 74 (1984)) (emphasis added). The *Jordan* Court then summarized *Beasley*, which had noted that "'[a]ny attempt by a

court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.'" 2004-Ohio-6085 ¶ 25 (quoting *Beasley*, 14 Ohio St. 3d at 75). Yet *Jordan*'s discussion of void sentences was pure dictum. The case arose on *direct appeal*, 2004-Ohio-6085 ¶¶ 2-3, so the Court had no reason to consider any distinction between void and voidable sentences. The defendants had preserved their challenge to the error. Whether that error made the sentence void or voidable, a remand was proper. *See* R.C. 2953.08(G)(2)(b) (authorizing appellate court to remand when a sentence is "contrary to law").

Furthermore, *Jordan*'s dictum overread *Beasley*. The trial court in that case had fined a defendant $500 for felonious assault, but a statute required a minimum sentence of two years' imprisonment. *Beasley*, 14 Ohio St. 3d at 74. After the appellate court ordered the correction of this sentencing error, the defendant argued that the harsher sentence violated the Double Jeopardy Clause. *Id.* at 75. In the context of rejecting a *double-jeopardy* claim, *Beasley* held that jeopardy did not attach because the original sentence was void. *Id.* The ultimate holding followed from the black-letter law that "[t]he double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence." *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980). *Beasley* thus stands only for the principle that the "correction of a statutorily incorrect sentence" does not violate a defendant's *federal right* "to be free from double jeopardy." 14 Ohio St. 3d at 76. The decision nowhere suggests that it was articulating broad principles about the finality of judgments under *Ohio law*. Indeed, *Beasley* did not identify, let alone distinguish, any of the many sentencing cases cited above.

Yet *Bezak* turned *Jordan*'s dictum into a holding in a sharply divided decision. That case considered the same type of notice error as *Jordan* and also arose on direct appeal. 2007-Ohio-3250 ¶¶ 3-4. So the distinction between void and voidable judgments was again arguably

unnecessary for the decision to remand. Yet the Court invoked *Jordan*'s voidness dicta to hold—much more broadly—that postrelease-control errors allow courts to reconsider the *entire judgment* (including portions unrelated to postrelease control). *Bezak*, 2007-Ohio-3250 ¶¶ 13-16. That holding followed from the "void" finding because such a finding traditionally meant, under the Court's precedent, that the judgment was a nullity and the parties were in "the same place as if there had been no sentence." *Id.* ¶ 13. But opening up the entire judgment to collateral attack in this broad fashion greatly "undermine[d] the principles of res judicata." *Id.* ¶ 31 (Lanzinger, J., dissenting).

Given these potentially far-reaching consequences, the General Assembly passed R.C. 2929.191's remedy, which corrected only postrelease-control errors (and did not open up the entire judgment). Yet, as noted, *Singleton* held that *Bezak*'s broad remedy (not R.C. 2929.191's narrow one) must apply to judgments predating the law's effective date. 2009-Ohio-6434 ¶¶ 25-26. To do so, it relied on *Bezak*'s conclusion that these judgments were void, and reemphasized that the effect of such a conclusion was to render the judgments absolute "nullities at their inception." *Id.* ¶ 26. That said, *Singleton* held that the narrower statutory remedy *could* apply to judgments postdating the law's 2006 effective date, a decision that rested on the General Assembly's prospective ability to alter this Court's characterization of a judgment as void. *Id.* ¶¶ 26-34. *Singleton*'s split analysis suggested that—after the statutory changes—postrelease-control errors would no longer make criminal judgments void.

Then came *Fischer*, which departed from the logic of both *Bezak* and *Singleton*. There, the defendant successfully attacked his criminal judgment years later on the ground that he did not receive the statutorily required postrelease-control notice. *Fischer*, 2010-Ohio-6238 ¶ 3. He argued that, under *Bezak*, this "voidness" finding allowed him to raise *any* challenge to his

conviction, including challenges unrelated to this postrelease-control error. *Id.* ¶ 4. *Fischer* rejected that claim by overruling the portion of *Bezak* that rested on the distinction between void and voidable judgments. *Id.* ¶ 28; *see id.* ¶ 43 & n.3 (Lanzinger, J., dissenting). But *Fischer* did *not* accept Justice Lanzinger's proposal to return to the traditional distinction between void and voidable judgments and allow courts to correct postrelease-control errors under R.C. 2929.191. *Id.* ¶¶ 52-56 (Lanzinger, J., dissenting). Instead, *Fischer* created a novel "partially void" doctrine. Under that doctrine, a postrelease-control error would still render a criminal judgment void (and subject to collateral attack), but the "voided" portion would *not* extend to anything but that postrelease-control sentence. *Id.* ¶ 28. That conclusion conflicted with *Singleton*'s holding that postrelease-control errors after the 2006 statutory changes would no longer render judgments void (and that challengers should assert postrelease-control errors under R.C. 2929.191).

While *Fischer*'s partially void holding remains the law today, *see Johnson*, 2018-Ohio-4957 ¶ 12 (DeWine, J., concurring in judgment), it failed to justify its conclusion. *Fischer* suggested that "[t]he historic, narrow view [of void judgments] [did] not adequately address the constitutional infirmities of a sentence imposed without statutory authority." 2010-Ohio-6238 ¶ 20. And it said that, "in the modern era, in which we have a more sophisticated understanding of individual rights, we have not so severely limited the notion of void judgments to only those judgments that arise from jurisdictional cases." *Id.* Even in the modern era, however, the Court regularly applies the traditional rule. It has held, for example, that even serious constitutional violations—like a violation of the jury-trial right announced in *Blakely v. Washington*, 542 U.S. 296 (2004)—do not render judgments void so long as they were issued by courts with jurisdiction. *Payne*, 2007-Ohio-4642 ¶¶ 27-30. And it still regularly states that "'sentencing errors are generally not remediable by extraordinary writ, because the defendant usually has an

adequate remedy at law available by way of direct appeal.'" *Hunter*, 2018-Ohio-2681 ¶ 20 (quoting *State ex rel. Ridenour v. O'Connell*, 147 Ohio St. 3d 351, 2016-Ohio-7368 ¶ 3); *see Sneed*, 2007-Ohio-2454 ¶ 7. The Court's postrelease-control cases are outliers.

* * *

Harper's case would be simple under this Court's longstanding precedent. He claims that his sentencing entry did not include a required statement about his postrelease-control sentence. App. Op. ¶ 14. But, like the failure to include the "statutory maximum and minimum penalties" for the crime, this error merely rendered the judgment voidable, not void. *Carmelo*, 173 Ohio St. at 570-72. And because Harper did not allege this error on direct appeal, res judicata should prohibit him from raising it now. *Perry*, 10 Ohio St. 2d 175, syl. ¶ 9. To the extent *Jordan* and its progeny would require a different result, those decisions arose from mere dictum and have never justified their departure from a century's worth of this Court's precedent.

b. The Court's void-sentence jurisprudence has proven unworkable.

In addition to being wrong when they were decided, the Court's recent cases expanding the types of judgments that it considers void have "def[ied] practical workability." *Galatis*, 2003-Ohio-5849 ¶ 50. The Court has acknowledged the "recurrent and increasingly divisive debate" over when judgments should be considered void or voidable. *Fischer*, 2010-Ohio-6238 ¶ 6. That debate will continue as long as the Court fails to correct its initial error.

Indeed, the Court's void-sentence cases have gone through the same never-ending cycle of clarification and modification that troubled *Galatis* in the insurance context. 2003-Ohio-5849 ¶ 50. Once the Court adopted *Jordan*'s void-sentence dictum as a holding, it recognized the traditional effect of its conclusion—the judgment became a nullity and any part could be attacked at any time. *Bezak*, 2007-Ohio-3250 ¶ 12. That result had unpalatable consequences, so the General Assembly intervened. While this Court held that the legislative remedy could not

apply to judgments passed before its effective date, *Singleton*, 2009-Ohio-6434 ¶¶ 25-26, it then reversed its own precedent concerning the effect of finding a judgment void, *Fischer*, 2010-Ohio-6238 ¶¶ 26-28. The Court has also sometimes extended its jurisprudence outside the context of postrelease control, but other times has not. *See Williams*, 2016-Ohio-7658 ¶ 28 (extending rule to separate sentences for offenses that a court has found to be allied offenses of similar import); *State v. Holdcroft*, 137 Ohio St. 3d 526, 2013-Ohio-5014 ¶ 8 (noting that "the *Fischer* rule does not apply to most sentencing challenges" and providing examples).

The voidness doctrine has also encouraged gamesmanship. In *Billiter*, for example, the postrelease-control error benefited the defendant: He was ordered to serve only a maximum *three-year* term of postrelease control even though the statute required him to serve a *five-year* term. 2012-Ohio-5144 ¶ 2. The defendant had no reason to appeal this error and the State overlooked it as well. While serving the shorter postrelease-control term, the defendant committed an escape violation, pleaded guilty, and was sentenced to six years' imprisonment. *Id.* ¶¶ 3-4. Many years later, he collaterally attacked this escape conviction on the ground that the postrelease-control error that *benefited* him had rendered his judgment void, such that he could not have committed the escape. *Id.* ¶¶ 5-6. The Court agreed with the defendant that its precedent required it to find his postrelease-control sentence void, and it overturned his conviction. *Id.* ¶¶ 10-13. This reasoning provides a roadmap for defendants: sit on any and all errors in their postrelease-control sentences until after their release from prison and then move to collaterally attack those sentences years later to avoid *any* postrelease-control obligations—thereby frustrating the General Assembly's rehabilitation choices.

At bottom, by attempting to contain the effects of its void-sentence jurisprudence without overruling it, the Court has created "a patchwork of exceptions and limitations" that have

reduced "certainty in the law and contribute[d] to the continuing morass of litigation." *Galatis*, 2003-Ohio-5849 ¶ 57. The Court's own docket reflects the unworkability of its jurisprudence. Because errors in imposing postrelease control can make even long-settled sentences void, the number of sentences that are affected when a court recognizes a new type of error is significant. These heightened stakes mean that, even though the Court does not engage in error correction, it is frequently called upon to address minor disputes about how a defendant should have been sentenced. Returning to a traditional understanding of what makes a sentence void would reduce this pressure. *Cf. Grimes*, 2017-Ohio-2927 ¶ 29 (DeWine, J., dissenting) (noting, given the number of postrelease-control cases that the Court has recently considered, that "[o]ne might think that the most pressing issue confronting our criminal-justice system is the manner and terms by which trial courts tell defendants about supervision after they leave prison").

The unsettled nature of this Court's jurisprudence has also had real-world consequences for those tasked with applying its decisions. Despite the Court's efforts to provide guidance about the limits of its void-sentence jurisprudence, lower courts remain confused. "[N]o one knows whether the court might find a judgment subject to collateral attack from one case to the next, at least until this court makes a decision on the particular sentencing error at issue in the case." *In re J.S.*, 136 Ohio St. 3d 8, 2013-Ohio-1721 ¶ 16 (Lanzinger, J., dissenting from denial of review); *see also Billiter*, 2012-Ohio-5144 ¶ 20 (Lanzinger, J., concurring in part and dissenting in part) ("[H]istory has shown that the court has been anything but clear and consistent in its postrelease control cases."). Further, the Court's "inconsistent jurisprudence on void versus voidable sentences has not gone unnoticed by appellate courts." *State v. Murray*, __ Ohio St. 3d __, 2018-Ohio-4958 ¶ 8 (DeWine, J., dissenting). In this very case, Judge Brunner's majority opinion noted that "we and others have previously raised questions about the 'voidness'

doctrine that the Supreme Court has created in this context." App. Op. ¶ 15 n.4. And Judge Sadler's dissent expressed the belief "that traditional principles of res judicata should apply to post-release control sentencing errors." *Id.* ¶ 22 n.5.

This case, too, shows how the abandonment of traditional principles of res judicata breeds uncertainty. At issue here is a judgment entry that imposed a term of postrelease control, but that did not discuss the terms of supervision. App. Op. ¶ 12. Under *Grimes*, a detailed discussion should not be required; a sentencing entry need only provide the Adult Parole Authority with enough information to "execute the postrelease control portion of the sentence." *Grimes*, 2017-Ohio-2927 ¶ 13. So *Grimes* should have disposed of Harper's claim; his entry was at least "minimally" compliant with the statute. *See id.* But the Tenth District held the opposite. Pointing to summary language in *Grimes*, it interpreted that decision—which was intended to limit the scope of the void-sentence jurisprudence—as instead creating yet another avenue by which offenders can collaterally attack their sentence years after the fact. *See* App. Op. ¶ 14. Thus, the Court has been called on once again to determine which types of errors will result in a void sentence. The time has come to return to first principles.

c. Returning to the traditional distinction between void and voidable judgments will not impose undue hardship.

Reverting to a traditional jurisdictional understanding of what makes a sentence void, and applying traditional res judicata principles to sentences that are not appealed, will not create any undue hardship. *See Grimes*, 2017-Ohio-2927 ¶ 61 (DeWine, J., dissenting) ("There are no reliance interests at stake that should prevent [the Court] from correcting [its] errors"). To begin with, this change would not affect the *outcome* of most of the Court's cases (even if it departs from their reasoning). That is because most of these precedents can be justified on grounds other than the aberrational voidness doctrine. *Jordan*, for example, arose on direct appeal and

correctly remanded for resentencing under the criminal-appeal statute, R.C. 2953.08(G)(2)(b), *whether or not* the judgment was void. 2004-Ohio-6085 ¶¶ 2-3, 17.

Or take *Simpkins*. It used the voidness doctrine to allow the State to move to correct a judgment that failed to include postrelease control years after that judgment issued. 2008-Ohio-1197 ¶¶ 22-30. Today, whether that judgment would be considered void or voidable, the remedy statute expressly allows courts to correct judgments "at any time before the offender is released from imprisonment." R.C. 2929.191(A)(1). This Court has also recognized that these belated corrections would not raise any constitutional concerns "because an offender is charged with knowledge of the fact that his sentence is legally incomplete and that R.C. 2929.191 provides a statutory mechanism to correct it." *Singleton*, 2009-Ohio-6434 ¶ 33.

The Court's decision in *Qualls* is also justifiable independent of the voidness doctrine. It held that courts could use nunc pro tunc entries to correct judgment entries that omitted the postrelease-control sentence if the defendant received postrelease-control notice at the sentencing hearing. 2012-Ohio-1111 ¶¶ 26-29. *Qualls* rested on Crim.R. 36, not on any distinction between void and voidable sentences. *Id.* That rule allows courts to make these clerical corrections "at any time" (whether or not the judgment is void). *See* Crim.R. 36.

In addition, applying regular res judicata principles to postrelease-control errors will not leave offenders who receive an erroneous sentence without remedy. It will simply require the same thing of them that is required of anyone else who has been sentenced in error: a timely appeal. By adopting such a rule, the Court would not be upsetting any settled reliance interests; it would be "harmoniz[ing] the treatment of postrelease-control sentences with the treatment of the rest of criminal sentences." *Grimes*, 2017-Ohio-2927 ¶ 38 (DeWine, J., dissenting).

CONCLUSION

The Court should reverse the judgment of the Tenth District.

Respectfully submitted,

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