NO. 21-7709

IN THE SUPREME COURT OF THE UNITED STATES

DAVID C. MORRIS

Petitioner

-vs-

THE STATE OF OHIO

Respondent

On Petition For Writ Of Certiorari
To The Supreme Court of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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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OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at *State v. Morris*, 2022-Ohio-994.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides that:

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

The Fourteenth Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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

Petitioner David C. Morris has not presented this Court with his complete history.

Morris is in prison because he went on a crime spree on the evening of March 24, 1987, one that started when he stole another man's pistol and then kidnapped the man and robbed him of his money.

Morris and a co-defendant then went to the Carriage House Drive-Thru in Akron, Ohio, to rob it — and in the process, Morris used the stolen pistol to shoot and kill Joseph Mitri.

Less than an hour after Morris and his accomplice fled the drive-thru, Morris robbed two people at gunpoint in the Sons of Herman Lodge.

After leaving that establishment, Morris went to a gas station where he robbed the clerk at gunpoint before turning the stolen gun on a customer and demanding his wallet.

Morris pulled the trigger.

The gun did not fire. The customer lived.

Morris fled. Akron police caught up with him and the accomplice, arrested them, and found the stolen gun Morris used to kill Mitri under the front seat of Morris' car.

A grand jury indicted Morris in April 1987 of aggravated murder with two death-penalty specifications and a firearm specification; six counts of aggravated robbery, each with a firearm specification; attempted aggravated murder with a

firearm specification; kidnapping with a firearm specification; and carrying a concealed weapon.

Morris opted to waive a jury trial in favor of being tried by a panel of three judges. He later pleaded guilty to the kidnapping and aggravated robbery of the man from whom he stole the gun; to the aggravated robberies of the victims at the Sons of Herman Lodge; and to the aggravated robberies of the gas station clerk and customer.

The three-judge panel acquitted Morris of the death penalty specifications, but found him guilty of Mitri's aggravated murder and aggravated robbery, of the attempted aggravated murder of the gas station customer, and of carrying a concealed weapon.

The panel sentenced Morris to serve 10-25 years for each of the six aggravated robbery charges; seven-25 years for the attempted aggravated murder; eight-15 years for the kidnapping; two years for the concealed weapons charge; an aggregate of 18 years for the firearm specifications; and for "the remainder of his natural life" for Mitri's murder. Morris must serve all these terms consecutively to each other — a minimum of 95 years, even without the murder sentence. Ninety-five years after 1987 would be 2082.

According to the Ohio Department of Rehabilitation and Correction, Morris does have a hearing date before Ohio's Parole Board in October 2072. He will be 113 years old.

See https://appgateway.drc.ohio.gov/OffenderSearch/Search/Details/A198637,

accessed May 19, 2022.

Morris took a direct appeal to Ohio's Ninth District Court of Appeals, which affirmed his conviction and consecutive sentences in *State v. Morris (Morris I),* No. 13366, 1988 WL 40387 (Ohio Ct.App. April 27, 1988), appeal not allowed, *State v. Morris,* 533 N.E.2d 722 (Ohio 1988).

Morris filed a petition for postconviction relief under Ohio's statutes, Ohio Rev.Code 2953.21 through 2953.23, in the trial court in November 2008, at a time when the statutes gave defendants 180 days from the date their transcripts were filed in their direct appeal to file a postconviction relief petition. In that petition, he claimed that he was "legally innocent" of Mitri's murder due to what he believed was a flaw in his indictment.

The trial court dismissed the petition because, under the statutes, it lacked jurisdiction to consider Morris' untimely petition; the Court of Appeals affirmed in *State v. Morris (Morris II),* No. 24613, 2009 WL 1862540 (Ohio Ct.App. June 30, 2009), appeal not allowed, *State v. Morris,* 915 N.E.2d 1255 (Ohio 2009).

After filing two unsuccessful collateral challenges to other aspects of his conviction in the trial court, Morris first attacked the "remainder of his natural life" language in his murder sentence in a pro se motion in October 2011. When the trial court did not rule on that motion, Morris obtained counsel who raised the same issue in a July 2015 motion. The trial court denied that motion in September 2015, and Morris did not appeal.

Morris raised the same challenge to his murder sentence in a motion to

withdraw his guilty plea and a "motion to correct the record" in late 2015 and early 2016, respectively. The Court of Appeals affirmed the trial court's rejection of both motions in *State v. Morris (Morris III),* No. 28124, 2017 WL 389557 (Ohio Ct.App. Jan. 25, 2017), appeal not allowed, *State v. Morris*, 82 N.E.3d 1177 (Ohio 2017).

The Court of Appeals held that Ohio's precedents prohibited the trial court from considering Morris' motion to withdraw his guilty plea when his conviction and sentence had already been affirmed in a direct appeal. It further held that, "to the extent that Morris raised other issues in his 'Motion to Correct the Record,' those issues could have been raised on direct appeal. Consequently, res judicata barred the trial court's consideration of them." *Morris III*, ¶6. On that basis, the court declared Morris' other contentions moot. See *Morris III*, ¶8.

Morris tried again two years later with a motion to "correct void sentence." The Court of Appeals affirmed the trial court's rejection of that motion in *State v. Morris (Morris IV),* No. 29419, 2019 WL 7373793 (Ohio Ct.App. Dec. 31, 2019), appeal not allowed, *State v. Morris*, 145 N.E.3d 312 (Ohio 2019).

The appellate court agreed that Morris' motion was actually an untimely and successive postconviction relief petition (which Ohio Rev.Code 2953.23 denies trial courts jurisdiction to entertain), and "Mr. Morris' suggestion that his sentences [sic] for aggravated murder are void does not change this result. This Court has recognized that the [Ohio] Supreme Court applies its void-sentence analysis only in limited circumstances and, without clear direction from the Supreme Court, this Court has declined to extend its reach. *** The trial court had jurisdiction over Mr.

Morris' criminal case, and when a sentencing Court has jurisdiction and statutory authority to act, errors in sentencing are voidable." *Morris IV*, *3, citation omitted.

Undeterred, Morris raised the same issue again in a motion for relief from judgment under Ohio R. Civ. P. 60(B) in June 2020. The Court of Appeals again affirmed the trial court's denial of relief in *State v. Morris (Morris V),* No. 29809, 2021 WL 2695132 (Ohio Ct.App. June 30, 2021), appeal not allowed, *State v. Morris*, 173 N.E.3d 1243 (Ohio 2021).

The Court of Appeals explained as follows:

> {¶5} Morris argues in his sole assignment of error that the trial court erred in its 1987 sentencing entry by using the phrase "the remainder of his natural life[,]" and, instead, he should have received a sentence that included parole eligibility after serving 20 years in prison. See former R.C. 2903.01(C); former R.C. 2929.02; former R.C. 2929.03. Morris asserts that this error renders his sentence void.
>
> {¶6} As mentioned above, Morris has raised this issue before. *See Morris* [IV,] ¶ 2. Morris' sole assignment of error is overruled for the reasons stated in this Court's opinion resolving Morris' prior appeal on the same issue. *See id.* at ¶ 4-9. Like the previous motion, Morris' current motion is properly construed as an untimely and successive petition for post-conviction relief. *See id.* at ¶ 4-8. In addition, Morris has not demonstrated that his sentence is void. *See id.* at ¶ 9; *see also State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, ¶ 43 ("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. Brown*, 7th Dist. Mahoning No. 14 MA 37, 2014-Ohio-5832, [2014 WL 7475234], ¶ 22-37. Notably, even if this Court were able to address the merits of his argument there is law which supports that his 1987 sentencing entry would be read to impose parole eligibility after twenty years. *See Brown* at ¶ 34-37; *see also* former R.C. 2903.01(C); former R.C. 2929.02; former R.C. 2929.03.

Morris V, ¶¶5-6.

Ohio R. App. P. 26(B) gives a criminal defendant 90 days after the court of appeals enters its decision in its docket to ask the appellate court to reopen the appeal based on a colorable claim that appellate counsel rendered ineffective assistance of counsel. Morris filed a motion under that Rule to reopen his original, direct appeal — *Morris I* — in the Court of Appeals on October 22, 2021.

The Court of Appeals denied Morris' motion to reopen the 33-year-old appeal in a December 29, 2021, Journal Entry, due to the application's untimeliness.

Morris sought the Ohio Supreme Court's discretionary review of the Court of Appeals' December 29, 2021, ruling denying his motion to reopen his original appeal, in Case No. 22-0078. The Ohio court denied review in *State v. Morris*, 184 N.E.3d 153 (Ohio 2022).

It is from *that* order that Morris seeks this Court's review.

ARGUMENT

I. Morris Misrepresents His Case

Morris misleadingly captioned this case. Contrary to his caption, this is neither a habeas corpus petition nor an appeal from a habeas corpus action. The proper Respondent is not Keith Foley, the Warden of Morris' correctional institution, but it is the State of Ohio.

Morris' reliance on *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) — which reaffirmed that res judicata could not always bar federal inmates from filing repetitive habeas corpus actions under some circumstances under former federal law — is therefore misplaced.

This is also not an appeal from any ruling directly addressing the questions of law Morris asks this Court to address.

Instead, this case is merely an attempted appeal from the Ohio Supreme Court's decision declining review of an intermediate court of appeals' decision on purely state procedural grounds not to allow Morris to reopen his original direct appeal, 33 years after its judgment was final.

II. Morris' Question Is a Creature Solely of Ohio Law and Cannot Be Reviewed

The Conclusion to Morris' Petition asks this Court to rule that what he calls the "*Henderson/Harper* Doctrine" violates due process and continues a sentence he believes violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Morris complains about the Ohio Supreme Court's 2020 decisions in *State v.*

Harper, 159 N.E.3d 248 (Ohio 2020), and *State v. Henderson*, 162 N.E.3d 776 (Ohio 2020), which operate to put an end to what even Morris describes as an avalanche of postconviction motions by prison inmates endlessly and repetitively collaterally challenging any misplaced jot or tittle in their sentences in fruitless efforts to show that their sentences were "void" — and their initial unsuccessful appeals could be relitigated — just like Morris has.

In deciding these cases, the Ohio Court did not make new law — it merely returned, after a spasm that began in 2004, to principles long established in Ohio as well as the general common law that held that an error in a trial court's pronouncement of a criminal defendant's sentence made the sentence voidable, rather than void ab initio. As the Ohio Court stated in *Harper*:

> {¶ 37} The current state of our void-sentence jurisprudence [] runs counter to the doctrine of res judicata and disrupts the finality of judgments of conviction. We have recognized that " ' "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." ' " *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996), quoting *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), quoting *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 75 L.Ed. 1244 (1931). This public policy is reflected in the doctrine of res judicata, which "promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 18. But contrary to these time-honored principles, our void-sentence jurisprudence has invited continued relitigation of the validity of a sentence—sometimes more than a decade after sentencing, e.g., *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, ¶ 6.

Harper, 159 N.E.3d at 259. The *Harper* decision affected a case where a trial judge

had incorrectly notified the defendant about the postrelease control monitoring that would affect him after his release. The Ohio Court expanded on *Harper* to explain that *Harper*'s return to the state's historical view of res judicata would apply to every sentencing error, in *Henderson*. See *Henderson*, 162 N.E.3d at 786.

That Ohio's Court reviewed a void sentencing doctrine that was unique to Ohio, and did so under Ohio law, independent of the United States Constitution, demonstrates that these decisions arise entirely under Ohio law. Since they do not depend on any Federal constitutional ruling, but rest on adequate and independent state grounds, they are not reviewable by this Court under this Court's longstanding decisions. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 125, 65 S. Ct. 459, 463, 89 L. Ed. 789 (1945). Furthermore, Morris' Petition arises wholly from the state courts' resolution of a state procedural question that did not depend on a federal constitutional ruling in any way. See *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S. Ct. 1087, 1092, 84 L. Ed. 2d 53 (1985).

This Court has noted that the doctrine of res judicata — which Ohio has described in its own line of precedents — is a common law preclusional doctrine. See *Minerva Surgical, Inc. v. Hologic, Inc.*, — U.S. —, 141 S.Ct. 2298, 2307, 210 L.Ed.2d 689 (2021). Ohio holds that the doctrine includes both issue and claim preclusion, and is joined by the law of the case doctrine. See *O'Nesti v. DeBartolo Realty Corp.*, 862 N.E.2d 803 (Ohio 2007), ¶6; *State ex rel. Nickoli v. Erie MetroParks*, 923 N.E.2d 588, 592 (Ohio 2010); *Giancola v. Azem*, 109 N.E.3d 1194 (Ohio 2018).

Meanwhile, Morris was sentenced before Ohio experimented with its "void

sentencing doctrine," and the Court of Appeals began rejecting his claims about his sentence even before the Ohio Supreme Court returned to the traditional view in *Harper* and *Henderson*. Morris, then, has not been robbed of due process.

He also cannot actually demonstrate prejudice as a practical matter; thus, even if he had brought a question that this Court could review, his would not be the ideal case in which to resolve it.

First, Morris' sentence does not operate the way he has claimed. As the Court of Appeals noted in *Morris V*, its sister Court of Appeals held in similar cases that where a trial court did not pronounce that the defendant's aggravated murder sentence was "life without parole," it did not mean the defendant would be denied any opportunity for parole after serving 20 years in prison, as Ohio's murder statute required. See *State v. Brown*, No. 14 MA 37, 2014 WL 7475234 (Ohio Ct.App. Dec. 19, 2014). Instead, Ohio Admin.Code 5120-2-10(B)'s presumption that a life sentence imposed via Ohio Rev. Code 2929.03 for aggravated murder shall be life imprisonment with parole eligibility after 20 years applied to any life sentence imposed for aggravated murder. See *Brown*, ¶¶34, 35.

This includes Morris'. That Morris has a parole hearing date indicates that the Ohio Parole Authority and the Department of Corrections have followed Brown's reasoning.

Next, even if it were true that Morris' sentence as written in the court's entry actually operated to deny him parole, correcting that sentence to require him to serve an additional 20 years to life on top of the 95 minimum years he must serve

for his other crimes would not assist him. At present, his parole hearing is scheduled for 2072, a full 10 years before the 95-year minimum sentence expires. Adding another 20 years would only serve to lengthen his wait for a parole hearing by 10 years.

CONCLUSION

For the above-stated reasons, the State of Ohio respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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