IN THE SUPREME COURT OF OHIO

SCT NO.

STATE OF OHIO	:	
Appellee	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of
vs.	:	Appeals CA: 109254
MICHAEL J. STOUDEMIRE	:	
Appellant		

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT MICHAEL J. STOUDEMIRE

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TABLE OF CONTENTS

PAGES

EXPLANATION OF WHY THIS FELONY CASE RAISES SUBTANTIAL CONSTITUTIONAL QUESTIONS AND IS A MATTER OF GREAT PUBLIC AND GREAT GENERAL INTEREST

When this Court was confronted with an 18 year sentence for murder that was incorrectly imposed upon Rogers Henderson, this Court held that the sentence needed to be challenged at the time it was imposed. *State v. Henderson,* 161 Ohio St.3d 285, 162 N.E.3d 776, 2020-Ohio-4784. In a concurring opinion, the Chief Justice warned that there may be times when a judge's sentencing mistake may need to be corrected to avoid a miscarriage of justice. *Id.* at ¶ 48 (O'Connor, C.J., concurring in judgment only).

In this case, the trial judge originally imposed a sentence of life when the sentence should have been life with parole eligibility after 20 years. Everyone agreed this was in error and that problem has been rectified at an agreed-upon resentencing.

Unlike in *Henderson,* the trial court's sentencing error in this case inured to the defendant's detriment. It would have violated due process under the Fourteenth Amendment and under Article I, Sections 10 and 16 of the Ohio Constitution not to have corrected the sentence. Unlike the situations in *State v. Fischer,* 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, *State v. Harper,* 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, and *State v. Hudson,* 161 Ohio St. 3d 166, 2020-Ohio-3849, 161 N.E.3d 608, the error in this case was committed with respect to the base prison sentence and not a adjunct to the prison sentence such as postrelease control. This is the type of situation where the originally imposed sentence needs to be considered void ab initio in order to avoid constitutional prohibitions.

And in these limited situations, it follows that an appeal from the original verdict can be taken -- because the "new" sentence is the first legal sentence. Any other conclusion requires upending traditional appellate theory regarding when an order is final and appealable in a criminal case, i.e. after sentencing, and also requires one to ignore the fundamental nature of a void sentence

as one that never legally existed. By applying res judicata to an appeal taken from a void sentence, the Eighth District fundamentally mischaracterizes what it means to be "void" -- there can be no significance to a an appeal taken from a null sentence because the absence of a sentence (which is the definition of a nullity) means there never was a final appelable order.

By accepting this case, this Court will recognize a limited exception to the blanket statements in Henderson, Hudson, Harper and Fischer regarding finality. The floodgates are not being opened. But a small opening to prevent injustice will be carved out in a manner that does not change what it means to be void ab initio. For these reasons, this Court should accept this appeal.

STATEMENT OF THE CASE

On March 8, 1994, Michael Stoudemire was indicted for the February 18, 1994, aggravated murder of Osceola Jones, along with a firearm specification. Trial by jury proceeded from uly 25 through July 29, 1994, when the jury returned a guilty verdict on the single count of aggravated murder with a firearm specification. (In 1994, there was only one available firearm specification, which carried a three-year consecutive prison sentence). Michael Stoudemire was sentenced to life imprisonment immediately following the verdict.

An appeal was noted. This Court promulgated an opinion in *State v. Stoudemire*, 8th Dist. No. 69335 which stated that the conviction was affirmed. This opinion is reported at 118 Ohio App.3d 752, 694 N.E.2d 86 (8th Dist. 1997).

On April 23, 2019, Michael Stoudemire filed a pro se motion to vacate his sentence as contrary to law and thus void. On September 16, 2019, the State of Ohio filed a motion that acknowledged the aggravated murder sentence was void. The trial court ordered a new sentencing, which took place on November 5, 2019. The original sentence was vacated and a new sentence of life imprisonment, with parole eligibility after twenty years, to run consecutively to a sentence of three years for the firearm specification was imposed.

A timely appeal was noted. On appeal, Mr. Stoudemire raised four assignments of error:

> THE TRIAL COURT ERRED WHEN IT PROHIBITED THE DEFENSE FROM TRYING TO ESTABLISH THE BIAS OF THE PROSECUTION'S WITNESSES VIA CROSS-EXAMINATION REGARDING THEIR ILLEGAL ACTIVITIES AND BAD ACTS COMMITTED INDVIDUALLY, AND IN CONCERT WITH EACH OTHER AND WITH OSCEOLA JONES.
>
> THE JURY INSTRUCTIONS IMPROPERLY RELIEVED THE STATE OF OHIO OF ITS BURDEN OF PROOF
>
> THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE DEFENDANT ACTED WITH PRIOR CALCULATION AND DESIGN.
>
> THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The Eighth District affirmed without addressing the merits of any of the assignments of error. The Eighth District held that res judicata barred consideration of the assignments because the court held that these were all issues that either were or could have been raised in the earlier appeal.

This appeal follows.

ARGUMENT

Proposition of Law I:

A prison term that exceeds the statutory maximum for the offense is void ab initio.

The original sentence that was imposed in the instant case did not include a recognition that parole was available after twenty years. All parties agreed this was legally incorrect. The question is whether the illegal sentence can be fixed if an immediate appeal is not taken. The answer to this question, as a matter of constitutional due process, is "yes."

Henderson, Harper and *Hudson* all required that an immediate appeal be taken to correct an illegal sentence. But none of these cases concerned a prison term that exceeded the maximum. Under these circumstances, principles of finality and res judicata must give way to fundamental fairness under the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution. In this regard, the United States Supreme Court has recognized

that res judicata is generally inapplicable " where life or liberty is at stake." *Sanders v. United States*, 373 U.S. 1, 8, 83 S.Ct. 1068, 1073, 10 L.Ed.2d 148 (1963); *National Amusements, Inc., v. City of Springdale,* 53 Ohio St.3d 60, 558 N.E.2d 1178 (1990) (quoting *Sanders*).

Accordingly, the trial court properly vacated the previous sentence and imposed a new sentence -- one that was legally valid. The ability to revisit the sentence lies in its having been void, a legal nullity, from its inception. This is critical to navigating around two otherwise-roadblocks: The requirement to take a timely appeal, and the multiple sentence prohibition of the Double Jeopardy Clause. U.S. Const. Amend. V and Ohio Const. Art. I, Sec. 10.

All of the above argument was uncontested at the trial court. The State and Henderson both moved for a resentencing. But this proposition of law sets the stage for the more important proposition that follows below and addresses the pivotal question in this case: When a trial court vacates a sentence because it is void, what effect does that have on the ability to appeal the underlying conviction?

Proposition of Law II:

> **A court of appeals has no jurisdiction to consider the merits of an appeal of a verdict in a criminal case if the sentence imposed is void ab initio.**

It is axiomatic that a court of appeals lacks jurisdiction to consider defense challenges to the verdict until sentence is imposed and journalized. *See State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182 ("a 'conviction' consists of a guilty verdict and the imposition of a sentence or penalty"); *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, syllabus (sentence must be included for judgment to to be a final, appealable order).

But if a sentence is void ab initio, it is a nullity from the beginning; it is as if there is no sentence at all. *See, Walsh v. Bollas*, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist. 1992)

quoting Black's Law Dictionary (6th ed. 1990), 1574. Accordingly, the first sentence was imposed in November, 2019 and the first valid appeal was that taken in the instant case.

Moreover, the prosecution agreed to the vacation of the first sentence as a nullity (although they did not agree that an appeal of the verdict could be taken in 2019). Thus, the question of whether the first sentence was void ab initio was never contested.

As a result, the Eighth District erred when it held that the earlier appeal taken by Mr. Stoudemire, in 1997, had a res judicata preclusive effect on the issues presented in the instant case.

The Eighth District's decision should be reversed and the case remanded for the Eighth District to decide the merits of the issues raised below.

CONCLUSION

For these reasons, this Court should accept jurisdiction over the instant case.

Respectfully submitted,

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SERVICE

A copy of the within was served upon the office of the Cuyahoga County Prosecutor at the time of filing on this 14th day of June, 2021, via electronic mail to ksobieski@prosecutor.cuyahogacounty.us and fzeleznikar@prosecutor.cuyahogacounty.us.

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