IN THE SUPREME COURT OF OHIO
2024

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

Case No. 2024-0164
Regular Calendar

DAVID THOMPSON ,

Defendant-Appellant.

ON APPEAL FROM THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

BRIEF OF PLAINTIFF-APPELLEE

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INTRODUCTION

This case involves a challenge to a "split" prison/community-control sentence imposed in 2010. The trial court impose an aggregate prison term on 18 counts to be followed by a term of community control on two other counts. After being granted judicial release from his prison sentence, Defendant violated the terms of his release and was revoked. During the revocation proceedings, Defendant began challenging his consecutive community control sentence.

In his latest attempt to vacate his consecutive community control sentence, Defendant asks this Court to augment the language of R.C. 2929.20 and R.C. 2929.15 to create a single comprehensive community control scheme that ultimately requires a post-conviction "merger" of unrelated sentences. There is no authority and no rule of statutory construction that would support Defendant's interpretation of these statutes. The plain language of R.C. 2929.20 and R.C. 2929.15 shows that these are distinct statues with separate term limitations that apply to different types of sentences.

Ultimately, Defendant's complaint is that his 2010 consecutive community control sentence violates *State v. Hitchcock*, 2019-Ohio-3246. However, it is now well settled that such sentencing errors must be raised on appeal. *State v. Harper*, 2020-Ohio-2913, *State v. Henderson*, 2020-Ohio-4784. Defendant did not challenge the consecutive community control sentence in his direct appeal, and indeed he benefited from that sentence as he avoided significant additional prison time on the underlying felony counts. Over the past four years, the Tenth District Court of Appeals has repeatedly rejected Defendant's attempts to vacate that consecutive community control sentence. Res judicata bars further litigation of his claim.

Now that "split" sentences are expressly prohibited by *Hitchcock*, this case is an appropriate candidate for a dismissal as improvidently granted given the complex and convoluted procedural history and as these facts are unlikely to ever be repeated.

STATEMENT OF CASE AND FACTS

From 1998 to 2007, Defendant, acting as pastor of the World of Pentecost Church, defrauded the congregation, drained church accounts for his personal benefit, and left the church in substantial debt. (R. 1; Tr. Vol. I, 139, 141-144, 212-224, 270, 321, 361, 439; Supp. Tr. 59; State's L) Defendant exceeded his authority in the church by selling church property, securing debt in the name of the church, and spending donations earmarked for other purposes on personal luxury items. (Tr. Vol. I, 115, 120; Vol. II, 262, 268, 304, 442, 353, 410, 492; Supp. Tr. 14, 93-94, 102) By altering church records and reports, Defendant concealed his fraud over a significant period of time. (Tr. Vol. I, 120, 129: State's L; Vol. II, 367; Vol. IV, 824, 842; State's K)

Defendant admitted that he used church money to fund a lavish lifestyle, building an in-ground pool at his home, paying his personal credit card bills, paying tuition at private schools for his three children, and purchasing luxury cars for his family. (Tr. Vol. I, 163-164; 432, 476; Vol. IV, 920; Vol. V. 808, 776-777, 922, 637-639, 657, 880, 924, 946) Defendant also admitted that he spent all the money and left nothing for the church. (Vol. II, 368; Vol. IV, 947)

After trial in 2010, Defendant was convicted for 22 felonies including: engaging in a pattern of corrupt activity, a first-degree felony (Count 1); theft, a second-degree felony (Count 3); three counts of tampering with records, all third-degree felonies (Counts 4 through 6); nine counts of money laundering, all third-degree felonies (Counts 7 through 15); forgery, a third degree felony (Count 16); and seven counts of filing false/fraudulent tax returns, all fifth-degree felonies (Counts 17 through 23). (Judgment at R. 187)

On December 1, 2010, the trial court imposed an aggregate five-year prison sentence as to Counts 4 - 23. (Judgement at R. 187; Dec. 1, 2010 Tr. at 64-65) The court imposed a consecutive term of community control on Counts 1 and 3, reserving an aggregate six-year prison on those counts. (12/1/2010 Tr. at 64) The court made consecutive-sentence findings on the record and

stated that it wanted to impose a "split" sentence, requiring Defendant to first serve the prison sentence followed by a term of community control supervision. (*Id*. at 66-67, 69) Defendant did not object to that sentence. (*Id*.)

Defendant was ordered to pay $733,048.86 in restitution to the victim church. (R. 187)

Defendant has litigated four appeals in the Tenth District Court of Appeals. For ease of reference, the appeals are summarized as follows. A discussion of each appeal in context with Defendant's simultaneous trial court litigation follows.

Case Reference	Summary of Appellate Litigation
Thompson I 2011-Ohio-5169 (Oct. 6, 2011)	Defendant's direct appeal challenging the restitution order and evidence supporting his theft conviction. The Tenth District affirmed the theft conviction but remanded the case due to error in calculation of restitution.
Thompson II 2020-Ohio-6756 (Dec. 17, 2020)	Defendant's appeal from the Entry restoring him to judicial release supervision as to Counts 4 - 23. Defendant argued his consecutive community control sentence on Counts 1 and 3 was void under *Hitchcock.* Following *Harper* and *Henderson*, the Tenth District found his argument was barred.
Thompson III 2021-Ohio-4491 (Dec. 21, 2021)	Defendant's appeal challenging the trial court's decision granting Defendant's motion to vacate the consecutive community control sentence on Counts 1 and 3 as void under *Hitchcock* and imposing prison for those counts. Highlighting the difference between judicial release and community control, the Tenth District found that Defendant had not yet served his consecutive community control sentence on Counts 1 and 3. The judgment was reversed as the trial court lacked jurisdiction to consider Defendant's motion during the pendency of *Thompson II*.
Thompson IV 2023-Ohio-4805 (Dec. 28, 2023)	Defendant's appeal from the 2022 Judgment enforcing his prison sentence on Counts 4 - 23. Defendant argued that he could not begin a new term of community control after the expiration of judicial release on Counts 4 - 23. The appellate court rejected that argument, remanding only for the trial court to issue a nunc pro tunc entry correcting clerical errors in the judgment.

2011 – Direct Appeal

On December 20, 2010, Defendant filed a direct appeal challenging the restitution order and the evidence underlying his theft conviction. (R. 212) Defendant did not challenge his

sentence. The Tenth District Court of Appeals affirmed his conviction and, finding error only as to the calculation of restitution, the case was remanded for the trial court to correct the restitution order. *State v. Thompson*, 2011-Ohio-5169, ¶ 41 (10th Dist.) (*Thompson I*).

Following the appellate remand, the court issued a corrected entry on January 28, 2014, ordering Defendant to pay $625,727.86 to the victim church. (R. 245)

2015 – Defendant granted judicial release from the prison sentence on Counts 4 - 23

On January 16, 2015, Defendant was granted judicial release after serving almost four years of his aggregate five-year prison sentence for his convictions in Counts 4 - 23. (R. 270) Defendant was required to comply with the conditions of his release, which included obtaining and maintaining verifiable employment and making payments toward restitution. (*Id*.) Six months later, at an administrative hearing on June 26, 2015, the trial court addressed Defendant's minimal efforts to pay restitution. (6/26/15 Tr. 4-5)

On March 13, 2019, Defendant's probation officer filed a statement of violations noting Defendant's failure "to make appropriate payments toward restitution." (R. 283) A hearing was held on April 26, 2019, where Defendant stipulated to probable cause and admitted the violations. (4/26/19 Hrg. Tr. 3)

At that hearing, counsel for Defendant advised the court that he believed the "split" sentence imposed in 2010 was contrary to law. (4/26/19 Hrg. Tr. at 8) However, counsel stated "we are not trying to undo anything. I'm not trying to undo the sentencing in this case . . . . " (*Id*.) Nevertheless, Counsel argued that, because Defendant had done well on judicial release, his entire sentence should be terminated. (*Id*. at 10)

The court addressed Defendant's minimal effort to pay restitution while on judicial release. (*Id*. at 14) The court found that Defendant was required to provide pay stubs to document his

income and he never complied with that condition. (*Id*.) The court found that Defendant only self-reported his income – in cash – at $300 a week. (*Id*.) The court noted that Defendant had funds to pay for a wedding and an out-of-state honeymoon. (*Id*.) The court also noted its concern that Defendant had spare time to volunteer rather than getting a second job to increase his restitution payments. (*Id*.) By Entry, filed on May 2, 2019, the court continued Defendant on judicial release supervision on Counts 4 - 23. (R. 285)

2019 – Second appeal: void-sentence claim as to the consecutive community control sentence

On May 31, 2019, Defendant appealed the trial court's entry restoring judicial release supervision on Counts 4 - 23. (R. 292) Defendant sought to directly challenge his 2010 sentence, arguing that the consecutive community control sentence on Counts 1 and 3 was void under *Hitchcock*. *State v. Thompson*, 2020-Ohio-6756, ¶¶ 9-10 (10th Dist.) (*Thompson II*). On December 17, 2020, following *Harper* and *Henderson*, the Tenth District rejected his argument. *Id*. at ¶ 11. The Tenth District found the trial court had jurisdiction over the case and over Defendant, and because Defendant failed to raise his sentencing claim in his direct appeal, res judicata barred his sentencing claim because he "could have, but did not, raise an argument regarding his sentence to a consecutive term of community control in his direct appeal." *Id*. at ¶ 13.

2019 – 2020: Trial court litigation during the pendency of Thompson II

On October 23, 2019, while still on judicial release for Counts 4 - 23 and during the pendency of his second appeal, Defendant filed a motion to terminate judicial release supervision. (Motion at R. 304). Defendant argued, as he did in *Thompson II*, that his consecutive community control sentence on Counts 1 and 3 violated *Hitchcock* and that the remedy was to void that sentence. (*Id*. at pg. 1) Defendant's suggested remedy was to terminate all of his remaining sentences, resulting in no sentence on Counts 1 and 3. (*Id*.)

Before ruling on that motion, the court addressed Defendant's additional probation violations and conducted a hearing to determine whether Defendant made make bona fide efforts to pay restitution. (Statement of violations at R. 305; 1/23/2020 Hrg. Tr. at 8-9) At that hearing, Defendant testified about his educational background and reported that he worked for his friend Bishop Posey or his church, Living Faith Apostolic Church, and a company owned by the Posey's Church, MiraCit Development Company. (*Id*. at 8-9, 14-17) Defendant testified that he was paid in cash and that he never received W2s or paystubs. (*Id*. at 15, 21, 30) Defendant acknowledged to having funds to pay for out-of-state trips. (*Id*. at 38-39) Defendant admitted that he did not ask anyone for help in finding a job, and he admitted that he "could have put forth better effort" to find other (or better paying) employment. (*Id*. at 20, 58)

On March 19, 2020, the trial court revoked judicial release supervision as to Counts 4 - 23. (Entry at R. 318) In the revocation entry, the court noted that Defendant stipulated to probable cause and that Defendant was in violation of the conditions of his supervision. (*Id*.; Entry at pg. 2) The court found that Defendant never provided any documentation to his probation officer regarding his attempts to find employment. (*Id*.) Based on documentation collected by the probation department and evidence at the hearing, the court concluded that Defendant had been underemployed and that he "willfully or intentionally failed to pay restitution by not making a bona fide effort." (*Id*. at 6) The case was set out for sentencing following revocation.

The sentencing revocation hearing was held on June 25, 2020, where the trial court addressed Defendant's October 23, 2019, motion to vacate his consecutive community control sentence on Counts 1 and 3. (6/25/20 Tr. at 2, 6) As in his then-pending appeal (*Thompson II*), Defendant argued the consecutive sentence was void, and he requested that his entire remaining sentence be terminated. (*Id*.) The trial court agreed with Defendant that the original "split" sentence

was void based on *Hitchcock*. (*Id*. at pg. 17) However, the court disagreed with Defendant's suggested remedy - that he serve no sentence on Counts 1 and 3. Instead, the court ordered that Defendant serve the originally-reserved six-year prison term on Counts 1 and 3. (*Id*. at 15-16)

On July 22, 2020, that sentence was stayed as Defendant again appealed. (R. 347)

2020 – 2021: Defendant's third appeal

On July 13, 2020, Defendant filed his third appeal arguing that the trial court lacked jurisdiction to impose a prison sentence on Counts 1 and 3. (R. 431) Addressing the confusion in the June 25, 2020, revocation proceedings regarding whether Defendant served his consecutive community control sentence on Counts 1 and 3 concurrently with judicial release for Counts 4 - 23, the appellate court found that "when the court granted appellant judicial release in 2015 it could only release appellant from the non-mandatory prison term he was serving on Counts 4 through 23." *State v. Thompson*, 2021-Ohio-4491, ¶ 26 (10th Dist.) (*Thompson III*). The court distinguished judicial release from community control, *id*. at ¶¶ 27-30, and concluded that because Defendant's sentence on Counts 1 and 3 was consecutive to his prison term on Counts 4 - 23, the consecutive sentence on Counts 1 and 3 could not begin to run until he completed the sentence on Counts 4 - 23. *Id*. at ¶ 31 (internal citation references omitted).

Finding that the trial court lacked jurisdiction to void Defendant's sentences on Counts 1 and 3 during the pendency of *Thompson II*, the appellate court reversed and remanded the case for further proceedings. The Tenth District noted that "[b]ecause the trial court originally sentenced Appellant to serve Counts 1 and 3 consecutive to Counts 4 through 23, when appellant completes the approximate 11-month prison term remaining on Counts 4 through 23, his 5-year term of community control on Counts 1 and 3 will begin." *Thompson III* at ¶ 34.

2022 – Remand proceedings

Following the remand order in *Thompson III*, the trial court held a sentence enforcement hearing on March 25, 2022. At that hearing, Defendant again sought to vacate the consecutive community control sentence on Counts 1 and 3, this time raising equitable grounds. (3/25/22 Tr. at 4-6) Defendant wanted to avoid the remaining prison term on Counts 4 - 23 following revocation from judicial release supervision on those counts and he wanted to avoid the unserved consecutive community control sentence on Counts 1 and 3. (*Id*. at 6) Defendant argued that the court had discretion to simply terminate all of his remaining sentence. (*Id*. at 7)

Having previously revoked judicial release on Counts 4 - 23, the court ordered that Defendant serve his remaining prison term on those counts. (*Id*. at 27-28) The court noted that the original sentence of community control on Counts 1 and 3 would be served after completion of that prison sentence. (*Id*.) On May 6, 2022, the trial court issued its remand entry reflecting the revocation of judicial release and the original consecutive community sentence on Counts 1 and 3. (Entry at R. 368) Defendant's sentence was again stayed pending appeal. (R. 399)

2022 – Fourth appeal

On June 3, 2022, Defendant filed a notice of appeal to challenge the trial court's May 6, 2022 Entry. (R. 396) Defendant sought to litigate several issues that had been addressed in prior appeals, including claims that he should not have been revoked from judicial release, that the consecutive community control sentence was void, and that he served the community control sentence on Counts 1 and 3 while on judicial release for Counts 4 - 23. *State v. Thompson*, 2023-Ohio-4805, ¶ 21 (10th Dist.) (*Thompson IV*). The Tenth District rejected Defendant's arguments finding that because of the remand order in *Thompson III* "the trial court did not have discretion to consider whether to revoke Appellant's judicial release community control, whether to reimpose

the prison sentence on Counts 4 through 23, or to otherwise reconsider appellant's sentence on Counts 1 and 3." *Thompson IV* at ¶ 29.

As to Defendant's claim equating judicial release supervision with a community control sentence, the Tenth District again found that "when the trial court granted appellant judicial release, it could only release him from the prison sentence he was serving on Counts 4 through 23. During his term of judicial release, appellate was 'still effectively serving his sentence on Counts 4 through 23.' " *Thompson IV* at ¶ 32, quoting *Thompson III* at ¶ 30. The appellate court reiterated that "appellant's sentence on Counts 1 and 3 could not begin until appellant completed his sentence on Counts 4 through 23 . . . ." *Id*., quoting *Thompson III* at ¶ 31.

Reviewing R.C. 2929.15 and R.C. 2929.20, the Tenth District rejected Defendant's claim equating judicial release supervision on Counts 4 - 23 with his community control sentence on Counts 1 and 3, noting that "[c]ourts have consistently found that R.C. 2929.15 and R.C. 2929.20 are independent statutes and serve different purposes." *Thompson IV* at ¶ 36, quoting *State v. Justice*, 2013-Ohio-2049, ¶ 11 (4th Dist.) (additional reference omitted). The court further found that, "[t]here is no language in either statute indicating that the General Assembly intended for R.C. 2929.15 and 2929.20 to impose a collective five-year limitation on both a sentence of community control and a term of community control imposed pursuant to judicial release." *Thompson IV* at ¶ 38 (reference omitted). Finally, the appellate court found, again, that res judicata barred Defendant's challenge to his consecutive community control sentence on Counts 1 and 3. *Id*. at ¶ 40, citing *Thompson II*, 2020-Ohio-6756, ¶ 13 (10th Dist.).

The Tenth District affirmed the trial court's judgment but issued a limited remand for the trial court to correct clerical errors in the May 6, 2022 Entry. *Thompson IV* at ¶ 50.

Defendant's sentence remains stayed pending this appeal.

ARGUMENT

RESPONSE TO PROPOSITION OF LAW

RES JUDICATA BARS LITIGATION OF SENTENCING CLAIMS NOT RAISED ON APPEAL (FOLLOWING *HARPER* AND *HENDERSON*)

WHEN A SPLIT SENTENCE HAS BEEN IMPOSED, JUDICIAL RELEASE ON THE PRISON COUNTS DOES NOT TRANSFORM A CONSECUTIVE COMMUNITY CONTROL SENTENCE INTO A CONCURRENT SENTENCE

Because Defendant ultimately seeks to vacate his community control sentence on Counts 1 and 3, Defendant's argument is barred by res judicata. Defendant cannot avoid that bar by conflating judicial release supervision on Counts 4 - 23 with a direct *consecutive* sentence of community control on Counts 1 and 3. R.C. 2929.20 or R.C. 2929.15 are separate and distinct statutes that apply to different sentences. Defendant's proposition for a comprehensive community control scheme is contradicted by the plain language of those statutes, and there is simply no authority that would allow for the post-conviction "merger" of Defendant's sentences.

I. Res judicata bars sentencing claims not raised on appeal.

It is well settled that an offender is only permitted one direct appeal from a conviction, and claims not raised in a direct appeal are barred by res judicata. "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175, 180 (1967). This Court has repeatedly held that when sentencing error is not raised in a direct appeal, that error is barred by res judicata. *State v. Bates*, 2022-Ohio-475, ¶ 32; *Harper*, 2020-Ohio-2913, ¶ 42; *Henderson*, 2020-Ohio-4784, ¶ 43.

Res judicata applies here because Defendant is asking this Court to vacate the consecutive community control sentence on Counts 1 and 3 that was imposed in 2010. Because Defendant did not challenge that sentence in his direct appeal, his claim is barred. *Thompson II* at ¶ 11 (following *Harper* and *Henderson* and finding res judicata barred Defendant's sentencing claim.); *Thompson IV*, 2023-Ohio-4805, ¶ 40 (10th Dist.).

Res judicata bars Defendant's claim that service of judicial release on Counts 4 - 23 constituted service of his consecutive community control sentence on Counts 1 and 3 because Defendant could have raised this claim when he was granted judicial release in 2015 or in *Thompson II*. Additionally, Defendant could have challenged the Tenth District's decision in *Thompson III*, where court found that there was no authority to support the conclusion that time on judicial release under R.C. 2929.20 must also count as time on a separate consecutive community control sentence. *Thompson III*, 2021-Ohio-4491, ¶¶ 26 – 29 (10th Dist.). Notably, the *Thompson IV* Court relied on its decision in *Thompson III* in disposing of Defendant's claim. *Thompson IV* at ¶ 36, citing *Thompson III* at ¶ 28.

The application of res judicata is appropriate here. Defendant is in the same position as any other party who failed to litigate a sentencing claim on direct appeal. See, *Harper*, 2020-Ohio-2913, ¶ 43 (finding that post-release control could not be corrected after conviction and noting that the parties were on notice that sentencing claims "must be brought on appeal from the judgment of conviction or the sentence will be subject to res judicata."); *Henderson*, 2020-Ohio-4784, ¶ 44 (State could not seek correction of a sentence through a post-conviction motion); *Bates*, 2022-Ohio-475, ¶ 22 (finding that the aggrieved party must challenge the error on appeal to avoid the res judicata bar.). Allowing Defendant to avoid the bar of res judicata at this late date would undermine holdings in *Harper* and *Henderson*.

II. Separate statutory provisions limit the duration of a community control sentence and the duration of judicial release supervision, and those provisions do not "merge" the underlying sentences.

Even if res judicata did not apply, Defendant's argument fails on the merits. By the time the court revoked judicial release supervision on Counts 4 - 23, Defendant reached the maximum period of supervision authorized under R.C. 2929.20(K). Now, because Defendant served the maximum five-year term under judicial release supervision on Counts 4 – 23, he contends that, if he is required to serve the consecutive community control sentence on Counts 1 and 3, he will serve more than the maximum five-year period allowed for "all" community control sanctions under R.C. 2929.15(A). Defendant's interpretation of R.C. 2929.15(A)(1) and R.C. 2929.20 is inconsistent with the plain language of these statutes. As there is no authority to aggregate the separate term limitations under R.C. 2929.15 and R.C. 2929.20, this Court would be required to add language to both statutes to achieve Defendant's proposed comprehensive community control scheme. His argument would also require an unauthorized post-conviction "merger" of unrelated sentences where, as here, an offender was granted judicial release from a prison sentence and also has a separate consecutive community control sentence to serve on other counts.

In examining the plain language of a statute, this Court has articulated the proper standard of review:

> "The primary goal in construing a statute is to ascertain and give effect to the intent of the legislature." *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, 910 N.E.2d 432, ¶ 15. "A court must look to the language and purpose of the statute in order to determine legislative intent." *State v. Cook*, 83 Ohio St.3d 404, 416, 700 N.E.2d 570 (1998). "[W]hen the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written." *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, syllabus.

State v. Miranda, 2014-Ohio-451, ¶ 11. Under this standard, the reviewing court must " 'giv[e] such interpretation as will give effect to every word and clause in a statute,' " treating no part " 'as

superfluous unless that is manifestly required, and * * * avoid[ing] that construction which renders a provision meaningless or inoperative.' " *State v. Smith*, 2022-Ohio-274, ¶ 36, quoting *Boley v. Goodyear Tire & Rubber Co.*, 2010-Ohio-2550, ¶ 21 (additional references and parenthetical omitted).

As the Tenth District properly found, "the plain language of R.C. 2929.15 and R.C. 2929.20 demonstrate that each statute contains a five-year limitation 'but as it pertains to the subject matter of each of the statutory sections.' " *Thompson IV*, 2023-Ohio-4805, ¶ 35 (10th Dist.), quoting *State v. Briggs*, 2014-Ohio-705, ¶ 13 (8th Dist.) (additional references omitted). R.C. 2929.15(A)(1) provides "[t]he duration of all community control sanctions imposed on an offender under this division shall not exceed five years." Defendant seeks to emphasize the term "all" while excising the phrase "imposed on an offender under this division." That language places a five-year limitation only on sentences of community control that are imposed under R.C. 2929.15(A)(1). Indeed, the first sentence of R.C. 2929.15(A)(1) authorizes direct placement community control sanctions as a sentence, stating "the court may *directly impose a sentence* that consists of one or more community control sanctions authorized under R.C. 2929.16, 2929.17, or 2929.18 of the Revised Code." (emphasis added). Given this language, the five-year limitation under R.C. 2929.15(A)(1) could only apply to direct placement community control sentences. *Thompson IV* at ¶ 37, citing *State v. Jenkins*, 2011-Ohio-6294, ¶ 16 (4th Dist.). No other interpretation is consistent with the statutory language.

Furthermore, Defendant's construction of R.C. 2929.15(A)(1) renders the term limitation for judicial release under R.C. 2929.20(K) meaningless. In relevant part, R.C. 2929.20(K) requires that when a court grants judicial release under R.C. 2929.20, the court "shall place the offender under an appropriate community control sanction" and that "the period of community control shall

be no longer than five years." R.C. 2929.20(K). The five-year limitation for judicial release supervision under R.C. 2929.20(K) can only apply to offenses for which the offender was granted judicial release supervision.

Relying on the fact that R.C. 2929.20(K) requires the court to impose community control sanctions for supervision under judicial release, Defendant and the *Thompson IV* dissent suggest that the General Assembly intended these statutes to be construed together into one unified or comprehensive community control scheme. *Thompson IV* at ¶ 55 (dissent). However, if that were true, the language in each statute would reflect that intent. *Thompson IV* at ¶ 38 (finding no language in either statute to authorize the imposition of "a collective five-year limitation" period). Instead, the General Assembly separately defined the maximum periods for sentences of community control under R.C. 2929.15(A) and for judicial release supervision under R.C. 2929.20(K). There is simply no authority to support the conclusion that the imposition of community control sanctions for judicial release supervision transforms the underlying sentence into a community control sentence imposed under R.C. 2929.15(A)(1). *Thompson III*, 2021-Ohio-4491, ¶ 28 (10th Dist.), citing *State v. Terry*, 2011-Ohio-6666, ¶ 9 (10th Dist.); *Thompson IV* at ¶ 37, citing *Jenkins* at ¶ 16.

Defendant's argument for a comprehensive community control scheme would undermine other statutes that require the court to impose community control sanctions. For example, courts are required to impose community control sanctions for judicial supervision under Intervention In Lieu. R.C. 2951.041(D)(1). Like judicial release, the court's authority to supervise intervention treatment is also specifically capped at five years. R.C. 2951.041(D)(3). There is no language under R.C. 2951.041 or R.C. 2929.15 authorizing a collective five-year limit on supervision or evidencing the General Assembly's intent that those statutes must be interpreted together.

Because there is no language authorizing an aggregate limit on community control sanctions under R.C. 2951.041 and R.C. 2929.15(A), when an offender violates the community control sanctions under R.C. 2951.041, the trial court remains free to impose a full five-year sentence of community control sanctions under R.C. 2929.15(A). See, *State v. McCarty*, 2006-Ohio-588, ¶ 13 (6th Dist.). Although the Sixth District reviewed a different claim advocating for a cap on a sentence imposed after revocation under R.C. 2951.041, the appellate court found no statutory authority limiting a sentencing court's discretion to impose sentence. *Id*. "We find nothing in R.C. 2951.041 that limits the length of sentence imposed after TLC has been violated and revoked. The trial court's imposition of sentence is limited only by the statutory penalties permitted for the initial crime committed. Thus, contrary to appellant's suggestion, the trial court did not exceed any statutory sentencing or supervision time limits regarding the initial TLC rehabilitation period." *Id*. at ¶ 13. Ultimately, as separate statutory provisions apply, there can be no restriction on sentencing under R.C. 2929.15 because "R.C. 2951.041(D) does not transform intervention in lieu of conviction into a sentence imposing community control." *Giles v. State*, 2024-Ohio-1012, ¶ 9 (11th Dist.).

Applying Defendant's Proposition of Law to R.C. 2951.041(D) would mean that, when an offender serves a period of community control sanctions under R.C. 2951.041(D) and is later revoked, the court would have no discretion at sentencing. The court could be prohibited from imposing a full term of community control as a sentence under R.C. 2929.15(A). Indeed, under Defendant's approach, depending on how much time the offender served under R.C. 2951.041(D) supervision, the court could be required to impose a prison sentence rather than a sentence of community control to allow continued or other treatment under R.C. 2929.15(A). Such an outcome would be contrary to the plain language of both statues.

Similarly, R.C. 2929.15 and R.C. 2929.20 cannot be read to create one comprehensive community control scheme. A key distinction is that R.C. 2929.20 and R.C. 2929.15 apply to different types of sentences. R.C. 2929.15(A) authorizes direct placement on community control sanctions as a sentence, reserving a specific prison term that may be imposed if the offender violates the court's conditions. *Thompson III*, 2021-Ohio-4491, ¶ 28 (10th Dist.); *State v. Brooks*, 2004-Ohio-4746, ¶ 29. In contrast, R.C. 2929.20 applies only to certain eligible offenders who were previously sentenced to – and who have served some portion of – one or more nonmandatory prison terms. R.C. 2929.20(A); R.C. 2929.20(C); *Thompson III* at ¶ 28 (summarizing the differences between judicial release and a sentence of community control); see also, *Thompson IV*, 2023-Ohio-4805, ¶ 35 (10th Dist.); *State v. Barefield*, 2023-Ohio-115, ¶¶ 23-24 (12th Dist.) (discussing the difference between R.C. 2929.20 and R.C. 2929.15 in the context of determining the appropriate appellate standard of review.). By definition, judicial release cannot apply to a community control sentence imposed under R.C. 2929.15(A)(1). *Thompson III* at ¶ 26 ("R.C. 2929.20 does not permit a court to grant judicial release from a term of community control.").

R.C. 2929.15 and R.C. 2929.20 also have different procedural requirements governing revocation of supervision – a distinction that further reinforces the conclusion that they cannot be construed as imposing one overarching community control scheme. The court has options under R.C. 2929.15(B)(1) when revoking a community control sentence and may continue supervision not to exceed the five year limitation, or the court may impose a more restrictive sanction, or the court may impose a prison term not to exceed the reserved term specified at sentencing. *Brooks*, at paragraph two of the syllabus. In contrast, when the court revokes judicial release status, the court is only permitted to reimpose the original sentence unless the defendant is charged with a new crime while on judicial release. *Thompson III* at ¶ 29, citing R.C. 2929.20(K) and *Terry*, 2011-

Ohio-6666, ¶ 10 (10th Dist.) (additional references omitted); *State v. Lister*, 2024-Ohio-2678, ¶ 11 (3rd Dist.). "R.C. 2929.20 'does not authorize the trial court to increase or reduce the original sentence.' " *Thompson III* at ¶ 29, quoting *Terry* at ¶ 12. These differences between R.C. 2929.20 and R.C. 2929.15 plainly show the General Assembly's intent to enact two separate and distinct statutes rather than one comprehensive community control scheme.

There is no statute or rule that would authorize an offender to accumulate time under R.C. 2929.20 community control sanctions on one sentence and then apply that time to a separate – and unserved – community control sentence under R.C. 2929.15 on a separate consecutive sentence. As the Tenth District noted, although the General Assembly provided that judicial release supervision under R.C. 2929.20(K) may be reduced for time the offender spent in jail or in prison for the offense, there is no similar reduction authorized for time spent under R.C. 2929.15(A) community control sanctions. *Thompson IV*, 2023-Ohio-4805, ¶ 37 (10th Dist.). There are no provisions authorizing a single collective five-year limitation for the sanctions imposed under R.C. 2929.20 and R.C. 2929.15. See, *id*. at ¶ 38. And, a court may order community control sanctions imposed under R.C. 2929.15 and R.C. 2929.20 consecutively as the statutory presumption for concurrent terms under R.C. 2929.41 applies only to "prison term, jail term, or sentence of imprisonment."

Fatal to Defendant's proposal is that achieving his comprehensive community control scheme would require this Court to add language to R.C. 2929.15 and R.C. 2929.20. Combining the separate term limitations under R.C. 2929.15 and R.C. 2929.20 "would contravene the well-established principle that R.C. 2929.15 and R.C. 2929.20 are separate statutes with different purposes and would add language to the statutes by judicial construction." *Thompson IV*, 2023-

Ohio-4805, ¶ 38 (10th Dist.), *citing Gabbard v. Madison Local School Dist. Bd. of Edn.*, 2021-Ohio-2067, ¶ 13 (parenthetical quotation omitted).

Defendant cannot substitute his time on judicial release for his consecutive community control sentence because, as correctly recognized by the Tenth District, Defendant has not yet begun service of his consecutive sentence. *Thompson III*, 2021-Ohio-4491, ¶ 31 (10th Dist.). "[A] consecutive sentence 'begins to run only after the completion of a prior sentence.' " *Id.*, quoting *State ex rel. Gray v. Karnes*, 2010-Ohio-5364, ¶ 41 (10th Dist.) (additional references omitted). Indeed, it is well settled that "consecutive sentences are separate and distinct from one another and do not combine in the aggregate to form a 'sentencing package.' " *State v. Lyle*, 2014-Ohio-751, ¶ 34 (3rd Dist.), citing *State v. Holdcroft*, 2013-Ohio-5014, ¶ 6; see also, *State v. Leach*, 2024-Ohio-978, ¶ 26 (2nd Dist.); *State v. Paige*, 2018-Ohio-813, ¶ 8 (finding the federal "sentencing package" doctrine does not apply to Ohio courts).

Ultimately, Defendant's complaint is that he remains subject to a consecutive community control sentence that, following *Hitchcock*, would now be considered improper. However, as discussed in the first section, this Court has found that such sentencing errors must be raised on direct appeal to avoid the res judicata bar. *Harper*, 2020-Ohio-2913, ¶ 4; *Henderson*, 2020-Ohio-4784, ¶ 43; *Thompson II*, 2020-Ohio-6756, ¶¶ 11, 13 (10th Dist.) (following *Harper* and *Henderson*); *State v. Peoples*, 2022-Ohio-953, ¶ 24 (10th Dist.); see also, *State v. Christy*, 2021-Ohio-1470, ¶ 26 (5th Dist.); *State v. Richards*, 2020-Ohio-5159, ¶ 5 (1st Dist.); *State v. Hall*, 2021-Ohio-791, ¶ 27 (11th Dist.). It is likely that Defendant did not challenge his consecutive community control sentence on Counts 1 and 3 because he *benefited* from that sentence by avoiding additional prison time. Given the history in this case, res judicata bars further litigation of Defendant's sentence.

III. Defendant's requested remedy is unlawful.

Defendant requests that this Court order "a general remand to the trial court with orders to craft a sentence that fully comports with Ohio law . . . ." (Def's Brief at 16) Defendant cites no authority that would allow a de novo resentencing 14 years after the original sentence was imposed. Indeed, there is no authority to support such a request.

Defendant may argue, as he did below, for equitable relief to support his request for resentencing or termination of his sentence on Counts 1 and 3. However, it is well settled that criminal courts are courts of law, not equity. *State ex rel. Chalfin v. Glick*, 172 Ohio St. 249, 252-253 (1961). Trial courts have no inherent power to suspend the execution of a sentence. *State v. Ware*, 2014-Ohio-5201, ¶ 12, citing *State v. Smith*, 42 Ohio St.3d 60, 61 (1989). There is also no authority that would permit reconsideration of a final judgment. *Pitts v. Ohio Dept. of Transp.*, 7 Ohio St.2d 378 (1981), syllabus. The Tenth District recognized that the trial court had no authority to modify Defendant's sentence on Count's 1 and 3 when it granted judicial release on Counts 4 - 23. *Thompson III*, 2021-Ohio-4491, ¶ 32 (10th Dist.).

It must be recalled that Defendant was afforded resentencing in 2020 when, during the pendency of *Thompson II*, he convinced the trial court that his consecutive sentence on Counts 1 and 3 was void. *Thompson III* at ¶ 15. The court agreed but, rather than imposing no sentence on Counts 1 and 3 as Defendant requested, the trial court imposed the prison sentence originally reserved on those counts in 2010. Of course, Defendant was dissatisfied with that outcome and won reinstatement of his consecutive community control sentence – a sentence that has now been the subject of three appeals.

If this Court does choose to adopt Defendant's proposition and find that Defendant cannot serve a consecutive term of community control on Counts 1 and 3, the only sentence that could be imposed on remand for those counts is a prison term. Defendant has not served his consecutive

sentence on Counts 1 and 3, and he cannot, as he has repeatedly argued below, simply avoid a sentence on those counts. Such an outcome would be unlawful as Ohio "felony sentencing statutes . . . require trial courts to impose either a prison term or community control sanctions on each count." *State v. Anderson*, 2015-Ohio-2089, ¶ 23; *Hitchcock*, 2019-Ohio-3246, ¶ 16.

Based on the foregoing, the State requests that Defendant's Proposition of Law be overruled.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.[1]

Respectfully submitted,

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[1] If this Court *sua sponte* contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170 (1988).

CERTIFICATE OF SERVICE

This is to certify that on August 22, 2024 a copy of the foregoing was delivered via electronic mail to Leon Sinoff, ljsinoff@franklincountyohio.gov, Franklin County Public Defender's Office, Counsel for Defendant-Appellant, and T. Elliot Gaiser and Nicholas Cordova, counsel for *Amicus Curiae*.

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