No. 21-6416

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IN THE

SUPREME COURT OF THE UNITED STATES

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BRADFORD S. DAVIC — PETITIONER, *pro se*

vs.

CHARMAINE BRACY, WARDEN — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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# PETITIONER'S PETITION FOR REHEARING OF THE DENIAL OF HIS WRIT OF CERTIORARI


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## NEW POINT TO BE ADDRESSED IN THE PETITION FOR REHEARING

The Petitioner has provided the Court with a Petition for Rehearing pursuant to USCS Supreme Ct R 44. Petitioner respectfully submits the following issue not directly addressed in the Writ of Certiorari that may impact the Court's decision to deny the Writ rendered on January 10, 2022:

> THE COURT SHOULD GRANT REVIEW TO ADDRESS THE ISSUE OF WHETHER A TRIAL COURT'S JUDGMENT OF CONVICTION IS VOID, WHERE EVEN IF THE COURT HAD JURISDICTION OVER THE CASE, IT ACTED WITHOUT AUTHORITY.

## LIST OF PARTIES

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

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## INTRODUCTION

The Petitioner, Bradford S. Davic, seeks relief from the denial of his Writ of Certiorari entered by the Court on January 10, 2022. *Davic v. Ohio*, 2022 U.S. LEXIS 384. "The right to [rehearing] is not to be deemed an empty formality as though such petitions will as a matter of court be denied. This being so, the denial of a petition for certiorari should not be treated as a definitive determination in this Court, subject to all the consequences of such an interpretation." *Robinson v. United States*, 416 F.3d 645, 650 (7th Cir. 2005), citing *Flynn v. United States*, 75 S.Ct. 295 (1955).

"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 Supreme] 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). Herein, Davic will present an issue related to, but not directly addressed in, his Petition for a Writ of Certiorari. Through his petition Davic seeks to have clarified a conflict between the precedents set by this Court and the various courts of the State of Ohio, including the Ohio Supreme Court, regarding *void judgments*.

The issue to be settled is: Where a case is within its jurisdiction, but the trial court acts without or exceeds its authority, is the resultant sentence and judgment of conviction void or merely voidable? This issue concerns an individual's Due Process protections under the Fifth and Fourteenth Amendments to the U.S. Constitution.

## PETITIONER'S ARGUMENTS IN SUPPORT OF A REHEARING

THE COURT SHOULD GRANT REVIEW TO ADDRESS THE ISSUE OF WHETHER A TRIAL COURT'S JUDGMENT OF CONVICTION IS VOID, WHERE EVEN IF THE COURT HAD JURISDICTION OVER THE CASE, IT ACTED WITHOUT AUTHORITY.

Long ago this Court established that, "Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void[.]" *Elliott v. Lessee of Peirsol*, 26 U.S. 328 (1828). Thus the standard for a court's judgment being void is not only where the court acts without jurisdiction, but also where the court has acted within its jurisdiction but without authority.

Pursuant to 28 USCS § 2255(a): "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, my move the court which imposed the sentence to vacate, set aside or correct the sentence." This rule clearly equates a court imposing a sentence where it lacked jurisdiction to a court having jurisdiction but exceeding its authority in imposing sentence; and provides as a remedy under either scenario that a defendant may move to have the unconstitutional or unlawful sentence vacated. This would be consistent with the precedent set in *Elliott*.

A brief history of Ohio jurisprudence on the issue of void judgments would include *Colegrove v. Burns*, 175 Ohio St. 437 (1964), where the Ohio Supreme Court found that, "Crimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute. A court has no power [authority] to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law."

The Ohio Supreme Court later held that "[i]n general, 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, citing *State v. Payne*, 114 Ohio St. 3d 502 (2007) at ¶27. "It is axiomatic that imposing a sentence outside the statutory range, contrary to the statute, is outside a court's jurisdiction, thereby rendering the sentence void ab initio." *Payne* at fn 3. See also *Howard v. Wilson*, 2008 U.S. Dist. LEXIS 92840 at *18, quoting *Payne*. Thus, at that time, where a trial court had jurisdiction over a case but acted without or exceeded its authority in imposing sentence, the resultant judgment was deemed void.

This changed drastically in 2020, when the Ohio Supreme Court entered a pair of decisions which directly conflict with the standard set by this Court in *Elliott*. In the first, the Ohio Supreme Court 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 upon *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."

*State v. Henderson*, 161 Ohio St. 3d 285 (2020) at ¶43.

More recently, in a state habeas corpus proceeding, the Ohio Supreme Court found that "Slaughter alleged that he could not be detained pursuant to a sentence that the trial court had no legal authority to impose. But we rejected that argument in [*Henderson*]." *State ex rel. Slaughter v. Foley*, 2021-Ohio-4049 at ¶9.

So pursuant to *Harper* and *Henderson*, as long as a court has jurisdiction over a case, acting without authority only renders a resultant judgment voidable, not void. Under Ohio law, it remains that "[a] void judgment is a nullity and open to collateral attack at any time." *Lingo v. State*, 138 Ohio St. 3d 427 (2014) at ¶ 46. However, a voidable judgment can only be challenged on direct appeal. *Harper* at ¶42.

The result is cases like *Stansell*, where the appellate court acknowledged that, "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* (8th Dist.), 2021-Ohio-203 at ¶23. The court concluded that "[t]he trial court here imposed a sentence outside of its authority; *Harper* and *Henderson* should not serve as a bar to this court's review." *Id.* at ¶31. Stansell's life sentence, which the trial court had jurisdiction, but not authority, to impose was vacated and the case remanded for resentencing. *Id.* at ¶32.

However, relying on *Harper* and *Henderson*, on reconsideration the court reversed its earlier decision, finding "that where a defendant's sentence exceeds statutory limitations, the sentence is voidable, but not void, unless the sentencing court lacked subject-matter jurisdiction over the case or personal jurisdiction over the defendant." *State v. Stansell*, 2021-Ohio-2036 at ¶2. Thus, even though the trial court imposed a life sentence that exceeded its authority, the judgment of conviction was found to be only voidable; and because Stansell had failed to challenge the sentence on direct appeal he was unable to challenge it in a post-sentence (collateral) motion. Even that court "recognize[d] that the application of the Ohio Supreme Court's current void-sentence jurisprudence can be unjust * * * where the sentencing error is not challenged on direct appeal and causes the defendant to spend 'unwarranted time incarcerated.'" *Id.* at ¶10, quoting *Henderson* at ¶48. See also *Speed v. Fender*, 2021 U.S. Dist. LEXIS 187345 at *54, citing *Henderson* ("This means that some defendants in Ohio cases will never be able to obtain state court relief to correct sentencing errors.").

In the present case, as established in his petition to this Court, Davic entered into a guilty plea where the trial court failed to inform him beforehand that the four counts of rape to which he would plead guilty were subject to mandatory consecutive sentences under O.R.C. § 2971.03(E), and that one of the penalties he faced would be registration as a Tier III sex offender. Consequently, Davic's guilty plea was not entered knowingly, intelligently and voluntarily; which by this Court's standard renders the plea void. *McCarthy v. United States*, 394 U.S. 459 (1969) ("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.").

Furthermore, in accepting Davic's guilty plea, the trial court violated Ohio Criminal Rule 11(C), thus also rendering the plea void. "A conviction or sentence imposed in violation of a substantive rule [such as Crim.R. 11(C)] is not just erroneous but contrary to law and, as a result, void." *Montgomery v. Louisiana*, 136 S.Ct. 718, 731 (2016).

Since rendering its decisions in *Harper* and *Henderson*, the Ohio Supreme Court has yet to apply its revised definition of *void* to the issue of guilty pleas. However, lower courts in the state have. See, e.g., *State v. Davic* (10th Dist.), 2021-Ohio-131 at ¶18 ("Because the Franklin County Court of Common Pleas had 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."). In one prior decision, the Ohio Supreme Court did find 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." *Dunbar v. State*, 136 Ohio St. 3d 181 (2013) at ¶15. This piece of dictum did not directly address the question of whether the court had acted without authority.

Taken altogether, it would seem the courts of Ohio are now taking the position that as long as a trial court has jurisdiction over a defendant entering a guilty plea, even if the court violates Ohio Crim.R. 11(C) or the plea is not entered knowingly, intelligently and voluntarily, or the court acts outside the law or without authority,

the plea will only be considered voidable, not void. This clearly runs afoul of the precedent set by this Court in *McCarthy*, *Montgomery*, et al.

"Black's Law Dictionary defines 'void' as 'null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended.' BLACK'S LAW DICTIONARY 1411 (5th ed. 1979). A void order has no legal effect and is treated as if it never existed." *In re Ruehle*, 296 B.R. 146 (2003). "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. "Sentences based on such [void] pleas are deemed to be void." *State v. Aponte* (10th Dist.), 145 Ohio App. 3d 607, 615 (2001).

As presented in his petition, the issue of Davic's plea agreement should also be viewed in terms of contract law, since "plea bargains are essentially contracts." *Puckett v. United States*, 556 U.S. 129, 137 (2009). "To form a contract, the parties must have a meeting of the minds on all essential terms of the contract." *Innotext, Inc. v. Petra'Lex USA Inc.*, 694 F.3d 581 (6th Cir. 2012). In Ohio, "A criminal sentence consists of several distinct components, including a prison sentence, a fine, *sex offender registration* and notification requirements and duties, and postrelease control." (Emphasis added.) *State v. Rogers* (12th Dist.), 2020-Ohio-4102 at ¶19. Thus, as in the present case, registration can be one of the essential terms to a plea agreement.

As to Davic's plea agreement, there clearly was not a meeting of minds as to the sentencing exposure he faced by pleading guilty to four counts of rape – that he

was subject to mandatory consecutive sentences under O.R.C. § 2971.03(E) – as Davic during his plea hearing (Tr. 3), and his counsel at sentencing (Tr. 20), both implicitly expressed a belief that the sentences for those four counts could be run concurrent, yielding a sentence of only 10 years to life (as opposed to the sentence of 40 years to life that was imposed by mandate). Likewise, where the designation of Davic as a Tier III sex offender was, by statute, a mandatory penalty for his pleading guilty, but was never discussed during his plea hearing or made a part of his written plea agreement, there was never a meeting of the minds on that essential term. Consequently, Davic's plea agreement was *not* an enforceable contract.

This Court has held that where "the voluntary bilateral consent to the [plea] contract never existed * * * it is automatically and utterly void." *Puckett* at 137. Again, "If the plea is void, then it is a nullity, and no adjudication occurred." *Laswel,* supra. Query: So if the plea was void, the agreement an unenforceable contract, did the trial court even have jurisdiction to impose a sentence? Yet whatever the answer to that query, Davic asserts that, pursuant to *Elliott,* even if the trial court did still have jurisdiction over Davic's case after he pleaded guilty, because his guilty plea was void, and the plea agreement not an enforceable contract, the court was never vested with authority to impose a sentence. Consequently, Davic's sentence of 40 years to life was void ab initio; as was the resultant judgment of conviction.

Furthermore, at sentencing the trial court imposed a punitive sanction – Tier III sex offender registration – that was not part of Davic's plea agreement. "Once the court unqualifiedly accepts the [plea] agreement it too is bound by the bargain."

*United States v. Holman*, 728 F.2d 809, 813 (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.").

In *United States v. Hodge*, 306 Fed. Appx. 910, 915 (2009), the Sixth Circuit found that "the district court imposed a sentence which was not in accordance with the terms of the plea agreement as required by Fed. R.Crim.P. 11(c)(1)(C). Thus * * * the plea agreement is null and void and the parties are not bound by its terms." Davic's plea agreement should likewise be deemed null and void; and even if the trial court had jurisdiction to sentence Davic (a point of contention in itself), it exceeded its authority by sentencing him to a punitive sanction that was not part of the plea agreement. This should further render his sentence and judgment void, not voidable.

Federal courts have found "[a] sentence is illegal when * * * it is greater or less than the permissible statutory penalty for the crime. * * * There can be no plea bargain to an illegal sentence. Even when a defendant, prosecutor, and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law." (Internal citations omitted.) *United States v. Greatwalker*, 285 F.3d 727, 729-30 (8th Cir. 2002). Applied here, because sex offender registration was not made part of Davic's plea bargain – denying the trial court authority to impose it at sentencing – Davic pleaded to an illegal sentence. Therefore, the trial court could not give effect to the sentence; it should be deemed void ab initio.

"A void judgment is a legal nullity." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). "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. 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.").

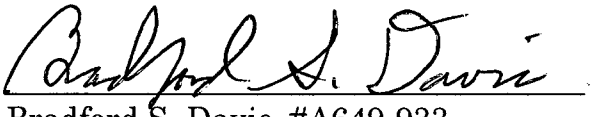
Because Davic's plea, sentence, and judgment of conviction were all void, he never had a final, appealable order from which to seek appeal. Consequently, the appellate court never had jurisdiction to hear Davic's appeal in Case No. 11AP-555, and its resultant decision is a nullity. See *State v. Hannah* (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.").

In overruling Davic's appeal of his Motion to Vacate Void Plea Agreement, the appellate court found that, "The Supreme Court of Ohio has 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* at ¶16, quoting *State ex. rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97 (1978). If, based upon the foregoing arguments, this Court agrees that Davic's appeal in Case No. 11AP-555 is a nullity, then *Special Prosecutors* was inapplicable to his motion and, contrary to the finding of the appellate court (see *Davic* at ¶23), the trial court did indeed have jurisdiction to hear Davic's motion.

## CONCLUSION

Based on the foregoing, a rehearing should be held on Davic's Petition for Writ of Certiorari, and review granted based on the grounds presented in the petition and herein.

Respectfully Submitted,



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