In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2021-0948
	:	
Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
MICHAEL STANSELL,	:	
	:	Court of Appeals
Appellant.	:	Case No. 109023

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

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INTRODUCTION

Over twenty years ago, Michael Stansell faced an important choice. The State had charged Stansell with almost forty crimes relating to sex offenses inflicted upon two boys over a four-month period. The most extreme charges were for forcible rape of children under the age of thirteen—charges that, by themselves, carried a sentence of ten years to life on each count. The State also alleged that Stansell was a sexually violent predator, which was at the time a new sentencing specification. That specification came with a minimum sentence of at least two years and a maximum sentence of life in prison.

The State offered a plea deal: Stansell, rather than going to trial and risking punishment for almost forty crimes, could plead guilty to fewer crimes and have some say in the sentence he received. Stansell accepted. He pleaded guilty to a handful of crimes and also to being a sexually violent predator. The State, for its part, dropped most of the charges, including the charges of forcible rape. Stansell and the State also agreed on a sentence: twenty years to life. And the trial court signed off on the bargain. It accepted Stansell's guilty plea and imposed the agreed-upon sentence.

Decades later, Stansell is now trying to back out of the deal. With the hindsight of this Court's decision in *State v. Smith*, 104 Ohio St. 3d 106, 2004-Ohio-6238, it turns out that Stansell was not eligible for the sexually-violent-predator specification. Why not? At the time of his guilty plea, he had not yet been convicted of a violent sex of-

fense. Stansell now argues that, because he was ineligible for the sexually-violent-predator specification, the portion of his sentence attributable to that specification (the life-tail) is "void" and thus open to attack at any time. Stansell correspondingly argues that this Court should erase the life-tail from his sentence.

Stansell is wrong for several reasons, two of which this brief highlights. *First*, Stansell's sentence is not "void." As this Court recently clarified, a sentence is void only if the sentencing court lacked jurisdiction to sentence the defendant. *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913 ¶¶4-5; *State v. Hudson*, 161 Ohio St. 3d 166, 2020-Ohio-3849 ¶17; *State v. Henderson*, 161 Ohio St. 3d 285, 2020-Ohio-4784 ¶34. The trial court had jurisdiction over Stansell's criminal proceedings. *See* R.C. 2931.03. So, Stansell's sentence is not "void" within the traditional meaning of that term. If Stansell wanted to challenge his eligibility to be a sexually violent predator, he needed to do so on direct appeal. He failed to do so.

Second, even if the Court were willing to make exceptions to the voidness doctrine in cases where the failure to do so would elevate "finality over fairness and substantial justice," *Henderson*, 161 Ohio St. 3d 285 ¶48 (O'Connor, C.J., concurring in judgment only), it should not do so here. Stansell agreed to serve twenty years to life in order to avoid facing many other charges—charges that could have easily landed him a harsher sentence. Holding Stansell to his agreement is in no way unjust.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief legal 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. Ohio has an interest in this case, which implicates the finality of criminal sentences. To further Ohio's interest, the Attorney General seeks to promote an approach to "void" sentences that is both legally correct and practically workable. For years this Court, and Ohio's lower courts, struggled to apply a "void-sentence doctrine," under which some criminal sentences were deemed "void" based on non-jurisdictional errors. Over the last two years, this Court has returned to a traditional understanding of what constitutes a "void" judgment. But if this Court accepts Stansell's invitation to craft a new void-sentence exception—an exception that would, apparently, apply only to defendants—it should expect more confusion to follow.

STATEMENT OF THE CASE AND FACTS

1. To appreciate the facts of this case, it helps to first consider the evolution of Ohio law concerning "sexually violent predator[s]." *See* R.C. 2971.03. In the mid-1990s, the Generally Assembly decided to impose harsher sentences on any sex offender who qualified as "a sexually violent predator." 146 Ohio Laws 2653–56 (1996) (creating R.C. 2971.03). In most cases, a conviction on the sexually-violent-predator specification required an indefinite sentence, with a minimum sentence of not less than two years in

prison and a maximum sentence of life in prison. *See Smith*, 104 Ohio St. 3d 106 ¶12. The General Assembly originally defined "sexually violent predator" as "a person who has been convicted of or pleaded guilty to committing, on or after January 1, 1997, a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." *Id.*, ¶1 (quoting former R.C. 2971.01(H)(1)) (emphasis omitted).

Ohio courts struggled with that definition. Specifically, they disagreed about whether, to be a "sexually violent predator," a defendant needed to have a *prior* conviction for a "sexually violent offense" at the time of the relevant indictment. The Third and Fifth Districts read the specification as requiring a prior conviction. *State v. Reigle*, 3d Dist. No. 5-2000-14, 2000 Ohio App. LEXIS 5186 at *19–20 (Nov. 9, 2000); *State v. Smith*, 5th Dist. No. CA-957, 2003-Ohio-3416 ¶26. The Ninth District reached the opposite conclusion. *State v. Haven*, 9th Dist. No. 02CA0069, 2004-Ohio-2512 ¶16.

This Court resolved the split near the end of 2004. *Smith*, 104 Ohio St. 3d 106. A four-Justice majority held that, to be a sexually violent predator, a defendant must have "already been convicted of a sexually violent offense" by "the time of indictment." *Id.*, ¶18. But three Justices read the statute differently. They thought that a specification could be based on "a conviction for an underlying sexually violent offense included in the same indictment." *Id.*, ¶34 (O'Donnell, J., dissenting).

Ohio's lawmakers apparently agreed with the *Smith* dissenters. In less than two months, the legislature amended the definition of "[s]exually violent predator" to mean

"a person who, on or after January 1, 1997, *commits* a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." *State v. Townsend*, 163 Ohio St. 3d 36, 2020-Ohio-5586 ¶8 (quoting R.C. 2971.01(H)(1), as amended) (emphasis added). Thus, for crimes committed after that amendment's effective date, a person can be indicted as a sexually violent predator without a prior conviction. *See id.*, ¶13.

2. This case involves crimes that took place several years before the *Smith* decision, when the former definition still applied. Over a four-month stretch in 1997, Michael Stansell sexually assaulted two boys. *See State v. Stansell*, 8th Dist. No. 75889, 2000 Ohio App. LEXIS 1726 at *2–3 (April 20, 2000) ("*Stansell I*"). The State indicted him on thirty-eight counts. Among other crimes, the State charged him with five counts of forcible rape involving a child under the age of thirteen. *Id.* A conviction for even a single count of that crime would have required Stansell to "be imprisoned for life." 146 Ohio Laws 7263 (1996) (former R.C. 2907.02(B)). Further, if Stansell had been sentenced to "imprisonment for life" on even a single count of forcible rape, he would have needed to serve ten years in prison before becoming parole eligible. *See* 146 Ohio Laws 2643 (1996) (former R.C. 2967.13(E)). The State also alleged that Stansell was a sexually violent predator. *Stansell I*, 2000 Ohio App. LEXIS 1726 at *2. Again, during the relevant timeframe, that specification required an indefinite sentence, with a minimum sentence

of not less than two years in prison and a maximum sentence of life in prison. *See Smith*, 104 Ohio St. 3d 106 ¶12.

On the day his trial was set to begin, Stansell agreed to a plea bargain. *Stansell I*, 2000 Ohio App. LEXIS 1726 at *3. He pleaded guilty to several crimes, including rape with a sexually-violent-predator specification. *Id.* And he agreed to a sentence of twenty years to life. The State, in exchange, dropped thirty of the charges Stansell faced. *Id.* at *1. Perhaps most important here, the State agreed to "delete the force language" from the rape charges to which Stansell pleaded guilty. *Id.* at *3. The deal, in sum, looked like this: instead of risking conviction and punishment for nearly forty crimes—including five separate charges of forcible rape against a child—Stansell agreed to plead guilty to eight crimes and to serve a total sentence of twenty years to life. *Stansell I*, 2000 Ohio App. LEXIS 1726 at *3–5. The sentence included five years to life in prison based on the sexually-violent-predator specification. *See id.* (count six).

After accepting Stansell's guilty plea, the trial court imposed the agreed-upon sentence. *Id.* at *7. Stansell, nonetheless, appealed. He argued that he should have received a "hearing to determine whether any of the offenses charged were allied offenses." *Id.* at *1. But he raised no issue on direct appeal about his eligibility to be a sexually violent predator. The Eighth District rejected Stansell's arguments and affirmed his sentence. *Id.* at *18. This Court denied Stansell leave to file a delayed appeal. *State v. Stansell*, 91 Ohio St. 3d 1527 (2001).

3. That was how things stood for many years. But in March 2013—over eight years after this Court's decision in *Smith*—Stansell moved the trial court to vacate his sentence as a sexually violent predator. *State v. Stansell*, 8th Dist. No. 100604, 2014-Ohio-1633 ¶1 ("*Stansell II*"). At the time of his 1997 indictment, Stansell had no prior convictions. He therefore argued in light of *Smith* that the life-tail of his sentence—imposed as a result of the sexually-violent-predator specification—"was invalid," making that part of his sentence "illegal and void." *Id.*, ¶13. The trial court rejected that theory and denied the motion to vacate.

Stansell appealed, and the Eighth District affirmed. The Eighth District noted that res judicata might bar Stansell's claim. *Id.*, ¶6. But it rejected Stansell's claim on a slightly different ground: it held that, regardless of res judicata, *Smith* had no retroactive application to Stansell's "no longer pending" case. *Id.*, ¶16. For support, the Eighth District observed that the Ninth and Tenth Districts had similarly refused to apply *Smith* to cases that were no longer pending. *Id.*, ¶14 (citing *State v. Ditzler*, 9th Dist. No. 13CA010342, 2013-Ohio-4969 and *State v. Draughon*, 10th Dist. Nos. 11AP-703 & 11AP-995, 2012-Ohio-1917). This Court again denied Stansell leave to file a delayed appeal. *State v. Stansell*, 140 Ohio St. 3d 1413, 2014-Ohio-3785.

4. Stansell waited a few years before giving the same theory another try. In 2019, he moved for a second time to vacate his sentence as a sexually violent predator. *State v. Stansell*, 8th Dist. No. 109023, 2020-Ohio-3674 ¶12 ("*Stansell III*"). Stansell did not ar-

gue that any statute or procedural rule allowed for his belated, repetitive motion. *See* Mot. to Vacate (July 23, 2019). He instead argued that the trial court was "authorized to correct a void sentence." *Id.* at 2. The trial court again denied the motion. *See Stansell III*, 2020-Ohio-3674 ¶12.

Stansell appealed. This time, a panel of the Eighth District was more receptive to his argument. To understand why, recall that for many years this Court embraced a void-sentence doctrine, under which a trial court's failure to follow statutory commands during sentencing would sometimes render a sentence "void" and thus subject to challenge at any time. *See e.g.*, *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197 ¶21. Relying on that doctrine, the Eighth District panel held that Stansell "did not qualify as a sexually violent predator" under the former statutory definition. *Stansell III*, 2020-Ohio-3674 ¶17. That meant, according to the panel, that the life-tail of Stansell's sentence was "void" and open to attack at any time. *Id.*, ¶¶18–20.

At the State's request, the same panel reconsidered its decision, but it reached the same result. *State v. Stansell*, 8th Dist. No. 109023, 2021-Ohio-203 ("*Stansell IV*"). More specifically, the panel reconsidered whether this Court's decisions in *Harper* and *Henderson* affected Stansell's claim of a "void" sentence. *Stansell IV*, 2021-Ohio-203 ¶¶26–31. In *Harper* and *Henderson*, this Court overruled its void-sentence doctrine and returned to the traditional understanding of voidness. Under that traditional understanding, a sentence is "void" only if the sentencing court lacked jurisdiction. *Harper*, 160 Ohio St.3d

480 ¶4; *Henderson*, 161 Ohio St. 3d 285 ¶43. But Stansell's case was different, in the panel's view, because it involved an offender "serving more time than what was statutorily permitted at the time he was indicted and sentenced." *Stansell IV*, 2021-Ohio-203 ¶29.

5. The Eighth District took the case *en banc* to decide whether a sentence is "void" when it "exceeds statutory limitations." *State v. Stansell*, 8th Dist. No. 109023, 2021-Ohio-2036 ¶1 (*en banc*) ("App. Op."). A majority of the Eighth District held that a sentence that "exceeds statutory limitations … is voidable, but not void." App. Op. ¶2. Thus, Stansell's sentence was voidable (subject to attack on direct appeal), *not* void (subject to attack at any time). It followed that Stansell's motion to vacate was untimely because he could have challenged his status as a sexually violent predator on direct appeal. App. Op. ¶46 (panel decision upon return). The *en banc* majority stressed that this Court, in *Harper* and *Henderson*, "created no exception to its realigned void-sentence jurisprudence for sentences that exceed statutory limitations." App. Op. ¶8 (majority op.). In reaching that conclusion, the majority did express concern that a traditional approach to voidness might, in some applications, "elevate[] predictability and finality over fairness and substantial justice." App. Op. ¶10 (quoting *Henderson*, 161 Ohio St. 3d 285 ¶48 (O'Connor, C.J., concurring in judgment only)).

Judge Gallagher concurred. App. Op. ¶¶12–32 (Gallagher, J., concurring). He wrote separately to emphasize that, in addition to *Harper* and *Henderson*, the Eighth District was also bound by this Court's decision in *State ex rel. Romine v. McIntosh*, 162 Ohio

St. 3d 501, 2020-Ohio-6826 (*per curiam*). App. Op. ¶¶13, 22. In that case, this Court applied a traditional understanding of voidness and rejected a belated attack on a final sentence, despite an offender's allegations that his sentences included "greater punishment than the legislature authorized." *State ex rel. Romine*, 162 Ohio St. 3d 501 ¶¶11, 15–16.

Judge Gallagher further stressed that the finality of convictions is "essential to the administration of the criminal justice system." App. Op. ¶¶25–29. "Without finality," Judge Gallagher observed, "the criminal law is deprived of much of its deterrent effect." App. Op. ¶27 (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989)). And creating "defendant-centric" exceptions to finality "generally ignores" that crime victims often have much different views about what sentences "justice" requires. App. Op. ¶28. Judge Gallagher thus emphasized that finality principles should remain neutral: Ohio law should supply an "equal playing field" on which finality principles apply the same way "against defendants and the state." App. Op. ¶¶29, 32.

Judge Jones, Sr., who wrote the panel opinions in *Stansell III* and *Stansell IV*, dissented from the majority's decision. He reiterated his belief that Stansell's case was distinguishable from *Harper* and *Henderson*. App. Op. ¶33 (Jones, Sr., J., dissenting).

6. Stansell appealed and this Court accepted the case for review. Stansell's sole proposition asks whether, given recent decisions like *Harper* and *Henderson*, offenders

may collaterally attack sentences "that exceed[] the statutory maximum" after the time for direct appeal has passed. Stansell Br. 4.

ARGUMENT

Proposition of Law:

> *A sentence is "void" only if it is entered by a court without jurisdiction; when a court has jurisdiction and imposes a sentence outside the statutory range, the error is "voidable," making it up to the adversely-affected party—whether that party be the defendant or the State—to seek timely correction of the error.*

I. Stansell's sentence is not void.

Stansell's theory rests on this Court's exhuming, at least in part, the now-overruled "void-sentence doctrine" that *Harper* entombed. Under that doctrine, a trial court's failure to follow statutory commands would sometimes "void" a sentence, making it subject to attack at any time. *See State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085 ¶23. The Court recently overruled that doctrine, which was wrong when it was first decided and which proved unworkable in practice. *See Harper*, 160 Ohio St. 3d 480 ¶¶34–40. Stansell seeks to revive it: he argues that defendants may belatedly attack—as, in essence, "void"—a sentence that "exceeds the statutory maximum for the offense of conviction." Stansell Br. 4. The Court should reject that argument.

Before proceeding further, however, this brief pauses to urge this Court to dismiss the case as improvidently accepted. Of particular note, the case does not actually present the question whether defendants can belatedly challenge statutorily impermissible sentences. Stansell's sentence was permissible under statute. He pleaded guilty to

being a sexually violent predator. *Stansell I*, 2000 Ohio App. LEXIS 1726 at *2. And that specification carried a maximum sentence of life in prison. *Smith*, 104 Ohio St. 3d 106 ¶12. Thus, Stansell's sentence of twenty years to life *does not* "exceed[] the statutory maximum for the offense" to which Stansell pleaded guilty. *Contra* Stansell Br. 4.

What Stansell really challenges, with the hindsight of *Smith*, is his decision *before sentencing* to plead guilty to being a sexually violent predator. In other words, he is challenging *not* his sentence for being a sexually violent predator, but rather his guilty plea on the sexually-violent-predator specification. That makes his search for a voidness exception all the more problematic. The reason is that Criminal Rule 32.1 already provides an express path by which a defendant may withdraw a guilty plea to avoid a "manifest injustice." Crim.R. 32.1. The Court should not consider altering principles of voidness as a way of circumventing the limits on withdrawing guilty pleas under Criminal Rule 32.1.

Beyond that, another factor supports dismissal: the question Stansell presents to the Court does not matter to the outcome of Stansell's case. Even if Stansell were challenging the legality of his sentence (not his guilty plea), and even if his theory of voidness were viable (it is not, as this brief will detail), he would still lose. That is because offenders cannot engage in endless re-litigation of their sentences, *even when* they claim jurisdictional errors. Rather, once a party has raised a jurisdictional issue and lost, "principles of res judicata apply." *State ex rel. Peoples v. Johnson*, 152 Ohio St. 3d 418,

2017-Ohio-9140 ¶13 (quotations omitted); *see also State ex rel. Rash v. Jackson*, 102 Ohio St. 3d 145, 2004-Ohio-2053 ¶11. Here, Stansell's first attempt to "void" his sentence based on *Smith* failed several years ago. *See Stansell II*, 2014-Ohio-1633 ¶¶1, 13, 16. That first attempt ended when this Court denied leave to file a delayed appeal. *State v. Stansell*, 140 Ohio St. 3d 1413. The jurisdictional implications of Stansell's theory do not entitle him to another bite at the apple. *See State ex rel. Peoples*, 152 Ohio St. 3d 418 ¶13.

In any event, this Court should reject Stansell's belated challenge to his sentence. This brief offers two reasons why. *First*, if this Court continues to apply a traditional understanding of what constitutes a "void" judgment, then Stansell's sentence is not "void." *Second*, even assuming this Court is open to carving out void-sentence exceptions for scenarios where it finds finality troubling, this case is not deserving of such an exception.

A. A sentence is "void" only if the court that entered it lacked jurisdiction to do so; a sentence outside the permissible statutory range is "voidable" through challenge on direct appeal.

1. Applying a traditional understanding of voidness, a judgment is "void" only if entered by a court lacking jurisdiction. *See, e.g.*, *Miller v. Nelson-Miller*, 132 Ohio St. 3d 381, 2012-Ohio-2845 ¶12 (citing *Cochran's Heirs' Lessee v. Loring*, 17 Ohio 409, 423 (1848)); *Ex parte Shaw*, 7 Ohio St. 81, 82 (1857); *accord Sheldon's Lessee v. Newton*, 3 Ohio St. 494, 498 (1854). That traditional understanding protects "the finality of criminal judgments." *Harper*, 160 Ohio St. 3d 480 ¶3. A party seeking to "set aside" a sentence based on a

non-jurisdictional error—that is to say, a "voidable" error—must challenge the error on direct appeal. *Id.*, ¶4. If a party fails to do so, res judicata will bar collateral attacks. *Id.*, ¶41.

For several years, however, this Court applied a more expansive "void-sentence doctrine." It held that, in some situations—typically involving the imposition of post-release control—offenders could "void" their sentences, with no time limits, based on non-jurisdictional errors. *See Jordan*, 104 Ohio St. 3d 21 ¶23. In 2020, after years of struggling to apply that more-expansive approach, the Court overruled the doctrine and returned to the traditional rule that a sentence is "void" only if imposed by a court lacking jurisdiction. *Harper*, 160 Ohio St. 3d 480 ¶4; *Hudson*, 161 Ohio St. 3d 166 ¶17; *Henderson*, 161 Ohio St. 3d 285 ¶34; *see also State v. Bates*, — Ohio St. 3d —, 2022-Ohio-475 ¶¶13–14.

That traditional understanding is neutral: whether a sentence is "void" turns on the jurisdiction of the sentencing court, not on whether an alleged error favors or disfavors the defendant. It follows that, when a non-jurisdictional error occurs, both sides need to either appeal or accept the error going forward. Indeed, in *Harper* and *Hudson*, the Court cautioned everyone—"prosecuting attorneys, defense counsel, and pro se defendants throughout this state"—of the need to correct sentencing errors via direct appeal. *Harper*, 160 Ohio St. 3d 480 ¶43; *Hudson*, 161 Ohio St. 3d 166 ¶18. The Court similarly said in *Henderson* that "[n]either the state nor the defendant can challenge [a] void-

able sentence" by way of a later "postconviction motion." *Henderson*, 161 Ohio St. 3d 285 ¶43; *accord id.*, ¶91 (Donnelly, J., concurring).

The results of recent cases confirm that a traditional approach applies neutrally. The doctrine at times blocks the State from correcting sentencing errors that favor defendants. *See, e.g.*, *Henderson*, 161 Ohio St. 3d 285 ¶44; *State ex rel. Fraley v. Ohio Dep't of Rehab. & Corr.*, 161 Ohio St. 3d 209, 2020-Ohio-4410 ¶17 (*per curiam*). Other times the doctrine blocks defendants from raising untimely challenges. *See, e.g.*, *Boler v. Hill*, — Ohio St. 3d —, 2022-Ohio-507 ¶¶4, 9 (*per curiam*); *Simmons v. Black*, — Ohio St. 3d —, 2022-Ohio-352 ¶11 (*per curiam*); *State ex rel. Slaughter v. Foley*, — Ohio St. 3d —, 2021-Ohio-4049 ¶10 (*per curiam*); *State ex rel. Romine*, 162 Ohio St. 3d 501 ¶16; *State ex rel. Crangle v. Summit Cty. Common Pleas Court*, 162 Ohio St. 3d 488, 2020-Ohio-4871 ¶10 (*per curiam*); *Harper*, 160 Ohio St. 3d 480 ¶41; *Hudson*, 161 Ohio St. 3d 166 ¶¶1, 16.

A related point proves dispositive in this case: the question whether a trial court had jurisdiction to sentence a defendant is distinct from the question whether that court imposed a sentence within the permissible statutory range. In other words, since a sentence is "void" *only if* the issuing court lacked jurisdiction to issue it, the possibility that a trial court imposed a sentence outside the statutory range has no bearing on the voidness inquiry. Several cases, both old and young, teach that lesson. Begin with *Ex parte Shaw*, 7 Ohio St. 81 (1857). The sentencing court in that case gave a horse thief one year in prison instead of the three years required by statute. *Id.* at 81. But the sentencing

court "had jurisdiction over the offense and its punishment." *Id.* at 82. So, even though the sentence was clearly outside the statutory range, the sentence "was not void, but erroneous." *Id.* Consider, also, the Court's recent decision in *Henderson*. In that case, the sentencing entry gave a murderer "15 years" instead of the "15 years to life" required by statute. *Henderson*, 161 Ohio St. 3d 285 ¶2. This Court rejected the State's attempt to correct the sentence 18 years later. *Id.*, ¶44. Even though the sentence was much more lenient than what the law required, *id.*, ¶40, Henderson's sentence remained voidable, not void, *id.*, ¶1.

And, though *Ex parte Shaw* and *Henderson* both involved illegally lenient sentences, the same lesson applies to sentences that are harsher than what statutory law permits. In *Ex parte Van Hagan*, 25 Ohio St. 426 (1874), for example, a habeas petitioner argued that he had been wrongly sentenced under a repealed version of a criminal statute. *Id.* at 429. The Court agreed with the petitioner on the merits. *Id.* at 432. As to remedy, however, the Court held that the petitioner's sentence was voidable, not void—making habeas relief unavailable. *Id.* The Court explained: "The punishment inflicted by the sentence, in excess of that prescribed by the law in force, was erroneous and voidable, but not absolutely void." *Id.* at 432. Since *Harper* and *Henderson*, the Court has confirmed that an illegally harsh sentence is not a "void" sentence. In *State ex rel. Romine*, for example, a petitioner argued that he had been sentenced twice for allied offenses of similar import, in violation of statute. 162 Ohio St. 3d 501 ¶¶4, 13. He further

argued that the alleged error made his second sentence "void" and thus subject to collateral attack through a mandamus action. *Id.*, ¶¶4, 11–12. This Court disagreed. It explained that even when a defendant argues that a "court has imposed greater punishment than the legislature authorized," the underlying sentence remains "voidable." *Id.*, ¶16; *see also State ex rel. Crangle*, 162 Ohio St. 3d 488 ¶10; *State ex rel. Slaughter*, 2021-Ohio-4049 ¶10; *Boler*, 2022-Ohio-507 ¶¶4, 9. And the proper path for correcting "voidable" errors is "by way of direct appeal." *State ex rel. Romine*, 162 Ohio St. 3d 501 ¶16.

*

Applying the traditional understanding of what constitutes a "void" sentence, Stansell's sentence is not "void." The trial court had jurisdiction to accept Stansell's guilty plea and sentence him for his crimes. *See* R.C. 2931.03. So Stansell's sentence was, at worst, "voidable." *See Henderson*, 161 Ohio St. 3d 285 ¶26. That means that the sentence could be "set side only if … successfully challenged on direct appeal." *Id.* Stansell raised no issue on direct appeal about his eligibility to be a sexually violent predator. *See Stansell I*, 2000 Ohio App. LEXIS 1726 at *1–2. He cannot do so now, more than two decades too late. Tellingly, outside of alleging that his sentence was "void," Stansell identified no basis for the trial court to exercise continuing jurisdiction over his sentence. *See* Mot. to Vacate (July, 23, 2019). Even if he had, res judicata would bar his untimely attack. *See Harper*, 160 Ohio St. 3d 480 ¶41.

This case's lengthy procedural history illustrates the unworkable nature of an expansive approach to voidness. When courts fail to respect the finality of criminal sentences, they encourage offenders to repeatedly challenge their sentences. Here, despite the fact that Stansell lost on this same exact theory in 2014, *Stansell II*, 2014-Ohio-1633 ¶13, he unabashedly raises the theory again in a different round of proceedings. To be fair, it is hard to blame Stansell for his persistence. Until the Court makes clear that it will consistently respect the finality of sentences, it makes sense for offenders to adopt a never-say-quit approach.

B. Holding Stansell to his guilty plea is in no way unfair or unjust.

This case becomes complicated only if the Court backtracks from *Harper* and its cases since. Some have suggested that it should, including the Eighth District's *en banc* majority. *See* App. Op. ¶10. The main concern is that, since "mistakes happen," some sentencing mistakes will go uncaught and uncorrected on direct appeal. *See Henderson*, 161 Ohio St. 3d 285 ¶47 (O'Connor, C.J., concurring in judgment only). The Court's "void-sentence jurisprudence," the idea continues, should save room for exceptions to finality when "fairness and substantial justice" require. *See id.*, ¶¶48–49.

That approach would conflict with the Court's recent return to a traditional, jurisdiction-based understanding of what constitutes a void sentence. Further, any attempt at a "perfect safeguard against" injustice is destined to prove unmanageable. *Cf. Dretke v. Haley*, 541 U.S. 386, 393–95 (2004). After all, if the possibility of mistake pre-

vents the finality of a judgment, "there can be no escape from a literally endless relitigation of the merits because the possibility of mistake always exists." Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 447 (1963). By cracking open the door for fairness-and-justice exceptions to case finality, this Court would invite defendants to flood lower courts with requests for "ad hoc exceptions" to finality "whenever they perceive an error to be 'clear' or departure from the rules expedient." *Dretke*, 541 U.S. at 394–95. And that would have the "unhappy effect" of disrupting Ohio's criminal process as "each new exception is tested in the courts." *See id.* at 395.

The Court, to be sure, can purport to recognize a narrow exception. But narrow exceptions without principled limits soon become broad exceptions. *See Trevino v. Thaler*, 569 U.S. 413, 434 (2013) (Scalia, J., dissenting). Stansell's request illustrates the point. On the surface, he asks for a finality exception in cases involving illegally harsh sentences. But, implicitly, he wants more than that: in his view, an illegally harsh sentence includes *legal* sentences that derive from flawed guilty pleas. He then adds yet another wrinkle: to argue that a guilty plea is flawed, a defendant can rely on legal developments (like the *Smith* decision here) that occur after the plea was entered. All of that adds up to a sizeable exception to case finality. And that exception does not account for the other scenarios that defendants will perceive as similarly deserving of exceptions.

In any event, even if the Court is open to recognizing a fairness-and-justice exception to case finality, this is not the right case for at least two reasons.

First, the nature of Stansell's plea agreement eliminates any concern about an unfair or unjust result. As part of his plea agreement, Stansell pleaded guilty to rape with a sexually-violent-predator specification. And he agreed to serve five years to life for that crime and twenty years to life in total. *Stansell I*, 2000 Ohio App. LEXIS 1726 at *3–5 (count six). He received quite a bit in exchange. The State dropped thirty of the thirty-eight charges Stansell faced. Perhaps most important, the State dropped all five counts of *forcible* rape. *See id.* at *3. If Stansell had been convicted of even a single count of that crime, he would have faced life in prison without parole eligibility for 10 years. *See above* 5. And he would have faced a much longer sentence if he had gone to trial and lost on the many charges he faced. Imagine, more precisely, that the State dismissed its allegation that Stansell was a sexually violent predator, but then successfully prosecuted Stansell on the remaining charges, including five counts of forcible rape of a child under the age of thirteen. *See Stansell I*, 2000 Ohio App. LEXIS 1726 at *2–3. Under that scenario, Stansell would have faced the same maximum sentence (life) and presumably a much longer minimum sentence. *See Schrock v. Ohio Adult Parole Auth.*, 10th Dist. No. 05AP-82, 2005-Ohio-3938 ¶11 (affirming a 220-year aggregate minimum prison term for "22 terms of life imprisonment for … rape convictions"). In sum, Stansell has already benefitted from the deal he struck; he should not receive a windfall now.

Second, it was far from clear at the time of Stansell's plea agreement that he was ineligible to be a sexually violent predator. Stansell pleaded guilty in 1997. That was years before this Court decided that a defendant needed a prior conviction to qualify as a sexually violent predator. *See Smith*, 104 Ohio St. 3d 106. And that legal issue proved difficult. Reasonable jurists across Ohio disagreed about what the statutory language required; and it took a 4–3 decision from this Court to resolve that disagreement. *Id.*

None of this, of course, is to suggest that Ohio's plea-bargaining system has no room for improvement. But in this case the trial court was "amenable to accepting" the parties' sentencing proposal. *See* Justice Michael P. Donnelly, *Sentencing by Ambush: An Insider's Perspective on Plea Bargaining Reform*, 54 Akron L. Rev. 223, 224 (2020). Stansell thus received the anticipated benefit of the deal he struck—he was not "ambush[ed]" with a sentence he was not expecting. *See id.* Further, Stansell does not suggest that he consciously entered a "fictional plea[]" to a crime he did not commit. *See* Justice Michael P. Donnelly, *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*, 17 Ohio St. J. Crim. L. 423, 423 (2020). He instead made a reasonable decision to plead guilty to a crime based on the legal landscape as it stood in 1997. In sum, this case presents no injustice that legal doctrine must be reworked to address.

II. Stansell's contrary arguments are unpersuasive.

Stansell makes no serious attempt to argue that his sentence is "void" within the traditional meaning of the term. Indeed, despite his arguments below, Stansell noticeably avoids the word "void" in stating his position now. Stansell nonetheless offers his own rule for when "basic justice" requires a sentence be set aside even after the time for appeal has passed. Stansell Br. 2. Stansell suggests that this Court create a defendants-only exception that declares a sentence subject to attack at any time when the "sentence … exceeds the statutory maximum." Stansell Br. 4. It bears repeating that the question Stansell presents to the Court does not match the facts of his case. This is *not* a case where "the trial court imposed a sentence" that exceeded the statutory range "for the particular offenses for which the defendant had been found guilty." *Contra* Stansell Br. 5–6. Stansell pleaded guilty to being a sexually violent predator, and the sentence for that classification included a life-tail. *See above* 5–6. Stansell is not challenging the legality of the sentence, but rather the legality of his guilty plea. Regardless, Stansell's proposed exception to traditional void-sentence principles does not withstand scrutiny.

A. Stansell proposed rule would contradict this Court's recent void-sentence cases.

Stansell suggests that his proposal can be squared with this Court's recent decisions, Stansell Br. 4–7, but that is simply not so. The Court has said, quite explicitly, that when a sentence imposes "greater punishment than the legislature authorized," the sentence is "voidable," not void. *State ex rel. Romine*, 162 Ohio St. 3d 501 ¶16; *accord*

State ex rel. Crangle, 162 Ohio St. 3d 488 ¶10; *State ex rel. Slaughter*, 2021-Ohio-4049 ¶10. Stansell fails to grapple with recent decisions like *State ex rel. Romine*, *State ex rel. Crangle*, and *State ex rel. Slaughter*.

Even setting those cases aside, Stansell's rule flatly contradicts the reasoning of *Harper*, *Hudson*, and *Henderson*. Those cases, to be sure, involved different fact patterns and different allegations of error. But in describing what a "void" judgment is, those cases "make it clear" that "[a] sentence is void *only* if the sentencing court lacks jurisdiction over the subject matter of the case or personal jurisdiction over the accused." *Henderson*, 161 Ohio St. 3d 285 ¶27 (emphasis added). Only means only. Stansell's attempt to add other void-sentence scenarios cannot be reconciled with those cases.

B. Stansell's constitutional assertions do not matter to the void-sentence analysis; and, regardless, they are wrong.

Stansell next makes a series of undeveloped—and long-ago forfeited—assertions under the United States Constitution. He suggests that a sentence in excess of the statutory maximum (1) violates due process under the Fifth and Fourteenth Amendments, (2) constitutes an unreasonable seizure under the Fourth Amendment, and (3) amounts to cruel and unusual punishment under the Eighth Amendment. *See* Stansell Br. 7–9. (Stansell also cites to comparable provisions within the Ohio Constitution. Stansell Br. 7. But he develops no argument for greater protection under the Ohio Constitution, meaning any such issue is not properly before the Court. *See Stolz v. J & B Steel Erectors*, 155 Ohio St. 3d 567, 2018-Ohio-5088 ¶29 (Fischer, J., concurring).)

Stansell's constitutional arguments fail on multiple levels. Initially, whatever the underlying merits of Stansell's assertions, Stansell failed to raise these constitutional arguments in a timely fashion. These arguments, in other words, do nothing to carve out an exception to case finality. As this Court has long recognized, neither a constitutional violation (even one affecting due process) nor an illegally harsh punishment is enough to make a sentence "void." *Tari v. State*, 117 Ohio St. 481, 494–97 (1927); *Ex parte Van Hagan*, 25 Ohio St. at 432. In suggesting a different rule, Stansell cites to *Michel v. Louisiana*, 350 U.S. 91 (1955), but the case offers him no help. *Michel* stands for the unremarkable point that, to comport with due process, state procedural rules must give a defendant "a reasonable opportunity" to raise any "claim to federal rights." *Id.* at 93 (quotations omitted). The *Michel* Court found it "beyond question," however, that States "may attach reasonable time limitations" so as to "require prompt assertion" of any relevant issue. *Id.* at 97. Thus, Stansell's right to due process does not give him the right to challenge his sentence at any time he chooses.

In any event, Stansell's constitutional theories lack merit. Start with due process. As a matter of procedural due process, Ohio's criminal system gives "all defendants … the opportunity to challenge the legality of their conviction[s]." *See* App. Op. ¶25 (Gallagher, J., concurring). And, to the extent any concern of substantive due process remains, it is well settled that "mere error[s] of state law," even errors at sentencing, do not equate to a "denial of due process." *Gryger v. Burke*, 334 U.S. 728, 731 (1948); *accord*

Swarthout v. Cooke, 562 U.S. 216, 221–22 (2011). The Fourth Amendment is similarly irrelevant here: its protections prevent unreasonable seizure during a person's "pretrial detention." *Manuel v. City of Joliet*, 137 S. Ct. 911, 914 (2017). It is the Eighth Amendment that prevents excesses in the *punishment* a person receives after being found guilty of a crime. *See Whitley v. Albers*, 475 U.S. 312, 327 (1986); *Porro v. Barnes*, 624 F.3d 1322, 1325–26 (10th Cir. 2010) (Gorsuch, J.).

It follows from that last statement that the Eighth Amendment deserves slightly more discussion. It prohibits "cruel and unusual punishment." U.S. Const. amend. VIII. And it is true that, over the years, some courts have assumed that a sentence "exceed[ing] the statutory maximum" violates that prohibition. *Ralph v. Blackburn*, 590 F.2d 1335, 1337 (5th Cir. 1979). That, however, is an oversimplification under current doctrine. Relevant here, the key constitutional question is "not whether the state sentencer committed state-law error"; the question is instead whether the sentence amounted to "an independent … Eighth Amendment violation." *Richmond v. Lewis*, 506 U.S. 40, 50 (1992) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). And, in the context of non-death sentences, "the Eighth Amendment encompasses, at most, only a narrow proportionality principle." *United States v. Suarez*, 893 F.3d 1330, 1335–36 (11th Cir. 2018) (quotations omitted); *see also State v. Anderson*, 151 Ohio St. 3d 212, 2017-Ohio-5656 ¶¶27–28. That principle "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Graham v. Florida*, 560 U.S. 48, 60 (2010) (quotations omitted). Stansell's single

sentence addressing cruel and unusual punishment makes no attempt to engage with that framework. *See* Stansell Br. 7. Regardless, a total sentence of twenty years to life for rape offenses committed against children would no doubt survive such an analysis. *See, e.g.*, *Ewing v. California*, 538 U.S. 11 (2003); *Harmelin v. Michigan*, 501 U.S. 957 (1991).

On top of his constitutional assertions, Stansell says that "[r]es judicata must bow to these constitutional considerations." Stansell Br. 8. That is wrong. For one thing, because Stansell's just-discussed arguments all lack merit, there is no constitutional problem in the first place. For another, "[b]ecause of the important public and private interests served by the doctrine of *res judicata*, courts should be slow to broaden the few existing exceptions lest they abrogate the rule." *Nat'l Amusements v. City of Springdale*, 53 Ohio St. 3d 60, 63 (1990) (citation omitted). Take, for example, federal habeas review, which is one of the "few existing exceptions" to res judicata. *Id.*; *accord Sanders v. United States*, 373 U.S. 1, 8 (1963). A federal court's power to conduct habeas review is grounded in federal statutes. Those statutes, while abrogating case-finality principles to some degree, set strict limits on federal review. *E.g.*, 28 U.S.C. §2254(d). Stansell's proposed exception to res judicata lacks a comparable foundation or stopping point.

Two further points deserve mention. *First*, in making constitutional assertions, Stansell never confronts the fact that he agreed to his sentence as part of a plea bargain. That is a glaring omission because the United States Supreme Court has "accepted as constitutionally legitimate the simple reality that," through the "give-and-take of plea

bargaining," many defendants will inevitably choose to "forgo" the exercise of certain constitutional rights. *Bordenkircher v. Hayes*, 434 U.S. 357, 363–64 (1978) (quotations omitted). Given that reality, it would be quite confusing to say that an agreed-to sentence—entered through a voluntary plea agreement—amounts to unconstitutionally cruel punishment. *Cf. People v. Buttram*, 30 Cal. 4th 773, 776 (2003).

Second, Stansell's various fairness-and-justice arguments ignore how the Ohio Constitution divides power in this area. The Constitution empowers the Governor to commute sentences when he or she thinks it proper. Ohio Const., Art. III, §11. Thus, if normal judicial remedies fail, the Constitution leaves it to the executive branch to decide when broader considerations of fairness and justice should override the finality of a criminal sentence. Because the Constitution already provides a means to correct perceived injustices, this Court should not manufacture a different one.

C. Stansell fails to identify a viable path for belatedly challenging his sentence.

Stansell goes on to argue that the trial court could have modified his sentence through a writ of habeas corpus or by granting relief from judgment under Civil Rule 60. Stansell Br. 9–10. He did not raise these options below, *see above* 7–8, so he has forfeited the opportunity to raise them now, *State v. Wintermeyer*, 158 Ohio St. 3d 513, 2019-Ohio-5156 ¶10. Regardless, neither of these options is a viable path for Stansell to belatedly challenge the legality of his sentence.

Consider first the writ of habeas corpus. That writ is a means by which people may "inquire into the cause of [their] imprisonment," to ensure that there is no "unlawful[] restraint." R.C. 2725.01. This Court, however, has repeatedly held that the writ of habeas corpus is not a means of raising issues that parties could have raised through direct appeal. *Robinson v. Larose*, 147 Ohio St. 3d 473, 2016-Ohio-7647 ¶8; *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980 ¶8; *Douglas v. Money*, 85 Ohio St. 3d 348, 349 (1999). In other words, "it is an abuse of the writ of habeas corpus" to use the writ "as a short and summary mode of reviewing … and annulling the sentences of courts." *Ex parte Shaw*, 7 Ohio St. at 83. That is so even when petitioners contend that their sentences are illegally harsh. *See, e.g.*, *State ex rel. Slaughter*, 2021-Ohio-4049 ¶10; *Ex parte Van Hagan*, 25 Ohio St. at 432.

Stansell's appeal to Ohio's procedural rules fares no better. As a jumping-off point, he cites Criminal Rule 57, which says: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." Crim.R. 57(B). The ability to "look to the rules of civil procedure," the argument continues, means that the trial court could have modified Stansell's sentence under Civil Rule 60(B). Stansell Br. 9. That rule allows a trial court to grant relief from a civil judgment for "any … reason justifying relief from judgment." Civ.R. 60(B)(5).

Using Civil Rule 60 to modify a criminal sentence would violate Criminal Rule 57 in at least two ways. *First*, the modification of the sentence would not be "lawful." *See* Crim.R. 57(B). Under Ohio law, a petition for postconviction relief "is the *exclusive remedy* by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case." R.C. 2953.21(K) (emphasis added); *accord State v. Parker*, 157 Ohio St. 3d 460, 2019-Ohio-3848 ¶33 (plurality op.). *Second*, using Civil Rule 60 to modify a sentence would be "inconsistent with the[] rules of criminal procedure." *See* Crim.R. 57(B). Ohio's Rules of Criminal Procedure already outline a defendant's options for seeking relief from a criminal judgment. *See* Crim.R. 32–36. Perhaps most notably, Criminal Rule 36 provides the situations in which a trial court may correct a judgment "at any time," and those situations do not include a power to correct judgments for "any … reason." *Compare* Crim.R. 36; *with* Civ.R. 60(B)(5). By way of comparison, the criminal rules of some jurisdictions grant trial courts more latitude to correct illegal sentences at any time. *See State v. Fischer*, 128 Ohio St. 3d 92, 2010-Ohio-6238 ¶24. But Ohio's statutes and procedural rules do not include an illegal-sentence doctrine. *Id.*, ¶51 (Lazinger, J., dissenting); *accord* R.C. 2953.08 & 2953.21–.23; Crim.R. 35–36.

Ohio's procedural rules do, however, include timing exceptions that will fit at least some scenarios. To be more precise, the standard way to correct a sentencing error is by appealing within thirty days of the judgment. S*ee* App.R. 4(A). But Ohio's appellate rules allow defendants who do not initially appeal to move for leave to file delayed

appeals. App.R. 5(A). And defendants that do appeal, but whose counsel are deficient on appeal, have another option. They can, upon a showing of "good cause" for any delay, move to reopen their appeals so that they may argue ineffective assistance of appellate counsel. App.R. 26(B). Ohio's criminal rules further allow trial courts to correct clerical mistakes "at any time." Crim.R. 36. Thus, if a trial court properly states an offender's punishment at sentencing but then memorializes too harsh of a sentence in its judgment entry, then there is no time limit for correction. *See State v. Qualls*, 131 Ohio St. 3d 499, 2012-Ohio-1111 ¶¶13–15.

These exceptions are narrow. But even assuming more exceptions are desirable, there are proper avenues for reform. The General Assembly, for its part, has the ability to "provide[] by law" the scope of trial courts' jurisdiction. Ohio Const., Art. IV, §4. And this Court, for its part, has the power to set procedural rules governing the exercise of that jurisdiction. Ohio Const., Art. IV, §5(B). A specific process governs the Court's exercise of that rulemaking power. See *id.* The point being that, if a gap in judicial authority exists, and if that gap is worthy of being filled, rulemaking via judicial opinion is still unnecessary. A few years ago, the Illinois Supreme Court faced a similar decision about whether, and how, to clean up its void-sentence jurisprudence. That court declined to hastily amend Illinois' procedural rules without "a full exploration of the issues associated with any amendment." *People v. Castleberry*, 398 Ill. Dec. 22, 31 (Ill.

2015). If the Court has lingering concerns about case finality, it should travel a similar course.

D. Stansell's proposed rule lacks neutrality.

For all of the above reasons, Stansell fails to justify his rule altogether. But even assuming otherwise, he certainly fails to justify a *defendants-only* exception to case finality. As already discussed, this Court's recent decisions recognize that the traditional understanding of voidness is neutral. *See, e.g.*, *Harper*, 160 Ohio St. 3d 480 ¶43; *Hudson*, 161 Ohio St. 3d 166 ¶18; *Henderson*, 161 Ohio St. 3d 285 ¶44. In other words, under the traditional understanding of voidness, finality principles apply "equally to the state and the defendant." *Id.*, ¶91 (Donnelly, J., concurring).

Applying finality rules equally to all sides makes good sense. As this Court has often said, the General Assembly "is the ultimate arbiter of public policy" in Ohio. *Gabbard v. Madison Local Sch. Dist. Bd. of Educ.*, — Ohio St. 3d —, 2021-Ohio-2067 ¶39 (quotations omitted). The General Assembly, in exercising its policymaking role, decides for the State the "punishment for crimes" that justice demands. *State v. Rush*, 83 Ohio St. 3d 53, 57 (1998) (quotations omitted). It stands to reason that an out-of-range sentence contradicts Ohio's notion of justice *regardless* of whether it is above range or below range. To be clear, this brief argues that, absent a jurisdictional problem, a sentence is final after the time for appeal has run. But, if non-jurisdictional exceptions to finality do exist, they must cut both ways.

Criminal defendants, moreover, are not the only people whose rights are at stake during sentencing. *Contra* Stansell Br. 8. Crime victims also have rights that, under Ohio's Constitution, are to "be protected in a manner *no less vigorous* than the rights afforded to the accused." Ohio Const. Art. I, §10a (emphasis added). Those rights include the right "to be treated with fairness," the right "to proceedings free from unreasonable delay," and the right to "a prompt conclusion of the case." *Id.* That makes any asymmetry a problem, likely a problem of constitutional dimension. In Judge Gallagher's words, "[t]o suspend the rule of finality for defendants, to the exclusion of victims of the crimes, seems to provide a class of persons an advantage not available to all." App. Op. ¶28 (Gallagher, J., concurring). Or, phrased in constitutional terms, accepting Stansell's one-side rule means applying finality principles "less vigorous[ly]" to defendants than to crime victims. *See* Ohio Const. Art. I, §10a. That is a sure sign that Stansell's proposed rule strays off course.

CONCLUSION

For the above reasons, the Court should affirm.

Respectfully submitted,

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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 3rd day of March, 2022, by e-mail on the following:

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