

CASE NO. 21-7709

IN THE UNITED STATES SUPREME COURT

DAVID C. MORRIS, :
Petitioner, :
-vs- :
KEITH FOLEY, Warden, :
Respondent. :

ORIGINAL

Supreme Court, U.S.
FILED
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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

For Petitioner:

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QUESTION PRESENTED FOR REVIEW:

- I. WHETHER RES JUDICATA MAY LIE TO BAR CORRECTION OF A SENTENCE OF "NATURAL LIFE" THAT DOES NOT EXIST AND IS NOT AUTHORIZED BY STATUTE, WHICH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT BECAUSE IT WAS NOT ASSIGNED AS ERROR ON INITIAL DIRECT APPEAL DUE TO INEFFECTIVE ASSISTANCE OF APPOINTED APPELLATE COUNSEL?

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LIST OF PARTIES

All parties to this proceeding are listed in the Caption of the Case.

OPINIONS BELOW

Decision anbd Journal Entry, Ninth District Court of Appeals No. 29809, June 30, 2021(Exhibit A)

Decision and Journal Entry, Ninth District Court of Appeals No. 13366, September 28, 2021 (Exhibit C)

Entry, Ohio Supreme Court, No. 2021-0894 9/29/21 (Exhibit B)

Entry, Ohio Supreme Court, NO.2022-0078 02 /29 /22 (Exhibit D)

BASIS FOR JURISDICTION

The date upon which the Ohio Supreme Court declined selective jurisdiction was March 29, 2022.

This timely Petition for Writ of Certiorari is presented under the authority of 28 U.S.C. §§1254(1) and/or 1257, which vest jurisdiction in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment, U.S. Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment, U.S. Constitution:

"[n]or 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."

Sixth Amendment, U.S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right [...] to have the Assistance of Counsel for his defence."

Ohio Revised Code Section 2929.03(A) (1987):

The Penalty for Aggravated Murder is "Life imprisonment with parole eligibility after serving twenty years.'

STATEMENT OF THE CASE

In 1987, Petitioner David C. Morris (Morris) plead guilty to five counts of aggravated robbery and was found guilty by a three-judge panel of two counts of aggravated murder (via complicity) one count of attempted murder and one count of carrying concealed weapon. All counts were prosecuted and convicted under the theory of "aider and abettor". On September 3, 1987, the trial court sentenced Morris to various indeterminate prison terms for the other charges and for the aggravated murder charge, to "the remainder of his natural life" (Entry, Appendix E).

Morris has raised several challenges to this "remainder of his natural life" sentence, which is not authorized by law nor provided for by any provision of the law, and seeking to have a valid sentence properly imposed. On June 4, 2020, Morris filed a Motion for Relief from Judgment which was denied by the trial court. The Court of Appeals affirmed the denial (Appendix A) and the Ohio Supreme Court declined jurisdiction (Appendix B).

Morris then filed an Application to Reopen Direct Appeal which the Court of Appeals denied Appendix C) and the Ohio Supreme Court declined jurisdiction on
This timely Petition for Writ of Certiorari follows.

ARGUMENT

QUESTION PRESENTED FOR REVIEW:

WHETHER RES JUDICATA MAY LIE TO BAR CORRECTION OF A SENTENCE OF "NATURAL LIFE" THAT DOES NOT EXIST AND IS NOT AUTHORIZED BY STATUTE, WHICH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT, BECAUSE IT WAS NOT ASSIGNED AS ERROR ON INITIAL DIRECT APPEAL DUE TO INEFFECTIVE ASSISTANCE OF APPOINTED APPELLATE COUNSEL?

LAW AND ARGUMENT

This Court has previously held that, when construing a statute, the legislative selection of the word "shall" establishes that the legislative intent was to render the related passage to be mandatory, not discretionary. See, e.g. *Escoe v Zerbst* (1935) 295 U.S. 490. Criminal statutes must be strictly construed against the government, *U.S. v Leigh* (N.D. Ohio, 1981) 515 F.Supp. 405, and where there is any ambiguity in the language of either a statute, or a sentence, the ambiguity must be resolved in favor of the defendant. See, e.g. *Gaddis v U.S.* (6th Cir., 1960) 280 F2d 334. Where there is no ambiguity, and the statutory language is plain, the sole function of the court is to enforce the statute according to its terms. See, e.g. *U.S. v Ron Pair Enterprises* (1989) 484 U.S. 235, 240, quoting *Caminetti v U.S.* (1917) 242 U.S. 470.

In the instant case, it is undisputed that, in 1987, the sole penalty for a conviction for aggravated murder in violation of Ohio Revised Code §2903.01, is limited to "shall impose" "life with parole eligibility after serving twenty years" pursuant to Ohio Revised Code §2929.03(A) [1987]. It is also undisputed that, during sentencing, the trial court imposed a sentence for the aggravated murder conviction of "the remainder of his natural

life" upon Morris (Entry, Appendix E)

It is also undisputed that Morris' appointed appellate counsel did not raise this plain error on initial direct appeal.

In 1964, the Ohio Supreme Court, in *Colegrove v Burns* 175 Ohio St. 437, held that a trial court is without jurisdiction to impose any sentence in a criminal case which is not authorized by law. Similarly, in *State v Beasley* (1984) 14 Ohio St. 3d 74, the Court reaffirmed this fundamental doctrine of law requiring that a criminal defendant's punishment be limited to that which is authorized by law.

In 1996, Ohio effected substantive changes in its criminal sentencing scheme, removing most "tails" and effecting definite sentencing for most offenses, and including post-release supervision in the form of "Post-Release Control" in place of parole supervision. Over the following twenty years, an avalanche of cases came before the courts asserting a variety of errors in the language used by sentencing courts to advise and notify defendants during plea hearings and at sentencing of the imposition, requirements and duration of Post-Release Control.

In obvious frustration with the landslide of these PRC cases, in 2020, the Ohio Supreme Court seized on the opportunity to attempt to stem this tide, in two landmark cases. In *State v Henderson* (2020) 161 Ohio St. 3d 285, a case presenting yet another on the long, long line of PRC cases, the Court decided to use the opportunity to "revisit the void sentence doctrine in Ohio", and held that, so long as a court had subject matter jurisdiction over the case, and in persona jurisdiction over the defendant, then any error committed has now become "voidable"

rather than "void" and, thus, must now be raised in the initial direct appeal, or under the doctrine of res judicata, it will be considered waived. In **State v Harper** (2020) 161 Ohio St. 3d 480, the Court then applied its "new" void sentence doctrine to a case which was brought by a county prosecutor seeking to effect a correction of a sentence that had been imposed lower than statutorily required, and after the sentence imposed had been fully served by the defendant. The court adhered to its new rule and refused to order correction.

For decades, where an erroneous sentence was imposed by a trial court that was not specifically authorized by statute, a defendant had recourse via several avenues including, for example, a "Motion to Correct Void Sentence" or a Motion for Relief From Judgment. See, e.g. **State v Houston** (8th Dist., 2019, No. 107538; **State v Kemp**, 2013-Ohio-167; **State v Leegrand** 2020-Ohio-3179, **State v Dowdy** 2019-Ohio-3570 (reversed on Appeal of the Ohio Supreme Court following "Henderson/Harper").

The judicial promulgation of the "Henderson/Harper Doctrine" served to compel all defendants to raise any such sentencing errors, including any which cause the defendant to serve more time than the law permits, on initial direct appeal, or forfeit such errors under the doctrine of res judicata (**Henderson** and **Harper**, *supra*).

In **State v Stansell**, 2021-Ohio-2036, the Eighth District Court of Appeals, on third reconsideration brought by the prosecutor, reversed its prior grant of relief from a life sentence that was not authorized by law solely on the basis of the new "Henderson/Harper Doctrine" (which remains under appeal

to the Ohio Supreme Court at the time of this writing). In the dicta of **Stansell**, the Court noted that where, as in that case, the sentencing error was not presented on initial direct appeal, the mechanism of an "Application to Reopen Direct Appeal" pursuant to Ohio App. R. 26(B) was an appropriate remedy (id, fn. 2). This mechanism permits the filing of an application within 90 days of the entry of judgment on appeal, seeking reopening to raise issues of constitutional magnitude that were overlooked due to appellate counsel's ineffectiveness. In the event that the application is submitted beyond the 90 days, an ambiguous "good cause for delay" provision ostensibly provides a window for access. However, various courts have whittled down what could possibly constitute "good cause" until nothing remains, including lack of access to transcript, lack of notice of the fact that the appeal had been decided, lack of access to legal assistance, lack of ability to read and write, etc.

Prior to the promulgation of "Henderson/Harper", Morris filed a Motion for Relief From Judgment, seeking correction of the "natural life" sentence that, at the time, was considered void. The trial court erroneously changed the Motion to an "untimely Post-Conviction Petition" and held it to be res judicata. During the pendency of the proceedings, Henderson and Harper were decided and, on appeal from that denial, the Court of Appeals simply relied upon that new doctrine to affirm the denial of relief, on the basis of res judicata (Appendix A).

Morris then filed an Application to reopen the Direct Appeal as directed in **Stansell**, which was denied on the "good cause for delay" bar and was also held to be res judicata (Appendix C).

This Court has repeatedly held that it is a violation of due process of law, in violation of the Fifth and Fourteenth Amendments, to impose a sentence upon a defendant that is greater than that which is authorized by law. See, e.g. **Apprendi v New Jersey** (2000) 530 U.S. 446; **Blakely v Washington** (2004) 542 U.S. 530, and in these cases specifically held that res judicata does not lie to prohibit granting relief therefrom (*id*).

It is also well-settled that sentences which are greater than the legislatively created maximum permissible under the law are violative of the Eighth Amendment as cruel and unusual punishment. See, e.g. **Echols v Thomas** (11th Cir., 1994) 33 F3d 1277 [Cert. Den. 516 U.S. 1096 (1996)].

This Court has long held that res judicata may not be used to bar court review and correction of manifest errors. In **Sanders v U.S.** (1963) 373 U.S. 1, this Court stated "res judicata is generally inapplicable where life or liberty is at stake". This is a case where a life of deprivation of liberty is at stake where an unauthorized "natural life" sentence was imposed and, despite the lack of dispute of the error, the improper use of res judicata to bar relief, contrary to the dictates of this Court, is continuing the deprivation.

Notably, despite the fact that the Ohio Supreme Court has repeatedly acknowledged and followed this dictate from this Court, (see, e.g. **National Amusements, Inc. v City of Springdale** (1990) 53 Ohio St.3d 60[directly quoting **Sanders**] and **State v Simpkins** (2008) 117 Ohio St. 3d 420 [one of the plethora of PRC cases to come before that court], the court now ignores this precept in its "Henderson/Harper" doctrine and refuses to even

accept jurisdiction to hear cases of prisoners affected thereby.

Morris submits that a sentence which is not authorized by any law is not only cruel and unusual where, as here, it exceeds that which is authorized by law, but it also constitutes a structural defect which is not subject to waiver or res judicata concerns **Arizona v Fulminante** (1991) 499 U.S. 279.

Moreover, where the failure to raise a significant and obvious unconstitutional sentence absent statutory or other legal authorization to do so on direct appeal is the result of errors of appointed appellate counsel, such counsel is, thus, constitutionally ineffective within the parameters of the Sixth Amendment under the **Strickland v Washington** (1984) 466 U.S. 668 analysis of error and resultant prejudice. See, e.g. **Evitts v Lucey** (1985) 469 U.S. 387.

As the failure to raise the issue on direct appeal was clear error by counsel, the res judicata bar may not lie to bar review and relief thereof (id).

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction over this case, conduct full briefing and, ultimately, rule that the "Henderson/Harper Doctrine" is unconstitutional as violative of Due Process, Equal Protection and, in cases where the unauthorized sentence exceeds the otherwise legal maximum, as in the instant case, the Eighth Amendment, and Petitioner David C. Morris so prays.

Respectfully submitted,

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