No. 21-6416

IN THE

SUPREME COURT OF THE UNITED STATES

BRADFORD S. DAVIC — PETITIONER, *pro se*

vs.

STATE OF OHIO — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

OHIO COURT OF APPEALS, TENTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

FIRST QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS OF LAW, AND IS HIS GUILTY PLEA VOID, WHERE HIS PLEA WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY, DUE TO THE TRIAL COURT'S FAILURE TO NOTIFY HIM, PRIOR TO ACCEPTING HIS GUILTY PLEA, THAT IN PLEADING GUILTY HE IS SUBJECT TO MANDATORY CONSECUTIVE SENTENCES AND TO THE PUNITIVE SANCTION OF LIFETIME REGISTRATION AS A TIER III SEX OFFENDER?

SECOND QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS AND EQUAL PROTECTION OF LAW WHEN AN APPELLATE COURT HOLDS THAT THE TRIAL COURT DID NOT HAVE JURISDICTION TO HEAR HIS MOTION TO VACATE VOID PLEA AGREEMENT FILED?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the Unites States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United states district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[X] reported at *State v. Davic*, App. Case No. 19AP-579, 2021-Ohio-131; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Ohio Supreme Court appears at Appendix B to the petition and is

[X] reported at *State v. Davic*, Case No. 2021-0687, 2021-Ohio-2742; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States court of appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.
[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____ and a copy of the order denying rehearing appears in Appendix _____

[ ] An extension of time to file the petition for writ of certiorari was Granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under U.S.C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was August 17, 2021. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____ and a copy of the order denying rehearing appears at Appendix ___.
[ ] An extension of time to file the petition for writ of certiorari was Granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under U.S.C. § 1257(A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved herein are Amendments V and XIV to the United States Constitution:

Amendment V:

"No person shall be deprived of life, liberty, or property, without the due process of law..."

Amendment XIV:

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In November of 2010, the Petitioner, Bradford S. Davic, was indicted on one count of importuning (Count 1), five counts of rape (Counts 2-6), and one count of gross sexual imposition (Count 7). The five counts of rape, charged under R.C. 2907.02, specified that Davic's alleged victim was under thirteen years of age and each included a sexually violent predator (SVP) specification.

On April 13, 2011, Davic entered into a plea agreement with the State of Ohio, in which the State agreed to dismiss Count 2 and all SVP specifications. In return, Davic agreed to plead guilty to the remaining six counts. During the plea hearing, the following exchange took place between the trial court and Davic:

> THE COURT: Before you signed this [written plea agreement], did you go over with [defense counsel] Mr. Rogers?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Do you feel you understand it?
>
> THE DEFENDANT: Yes. The only thing I questioned to him, just because it wasn't on there, was that I am agreeing today to a plea deal that was going to be a sentence of ten years with the understanding life on the back side, but at least I questioned --
>
> THE COURT: What is the last part of what you said? You said ten years and then you said --
>
> THE DEFENDANT: Ten years to life, or I forget how he explained it, but ten years to a life sentence. And it only concerned me that it wasn't on there anywhere.
>
> THE COURT. Well, we will go over that in just a minute.
>
> (Tr. 3)

After subsequently reviewing the charges to which Davic was agreeing to plead guilty, and the State's agreement to dismiss Count 2 and all of the specifications (Tr. 5), the trial court provided Davic with the following information regarding the sentencing exposure he faced:

> "Now, as I said a moment ago, you are pleading guilty to four felonies of the first degree.[1] These felonies each carry a possible sentence of 10 years to life on each count. On Count 1, which is importuning, that is a felony of the second degree. The maximum could be eight years. On Count 7, gross sexual imposition is a felony of the third degree and the maximum sentence for that would be five years. The total maximum possible sentence you could receive in all of these would be 53 years to life."
>
> (Tr. 6-7)

Immediately thereafter, without providing any notification that Davic would also be subject to lifetime registration as a Tier III sex offender under the Adam Walsh Act, and a five-year mandatory term of post-release control, the court accepted Davic's guilty plea. (Tr. 8) No mention was made that, pursuant to O.R.C. § 2971.03(E), Davic would be subject to mandatory consecutive sentences for the four counts of rape. The written plea agreement to which the court referred did make mention of post-release control, but nothing about sex offender registration or mandatory consecutive sentences.

On May 20, 2011, Davic appeared back before the same trial court for sentencing. The court imposed prison terms of 8 years for Count 1, 10 years to life

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[1] Technically, pursuant to the Ohio Revised Code, the four counts of rape were unclassified felonies. At the time of Davic's plea and sentencing, a first degree felony was subject to a definite sentence of 3-10 years pursuant to O.R.C. 2929.14(A)(1).

each for Counts 3-6, and 5 years for Count 7, and ordered that the life sentences for Counts 3-6 be served consecutively, for an aggregate prison term of 40 years to life. The court also sentenced Davic to lifetime registration as a Tier III sex offender and a mandatory five years of post-release control.

Davic timely appealed and was appointed counsel through the Franklin County Public Defender's Office. The first assignment of error in the brief prepared on Davic's behalf challenged that: "Appellant's guilty plea was invalid as it was not entered in a knowing, voluntary, and intelligent manner as required by Crim. R. 11(C)(1) and due process guarantees under the state and federal Constitutions." *State v. Davic* ("*Davic I*"), No. 11AP-555, 2012-Ohio-952 at ¶ 6. Within the brief Davic's court-appointed appellate counsel specifically challenged that:

> "The trial court failed in the present case to properly determine whether Appellant's guilty plea was knowingly, voluntarily, and intelligently entered. Prior to entering his plea, Appellant asked the trial court why his plea form did not reflect the agreement that he would receive concurrent terms on ten years to life on the charges – an understanding that he had from his counsel. The court failed to question Appellant about the statement and indicated that it would address that issue at a later time. But it never did. Under the circumstances, the plea was constitutionally invalid as it violated Crim.R. 11(C) and Appellant's due process protections under the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution."
>
> Merit Brief of Defendant-Appellant, Pg 7, filed Oct. 4, 2011.

In concluding its argument, appellate counsel further asserted that, "The court did not correct Appellant's misapprehension at the time of the plea and accepted Appellant's plea without telling him that there were neither sentencing recommendations nor special considerations given in exchange for his guilty plea.

Without a more detailed examination of Appellant, the waiver of essential constitutional rights was invalid. The judgment of the trial court should, under these circumstances, be reversed." Merit Brief at Pg 13.

Based upon that argument, the Ohio Tenth District Court of Appeals "concluded that appellant failed to establish that he did not understand what sentence he was facing when the trial court accepted his guilty plea. Therefore, we conclude that his plea was knowing, intelligent, and voluntary." *Davic I* at ¶ 11. Davic appealed to the Supreme Court of Ohio, who declined to accept jurisdiction[2]. *State v. Davic*, 132 St. 3d 1482 (2012). His further appeal to the federal courts was also unsuccessful. *Davic v. Warden*, 2014 U.S. Dist. LEXIS 159172, (Motion for Certificate of Appealability denied on December 17, 2014).

On November 18, 2014, while his direct appeal was still active in federal court, Davic filed a *pro se* Motion to Correct Judgment Entry to the trial court. Davic subsequently filed a Motion to Proceed to Judgment on May 26, 2015, and a second one on October 7, 2015. The trial court finally ruled on Davic's Motion to Correct Judgment Entry on April 26, 2017, denying the motion. Davic filed a timely appeal to the Tenth District, who found that "the record reflects there was no notification of appellant's classification at the plea hearing, contrary to the statement in the May 24, 2011 sentencing entry." *State v. Davic* ("*Davic II*"), No. 17AP-354 (December 26,

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[2] Under this rule, the Ohio Supreme Court may decline to accept jurisdiction for any of the following reasons: (a) The appeal does not involve a substantial constitutional question and should be dismissed; (b) The appeal does not involve a question of great general or public interest; (c) The appeal does not involve a felony; (d) The appeal does involve a felony, but leave to appeal is not warranted.

2017, Unreported) at ¶ 19. The appellate court "remand[ed] this matter for the trial court to issue a nunc pro tunc entry properly recording appellant's sex offender classification as imposed at the sentencing hearing" and "order[ed] the trial court to correct the error in the sentencing entry regarding notification of appellant's sex offender classification at the plea hearing." *Id.* at ¶ 18 and ¶ 20, respectively.

On January 5, 2018, the trial court filed a Nunc Pro Tunc Judgment Entry which corrected the first error above. Davic did not receive a copy of the amended entry until after filing a Motion to Provide Defendant Proper Notice on April 9, 2018. He then discovered that the erroneous claim of having been notified about registration at the time of his plea remained uncorrected. As a result, Davic was compelled to file a second Motion to Correct Judgment Entry. The court then filed a Second Nunc Pro Tunc Judgment Entry on July 9, 2018, which finally corrected the error upon which Davic's initial Motion to Correct Judgment Entry had been filed almost four years earlier.

On April 2, 2019, Davic filed a *pro se* Motion to Vacate Void Plea Agreement to the trial court, which was denied on August 1, 2019. Davic timely appealed to the Tenth District, raising nine assignments of error, which included challenges that his guilty plea was not entered knowingly, intelligently and voluntarily, that his plea was void, and that his plea agreement was not an enforceable contract. The appellate court "conclude[d] that the trial court lacked subject-matter jurisdiction to consider appellant's motion." *State v. Davic* ("*Davic III*"), Case No. 19AP-579, 2021-Ohio-131 at ¶ 15. The judgment of the trial court was affirmed. *Id.* at ¶ 25. Davic subsequently

filed a timely appeal the to the Supreme Court of Ohio, who again declined to accept jurisdiction for non-specific reasons under Ohio S.Ct.Prac.R. 7.08(B)(4). *State v. Davic*, Case No. 2021-0687, 2021-Ohio-2742.

In 2021, Davic filed a Motion for Leave to File a Delayed Application for Reconsideration (along with the App.R. 26(A) Application for Reconsideration) of his original direct appeal in *Davic I.* On October 19, 2021, the motion was denied by the appellate court. *State v. Davic ("Davic IV")*, 2021 Ohio App. LEXIS 3649.

Davic now files this timely petition for writ of certiorari to this Court.

REASONS FOR GRANTING PETITION

Introduction – Davic asserts that the misapplications of law, misuse of judicial constructs, procedural bars, etc., used to justify and maintain constitutional violations and deprive justice must be rectified for the preservation of integrity in the judicial system and uphold the Constitution. The issues are simple and direct.

Davic will first demonstrate that his guilty plea was not entered knowingly, intelligently and voluntarily. This petition then presents a conflict between the longstanding precedents of this Court (and federal courts of appeal) over whether such a guilty plea is "void" or, in the context used by the Ohio Supreme Court, only "voidable." Davic contends that the voidness doctrine being espoused by the Ohio Supreme Court (and lower courts of the state) not only runs counter to this Court's standing on the issue, but also violates the Fifth and Fourteenth Amendment's Due Process protections for Davic and similarly situated defendants.

This petition then challenges that the state appellate court's holding that the

trial court never had jurisdiction to hear Davic's *pro se* Motion to Vacate Void Plea Agreement violated both his Due Process protections and his right to Equal Protection of the law, under the Fifth and Fourteenth Amendments to the United States Constitution.

I. THE COURT SHOULD GRANT THE WRIT BECAUSE PETITIONER WAS DENIED DUE PROCESS WHEN THE APPELLATE COURT FAILED TO RECOGNIZE HIS GUILTY PLEA AS VOID, WHERE IT WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY, DUE TO THE TRIAL COURT'S FAILURE TO NOTIFY HIM PRIOR TO ACCEPTING HIS GUILTY PLEA THAT HE WOULD BE SUBJECT TO MANDATORY CONSECUTIVE SENTENCES AND LIFETIME SEX OFFENDER REGISTRATION.

Guilty Plea Not Entered Knowingly, Intelligently and Voluntarily

This Court long ago held that "[a] plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. * * * Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Kercheval v. United States*, 274 U.S. 220 (1927). See also *Henderson v. Morgan*, 426 U.S. 637, 653 (1976) ("The plea of guilty must be made * * * with full understanding of the consequences."); *Brady v. United States*, 397 U.S. 742, 748 (1970). Thus this Court has concluded that "if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy v. United States*, 394 U.S. 459 (1969).

From the record, it is indisputable that, prior to accepting Davic's guilty plea, the trial court failed to provide him with *a full understanding of the consequences* of

his pleading guilty to four counts of rape in violation of O.R.C. § 2907.02 (and two lesser charges).

A. Mandatory Consecutive Sentences

As part of his plea deal, Davic agreed to plead guilty to four counts of rape in violation of O.R.C. § 2907.02 (and two lesser charges). Because each of the four counts of rape specified that his victim was under thirteen years of age, each was technically a violation of O.R.C. § 2907.02(A)(1)(b) and (B), making each count subject to an indefinite sentence of ten years to life pursuant to O.R.C. § 2971.03(B)(1)(a). Of this Davic was properly notified by the court. (Tr. 6) However, he was further subject to sentencing under O.R.C. § 2971.03(E), which provides that:

> "If the offender is convicted of or pleads guilty to two or more offenses for which a prison term or term of life imprisonment without parole is required to be imposed pursuant to division (A) of this section, divisions (A) to (D) of this section shall be applied for each offense. All minimum terms imposed upon the offender pursuant to division (A)(3) or (B) of this section for those offenses shall be aggregated and served consecutively, as if they were a single minimum term imposed under that division."

Thus pursuant to O.R.C. § 2971.03(E), each of the ten year minimum sentences for Davic's four counts of rape was mandated to be aggregated into a mandatory minimum sentence of forty years. Conversely, the trial court had no discretion to order the life sentences for the four counts of rape to be served concurrently, which could have resulted in a total sentence of only ten years to life (the sentence Davic indicated he was expecting). The Fourth Circuit found that a Rule 11 "violation can not be considered harmless if the defendant had no knowledge of the mandatory

minimum at the time of the plea." *United States v. Goins*, 51 F.3d 400, 403 (1995). Clearly Davic had no such knowledge at the time he entered his guilty plea.

On point here is *State v. Henderson* (11th Dist.), 2009-Ohio-5207 at ¶ 15, where the appellate court confirmed "R.C. 2907.02(B) provides that rapists found guilty pursuant to R.C. 2907.02(A)(1)(b) -- such as Mr. Henderson -- 'shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code.' * * * Pursuant to R.C. 2971.03(B)(1)(a), the trial court imposed the minimum sentences possible on Mr. Henderson: ten years to life imprisonment. Pursuant to R.C. 2971.03(E) it made the sentences consecutive, since that section requires all minimum sentences under R.C. 2971.03(B) to be consecutive."

Ohio courts have agreed that "when consecutive sentences are mandatory as opposed to discretionary, the trial court must advise defendant of that fact." *State v. Anderson* (8th Dist.), 2010-Ohio-5487 at ¶ 11. See also *State v. Norman* (8th Dist.), 2009-Ohio-4044 at ¶ 7 ("When consecutive sentences are mandatory, the consecutive sentence directly affects the length of the sentence, thus becoming a crucial component of what constitutes the 'maximum' sentence"); *State v. Millhoan* (6th Dist.), 2011-Ohio-4741 at ¶ 35. Davic was never informed by the court that mandatory consecutive sentences applied to his four counts of rape, pursuant to O.R.C. § 2971.03(E).

As the record shows, when asked by the court if he understood the terms of the plea agreement, Davic responded that it was his understanding he would receive a sentence of only ten years to life. (Tr. 3) During the later sentencing hearing, his

counsel confirmed that, "When we negotiated this case, we were anticipating a sentence of 10 years to life." (Tr. 20) Yet this was a statutory impossibility. It was simply not within the court's discretion to impose a sentence of ten years to life – effectively running the four sentences concurrent instead of consecutive. Yet the court never clarified to Davic that he faced mandatory consecutive sentences for the four counts of rape, with a mandatory minimum sentence of forty years.

This is comparable to *Smith v. United States*, 400 F.2d 860 (1968), where the defendant was under the misapprehension that the district court had the authority to impose concurrent sentences. There the Sixth Circuit vacated a guilty plea because "[t]he record does not disclose that the petitioner's misapprehension as to the possible consequences of his plea was ever corrected by anyone prior to its acceptance and his subsequent sentencing thereunder." *Id.* at 862. For like cause, Davic's plea should be vacated.

B. Tier III Sex Offender Registration

This Court has recognized that under Federal Criminal Rule 11(b)(1)(H), and the similar laws of many states – such as Ohio's Crim.R. 11(C)(2)(a) – before accepting a defendant's guilty plea, the trial court is required to "inform the defendant of, and determine that the defendant understands...any maximum possible penalty, including imprisonment, fine, and term of supervised release." *United States v. Rodriquez*, 553 U.S. 377, 388 (2008). See also *Ruelas v. Wolfenbarger*, 580 F.3d 403 (6th Cir. 2009). In Ohio, this would also include sex offender registration under the Adam Walsh Act, as codified under O.R.C. § 2950.

"Following enactment of the Adam Walsh Act, [the] SUPREME COURT OF OHIO held that R.C. Chapter 2950, providing for sex offender registration and notification, is punitive. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, ¶ 16, 952 N.E.2d 1108. Thus, the sex offender classification and corresponding registration and notification requirements imposed under R.C. Chapter 2950 on a defendant convicted of a sexually oriented offense are part of the penalty for that conviction. Accordingly, Crim.R. 11(C)(2)(a) requires a trial court to determine that a defendant understands these requirements before accepting a plea of guilty or no-contest to a sexually oriented offense." *State v. Wallace* (10th Dist.), 2019-Ohio-1005 at ¶ 11. See also *State v. Dangler* (Ohio Sup. Ct.), 2020-Ohio-2765 at ¶ 20, citing *Williams* ("the sex-offender-registration scheme * * * as a whole constitutes a penalty for purposes of Crim.R. 11"). Thus, registration as a Tier III sex offender was part of the maximum sentence Davic faced by pleading guilty.

In *Wallace*, the state appellate court found that, "There was no reference to the Tier III classification or the registration and notification requirements in the trial court's colloquy with Wallace at the plea hearing. Additionally, there was no reference to the Tier III classification or registration and notification requirements in the entry of guilty plea form that Wallace signed. * * * 'For this reason also, the plea was not knowing, voluntary, and intelligent.'" *Wallace* at ¶ 18, quoting *State v. Huff* (7th Dist.), 2014-Ohio-5513 at ¶ 22.

The record shows (and the Tenth District confirmed in *Davic II*) that, while Davic was sentenced to lifetime registration as a Tier III sex offender, there was not

notice of this sanction within Davic's written plea agreement, and the trial court failed to inform him it would be imposing such at any time during his plea hearing. Thus, Davic was never informed of the maximum sentence he faced by pleading guilty. Consequently, because his sentence deviated from the terms of his plea agreement, Davic's guilty plea was not entered knowingly, intelligently and voluntarily. See *Pickens v. Howes*, 549 F.3d 377 (6th Cir. 2008) ("a plea cannot be knowingly entered into if the sentence enumerated in the court's written order deviates from the terms reached with the defendant.").

Guilty Plea is Void

Davic acknowledges that under USCS Supreme Ct.R. 10, "A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10(b) provides that one of the reasons for this Court to consider a writ of certiorari is when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Under Rule 10(c), another reason for consideration is where "a state court...has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." "A decision is 'contrary to' clearly established federal law when 'the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts." *Otte v. Houk*, 654 F.3d 594, 599 (6th Cir. 2011), quoting *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

This petition presents a divergence between this Court (and the various federal courts of appeal) and the Ohio Supreme Court (and lesser courts of Ohio), on whether a guilty plea that was not entered knowingly, intelligently and voluntarily – as Davic has demonstrated his was not – is "void" or, in the context used by the Ohio Supreme Court, only "voidable."

This Court has long held that "[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." *Machibroda v. United States*, 368 U.S. 487 (1962). See also *McCarthy*, supra. Likewise, where "the voluntary bilateral consent to the [plea] contract never existed * * * it is automatically and utterly void." *Puckett v. United States*, 556 U.S. 129, 137 (2009). More recently, this Court again held that "[a] conviction or sentence imposed in violation of a substantive rule [such as Crim.R. 11] is not just erroneous but contrary to law and, as a result, void." *Montgomery v. Louisiana*, 136 S.Ct. 718, 731 (2016).

Lower federal courts have likewise agreed that "if a guilty plea is found to be unknowing or involuntary, the entire plea agreement is void[.]" *United States v. Dixon* (6th Cir.), 2018 U.S. App. LEXIS 27569. "If a plea is not knowingly, voluntarily, and intelligently entered, the guilty plea is void because appellant has been denied due process." *Bond v. Sexton*, 2014 U.S. Dist. LEXIS 11613. "A plea not voluntarily and intelligently made has been obtained in violation of due process and is void." *Blackwickliffe v. Winn*, 2017 U.S. Dist. LEXIS 144042. "A guilty plea is void if it is not knowing and voluntary." *United States v. Zayas*, 802 Fed. Appx. 355, 361 (10th Cir. 2020), quoting *United States v. Gigley*, 213 F.3d 509, 516 (10th Cir. 2000). In

sum, "It is also *clearly established federal law* that a guilty plea is void unless a defendant is 'fully aware of the direct consequences' of the plea." (Emphasis added.) *Fields v. Lee*, 2016, U.S. Dist. Lexis 11140, quoting *Bousley v. United States*, 523 U.S. 614, 619 (1998).

Under any of those authorities, a guilty plea that is not entered knowingly, intelligently and voluntarily is "void," which has been defined as: "Null; ineffectual; nugatory; having no legal force or binding effect." Black's Law Dictionary (6 Ed.Abr.1991). See also Ballentine's Law Dictionary (2010 LexisNexis) (defining *void* as "[c]onstituting a nullity. Binding on neither party and not subject to ratification."); The Law Dictionary (2002 Anderson Publishing Co.) (defining *void* as "of no force or effect; absolutely null." Thus in one particular case the Sixth Circuit concluded that "the district court imposed a sentence which was not in accordance with the terms of the plea agreement * * *. Thus * * * the plea agreement is *null and void* and the parties are not bound by its terms." (Emphasis added.) *United States v. Hodge*, 306 Fed. Appx. 910, 915 (6th Cir. 2009).

The term "void" has been used interchangeably with the terms "invalid" and "infirm." See *United States v. Stubbs*, 279 F.3d 402 (6th Cir. 2002) (Defendant's guilty plea in the case at bar is constitutionally invalid. * * * A defendant is entitled to withdraw his guilty plea if it is constitutionally infirm."); *United States ex rel. Thurmond v. Mancusi*, 275 F. Supp. 508 (1967) ("A guilty plea induced by a mistaken belief that a binding plea agreement had been made is invalid even if it is the defendant's own attorney who is responsible for the defendant's mistaken belief.). In

terms of jurisprudence, the word *invalid* is likewise defined as: "Illegal, having no force or effect or efficacy; void; null." Ballantine's; Black's Law Dictionary (9th Ed., pg. 900) similarly defines *invalid* as: "Not legally binding." It has been similarly found that that "when a defendant agrees to a sentence that is not permitted by law, courts have found the plea bargain is illegitimate." *Pickens* at 381, citing *United States v. Greatwalker*, 285 F.3d 727, (2002).

The Ohio Supreme Court has veered away from this Court's precedent and every standard legal definition of the term "void," first finding in *Dunbar v. State*, 136 Ohio St. 3d 181 (2013) at ¶ 15 that, "Although the trial court erred in the exercise of its jurisdiction, it did not act without jurisdiction. Therefore, the plea was voidable rather than void." This dictum has infected various Ohio appellate courts. See, e.g., *State v. Gannon* (4th Dist.), 2016-Ohio-1007 at ¶ 17; *State v. Brandeberry* (6th Dist.), 2014-Ohio-3856 at ¶ 14; *State v. Green* (12th Dist.), 2017-Ohio-2800 at ¶ 12.

Even after *Dunbar*, the Ohio Supreme Court continued to recognize that, "Due process requires that a defendant's plea must be made knowingly, intelligently, and voluntarily; otherwise, the defendant's plea is invalid." *State v. Bishop*, 156 Ohio St. 3d 156 (2018). See also *Dangler* at ¶ 10 ("If the plea was not made knowingly, intelligently, and voluntarily, enforcement of that plea is unconstitutional.").

In 2020, the Ohio Supreme Court twice addressed the issue of "void" versus "voidable" sentences. In the first, it held that:

> "A sentence is void when a sentencing court lacks jurisdiction over the subject matter of the case or personal jurisdiction over the accused. When the sentencing court has jurisdiction to act, sentencing errors in the imposition of postrelease control render the sentence voidable, not void, and the sentence may be set aside if successfully challenged on direct appeal."
>
> *State v. Harper*, 160 Ohio St. 3d 480, 492 (2020) at ¶ 42.

Soon after, the Supreme Court expanded *Harper*, holding that:

> "A judgment or sentence is void only if it is rendered by a court that lacks subject-matter jurisdiction over the case or personal jurisdiction over the defendant. If the court has jurisdiction over the case and the person, any sentence based on an error in the court's exercise of that jurisdiction is voidable. Neither the state nor the defendant can challenge the voidable sentence through a postconviction motion."
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> *State v. Henderson*, 161 Ohio St. 3d 285 (2020) at ¶ 43[3].

It is notable that, while *Harper* and *Henderson* address the issue of voidness as it pertains to sentencing errors, to date the Ohio Supreme Court has not since extended this new standard for voidness to the issue of guilty pleas.

Yet in denying Davic's appeal of his Motion to Vacate Void Plea Agreement the appellate court held that, "Because the Franklin County Court of Common Pleas had

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[3] In a concurring opinion, Chief Justice O'Connor rightly asked, "Will courts elevate predictability and finality over fairness and substantial justice?" *Henderson* at ¶ 48. Quoting *Henderson*, the Eighth District "recognize[d] that the application of the Ohio Supreme Court's current void-sentence jurisprudence can be unjust, especially in cases like this one * * * where the sentencing error is not challenged on direct appeal and causes the defendant to spend 'unwarranted time incarcerated.'" *State v. Stansell* (8th Dist.), 2021-Ohio-2036 at ¶ 10. Stansell, who failed to challenge his sentence on direct appeal, should have been released from prison three years ago, yet continues to serve an unlawful life sentence imposed on a sexually violent predator specification which the appellate court agreed did not apply to him ("Because Stansell could not qualify as a sexually violent predator at the time he was sentenced, his life-tail sentence was unlawful"). *State v. Stansell*, 2021-Ohio-203 at ¶ 23, overturned on other grounds in 2021-Ohio-2036.

personal and subject-matter jurisdiction over appellant's plea and sentencing proceedings, the Supreme Court's holding in *Harper* establishes that appellant's convictions, entered pursuant to his guilty plea, were not void." *Davic III* at ¶ 18.

Under Ohio jurisprudence, the difference between "void" and "voidable" is significant. "A void judgment is a nullity and open to collateral attack at any time." *Lingo v. State*, 138 Ohio St. 3d 427, 2014-Ohio-1052 at ¶ 46. Whereas, "a voidable judgment may be set aside only if successfully challenged on direct appeal." *State v. Hall* (11th Dist.), 2021-Ohio-791 at ¶ 23.

Query: Is a guilty plea that has not been entered knowingly, intelligently and voluntarily "void" and a nullity or, as used by Ohio courts, only "voidable?"

II. THE COURT SHOULD GRANT THE WRIT BECAUSE PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF LAW WHEN THE APPELLATE COURT FOUND THAT THE TRIAL COURT DID NOT HAVE JURISDICTION TO HEAR HIS MOTION TO VACATE VOID PLEA AGREEMENT.

Query: Did the Franklin County Court of Common Pleas have jurisdiction to hear Davic's Motion to Vacate Void Plea Agreement, which was presumptively filed under Ohio Crim.R. 32.1? In rejecting Davic's appeal the appellate court held that "[t]he Supreme Court of Ohio [] determined that 'Crim.R. 32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw [a] guilty plea subsequent to an appeal and an affirmance by the appellate court.'" *Davic III at 16*, quoting *State ex. rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978).

Herein, Davic challenges the constitutionality of *Special Prosecutors* and whether *Special Prosecutors* is even applicable to his case.

***Special Prosecutors* Unconstitutional**

Davic first argues that the holding by the Ohio Supreme Court in *Special Prosecutors* violates an individual's constitutional protections to Due Process and Equal Protection. Ohio Crim.R. 32.1 provides that: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Ohio courts have also found that "Crim.R. 32.1 is an adequate legal remedy to rectify any alleged breach of a plea agreement." *State v. Reynolds* (3rd Dist.), 2002-Ohio-2823 at ¶ 25, citing *Seikbert v. Wilkinson*, 69 Ohio St. 3d 489, 491 (1994).

Ohio courts have agreed that a Crim.R. 32.1 motion is not a post-conviction petition, but is a "distinct avenue for relief." *State v. Yuen* (10th Dist.), 2002-Ohio-5083 at ¶ 26, quoting *State v. Bush*, 96 Ohio St. 3d 235 (2002) at ¶ 11. As shown above, the purpose of a post-sentence Crim.R. 32.1 motion is to allow a defendant to withdraw (or have vacated) his guilty plea if he can demonstrate doing so is necessary to correct a manifest injustice or that his plea agreement was breached.

The same appellate court that overruled Davic's appeal of the denial of his motion to vacate his plea has previously held that "[a] manifest injustice occurs when a plea is not knowing, voluntary, and intelligent." *State v. Spivakov* (10th Dist.), 2013-Ohio-3343 at ¶ 14. That court has further held that, "A manifest injustice has been

defined as a 'clear or openly unjust act.'" *State v. Griffith* (10th Dist.), 2010-Ohio-5556 at ¶ 15, quoting *State v. Honaker*, 2004-Ohio-6256 at ¶ 7. See also *State v. Williams* (10th Dist.), 2004-Ohio-6123 at ¶ 5 ("Manifest injustice relates to some fundamental flaw in the proceedings which result in a miscarriage of justice or is inconsistent with the demands of due process.").

As demonstrated in his first reason for why this writ should be granted, it is indisputable that Davic's guilty plea was not entered knowingly, intelligently and voluntarily. According to the Tenth District (the same court who acknowledged in *Davic II* at ¶ 19 that he was not notified about sex offender registration prior to entering his guilty plea) in *Spivakov* this is the very definition of a "manifest injustice." The same court has found that to be cause to vacate a guilty plea. See *Wallace* at ¶ 19. By denying Davic the opportunity to have the trial court take jurisdiction of his Crim.R. 32.1 motion he was denied the opportunity to have the court correct the manifest injustice.

Davic also asserts that he pleaded guilty to an illegal sentence, where he was subject to a mandatory sex offender registration sanction pursuant to O.R.C. § 2950 that was absent from the plea agreement.[4] "A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty. * * * There can be no plea bargain to an illegal sentence. Even when a defendant, prosecutor, and court agree on a sentence, the

[4] He was also led to believe by trial counsel (and left uncorrected by the court) that he could plead guilty to an illegal aggregate sentence of 10 years to life for the four counts of rape.

court cannot give the sentence effect if it is not authorized by law." (Internal citations omitted.) *Greatwalker* at 729. In that instance, the Eighth Circuit "vacate[d] Greatwalker's conviction on his guilty plea [and] vacate[d] Greatwalker's illegal sentence." *Id.* at 731. Such was the remedy sought by Davic in his Crim.R. 32.1 motion.

Davic's Crim.R. 32.1 motion alternately challenged that *if* his plea agreement was valid, then it was later breached by the trial court at sentencing. "Once the court unqualifiedly accepts the [plea] agreement it too is bound by the bargain." *United States v. Holman*, 728 F.2d 809 (6th Cir. 1984). See also *State v. Dye*, 127 Ohio St. 3d 357 (2010) at ¶ 22, citing *State v. Carpenter*, 68 Ohio St. 3d 59 (1993) ("effect must be given to the intention of the state and the defendant in their plea bargain, and courts should enforce what they perceive to be the terms of the original plea agreement."); *State v. Burks* (10th Dist.), 2005-Ohio-1262 at ¶ 19 ("When a trial court accepts a plea bargain and makes a promise in a certain manner, consistent with the agreement, it becomes bound by said promise."); *State v. Elliott* (1st Dist.), 2021-Ohio-424 at ¶ 11 ("As a general rule, if the trial court accepts the terms of the plea agreement, it is also bound to that agreement.").

The relevance here is that the trial court imposed a punitive sanction that was not one of the terms of Davic's plea agreement: to wit, lifetime registration as a Tier III sex offender pursuant to O.R.C. § 2950. If the failure to notify Davic of that sanction prior to accepting his guilty plea does not actually invalidate the plea agreement, then it must be found that the court breached plea agreement when it

imposed registration at sentencing. Query: What remedy did Davic have for his breached plea agreement after his appellate counsel failed to raise this issue on direct appeal? A Crim.R. 32.1 motion should have afforded Davic a remedy for the breach. *Reynolds*, supra.; *Seikbert*, supra. Pursuant to *Special Prosecutors*, Davic was denied the remedy of a Crim.R. 32.1 motion.

As shown earlier in this petition, through appellate counsel Davic did appeal his guilty plea. However, counsel failed to specifically cite the trial court's failures to notify Davic of the sex offender registration and mandatory consecutive sentences, and did not challenge that the plea agreement had been breached. Had counsel included those failures in the appellate brief it is reasonable to believe the outcome of Davic's appeal would have been different, with his plea being vacated at that time.

Upon the filing of the appellate court's decision in *Davic I*, he had ten days to file an App.R. 26(A) application for reconsideration challenging the court's decision. Davic's counsel chose not to and by the time Davic became aware of the court's decision it would have been too late for him to file a timely *pro se* application. Davic recently attempted a motion for leave to file a delayed reconsideration, but it was denied as untimely. *Davic VI*, supra.

Davic's other possible remedy at the time of his direct appeal was to file an App.R. 26(B) application for reopening of the appeal based on ineffective assistance of appellate counsel (which would have been counsel's failure to cite the aforementioned oversights by the trial court). By rule he had ninety days to file a *pro se* application. At that time, Davic was still being represented by said counsel on an

appeal of the district court's decision to the Ohio Supreme Court. As such, Davic was wholly reliant upon counsel to pursue any available remedies, or to at least inform him of such. Counsel did neither. Davic did not become aware of App.R. 26(B) applications until after the Ohio Supreme Court had denied his appeal there, at which point he was now on his own to pursue other remedies of court; and by that point he could not have filed a timely application.

It was only after his original appeal made it to the federal level and he obtained all of the records and transcripts from his plea and sentencing proceedings that Davic came to realize that his guilty plea had not been entered knowingly, intelligently and voluntarily due to the trial court's failure to notify him about sex offender registration and mandatory consecutive sentences. At that point, a Crim.R. 32.1 motion should have been available to him to bring to the trial court's attention its earlier failures and to then have the court vacate (or allow him to withdraw) his guilty plea.

Significantly, Davic's failure to file applications for reconsideration and/or reopening (timely or not) is likely a moot point. Even if he had filed a timely application/motion for reconsideration raising the issues of registration and mandatory consecutive sentences it would have been denied because "a motion for reconsideration may not raise issues not previously raised." *Davic VI* at 8, quoting *State ex rel. Newell v. Ohio Adult Parole Auth.*, 2020-Ohio-967 at ¶ 12. Yet even had he filed a timely application for reopening, it is likely that the appellate court would have denied it under res judicata. See, e.g., *State v. Scott*, 2015-Ohio-1817 at ¶ 8 ("Because the issue of sufficiency of evidence * * * was previously raised on appeal

and found to be without merit, we find that the doctrine of res judicata prevents any further litigation of the claimed error through Scott's application for reopening.").

Thus the failure by Davic's appellate counsel to raise the issues of registration and mandatory consecutive sentences, or breach of the plea agreement, in the direct appeal effectively left him up the creek without a paddle. So once again, a Crim.R. 32.1 motion should have provided a vessel for Davic to have heard the issues his court-appointed appellate counsel failed to raise on appeal. Furthermore, a Crim.R. 32.1 motion would have been the only way to raise a challenge to his guilty plea based on evidence off the record.

It is notable that Davic's original Judgment Entry of sentencing falsely claimed that he had been notified about sex offender registration prior to entering his guilty plea. As detailed earlier herein, it took Davic two motions to correct the Entry, with an intervening decision by the appellate court acknowledging that Davic, in fact, had not been notified about registration (*Davic II* at ¶ 19), before a corrected Judgment Entry was issued. That alone should have allowed Davic to file a Crim.R. 32.1 motion.

This Court has held that, "Conventional notions of finality of litigation have no place were life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. 1 (1963). *Special Prosecutors* puts finality of litigation over the correction of the infringement of an individual's constitutional rights, and presents good cause for consideration under Rules 10(b) and 10(c). Indeed, after being failed miserably by court-appointed counsel not once but twice – first in the trial court then on appeal – there must be some avenue made

available to Davic to remedy his constitutionally infirm guilty plea. If not through a Crim.R. 32.1 motion, then how? Davic has been left with no remedy at law.

Interestingly, the Ohio Supreme Court later held that "the holding in *Special Prosecutors* does not bar the trial court's jurisdiction over posttrial motions permitted by the Ohio Rules of Criminal Procedure. These motions provide a safety net for defendants who have reasonable grounds to challenge their convictions and sentences." *State v. Davis*, 131 Ohio St. 3d 1 (2011) at ¶ 37. While *Davis* pertained specifically to a Crim.R. 33 motion for new trial, a Crim.R. 32.1 motion is likewise *a post-trial motion* permitted by the Ohio Rules of Criminal Procedure.

On appeal, Davic argued that *Special Prosecutors* was overturned by *Davis,* which should have given the trial court jurisdiction to hear his motion. However, the appellate court chose not to extend *Davis* to Crim.R. 32.1 motions. *Davic III* at ¶ 22. Had the court done so it is reasonable to believe it would have reached a different decision over whether the trial court had jurisdiction over Davic's motion.

The holding in *Special Prosecutors* has also led to different treatment between those defendants who appealed their convictions and those who did not. As shown, *Special Prosecutors* precludes an individual who appealed his guilty plea from later filing a Crim.R. 32.1 motion; consequently, they only get one opportunity to challenge their plea. Whereas an individual who has not directly appealed his plea can submit multiple Crim.R. 32.1 motions to withdraw their plea. While any subsequent motions may be subject to res judicata, they will not be denied for lack of jurisdiction.

A prime example there is *State v. Tinney* (5th Dist.), 2012-Ohio-72. Tinney did not appeal his conviction, but in the following years filed three different motions to withdraw his plea. *Id.* at ¶ 10-12, 15. The first two were denied but the third motion, filed almost twenty years after he first pleaded guilty, was granted by the trial court. *Id.* at ¶ 18. The State of Ohio appealed, arguing that Tinney's third motion was subject to res judicata. *Id.* at 26. In overruling the State's arguments, the appellate court found that the facts and circumstances of Tinney's case "at least heightened the possibility of an injustice done to [Tinney] nearly twenty years ago." *Id.* at ¶ 31.

Yet pursuant to *Special Prosecutors*, had Tinney appealed his guilty plea, the trial court never would have had jurisdiction to hear that third motion to withdraw his plea, which was granted. And significantly, his motion was granted only on the *possibility* that an injustice had occurred. By contrast, Davic has shown the manifest injustice his guilty plea created. Davic should have been provided the same opportunity to have his plea challenge heard through a first Crim.R. 32.1 motion that Tinney received in his first, second and third motions. Query: Why did Tinney get to challenge his guilty plea three times but Davic only got to challenge his once?

Tinney also illustrates that there is no time limit for the filing of a Crim.R. 32.1 motion. Theoretically, someone who has not directly appealed their guilty plea can raise one or more challenges of it through a Crim.R. 32.1 at any time in the future (20 years later in the case of Tinney), and the trial court will take jurisdiction every time. This is significant because it is not uncommon for new evidence to come forward, or for errors relating to the entering of the guilty plea, some time after the

original appellate process has ended. In Davic's case, he did not file his Crim. 32.1 motion until after his Judgment Entry had been corrected – the correction of which supported his challenge to the validity of his guilty plea – which did not happen until over six years after the appellate decision in his direct appeal.

For an incarcerated layperson, such as Davic, who discovers tangible errors relating to his guilty plea, which his court-appointed appellate counsel had earlier failed to raise on direct appeal, Crim.R. 32.1 should provide a means of bringing those errors back to the attention of the trial court. But because of *Special Prosecutors*, that opportunity is not afforded to those like Davic who had a direct appeal, while it is to individuals who did not directly appeal their conviction. This is the essence of an Equal Protection violation.

That Davic was denied the same opportunities as Tinney establishes that not only were his Due Process protections violated, but also his constitutional right to Equal Protection under the law as well. *Special Prosecutors* should be found to be unconstitutional, and the matter of *Davic III* remanded back to the state courts, and his motion adjudicated on its merits.

***Special Prosecutors* Inapplicable**

Query: What is the effect of a guilty plea being null and void? Here, Davic contends that because his guilty was null and void, and his plea agreement not an enforceable contract, the trial court never gained jurisdiction and authority to sentence him. Consequently, Davic did not have a final, appealable order, meaning the appellate court never had jurisdiction to hear his direct appeal. Therefore, his

original direct appeal in Case No. 11AP-555 (*Davic I*) is a nullity, and *Special Prosecutors*, even if not found unconstitutional, was not applicable to his Motion to Vacate Void Plea Agreement.

Davic has already demonstrated herein that his guilty plea is null and void. Restating *Dixon*, "[I]f a guilty plea is found to be unknowing or involuntary, the entire plea agreement is void and any waivers or promises contained therein are without effect. *Dixon*, supra. This would presumably apply to the terms of the agreement as well.

This Court has acknowledged that "plea bargains are essentially contracts." *Puckett* at 127, citing *Mabry v. Johnson*, 467 U.S. 504 (1984). As such, "An enforceable contract is not created unless there is mutual assent as to all essential terms." *Busch v. Dyno Nobel*, 40 Fed. Appx. 947 (6th Cir. 2002). See also *Innotext, Inc. v. Petra'Lex USA Inc.*, 694 F.3d 581 (6th Cir. 2012) ("To form a contract, the parties must have a meeting of the minds on all essential terms of the contract."); *Behr Sys. v. Envirometric Process Controls, Inc.*, 65 Fed. Appx. 3 (6th Cir. 2003) ("a contract is not enforceable if there is no 'meeting of the minds' as to its core terms."); *In re D.S.*, 148 Ohio St. 3d 390 (2016) at ¶ 31, Kennedy, J., concurring in judgment only ("For a plea to exist, there must be a 'meeting of the minds' between the state and the offender as to the terms of the agreement."); *Kostelnik v. Helper*, 96 Ohio St. 3d 1 (2002) at ¶ 16 ("A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract."); *State v. Dowdell* (9th Dist.), 2012-Ohio-1326 at ¶ ("In order for a plea to be constitutionally enforceable, it must be entered

knowingly, voluntarily, and intelligently."); *Elliott* at ¶ 13, citing *State v. Engle*, 74 Ohio St. 3d 525 (1996) ("failure on any point [knowingly, intelligently, voluntarily] can render the plea unconstitutional – and unenforceable – under both our federal and state constitutions.").

Under Ohio law, *essential terms* of Davic's plea agreement would include the mandatory consecutive sentences for the four counts of rape pursuant to O.R.C. § 2971.03(E) and Tier III sex offender registration under O.R.C. § 2950. These were guaranteed consequences of Davic pleading guilty. Yet because Davic was never informed of these punitive consequences there was never a *meeting of the minds* on those essential terms. Consequently, his plea agreement was not enforceable.

Query: How and when is a plea agreement enforced? Davic asserts this would be at sentencing. Thus, if his plea agreement was not enforceable (or his guilty plea void) the trial court had no jurisdiction or authority to sentence Davic. Ballentine's defines *void contract* as: "An absolute nullity from the contractual aspect. The equivalent of no contract at all." The Law Dictionary (2002 Anderson Publishing Co.) also defines *void contract* as: "a contract which possesses no legal effect or influence. A void contract never existed by operation of law." "If the plea is void, then it is a nullity, and no adjudication occurred." *Laswell v. Frey,* 45 F.3d 1011 (6th Cir. 1995), J. Kennedy dissenting on other grounds. Citing Black's Law Dictionary (3d Ed. 1933), this Court has likewise held that "[a] void judgment is a legal nullity." *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 270 (2010).

Prior to *Harper* and *Henderson*, the Ohio Supreme Court had held that "[a] void sentence is one that a court imposes despite lacking subject-matter jurisdiction or the authority to act." *State v. Payne*, 114 Ohio St. 3d 502 (2007) at ¶ 27. Soon after the Court held that "a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act." *State v. Simpkins*, 117 Ohio St. 3d 420 (2008) at ¶ 12. "Sentences based on [invalid] pleas are deemed to be void." *State v. Aponte* (10th Dist.), 145 Ohio 3d 607, 615 (2001), citing *State v. Bowen*, 52 Ohio St. 2d 27 (1977).

"Ohio courts have uniformly recognized that void judgments do not constitute final, appealable orders." *State ex rel. Carnail v. McCormick*, 126 Ohio St. 3d 124 (2010) at ¶ 36. See also *State v. Cole* (4th Dist.), 2010-Ohio-4774 at ¶ 8; *State v. Britton* (6th Dist.), 2015-Ohio-2945 at ¶ 8 ("No appeal can be taken from a void judgment because it is not a final appealable order."). Even if Ohio's standard of what constitutes a "void" sentence or judgment has changed pursuant to *Harper* and *Henderson*, the holding in *Carnail*, et al, still stands where a judgment is indeed void.

Thus, if this Court agrees that Davic's guilty plea is void – or not an enforceable contract – then his entire judgment of conviction is a nullity and thus not a final, appealable order, and, as Davic contends, the Ohio Tenth District Court of Appeals never gained jurisdiction to hear his direct appeal in Case No. 11AP-555. Consequently, the appellate court's resultant decision in *Davic I* is a nullity. See *State v. Hannah* (2nd Dist.), 2011 Ohio App. LEXIS 2427 ("Our 2003 opinion resolving

Hannah's first appeal is a nullity because we lacked jurisdiction to issue it in absence of a final, appealable order.").

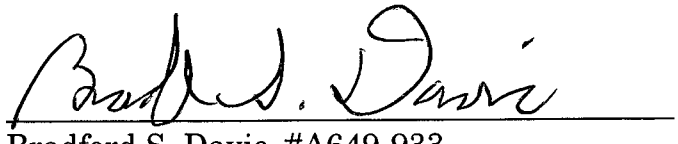
If Davic's original direct appeal in Case No. 11AP-555 is a nullity, then *Special Prosecutors* is inapplicable to his Motion to Vacate Void Plea Agreement, and the trial court did have jurisdiction to entertain it. Under these circumstances, the appellate court's opinion in *Davic III* at ¶ 23, where it concluded that the trial court did not have jurisdiction to hear the motion, is manifestly wrong.

CONCLUSION

The Petition for Writ of Certiorari should be granted review due to the grounds presented herein, which demonstrate clear constitutional Due Process and Equal Protection violations relating to the denial of Petitioner's Motion to Vacate Void Plea Agreement, and the affirmation of the trial court's decision by the Ohio Tenth District Court of Appeals.

Wherefore, the Petitioner, Bradford S. Davic, humbly prays this Honorable Court will grant his petition and allow further review of the issues raised herein.

Respectfully Submitted,



Date: November 10, 2021

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