NO. 21-6968

IN THE

ORIGINAL

SUPREME COURT OF THE UNITED STATES

JAY ANTHONY JONES Petitioner

vs.

STATE OF MARYLAND, Respondent

ON WRIT OF CERTIORARI FROM THE MARYLAND COURT OF APPEALS

Petition for Writ of Certiorari

Jay Anthony Jones
MCI-J P.O. BOX 549
Jessup, Maryland 20749
Self Represented

QUESTION (S) PRESENTED

1. Is the State of Maryland's case *Twigg v. State,* 447 Md. 1 (2016, afoul of the long standing principal set forth in *North Carolina v. Pearce,* 395 U.S. 711 (1969), *i.e.* that an increase in a criminal defendant's sentence is illegal, on remand from an appellate court. *North Carolina v. Pearce,* 395 U.S. 711 (1969).

LIST OF PARTIES

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

RELATED CASES

North Carolina v. Pearce, 395 U.S. 711 (1969), *Twigg v. State,* 447 Md. 1 (2016.

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STATUES AND RULES
Those applicable to the law at issue

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Jay Anthony Jones, (Petitioner), respectfully prays that a writ of certiorari be issue to review the judgment below.

OPINIONS BELOW

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 an unreported from the State of Maryland.

JURISDICTION

Case from **state courts**: State of Maryland

The date on which the highest state court decided my case was 9/28/21 A copy of that decision appears at Appendix B. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 14th Amendment to the U.S Constitution

STATEMENT OF THE CASE

By charging documents filed in Baltimore City, Maryland, the state charged Jay Anthony Jones (Mr. Jones) with Robbery and related offenses. Mr. Jones was convicted of two counts of armed robbery and related offenses. After a trial and sentencing in the Circuit Court for Baltimore City, Maryland, Mr. Jones appealed his sentence totaling 65 years' incarceration, which sentence was reversed and the matter remanded for re-sentencing in an unreported opinion in which the Court of Special Appeals of Maryland instructed the trial court to merge the first degree assault conviction into the robbery with

a deadly weapon conviction.

Following that reversal, a re-sentencing hearing was held, during which the trial court reduced Mr. Jones' sentence from 65 years' incarceration to 60 years' incarceration, but refused to hear and considered any evidence in mitigating before imposing sentence. Mr. Jones again appealed, and in *State v. Jones,* 414 Md. 686, 997 (2010) the Court of Appeals of Maryland again reversed his sentence and remanded the matter for a re-sentencing.

On January 13, 2011, a hearing was held on Mr. Jones second re-sentencing, the Mr. Jones was sentenced in Case No. 103149031 (031), and 103129033 (033), to twenty years; incarceration for the second armed robbery conviction, additionally he was sentence to a concurrent 20 years sentence for the handgun offense in the second case, to be served consecutive to the 40 year sentence imposed in the second sentencing and first re-sentencing for the crimes in Case No.103419032 (032).

REASONS FOR GRANTING THE WRIT

An increase in a criminal defendant's sentence is illegal, whether imposed by a trial court prior to any appeal, *State v. Sayre,* 314 Md. 559 (1989), or on remand from an appellate court. *North Carolina v. Pearce,* 395 U.S. 711 (1969); *State v. Thomas,* 465Md. 288 (2019). In this case, petitioner's sentences for certain counts were increased on remand. The illegal increase in sentence on remand is not sanctioned by *North Carolina v. Pearce,* 395 U.S. 711 (1969)

A limit upon resentencing.

Pursuant to § 12-702(b) of Court and Judicial Proceedings Article, "[i]f an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper . . . sentence, . . . the lower court may impose any sentence authorized by law to be imposed as punishment for the offense[;]" however, the resentencing court "may not impose a sentence more severe than the sentence previously imposed for the offense," except in certain circumstances that do not apply here. MD. CODE ANN., CIS. & JUD. PROC. §12-702(b). Section 12-702(b), which codified *North Carolina v. Pearce,* 395 U.S. 711 (1969), "was designed to prevent both the reality and the 'apprehension' of judicial 'vindictiveness' in response to a defendant's exercise of the right to appeal." *Thomas,* 465 Md. at 303 (holding that on resentencing "a term of imprisonment of equal length to the original sentence but with a later parole eligibility date [is] 'more severe' than the original sentence for purposes of CJ § 12-702(b)").

The trial court on remand imposed an illegal sentence.

At resentencing on remand in the case, after petitioner's sentence were vacated as a package, the circuit court imposed more severe sentences for certain counts as discussed in the arguments below. The package sentence is not sanctioned by *Twigg.* The Court of Appeals in *Twigg* held that the Double Jeopardy Clause did not bar

resentencing for child abuse on remand where the trial court erroneously sentenced the defendant for both child abuse and second degree rape instead of merging the conviction for the latter with the conviction for the former. The Court vacated both sentences and remanded for resentencing on the greater-inclusive offense of child abuse. 447 Md. at 18-19, 23. Twigg still stood convicted of second degree rape, third degree sexual offense, incest, and child abuse. *Id.* at 19. *Thus, Twigg was solely about sentencing following merger of sentences for convictions that remained intact.*

Absent resentencing the merger determination would have cut Twigg's prison sentence in half, because the trial court had imposed consecutive sentences totaling forty years of active incarceration, yet only a fifteen-year suspended sentence for sexual child abuse. *Id.* at 5. The remand for resentencing prevented a clear windfall to Twigg-a reduction in sentence without any reduction in criminal culpability.

The Court of Appeals reiterated in *Nichols v. State,* 461 Md. 572 (2018), that "where an appellate court determines that at least one of a defendant's sentences must be vacated, the appellate court may vacate all of the defendant's sentences and remand for resentencing 'to provide the [trial] court maximum flexibility on remand to fashion a proper sentence that takes into account all of the relevant facts and circumstances.'" *Id.* at609 (quoting *Twigg).* Thus, where the convictions upon which a defendant is initially sentenced remain intact, the *Twigg* total package of sentencing applies. *See Twigg,*447 Md. at 26-27 ("We conclude that, as the word is used in§ 12-702(b), 'offense means not simply one count in a multi-count charging document, but rather the

entirety of the sentencing package that takes into account each of the individual crimes of which the defendant was found guilty") (Emphasis added).

Twigg is consistent with the purpose of § 12-702(b), which was enacted to shield defendants from resentencing where there are reasonable grounds to fear vindictiveness, not to confer windfalls on defendants. Viewing the "offense" whose sentence serves as the baseline for resentencing as the total package of sentences makes sense in a context involving only merger, where the defendant's criminal culpability is unaltered, so a reduction in the defendant's sentence may be unjust. But that reasoning does not apply where a sentence is remanded and *the defendant has less culpability.* "[A]n appellate reversal [for insufficiency of facts to support a sentence] means that the government's case was so lacking that it should not have even been *submitted* to the" fact finder. *Burks v. United States,* 437U.S. 1, 16 (1978). Thus, the defendant should never have been sentenced for that offense. Nor should he have been sentenced on any charge based on the erroneous assumption that he was more culpable as than those who actually committed the offense.

Argument

All illegal sentence is imposed where "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason is intrinsically and substantively unlawful." *Chaney v. State,* 397 Md. 460, 466, 918 A.2d 506 (2007). The trial court has no discretion to impose an illegal sentence. The *de novo* standard of review, therefore, is applicable to the lower court's imposition

of sentence. *See Blickenstaff v. State,* 393 Md.680, 683, 904 A.2d 443 (2006) ("We shall address the legal issue of the sentencing in the case at bar under a *de novo* standard of review."); *see also Bonilla v. State,* 443 Md. 1, 6,116 A.3d 98 (2015) ("We review the legal issue of the sentencing in this case as a matter of law."); Md. Rule 4-345(a) ("The court may correct an illegal sentence at any time.").

The best analysis that, Mr. Jones has been able to find is that of the Honorable Judge Charles Moyland, in *Carlini v. State,* 215 Md. App. 419 81 A.3d 562. There, Judge Moylan undressed Maryland Rule 4-345 like no other judge has ever done before. Judge Moylan stated:

> What is an illegal sentence? That all depends upon what one means by "an illegal sentence." There are countless illegal sentences in the simple sense. They are sentences that may readily be reversed, vacated, corrected or modified on direct appeal, or even on limited post-conviction review, for a wide variety of procedural glitches and missteps in the sentencing process. Challenges to such venial illegalities, however, are vulnerable to such common pleading infirmities as non-preservation and limitations. There is a point, after all, beyond which we decline to revisit modest infractions. There are, by contrast, illegal sentences in the pluperfect sense. Such illegal sentences are subject to open-ended collateral review. Although both phenomena may casually be referred to as illegal sentences, there is a critically dispositive difference between a procedurally illegal sentencing process and an inherently illegal sentence itself. It is only the latter that is grist for the mill of Maryland Rule 4-345(a):
>
> (a) *Illegal sentence.* The court may correct an illegal sentence at any time. In one section of his well-crafted opinion Judge Moylan, discussed an issue relevant to this case, namely sentences that should have never been imposed.

Judge Moylan stated:

A Sentence That Should Never Have Been imposed

More common than the illegal sentences that exceed the sentencing cap are the sentences that are illegal because they should never have been imposed in the first place. Alston v. State, 425 Md. 326,339, 40 A.3d 1028 (2012), held clearly:

> There is one type of illegal sentence which this Court has consistently held should be corrected under Rule 4-345(a). 215 Md. App. 434 Where the trial court imposes a sentence or other sanction upon a criminal defendant, and where no sentence or sanction should have been imposed the criminal defendant is entitled to relief under Rule 4-345(a).(Emphasis supplied). See also *Taylor v. State*, 407Md. 137, 141 n.4, 963 A.2d 197 (2009) ("[A] motion to correct an illegal sentence is entertained ... where ... the sentence never should have been imposed."); *State v. Wilkins*, 393 Md. 269, 273-74, 900A.2d 765 (2006) ("[A] motion to correct an illegal sentence can be granted ... where no sentence should have been imposed.").

In *Ridgeway v. State*, 369 Md. 165, 797 A.2d 1287 (2002), the defendant was sentenced on three first-degree assault charges on which the jury had acquitted him. The Court of Appeals held, "The sentences for the three first degree assault convictions were illegal and properly vacated pursuant to subsection (a) of Rule 4-345. A court cannot punish a defendant for a crime for which he or she has been acquitted." 369 Md. at 171.

As an interesting variation on that theme, in *Johnson v. State*, 427 Md. 356, 47 A.3d 1002 (2012), the defendant's 30-year sentence for assault with intent to murder should never have been imposed for the simple reason that the defendant had never been charged with and had never been convicted of assault with intent to murder.

In *State v. Garnett*, 172 Md. App. 558, 559, 916 A.2d 393 (2007), this Court held that "a sentence of restitution' cannot be imposed on a defendant who has been found not criminally responsible by reason of insanity."

In *Moosavi v. State*, 355 Md. 651, 736 A.2d 285 (1999), the defendant was "charged ... under the wrong statute." 355 Md. at 663. This Court concluded that

"where a defendant has been charged and convicted under an entirely inapplicable statute ... the resulting sentence under the inapplicable statute is an illegal sentence which may be challenged at any time." 355 Md. at 662. (215Md. App. 435 81 A.3d 572 and see *Campbell v. State*, 325 Md. 488, 508-09, 601 A.2d 667 (1992).

In *Jones v. State,* 384 Md. 669, 866 A.2d 151 (2005), the Court of Appeals held that the defendant should never have been sentenced on one of four apparent convictions where, with respect to that one conviction, the verdict (albeit recorded on the verdict sheet) as to that conviction had never been orally announced in open court. "We conclude a sentence is illegal if based upon a verdict of guilt that is not orally announced in open court in order to permit the jury to be polled and hearkened to the verdict." 384 Md. at 672.

In *Alston v. State*, 425 Md. 326, 40 A.3d 1028 (2012), a post- conviction trial court had vacated Alston's convictions and sentences and granted him a new trial. After an unauthorized and untimely motion for reconsideration by the State, the trial court struck its earlier order and re-imposed the original convictions and sentences. The Court of Appeals held that the resentencing was inherently illegal. The original sentences had been properly vacated and no basis had been established for re-imposing them.

Two of the Rule 4-345(a) illegal sentences involved the imposition of sanctions, as a part of the sentence, where the sanctions had never been legally authorized. In *Holmes v. State*, 362 Md. 190, 763 A.2d 737 (2000), the Court held that, in the absence of statutory authority, the imposition of house detention or house arrest as a condition of probation constitutes an inherently illegal sentence. And see *Bailey v. State*, 355 Md. 287, 734 A.2d 684 (1999). In *Montgomery v. State,* 405 Md. 67, 950 A.2d 77 (2008), the defendant, after serving the five unsuspended years of a 25-year sentence and an additional five years of supervised probation, was found to be in violation of probation. The court sentenced the defendant to serve ten years but deferred the date to begin serving the sentence for three years and indicated that if, at the end of the three years the defendant had been on good behavior, the court would modify the sentence so that no time would be served. *Id* at 215Md. App. 436. The Court of Appeals held that although the common law allows for short periods of deferral of the execution of a sentence, there was no authority for the three-year deferral in this case. The sentence was, therefore, illegal within the contemplation of Rule 4-345(a).

A recurring problem, in Maryland and elsewhere, is the situation where there was

a single conviction but where that conviction is representative of a larger criminal scheme that has victimized other similarly situated persons. If the investigation reveals the other victimizations, may the sentencing judge order restitution beyond the case on which the verdict has been rendered? Maryland first addressed this issue in this Court's opinion in *Mason v. State*, 46 Md. App. 1, 415 A.2d 315 (1980). At the outset, we stated what was a question of first impression:

> The single issue before us on this appeal is the permitted breadth of an order of restitution. May a convicted thief (we use that term in its broadest and most informal sense) be required, as a condition of probation to make restitution to the world for his multitudinous peculations or must the restitution be limited by the losses established in the actual case the conviction as to which serves as the predicate for the sentence? We hold that the latter is the appropriate and legally required limitation upon court-ordered restitution. 46 Md. App. at 2 (emphasis supplied).
>
> We examined the Maryland statutes regulating restitution and concluded that restitution was limited to the case on 81 A.3d 573 which a criminal sentence could be imposed.

The issue now before us is one of first impression. Although the Maryland statutes do not, in terms, preclude the granting of restitution for other crimes not charged or proved, the clear sense of § 640(b) and § 145 seems unmistakably to contemplate restitution for the crimes as to which incarceration might otherwise be imposed. 46 Md. App. at 6 (emphasis supplied).

We then surveyed the national law and concluded that "the experience and wisdom of our sister common-law jurisdictions 215 Md. App. 437 helps to persuade us that this is clearly the correct result." 46 Md. App. at 6. We concluded that the additional order of restitution rendered the sentence excessive and, therefore, illegal.

We hold that in this case the restitution ordered in the amount of $3,949.61 to Mr. and Mrs. Bennett was legal but that the open-ended order to make additional restitution to a wide variety of "victims" to be determined by the probation department and in amounts to be determined by the probation department exceeded the sentencing authority of the court.46 Md. App. at 9 (emphasis supplied).

The Court of Appeals confirmed our result five years later. In *Walczak v. State,* 302 Md. 422, 488 A.2d 949 (1985), an order to pay restitution to the victim of a crime of

which the defendant had not been convicted was held to be inherently illegal. No sentence, including an order of restitution, should have been imposed. "Clearly, then, restitution is punishment for the crime of which the defendant has been convicted. Restitution depends on the existence of that crime, and the statute authorizes the court to order restitution only where the court is otherwise authorized to impose punishment." 302 Md. at 429.

In *Chertkov v. State,* 335 Md. 161, 642 A.2d 232 (1994), the trial court approved a plea agreement and imposed a sentence in accordance with that agreement. Subsequently, however, the court granted a defense motion to modify the sentence and granted the defendant probation before verdict. The State appealed, arguing that the downward modification was in violation of the plea agreement. The Court of Appeals held that the State had no right to appeal, but nonetheless, in considered dicta, addressed the merits of the State's contention. It announced that the State, as well as the defendant, has the right to rely on the terms of the plea agreement.

[I]t is clear that a court that binds itself to fulfill the plea agreement thereby relinquishes his or her right to modify the sentence, thereby imposed, absent the consent of the parties, and, in particular, in the case of reducing the sentence, absent the consent of the State. 335 Md. at 174-75.

The common denominator in all of these instances of Rule 4-345(a) sentence illegality is that once the objective outer boundary markers for the sentence have been established, the illegality that inheres in the sentence itself is obvious. Even if all of the antecedent proceedings had been procedurally impeccable, the illegality of the sentence is facial and self- evident.

Md. Rule 4-345 and the law of the case doctrine. The law of the case doctrine binds lower courts to the rulings made by an appellate court on a particular issue in the same case. *Scott v. State,* 379 Md. 170, 183-84 (2004). Future appeals at the same appellate level are bound by the law of the case as well unless one of the following three exceptions applies:

> (1) the evidence in a subsequent trial is substantially different from what was before the court in the initial

> appeal; (2) a controlling authority has made a contrary decision in the interim on the law applicable to the particular issue; or (3) the original decision was clearly erroneous and adherence to it would work a manifest injustice.

Baltimore Cty. v. Fraternal Order of Police, Balt. Cty. Lodge No. 4, 449 Md. 713, 730 (2016); *see also Scott,* 379 Md. at 183-84.

Recently, in *Nichols v. State,* 461 Md. 572, 589 (2018), the Court of Appeals explained how the law of the case doctrine applies to motions to correct an illegal sentence. Rule 4-345(a) permits a court to correct an illegal sentence "at any time," even if the defendant did not object to the sentence initially, even if the defendant consented to it, and even if the sentence was not challenged on direct appeal:

> If a sentence is illegal within the meaning of Maryland Rule 4-345(a)-that is, the illegality inheres in the sentence itself-then the defendant may file a motion in the trial court to correct it, notwithstanding that: (1) no objection was made when the sentence was imposed, (2) the defendant purported to consent to it, or (3) the sentence was not challenged in a timely-filed direct appeal or at some other previous procedural juncture.

Id. (quoting Smith v. State, 453 Md. 561, 576 (2017) (cleaned up). Even so, *Nichols* explained that the law of the case doctrine *does* bar a court from considering an issue bearing on the legality of a sentence if an appellate court has already resolved the same issue. *id.* at 593 ("The law of the case doctrine prevents re-litigation of an 'illegal sentence' argument that has been presented to, and rejected by, an appellate court.") *(quoting State v. Garnett,* 172 Md. App. 558, 562-63

(2007)). The law of the case doctrine does *not* bar a court from considering an issue as to the legality of a sentence that an appellate court has not resolved or that a defendant could have raised, but failed to raise, in a previous appeal. *Nichols,* 461 Md. at 593. If the issue is the same as an issue previously raised and decided, the Court is bound by our earlier decision unless one of the three exceptions applies; if the issue is different, the law of the case does not apply, even if Mr. Jones could have raised the issue previously. Mr. Jones has never argued that his sentence were illegal under Md. Rule 4.345, using the same reasons, he is using now. Therefore, the law of the case is not applicable.

Facts and argument

The Maryland Rules, specifically Rule 4- 345 provides as relevant here the following:

> (a) *Illegal Sentence.*- The court may correct an illegal sentence at any time. (b) *Fraud, mistake, or irregularity.*- The court has revisory power over a sentence in case of fraud, mistake, or irregularity.
> (c) Correction of mistake in announcement. - The court may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentence proceeding.
>
> Md. Rules 2018 *LexisNexis.*

In Maryland Mr. Jones sentences are illegal as a "sentence may not be consecutive with a term of confinement [that] is not then [in existence]." *Stouffer v. Pearson, Id.*

at 887 A.2d at 639 548-59 (quoting *DiPietrantonio v. State*, 61 Md. App. At 533, 487 A.2 at 679.

An illegal sentence is imposed where "there either has been no conviction warranting any sentence for the particular offense or *sentence is* not *a permitted one for the conviction upon which it was imposed* and for either reason, is intrinsically and substantively unlawful." *Chaney v. State,*. 397 Md. *60, 466,* 918 A. 2d 506 (2007). (Emphasis provided). The trial Court has no discretion to impose an illegal sentence. See *Blickenstaff v. State,* 393 Md. 680, 683, 904 A. 2d 443 (2006); Md. Rule 4-345 (a)[1] ("The court may correct an illegal sentence at any time"); Md. Rule 4-345 (b) ([t]he court has revisory power over a sentence in cases of fraud mistake, or irregularity."); Md. Rule 2-523. Failure to object to an illegal sentence at the time it was imposed did not preclude defendant from later raising the issue or later filing a motion to correct illegal sentence. *Montgomery v. State,* 405 Md. 67, 950 A.2d 77 (2008)

At issue in in this petition are subsections (a) and (b) of the Rule 4-3 45. The question that needs a definite answer is whether, as a result of Mr. Jones' first appeal, subsequent remand, and new sentence, the Circuit Court for Baltimore City Maryland, imposed yet another illegal sentence?

Insofar as this petition is concerned, the factual proceedings with respect to crimes that lead to these convictions are not in dispute.[2] Instead, the challenge here extends to

[1] See also *Carlini v. State,* 215 Md. App. 415, 81 A3d 560 (2013)

[2] Mr. Jones does not agree to the facts as painted by the prosecutor in this case however the facts are inconsequential for the issue at hand.

what occurred after the case at bar was remanded by the Appellate Courts.

Mr. Jones takes issue specifically with the sentences that were imposed consecutive to the first degree assault conviction, and the effect that such remand had in his aggregated sentences. The issue before the Court now *is* that since the first degree assault conviction was vacated, and because the manner in which the original sentencing Court imposed the sentences, the sentences that were ordered to be serve consecutive to that sentence, were effectively no longer consecutive for the evident reason that, that sentence was no longer in existence Although, at first instance it appears as though Mr. Jones is re-litigating what his re-sentencing's trial Counsel had argued at the re-sentencing, this is not the case. Rather, Mr. Jones allegations here now, are that this sentences were illegal imposed where the ***"Sentence is not a permitted one for the conviction upon which it was imposed*** and, for either reason, is intrinsically and substantively unlawful." *Chaney v. State,* 397 Md . 460, 466, 918 A. 2d 506 (2007).

Maryland's jurisprudence clearly supports Mr. Jones's statement that a court cannot impose a consecutive sentence to a sentence that is no longer in existence. Opening first with Court of Special Appeals' jurisprudence Mr. Jones arranges the foundation of his arguments:

"A [trial] court may make a sentence concurrent with[,] or consecutive to[,] any other unsuspended actual sentence of confinement that exists." *Parker v. State,* 193 Md. App 469, 486, 997 A.2d 912, *922* (2010) (citation and internal quotation marks omitted) Conversely, a trial court may not make a sentence concurrent with, or

consecutive to, any other unsuspended actual sentence of confinement that does not exist. See *Dipietrantonio v. State* 61 Md. App. at 533, 487 A.2 at 679. cert. denied, 303 Md. 295, 493 A2d 349 (1985).

This Court first applied this principal in *Alston v. State,* 38 Md. App. 611, 615, 379 A2d 754, 757 (1978), in which the Court held that a trial court erred in making a sentence concurrent with a sentence that another trial court was expected to impose- i.e., a sentence that did not exist. In *Alston,* id at 612, 379 A.2d at 755, a defendant had been convicted, but had not yet been sentenced, in a Maryland trial court and in a District of Columbia trial court. The Maryland trial court imposed a sentence that was to be concurrent with the sentence that the District of Columbia trial court would impose. See id at 612, 379 A.2d at 755. Afterward, the District of Columbia trial court imposed a sentence that was to be consecutive to the sentence that the Maryland trial court had imposed. See id. a t 612, 379 A.2d at 755. As a result, even though the Maryland trial court purportedly imposed a concurrent sentence, the defendant began serving the Maryland sentence without receiving any credit toward the District of Columbia sentence. See id. at 614, 379 A 2 .d at 756. This Court concluded that the Maryland trial court sentence was improper "because it was made to run concurrently with a sentence that have not yet been meted out to [defendant] ." ld. at 615, 379 A.2d at 757. Accordingly, the Court vacated the Maryland trial court's sentence and remanded for a resentencing. See id. at 615, 379 A.2d at 757.

The Court of Appeals has had several occasions of its own addressing similar

matters. For example in *Stanton v. State,* 290 Md. 245, 2 50, 428 A.2d 1224, 1227 (1981), the Court held that trial court did not err in making a sentence consecutive to an existing District Court sentence that was later superseded by a circuit court sentence that resulted from a *de novo* appeal. In *Stanton,* 290 Md. at 246, 250, 428 A.2d at 1225, 1227, a circuit court convicted a defendant and deferred sentence; in a second criminal case, the District Court convicted and sentenced the defendant, who noted a *de novo* appeal; before the *de novo* appeal's disposition, in the first criminal case, the circuit court imposed a sentence that was consecutive to the District Court sentence; and finally, in the *de novo* appeal in the second criminal case, the defendant was convicted, and the circuit court imposed a new sentence that superseded the District Court sentence. The Court of Appeals concluded that it was proper for the circuit court to make the sentence in the first criminal case consecutive to the District Court sentence in the second criminal case, as the latter sentence existed at the time, even though it was later superseded. See id at 250, 428 A .2d at 1227.

In *Dipietrantonio* this Court held that, where a trial court imposed a sentence that included probation and the defendant violated the order of probation, the trial court did not err in imposing a new sentence that was consecutive to an existing sentence in another criminal case. In *DiPietrantonio,* id. at 529, 487 A.2d at677, a trial judge imposed a sentence that include both imprisonment and probation. After the defendant served the term of imprisonment, during the probationary period, in a second criminal case, the defendant was convicted of, and sentenced for, additional crimes. See id. at *530,* 487 A.2d at 677. The second trial judge did not refer to the sentence in the

first criminal case. See id. at 530, 487 A2.d at 677. In the first criminal case, the first trial judge revoked the defendant's probation and imposed a portion of the previous suspended period of imprisonment, consecutive to the sentence in the second criminal case. See id. at 534, 487 a.2d. at 677. This Court explained that the sentence in the second criminal case could not have been concurrent with, or consecutive to, the original sentence in the first criminal case, as the defendant was not serving a term of imprisonment at that time. See id. at 534, 487A 2d at 679. The Court held that the first trial judge did not err in making the new sentence in the first criminal case consecutive to the sentence in the second criminal case as the defendant was serving a term of imprisonment at the time. See id. at 535, 487 A.2d at 679.

In *Stouffer v. Pearson,* 390 Md. 36, 41 887 A2d 623, 626 (2005), the Court of Appeals held that a sentence for crimes that the defendant committed while on parole could be consecutive to the defendant's term of parole because the defendant's parole was not revoked until after the defendant was sentenced. In *Stouffer id.* at 41-42, 887 A2.d at 626, a trial court sentence the defendant to a term of imprisonment; the defendant was released on parole; and, subsequently, the defendant was arrested. In a second criminal case, the defendant was convicted of, and sentenced for, additional crimes; the trial court made one of the sentences '"consecutive with any sentence on violation of parole[.]'" See id. at 42, 887 A.2d at 625. Afterwards, the defendant parole was revoked, and he was ordered to serve the balance of his original sentence. See id. at 42, 887 A.2d at *626*.

The Court of Appeals held that the trial court erred in making the sentence in the second criminal case consecutive to the defendant's term of parole, as that constitute a "sentence to commence in the future." id at 59, 887 A.2d at 636. The Court found

"persuasive" the statement in *DiPietrantonio,* 61Md. App. at 532, 487 A2d at 678, that a trial court:

> [M]ay make [a] sentence concurrent with[,] or consecutive to[,]whatever other sentence then exists, actually being serve. [The trial would be, *ipso facto,* to usurp the sentencing prerogative of some other [trial} judge operating in a near or distant time yet to be. *Stouffer,* 390 Md. at 58, 887 A.2d at 639.

The Court of Appeals explained that:

> When a person is sentenced for a new crime before revocation of parole, a [trial court] may not treat parole as an existing term of confinement and, as such, a new sentence may not be served consecutive to a parole term because, a "sentence may not be consecutive with a term of confinement [that) is not then [in existence]." ld. at 548-59, 887 A.2d at639 (quoting *DiPietrontonio,* 61 Md. App. at 533, 487 A.2d at 679) (ellipsis omitted).

At Mr. Jones' original sentencing hearing the Court imposed the following sentence in the manner as shown below:

> 031- Count 3 - First Degree Assault - Twenty five- years
> 031 - Count 4 - Use Of A Handgun In The Commission Of A Crime Of Violence - Twenty years, consecutive Twenty years, consecutive to 031- Count 3.
> 033 - Count - 1- robbery with A Deadly Weapon- Twenty years, consecutive to 032 - Count 5.
> 033 - Count 5- Use Of A Handgun In The Commission O f A Crime Of Violence - Twenty years, consecutive to 031 - Count 3, and concurrent to 031- Count 6.
> 032- Count -1 Robbery With A Deadly Weapon- Twenty years
> 032 -· Count 5- Use Of A Handgun In The Commission Of A Crime Of Violence - Twenty Years, consecutive to 32- Count 1.

Thereafter, Mr. Jones noted an appeal to Court of Special Appeals asserting *inter alia,* that his sentence for First Degree Assault should had merge into the Robbery with

a deadly weapon conviction.

The Court of Special Appeals agreed and remanded the case back to this Court for new sentencing.

At the new sentencing hearing held on October 15, 2007, Judge Themelis, after a brief discussion imposed the following sentences:

> 032- Count 1- Robbery With A Deadly Weapon- Twenty years 032 – Count 5 - Use Of A Handgun In The Commission Of A Crime Of Violence - Twenty years, consecutive to 032- Count 1 033 -Count 1Robbery With A Deadly Weapon -Twenty years, consecutive to 032-Count 5 033 - Count 5 - Use Of A Handgun In The Commission Of A Crime Of Violence - Twenty Years, concurrent with 32 - Count1.

As mentioned above Mr. Jones' sentence is an illegal sentence, for several reasons.

When the Court of Special Appeals vacated 031- Count 1 (First Degree Assault), the sentences that were previously imposed as consecutive to that Count, became by operation of law concurrent to the other sentences imposed. As explained in the cases cited above in this State, a Court has no authority to impose a sentence as consecutive to a sentence which does not exist. Thus the new sentencing as a whole was illegal and resulted in an increase of Mr. Jones' sentence. See e.g. *Stouffer v. Pearson,* "a sentence may not be consecutive with a term of confinement [that is not then [in existence]." Id. at 548-59, 887 A.2d at 639 (quoting *DiPietrontonio,* 61 Md. App. at 533, 487 A.2d a t 679 (ellipse omitted).

At the new sentencing hearing the Court needed only vacated the sentence imposed under count 031. The other sentences which were ordered to run consecutive to that count could not under Maryland law be changed to then run consecutive to other counts if that was not the original intended sentence. Such increase of sentence would upset Maryland law in that regard. See *Matthews v. State*, 424 Md. 503 (2012) holding that on remand the circuit court must not imposed a sentence greater than the sentence original imposed. And cautioning that to so would result in an illegal sentence under Maryland Rule 4-345 (a). Id at 525 26 (citing Court and Judicial Proceedings Article section 12-702 (b)).

The Judicial Proceeding Article section 12-702(b) provides as relevant here the following:

> If an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper judgment or sentence, or conduct a new trial, the lower court may impose any sentence authorized by law to be imposed as punishment for the offence. However, it may not impose a sentence more severe than the sentence previously impose for the offense unless:
>
> (1) The reasons for the increased sentence affirmatively appear;
>
> (2) The reasons are based upon additional objective information concerning identifiable conduct on the part of the defendant; and
>
> (3) The factual data upon which the increased sentence is based appear as part of the record

None of the three exceptions carved out in the Court and Judicial Proceedings Article section 12-702 (b) are applicable here. Therefore the circuit court was not authorized to impose a greater sentence than that originally imposed. Here as it stands is a sentence that was to be consecutive to a sentence that was later vacated by this Court. As in the cases, cited above, the result of such action deemed the consecutive sentence, consecutive to "a term of confinement {that] (was no longer] [in existence]" *Stouffer* ld. at 548-59, 887 A.2d at 639 (quoting *DiPietrontonio,* 61 Md. App. at 533, 487 A.2d at 679) (ellipsis omitted). Such a sentence is an illegal sentence under Maryland Rules, Rule 4-345 (a) & (b).

In particular after casting out Mr. Jones' sentence for first degree assault, the other sentences were by operation of law no longer categorized as consecutive sentences. Hence, Mr. Jones sentences when aggregated must be a sentence of 20 years. In re-sentencing Mr. Jones the Court fashioned a new sentence which resulted in an increased from the former sentence.

Mr. Jones' re-sentencing counsel and appellate counsel both at their respective times argued that the sentence should not be imposed. However unlike the claims now, they never argued that the sentence was an illegal sentence under Maryland Rule, Rule 4-345 (a) . Mr. Jones recognizes that both attorneys arguments were correct, albeit, the avenue upon which the relied in arguing was not necessarily the best course of action for such a challenge. See *State v. Crawley,* 2017 Maryland Lexis 542 (2017), reaffirming that an illegal sentence may be corrected at any time pursuant to Maryland Rule 4-345 (a).

It still remains that the sentence was imposed illegally. Notably, the sentences were imposed out of order, and thereby created an ambiguity as well. Moreover, as a result, "even though [the court) intended to impose consecutive sentences, the end result was [the court] could not impose a consecutive sentence." It continued that because the first degree assault had to be merged, the sentences which were consecutive to that sentence were consecutive to the sentence that no longer exist[ed]." It is clear from the way the original sentencing court imposed its sentence, that it, in effect imposed the armed robbery sentence in 033 consecutively to a sentence which did not exist . That is because at the time court was imposing this sentence, it had not imposed sentence for the handgun offense to which this sentence was to be consecutive too. (See *Dixon v. State,* 364 Md. 209, 228-29, 772 A.2d 283(2001)) It necessarily follows that with no sentence for use of a handgun conviction to run consecutive to, that sentence was rendered concurrent.

The second reason why the sentence is illegal is as defense counsel argued previously:

> [F]inally, the last sentence was reversed ... 032 count V, the 20 years was run consecutive, again, to the court three in 031 which is merged and non-longer exists. So if you remove the consecutive parts of the sentence that all ran to the case that is merged, we now have consecutive sentence to nothing. So they become concurrent. And the only one that could have survived and been consecutive [the sentencing court] imposed that before the actual sentence existed so there was nothing to run it consecutive to and therefore that has to be concurrent. (S. I 8; S.1 l. 6-7) .

Counsel for Mr. Jones further argued that:

> If the appeal caused ... assault first degree to merge with the

> robbery weapon, the end result when you knock out merges and what's consecutive and what's not is that the maximum sentence [Mr. Jones] can receive is 20 years on the robbery deadly weapon, 20 years concurrent on the use of a handgun in the commission of crime of violence on the counts which were sent back for re-sentencing." (.1 9-10; 5 I I 5)

The conclusion was "that by the way [the sentencing judge] structured the sentence, [the Court] may have intended to give 60 years ... [The Court] thought [it] gave 60 years, but in essence [it] gave 20 years." (5. II 11). Counsel for Mr. Jones discussed further that: "the sentence of 60 years was illegal [in the manner in which] [the sentencing judge] structure [the sentence] on March 21st of 2005, and that because of the language [the Court] uses and because of the standards in the case law[3] this Court is not... free to impose a sentence in excess of 20 years from the date of his arrest." (5. II 15).

In a nutshell Mr. Jones' sentences continues to have the infirmity of an inherently illegal sentence cognizable under Maryland Rules Rule 4-345 (a) & (b), wherefore Mr. Jones prays that this Honorable court reverse the judgment of the circuit court.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverses the judgment of the Court of Special Appeals and remand back to the Circuit Court for Baltimore City.

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[3] Counsel did not argue as Mr. Jones argues now that his sentence was illegals under Maryland 4-345 (a) & (b).