In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2020-0255
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
ROBERT L. BATES,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 107868

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

INTRODUCTION

For over fifteen years, this Court's "void-sentence doctrine" allowed defendants to "void" their post-release-control sentences, at any time, based on non-jurisdictional errors made by trial courts during the imposition of post-release control. A few months ago, the Court rightly decided to change course: it overruled the void-sentence doctrine and returned to the traditional understanding that a sentence is void only if imposed by a court lacking jurisdiction. *State v. Harper*, __ Ohio St. 3d __, 2020-Ohio-2913; *accord State v. Hudson*, __ Ohio St. 3d __, 2020-Ohio-3849. Going forward, the Court warned both defendants and the State that they must timely appeal if they wish to argue that a trial court erred in its imposition of post-release control. *Harper*, 2020-Ohio-2913 ¶43; *accord Hudson*, 2020-Ohio-3849 ¶18.

Now that the void-sentence doctrine is no more, this case raises a natural follow-up question: Who shoulders the burden of appealing when a trial court makes a mistake while sentencing a defendant to post-release control? The answer depends on the nature of the alleged mistake. In our adversarial system, the aggrieved party is the one that must appeal. *E.g.*, *State ex rel. Newsome v. Hack*, 159 Ohio St. 3d 44, 2020-Ohio-336 ¶9. Sometimes, a substantive mistake in imposing post-release control will harm the State, as the Court warned in *Harper*. *See* 2020-Ohio-2913 ¶43. For example, if a court imposes three years of post-release control when five is required, *see* R.C. 2967.28(B)(1), it is the State, not the offender, that is aggrieved, and so the State, not the offender,

needs to appeal. *Cf. State ex rel. Fraley v. Ohio Dep't of Rehab. & Corr.*, __ Ohio St. 3d __, 2020-Ohio-4410 ¶17.

But most of the time, the party aggrieved by a sentencing mistake will be the sentenced offender. This case, for example, involves a procedural error that allegedly occurred during Bates's sentencing hearing. Bates says that the trial court erred by giving him some, but not enough, notice about the nature of his post-release control. More precisely, he says the trial court failed to notify him at his original sentencing hearing about the consequences that he might face for violating the terms of his post-release control. Bates Br. 2–3; *see also* R.C. 2929.19(B)(2). The question in this case thus becomes: Who needed to appeal the procedural error Bates alleges? The answer is: "Bates." He was the party who stood to benefit from receiving notice at his sentencing hearing about the consequences of violating post-release control. Thus, if the trial court made a mistake, and assuming that mistake injured anyone, the mistake injured Bates. But Bates failed timely to appeal the alleged mistake. And he may not do so now, many years after the fact. *See Harper*, 2020-Ohio-2913 ¶43.

Bates seeks to avoid this simple conclusion with a convoluted theory. According to him, *the State* was the aggrieved party that needed to appeal the alleged notice error. Bates gets to that conclusion by taking an aggressive view of the separation of powers. Invoking that doctrine, he argues that if a trial court makes a procedural error during a sentencing hearing, the executive branch lacks power to enforce the sentence imposed.

In other words, Bates submits that the executive branch exercises judicial authority, and thus acts unconstitutionally, when it enforces a sentence imposed in a procedurally flawed manner. On this theory, *the State* was aggrieved by the (alleged) minor procedural error in Bates's case, as the error deprived the executive branch of any constitutional authority to carry out Bates's post-release-control sentence. Thus, Bates says, the State's failure to appeal the alleged procedural errors leaves the parole authority powerless to enforce his post-release control. *See* Bates Br. 3–4.

The Court should reject Bates's theory for either of two independent reasons, one based on first principles and the other based on the Court's past statements. *First*, procedural mistakes in imposing post-release control *can never* give rise to the separation-of-powers problem Bates posits. Among the three branches, it is the legislature, not the judiciary, that has the power "to prescribe crimes and fix penalties." *State v. Morris*, 55 Ohio St. 2d 101, 112 (1978). The judiciary's job is to impose a sentence that matches the affixed penalties. *State v. Anderson*, 143 Ohio St. 3d 173, 2015-Ohio-2089 ¶12. The executive's job is to carry out the sentences imposed. *See Woods v. Telb*, 89 Ohio St. 3d 504, 511 (2000) (plurality opinion); *Dennis v. Terris*, 927 F.3d 955, 958 (6th Cir. 2019) (per Sutton, J.). Under this division, if the judiciary imposes a sentence, the executive's carrying out that sentence entails the exercise of executive power alone. And that is true even if the courts committed some error while imposing the sentence—even if, for example, the trial court procedurally erred by failing to notify the defendant about the consequences

he would face from violating post-release control. It follows that procedural errors in the imposition of post-release control do not make a post-release-control sentence unenforceable on separation-of-powers grounds. That means the State is not aggrieved by such errors and need not appeal them.

Second, and assuming *arguendo* that a procedural error could theoretically cause a separation-of-powers problem, the error alleged in this case did not. Even during the void-sentence era, the Court never said that the separation-of-powers doctrine requires judicial perfection at sentencing. Instead, it held that post-release control is "validly" imposed—that is, enforceable—so long as the parole authority has "the information it needs to execute" that part of the sentence. *State v. Grimes*, 151 Ohio St. 3d 19, 2017-Ohio-2927 ¶13. Here, even if Bates was not perfectly informed of the potential consequences of violating post-release control, the trial court's original sentencing hearing and entry gave the parole authority more than enough information to execute a five-year term of post-release control. So, the State was not the aggrieved party and did not need to appeal.

For either of these two reasons, the Court should reject Bates's aggressive theory. Indeed, a ruling for Bates would be tantamount to exhuming the void-sentence doctrine that the Court so recently buried.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. Bates's argument in this case rests on the separation of powers between the three branches. That topic is of interest to the State, in part because the separation of powers can be frustrated if courts assign too much or too little power to any given branch. This case directly implicates the General Assembly's well-settled power to "establish penalties" for crimes. *State v. Morris*, 55 Ohio St. 2d 101, 112–13 (1978). That power includes the power to set automatic terms of post-release control for particular offenses. *See* R.C. 2967.28(B). As Ohio's chief law officer, the Attorney General has a duty to protect the General Assembly's power by ensuring that criminal penalties are properly applied.

STATEMENT OF THE CASE AND FACTS

1. In 2008, following a bench trial, a court convicted Robert Bates of multiple crimes, including kidnapping with a sexual motivation—a first-degree felony. *State v. Bates*, 8th Dist. No. 107868, 2020-Ohio-267 ¶2 ("App. Op."). Shortly thereafter, the trial court held a sentencing hearing and sentenced Bates to nine years in prison. App. Op. ¶3. Because Bates had been convicted of a first-degree felony, the trial court also "stated in open court that postrelease control was mandatory for five years." Bates Br. 2; *see also* R.C. 2967.28(B)(1). The initial sentencing entry stated: "post release control is part

of this prison sentence for 5 years for the above felony(s) under R.C. 2967.28." App. Op. ¶3. The Eighth District affirmed Bates's conviction on direct appeal and this Court declined jurisdiction. App. Op. ¶4.

The trial court held another hearing in October 2018 to address a different aspect of Bates's sentence. App. Op. ¶5. During that hearing, the State noted that the original sentencing entry failed to conform with some of this Court's statements in *State v. Grimes*, 151 Ohio St. 3d 19, 2017-Ohio-2927, a case decided several years after Bates was sentenced. App. Op. ¶5. In particular, Bates's sentencing entry did not state whether post-release control was mandatory, and it did not discuss the potential consequences for Bates should he violate the terms of his post-release control. App. Op. ¶5; *see also Grimes*, 151 Ohio St. 3d 19 ¶1. As a result, the trial court re-notified Bates of the nature and consequences of post-release control, both orally at the October 2018 hearing and through a revised sentencing entry that it issued a few days later. App. Op. ¶¶6–7.

2. Bates appealed—arguing that the trial court erred by revising its notice of post-release control when he had almost completed his sentence. App. Op. ¶11. The Eighth District rejected Bates's argument and kept his post-release control in place. With regard to the notice Bates received at the original sentencing *hearing*, the Eighth District noted that "[t]he transcript from the original sentencing hearing in October 2008 is not in the record before this court." App. Op. ¶18. Thus, it presumed regularity; in other words, it presumed that the trial court "properly imposed postrelease control at

the sentencing hearing." App. Op. ¶18. With regard to Bates's original sentencing *entry*, the court held that any error in the language could be corrected before Bates completed his sentence. App. Op. ¶16. To reach that holding, the Eighth District relied on this Court's void-sentence doctrine, App. Op. ¶¶12–17, a doctrine this Court would overrule a few months later, *see State v. Harper*, __ Ohio St. 3d __, 2020-Ohio-2913.

3. Bates next appealed to this Court, which granted jurisdiction. In his merits brief, Bates openly admits that he was informed at his original sentencing hearing that a mandatory five-year term of post-release control attached to his sentence. Bates Br. 2. He contends, however, that the trial court failed to inform him, at his original hearing, of the potential consequences of violating the terms of his post-release control. *Id.* at 2–3. Bates says he had no obligation to appeal that omission. Instead, under his current theory, the alleged error makes post-release control entirely unenforceable because the State did not appeal. *See id.* at 3. Thus, this case asks whether Bates or the State was obligated to appeal the trial court's alleged failure to properly notify Bates about the consequences of violating post-release control. (By and large, this *amicus* brief presumes that Bates properly preserved the argument he sets forth in his merits brief. But, as discussed below, *see* p. 18–19, that is far from clear.)

ARGUMENT

<u>*Amicus Curiae* Ohio Attorney General's Proposition of Law:</u>

> *The onus is on the defendant, as the aggrieved party, to appeal any lack of notice regarding the consequences of post-release control; imperfections in a trial court's providing notice do not render post-release control unenforceable under the separation-of-powers doctrine.*

This case involves a few critical points that no one disputes. No one disputes that Bates was convicted of a first-degree felony. No one disputes that such felonies come with a mandatory five-year term of post-release control. R.C. 2967.28(B)(1). Finally, no one disputes that the trial court stated in its 2008 sentencing hearing and entry that a five-year term of post-release control was part of Bates's sentence. *See* Bates Br. 2–3. Adding all this up, there can be no serious dispute that, factually speaking, the trial court imposed post-release control as part of Bates's sentence. That remains true even if, procedurally speaking, the trial court could have done a better job of explaining post-release control to Bates at his sentencing hearing.

Nonetheless, Bates seeks a sentencing windfall: he says his post-release control is invalid—apparently in its entirety—based on the trial court's failure to describe the consequences for violating post-release control during his sentencing hearing. Neither party appealed that alleged mistake, so the question is which side *needed* to appeal. The answer is "Bates"; he was the party aggrieved by any procedural error that occurred during his sentencing. Thus, he had the burden to appeal. Attempting to shift that burden of appeal to the State, Bates relies on a distorted view of the separation-of-

powers doctrine. What is more, Bates's theory—which glorifies procedural fictions over substantive facts—is eerily similar to the void-sentence doctrine this Court just overruled.

A. Offenders must appeal when trial courts fail to provide them the required notice before imposing a post-release-control sentence.

When a court sentences a defendant to post-release control, it must go through certain procedural steps. Relevant here, it must notify the defendant about the consequences of violating post-release control. *See* R.C. 2929.19(B)(2). The trial court in Bates's case sentenced Bates to five years' post-release control—the mandatory period of post-release control required by Ohio law. *See* R.C. 2967.28(B)(1). But the court allegedly forgot to notify Bates about the consequences of violating post-release control. Who had the burden to appeal that mistake? Bates, or the State?

Bates did. The party aggrieved by a trial court's error is the party that bears responsibility for appealing and correcting the mistake. As the Court recently reaffirmed, appeals are not an abstract exercise; the whole point is "to correct errors injuriously affecting the appellant." *State ex rel. Newsome v. Hack*, 159 Ohio St. 3d 44, 2020-Ohio-336 ¶9. At least generally speaking, it will be up to defendants to appeal if they believe they received too little process or insufficient notice during sentencing proceedings. And that is not unusual. For example, when a trial court makes a mistake in describing a sentence during a guilty-plea colloquy, the defendant must challenge that mistake through a direct appeal. *State v. Straley*, 159 Ohio St. 3d 82, 2019-Ohio-5206 ¶¶1, 23. In

the same vein, the burden is on defendants to appeal if they believe the trial court did not meet procedural requirements for sentencing under Criminal Rule 32. *See, e.g.*, *State ex rel. Woods v. Dinkelacker*, 152 Ohio St. 3d 142, 2017-Ohio-9124 ¶7; *State v. Fry*, 125 Ohio St. 3d 163, 2010-Ohio-1017 ¶¶186–93.

Here, Bates was the only party aggrieved by the trial court's supposed error: if the failure to tell Bates about the consequences of violating post-release control harmed anyone, it harmed Bates. And so he, not the State, had the responsibility to either appeal or to let the error go uncorrected.

To be clear, there will be cases when *the State* bears responsibility for appealing. This may occur, for example, when the trial court makes a *substantive* mistake regarding the nature of a sentence. The executive branch cannot carry out a sentence that contradicts the sentence a trial court imposes, even if the sentence is legally mistaken. Thus, if the trial court imposes an illegally lenient sentence, that error aggrieves the State, not the defendant, and the State must appeal. The Court's recent decision in *State ex rel. Fraley v. Ohio Department of Rehabilitation & Correction*, __ Ohio St. 3d __, 2020-Ohio-4410, illustrates the point. There, the trial court's sentencing entry clearly, but incorrectly, imposed concurrent sentences when the sentences should have instead been consecutive. *See id.*, ¶¶12, 17. Because the State did not appeal that mistake (a mistake that injured the State by reducing the prison term), it was stuck with the error. *Id.*, ¶17. Such a scenario is possible with post-release control, too. Say, for example, a trial court af-

firmatively imposes three years of post-release control for a first-degree felony even though the relevant statute mandates five. *See* R.C. 2967.28(B)(1). The onus in that case would be on the State to appeal or take other timely action.

This case does not involve that type of scenario. Here, even if the trial court's hearing and entry could have given Bates more thorough notice, neither said anything incorrect about Bates's five-year term of post-release control. Thus, the State was not aggrieved and had no reason to appeal.

B. Bates's contrary arguments are unpersuasive; they rely on a distorted view of how the separation-of-powers doctrine applies to procedural mistakes during sentencing.

To avoid the conclusion that he bore the burden of appealing, Bates turns to the separation of powers. Calling back aspects of the void-sentence doctrine, *see State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250 ¶13, Bates argues that without "the judge's words" discussing the consequences of post-release control, the separation of powers makes it as if post-release control were never imposed, *see* Bates Br. 5. To allow the State to enforce such a sentence without valid notice at the sentencing hearing, the argument goes, would violate the separation of powers: the executive branch would be enforcing a sentence that no court ever validly imposed. On this theory, a procedural flaw during the imposition of post-release control bars the State from enforcing post-release control. This, Bates says, means that *the State* is aggrieved by such procedural errors and that *the State* bears the burden of appealing.

This argument fails for two, independent reasons. *First*, the executive's enforcement of a judicially imposed sentence does not violate the separation of powers *even if* the court committed procedural errors in imposing that sentence. *Second*, even assuming that *some* procedural errors in the imposition of post-release control might make the carrying out of post-release control unconstitutional, the failure to provide notice of the consequences of violating post-release control would not. Thus, Bates's sentence of post-release control may be enforced *without regard* to the supposed procedural errors at sentencing. That means it was Bates, not the State, that was aggrieved by those errors and bore the burden of appealing.

1. The executive branch's carrying out of a judicially imposed sentence will never violate the separation of powers.

The Ohio Constitution vests the executive, legislative, and judicial powers in three separate branches across three separate articles. *City of S. Euclid v. Jemison*, 28 Ohio St. 3d 157, 159 (1986). From this, it follows that no branch may exercise powers that the People vested in another. *See, e.g.*, *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424 ¶40; *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799 ¶125; *City of Toledo v. State,* 154 Ohio St. 3d 41, 2018-Ohio-2358 ¶25; *State ex rel. Dann v. Taft*, 109 Ohio St. 3d 364, 2006-Ohio-1825 ¶72; *State ex rel. Khumprakob v. Mahoning Cnty. Bd. of Elections*, 153 Ohio St. 3d 581, 2018-Ohio-1602 ¶44 (Fischer, J., concurring in judgment only).

In the sentencing realm, each branch has a role to play. The legislative branch has "'plenary power to prescribe crimes and fix penalties.'" *State v. Anderson*, 143 Ohio St. 3d 173, 2015-Ohio-2089 ¶12 (quoting *State v. Morris*, 55 Ohio St. 2d 101, 112 (1978)); *accord Municipal Court of Toledo v. State*, 126 Ohio St. 103 (1933). That power includes the power to make a penalty automatic for a particular offense. *See, e.g.*, *State v. Warren*, 118 Ohio St. 3d 200, 2008-Ohio-2011 (affirming mandatory life sentence for rape). The judicial branch is responsible for imposing sentences upon a conviction. *See Anderson*, 143 Ohio St. 3d 173 ¶¶10, 12. And the executive branch is responsible for seeing to it that the sentence imposed is carried into effect. *See Woods v. Telb*, 89 Ohio St. 3d 504, 511 (2000) (plurality opinion); *Dennis v. Terris*, 927 F.3d 955, 958 (6th Cir. 2019) (per Sutton, J.).

For two reasons, the executive's carrying out of Bates's post-release-control sentence poses no separation-of-powers problem.

First, focusing on the specifics of this case, there is no dispute that the trial court actually imposed a sentence of post-release control. At Bates's initial sentencing hearing, the trial court "stated in open court that postrelease control was mandatory for five years." Bates Br. 2. Consistent with that, the initial sentencing entry then stated that five years of post-release control was part of Bates's sentence. App. Op. ¶3 Given these uncontested facts, subjecting Bates to five years of post-release control does not require the executive to exercise legislative or judicial power. The executive branch will instead

exercise purely executive authority by carrying Bates's sentence into effect. So, even assuming the trial court erred by imposing post-release control without providing notice of the consequences of violating the terms of post-release control, that error does not give rise to a separation-of-powers problem.

Second, and more broadly, there is little room for a separation-of-powers problem stemming from the failure to provide defendants with the required notice because the General Assembly has made post-release control *mandatory*, keying the terms of post-release control to the degree of offense. *See* R.C. 2967.28(B). Said differently, each crime itself "dictates whether postrelease control is mandatory or discretionary and for how long it will or may be imposed." *State v. Grimes*, 151 Ohio St. 3d 19, 2017-Ohio-2927 ¶50 (DeWine, J., concurring in judgment only). Under this setup, imposing a sentence is mechanical: "the judge serves only a ministerial role" and "has no say over who goes on postrelease control or for how long." *Id.*, ¶51 (DeWine, J., concurring in judgment only). The General Assembly reinforced as much when, through 2006 amendments, it added statutory language reflecting that notice mistakes during sentencing do not "negate, limit, or otherwise affect the mandatory period of" post-release control. R.C. 2967.28(B). Given the General Assembly's approach to post-release control, the executive branch needs little information from the trial court. As long as the parole authority knows the offense a defendant was convicted of, it has all "the information it needs to execute the postrelease-control portion of the sentence." *Grimes*, 151

Ohio St. 3d 19 ¶13 (majority opinion). And in carrying out such a sentence, the executive exercises purely executive power: it carries out a sentence that the legislature mandated and that is therefore necessarily imposed by the defendant's conviction. Any separation-of-powers problem arises *only when* the executive carries out a sentence that *contradicts* the sentence imposed by the trial court; for example, when the executive purports to impose a statutorily mandated five-year term despite a court order wrongly imposing a three-year term. *See above* 10–11.

2. Even assuming that some procedural errors during the imposition of post-release control give rise to separation-of-powers problems, the alleged errors here do not.

Even if *some* procedural errors during the imposition of a mandatory sentence could make the enforcement of that sentence inconsistent with separation of powers, it does not follow that *all* procedural errors have such a dramatic effect. The relatively minor error alleged here—a sentencing court's failure to provide adequate notice of the potential consequences of violating post-release control, *see* R.C. 2929.19(B)(2)—has no impact on the executive branch's ability to carry out Bates's sentence.

a. During the void-sentence era, this Court repeatedly suggested that a sentencing entry needs to incorporate post-release control to satisfy the separation of powers. *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085 ¶22; *Grimes*, 151 Ohio St. 3d 19 ¶15. The Court's rationale was that courts speak through their journal entries, and that a court must therefore mention post-release control within the sentencing entry to "em-

power" the executive. *Grimes*, 151 Ohio St. 3d 19 ¶¶8, 15. That rationale makes some sense when legal judgment is needed "to determine" what sentence applies. *See id.*, ¶21. But the Court never detailed why, when post-release control *mechanically* results from a given offense, a sentencing entry needs to expressly mention post-release control to avoid a separation-of-powers problem. *See id.*, ¶¶47–53 (DeWine, J., concurring in judgment only).

Regardless, even during the void-sentence era, the Court never held that the separation-of-powers doctrine required judicial perfection. If anything, *Grimes* rejected such a standard. It explained that a sentencing entry need not repeat "verbatim" what was said at the sentencing hearing in order to empower the executive. *Id.*, ¶13 (majority opinion). The Court instead held that, "to validly impose postrelease control, a minimally compliant entry must provide the [parole authority] the information it needs to execute the postrelease-control portion of the sentence." *Id.* In other words, *Grimes* said the entry must include "the notifications necessary for the [parole authority] to perform its job." *Id.*, ¶17.

In this case, Bates's original sentencing entry gave the parole authority enough information "to perform its job" of imposing post-release control. *See* R.49 (October 14, 2008 entry). It informed the parole authority that Bates had been convicted of kidnapping, a first-degree felony. From that conviction alone, the parole authority had enough information to apply a mandatory five-year term of post-release control.

R.C. 2967.28(B)(1). But the parole authority did not need to rely on Bates's conviction alone. The trial court's original sentencing entry stated that "post release control is part of this prison sentence for 5 years for the above felony(s) under R.C. 2967.28." App. Op. ¶3. That information, including the citation to the statute that assigns post-release control by offense, sufficiently empowered the parole authority to do its job. And the parole authority—part of the executive branch—could therefore do that job without intruding on the judicial branch's authority to impose sentences. In other words, the trial court's entry gave enough information to ensure that the parole authority was enforcing a judge-imposed sentence *rather than* an executive-imposed sentence.

The Court's recent decisions in *Harper* and *Hudson* confirm that Bates's post-release control is enforceable. In both of those cases, the defendants argued that lack of "consequences" language in their sentencing entries negated their post-release-control sentences. *Harper*, 2020-Ohio-2913 ¶9; *State v. Hudson*, __ Ohio St. 3d __, 2020-Ohio-3849 ¶1. In those cases, the Court was of course focused on ending its void-sentence doctrine. But it also rejected, at least implicitly, the notion that post-release control was unenforceable because the State did not appeal the alleged mistakes. In each case, the Court faulted the defendants (not the State) for failing to timely appeal. *See Harper*, 2020-Ohio-2913 ¶41; *Hudson*, 2020-Ohio-3849 ¶¶1, 16.

A final point related to the end of the void-sentence doctrine is worth mentioning. Recall again that, at the close of *Harper* and *Hudson*, the Court warned both de-

fendants and the State of the need to file timely appeals to correct post-release control errors. 2020-Ohio-2913 ¶43; 2020-Ohio-3849 ¶18. Those warnings might suggest that direct appeals are the *only* way to timely correct sentencing mistakes. But there are at least two other options for timely correction. First, Criminal Rule 36 allows courts to correct clerical oversights or omissions "at any time." Under that rule, a trial court may correct sentencing entries to reflect the notice actually given at the sentencing hearing. *State v. Qualls*, 131 Ohio St. 3d 499, 2012-Ohio-1111 ¶¶13–14. Second, in 2006, the General Assembly established a statutory process by which a trial court could fix post-release-control mistakes by holding a hearing any time before an offender is released from prison. *See* R.C. 2929.191. And this Court later interpreted the relevant statute, R.C. 2929.191, to "afford[] a mechanism" for correcting mistakes occurring after 2006. *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434 ¶¶34–35.

b. With the above analysis in mind, Bates's remaining arguments can be quickly refuted. Bates agrees that, in light of *Harper* and *Hudson*, omission of details in the sentencing entry "will not nullify" the post-release-control portion of a sentence. Bates Br. 1. But he then argues that procedural mistakes during a sentencing *hearing* are enough to nullify a sentence. Bates Br. 2. It is far from clear that Bates preserved this argument. He failed to submit his original sentencing-hearing transcript to the Eighth District. Thus, the court presumed regularity. More precisely, it presumed that the trial court

"properly imposed postrelease control at the sentencing hearing." App. Op. ¶18. If the Court accepts that presumption, Bates's argument never leaves the ground.

Presumption of regularity aside, Bates does not justify the distinction he draws between mistakes during sentencing hearings and mistakes in sentencing entries. If anything, Bates's theory mixes up the goals of sentencing hearings and sentencing entries. The notice given at the hearing is for the offender's benefit; the "preeminent purpose" of the hearing notice is to make sure "that *offenders* subject to postrelease control *know*" the nature of their sentences. *See Watkins v. Collins*, 111 Ohio St. 3d 425, 2006-Ohio-5082 ¶52 (emphasis added). In contrast, the entry provides notice to *the executive*: "it is the sentencing *entry* that '*empowers the executive branch* of government to exercise its discretion.'" *Grimes*, 151 Ohio St. 3d 19 ¶15 (emphasis added) (quoting *Jordan*, 104 Ohio St. 3d 21 ¶22). Consequently, if mistakes in a sentencing entry are not enough to disrupt executive authority, *see* Bates Br. 1, it is hard to see how mistakes during the sentencing hearing are enough to disrupt executive authority.

Bates's reliance on other constitutional rights does not save his argument. He cites several cases relating to his right to be sentenced in open court. *See* Bate Br. 5–6. But those cases involve *his* rights for *his* benefit. He forfeited those rights (to the extent they were violated) when he chose not to appeal the trial court's original sentencing proceedings. (In any event, Bates was sentenced in open court. Bates Br. 2.) He never explains how any violation of those forfeited hearing rights would now leave *the execu-*

tive branch unable to enforce post-release control under the separation-of-powers doctrine.

Bates's reliance on other passages from *Jordan* and *Qualls* also misses the mark. *See* Bates Br. 6 (citing *Jordan*, 104 Ohio St. 3d 21 ¶¶19–26); *id.* at 8 (quoting *Qualls*, 131 Ohio St. 3d 499 ¶18). Those passages discuss a *different* separation-of-powers concept that emerged during the void-sentence era. Specifically, under the void-sentence doctrine, *any* lapse by the trial court in following statutory requirements was enough to cause a separation-of-powers problem, thus making the sentence "void." *See Jordan*, 104 Ohio St. 3d 21 ¶25. In other words, the doctrine required strict compliance with sentencing statutes. *See Qualls*, 131 Ohio St. 3d 499 ¶18. The Court has since recognized that the separation of powers requires no such thing. *See Harper*, 2020-Ohio-2913 ¶¶34–35.

On a more practical note, it should not get lost that Bates suffered no actual prejudice from any failure by the trial court to give notice of the consequences of violating post-release control. True, trial courts are required to give defendants notice of the consequences of violating post-release control at their sentencing hearings. R.C. 2929.19(B)(2). Defendants, however, also have counsel to assist them in understanding their sentences. *See State v. Schleiger*, 141 Ohio St. 3d 67, 2014-Ohio-3970 ¶¶13–14. And, when it comes to the consequences of violating post-release control, the most important notice—at least in a practical sense—comes right before offenders leave prison. That is

when the parole authority has an independent duty to remind offenders about (1) their duty to comply with post-release control and (2) what will happen to them if they do not. R.C. 2967.28(D)(1).

*

At day's end, while Bates ostensibly applauds the end of the void-sentence doctrine, Bates Br. 10, he actually seeks to resurrect the doctrine—or at least something quite similar to it. Under his theory, if a trial court commits minor mistakes when it imposes post-release control, and if *the State* does not appeal those minor mistakes, then it becomes "as if there had been no sentence." *Bezak*, 114 Ohio St. 3d 94 ¶13. And his theory supplies no principled reason for distinguishing between different types of procedural mistakes. So, if the Court accepts that formula, another flood of cases will soon follow: defendants will pounce on Bates's "nullif[ication]" idea, Bates Br. 1, to argue that any procedural mistake during sentencing means that they too should be free from post-release control. The Court should stop this flood before it begins.

CONCLUSION

The Court should hold that Bates is subject to post-release control.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 6th day of October, 2020, by e-mail on the following:

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