CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE: MICHAEL STANSELL, :

Petitioner. : (Original Action)

ON PETITION FOR WRIT OF HABEAS CORPUS

APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS

FOR PETITIONER:

Michael Stansell
Reg. No. A 355-967
Grafton Corr. Inst.
2500 S. Avon-Belden Rd.
Grafton, Ohio 44044

Petitioner, in pro se

FOR RESPONDENT:

Dave Yost (0056290)
Ohio Attorney General
30 E. Broad St.
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614-466-8980

Counsel for Respondent

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 109023

v.

MICHAEL STANSELL, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: VACATED AND REMANDED
RELEASED AND JOURNALIZED: July 9, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-97-356129-ZA

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Assistant Prosecuting Attorney, *for appellee.*

Mark A. Stanton, Cuyahoga County Public Defender, and John T. Martin, Assistant Public Defender, *for appellant.*

LARRY A. JONES, SR., J.:

{¶ 1} This is defendant-appellant's, Michael Stansell, second appeal to this court over the issue of whether the trial court erred by not vacating his sexually

violent predator specifications. For the reasons that follow, we vacate the specifications and remand for resentencing.

I.

{¶ 2} In 1997, a 38-count indictment was filed against Stansell, charging him with sexually oriented crimes against two minor boys. In 1998, pursuant to a plea agreement, Stansell pleaded guilty to two counts of rape of a child under age 13, one count of rape with a sexually violent predator specification, two counts of corruption of a minor, one count of gross sexual imposition with a sexually violent predator specification, and one count of pandering obscenity.

{¶ 3} As part of the plea negotiation, Stansell and the state recommended an agreed sentence of 20 years to life to the trial court; the trial court imposed the recommended sentence and classified Stansell as a sexual predator. The "life tail" was purportedly mandatory due to the sexually violent predator specifications. Prior to this case, Stansell had never been convicted of a sexually oriented offense and, therefore, the sexually violent predator specifications were based on the charges contained in the indictment in this case. However, the version of R.C. 2971.01(H) defining sexually violent predator that was in effect at the time required that for an offender to be so labeled, he or she had to have had a prior sexually oriented conviction.

{¶ 4} Stansell filed a motion to withdraw his guilty plea on the ground that his counsel was ineffective because counsel failed to tell him about the allied offenses statute; the trial court denied the motion. This court upheld the denial of the motion

in *State v. Stansell*, 8th Dist. Cuyahoga No. 75889, 2000 Ohio App. LEXIS 1726 (Apr. 20, 2000). Stansell attempted to appeal to the Ohio Supreme Court, but the court declined jurisdiction. *State v. Stansell*, 91 Ohio St.3d 1527, 747 N.E.2d 252 (2001).

{¶ 5} In 2004, the Ohio Supreme Court issued a decision in a certified conflict case, *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, holding that a "[c]onviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)(1) if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment." *Id.* at syllabus.

{¶ 6} Four months after *Smith* was decided, the Ohio Legislature amended R.C. Chapter 2971, which governs "sentencing of sexually violent predators." The introduction to the bill which amended the statute states, in relevant part, that the amendment was made "to clarify that the Sexually Violent Predator Sentencing Law does not require that an offender have a prior conviction of a sexually violent offense in order to be sentenced under that Law." *See* 126 Am.Sub. H.B. 473.

{¶ 7} In 2013, Stansell filed his first motion to vacate the sexually violent predator specifications. The trial court denied the motion and Stansell appealed. This court, relying on the Ninth and Tenth Appellate Districts decisions, respectively, in *State v. Ditzler*, 9th Dist. Lorain No. 13CA010342, 2013-Ohio-4969, and *State v. Draughon*, 10th Dist. Franklin Nos. 11AP-703 and 11AP-995, 2012-

Ohio-1917, found that *Smith* did not have retroactive application. *State v. Stansell*, 8th Dist. Cuyahoga No. 100604, 2014-Ohio-1633, ¶ 14-16.

{¶ 8} Specifically, this court cited the Ninth District's reasoning as follows:

> The Supreme Court of Ohio has held that "[a] new judicial ruling may be applied only to cases that are pending on the announcement date." *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶ 6, 819 N.E.2d 687, citing *State v. Evans*, 32 Ohio St.2d 185, 186, 291 N.E.2d 466 (1972). Thus, '[t]he new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies.' *Ali* at ¶ 6.

Stansell at ¶ 15, quoting *Ditzler* at ¶ 11.

{¶ 9} Because Stansell's case was not pending at the time *Smith* was decided, this court held that it had no retroactive application. *Stansell* at ¶ 16. Stansell attempted to file a delayed appeal to the Ohio Supreme Court; the court denied the motion for delayed appeal. *State v. Stansell*, 140 Ohio St.3d 1413, 2014-Ohio-3785, 15 N.E.3d 882.

{¶ 10} In 2019, this court decided *State v. Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317. In *Frierson*, in 2016, the defendant was charged with sexually oriented offenses that contained sexually violent predator specifications; the crimes were alleged to have occurred in 1997. The defendant did not have any prior convictions for sexually oriented offenses. The defendant was found guilty on several of the charges, as well as the sexually violent predator specifications. On appeal to this court, he challenged his convictions on the specifications, contending that they violated the Ex Post Facto Clause of the United States Constitution.

{¶ 11} This court agreed, reasoning as follows:

> Under the plain language in R.C. 2971.01(H)(1) as it existed at the time of Frierson's offenses, he was not eligible for the enhanced, indefinite sentencing under R.C. 2971.03 because he did not qualify as a sexually violent predator. As the Ohio Supreme Court stated in *Smith*, the words of R.C. 2971.01(H)(1) as it existed during the relevant periods clearly indicated that at the time of indictment, the person must have already been convicted of a sexually violent offense in order to be eligible for the specification. The legislature's subsequent amendment of the statute following *Smith* was not mere "clarification" as the state argues, but a significant and substantive change to the definition of "sexually violent predator," allowing, for the first time, the underlying conduct in an indictment to satisfy the specification without a prior conviction. As applied to Frierson, this amendment greatly enhanced his potential punishment by subjecting him to the indefinite sentencing found in R.C. 2971.03 whereas he was not subject to an enhanced sentence prior to the amendment. Therefore, we find that amended R.C. 2971.01(H)(1), as applied to Frierson, violates the Ex Post Facto Clause of the United States Constitution.

Frierson at ¶ 12.

{¶ 12} After *Frierson* was decided, Stansell filed his second motion to vacate the sexually violent predator specifications. The trial court denied the motion and this appeal ensues.

{¶ 13} Stansell's sole assignment of error reads: "The trial court erred as a matter of law in denying appellant's motion to vacate sexually violent predator specification and re-sentence defendant."[1]

---

[1]After *Frierson*, this court reversed "life-tail" sentences on sexually violent predator specifications in two other cases: *State v. Townsend*, 8th Dist. Cuyahoga No. 107186, 2019-Ohio-1134, and *State v. Clipps*, 8th Dist. Cuyahoga No. 107747, 2019-Ohio-3569. *Frierson*, *Townsend*, and *Clipps* were all accepted by the Ohio Supreme Court upon the state's appeal, and are presently pending. *See State v. Frierson*, 131 N.E.3d 961, 2019-Ohio-3797; *State v. Townsend*, 131 N.E.3d 956, 2019-Ohio-3797; and *State v. Clipps*, 137 N.E.3d 1200, 2020-Ohio-122.

II.

{¶ 14} Initially, we note that the sentence imposed on Stansell was an agreed sentence. Under R.C. 2953.08(D)(1), "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

{¶ 15} In other words, a sentence that is "contrary to law" is appealable by a defendant; however, an agreed-upon sentence may not be appealed if (1) both the defendant and the state agree to the sentence, (2) the trial court imposes the agreed sentence, and (3) the sentence is authorized by law. R.C. 2953.08(D)(1). If all three conditions are met, the defendant may not appeal the sentence.

{¶ 16} In light of the above, we must determine whether Stansell's sentence is authorized by law. In *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, the Ohio Supreme Court held that "[a] sentence is 'authorized by law' only if it comports with all mandatory sentencing provisions." *Id.* at paragraph two of the syllabus.

{¶ 17} At the relevant time, Stansell did not, under R.C. 2971.01(H)(1), qualify for the enhanced, indefinite sentencing terms because he did not qualify as a sexually violent predator, that is, he did not have a prior conviction for a sexually oriented offense. Because his sentence was not authorized by law as it existed at the time of his sentencing, we are able to review it even though it was an agreed-upon sentence.

{¶ 18} We next consider the issues of res judicata and void sentences. The state contends that Stansell's challenge is barred under the doctrine of res judicata. Whether res judicata prevents Stansell from successfully appealing his sentence necessarily depends on the propriety of the sentence. "If a judge imposes a sentence that is unauthorized by law, the sentence is unlawful. 'If an act is unlawful it [is] not erroneous or voidable, but it is wholly unauthorized and void.'" *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 21, quoting *State ex rel. Kudrick v. Meredith*, 1922 Ohio Misc. LEXIS 262 (1922), 3.

{¶ 19} Because Stansell could not qualify as a sexually violent predator at the time he was sentenced, his "life tail" sentence was unlawful and res judicata does not apply. "If a judgment is void, the doctrine of res judicata has no application, and the propriety of the decision can be challenged on direct appeal or by collateral attack." *State v. Holmes*, 8th Dist. Cuyahoga No. 100388, 2014-Ohio-3816, ¶ 13. Thus, Stansell's failure to raise this issue in his direct appeal is irrelevant.

{¶ 20} Further, "when the trial court disregards statutory mandates, '[p]rinciples of res judicata, including the doctrine of the law of the case, do not preclude appellate review. The sentence may be reviewed at any time, on direct appeal or by collateral attack.'" *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 22, quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 30. Consequently, this court's decision in Stansell's first appeal is not binding here.

{¶ 21} Moreover, we are not persuaded by the state's contention that former R.C. 2971.01(H)(1) was always written to mean that the indicted offense could be used to qualify a defendant for a sexually violent offender specification, and that the amendment to the statute was just a clarification. As this court stated in *Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317, the amendment was "a significant and substantive change to the definition of 'sexually violent predator,' allowing, for the first time, the underlying conduct in an indictment to satisfy the specification without a prior conviction." *Id.* at ¶ 12.

{¶ 22} In light of the above, Stansell's convictions on the sexually violent predator specifications are vacated and the case is remanded for resentencing without those specifications.

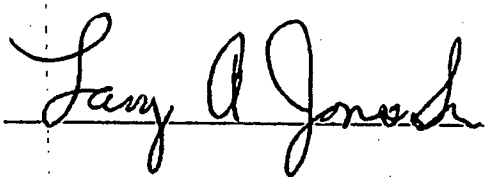
{¶ 23} Vacated and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



LARRY A. JONES, SR., JUDGE

MARY EILEEN KILBANE, J., CONCURS;
PATRICIA ANN BLACKMON, P.J., DISSENTS
WITH SEPARATE OPINION

PATRICIA ANN BLACKMON, P.J., DISSENTING

{¶ 24} I respectfully dissent from the majority opinion; I would find no error with the trial court's denial of Stansell's motion to vacate the sexually violent predator specification.

{¶ 25} In 2000, this court affirmed Stansell's plea and agreed-to sentence of 20 years to life in prison in *State v. Stansell*, 8th Dist. Cuyahoga No. 75889, 2000 Ohio App. LEXIS 1726 (Apr. 20, 2000) ("*Stansell I*"). I wrote that opinion in *Stansell I*. The sexually violent predator specification was not raised in that direct appeal, although the specification was noted and remained undisturbed. As stated in the majority opinion in this case, Stansell subsequently raised the issue in a postconviction action, and this court affirmed the specification in *State v. Stansell*, 8th Dist. Cuyahoga No. 100604, 2014-Ohio-1633 ("*Stansell II*"). Specifically, this court held that "the *Smith* decision has no retroactive application to Stansell's conviction on the sexually violent predator specification." *Id.* at ¶ 16.

{¶ 26} The majority opinion in the case bases its decision on *State v. Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317, *State v. Townsend*, 8th

Dist. Cuyahoga No. 107186, 2019-Ohio-1134, and *State v. Clipps*, 8th Dist. Cuyahoga No. 107747, 2019-Ohio-3569; in those cases this court found that amended R.C. 2971.01(H)(1) violates the Ex Post Facto Clause of the United States Constitution as applied to defendants who committed offenses prior to the date the statute was amended. In my opinion, the holdings in *Townsend*, *Frierson*, and *Clipps* directly conflict with the holding in *Stansell II*.

{¶ 27} *Townsend* was accepted for review by the Ohio Supreme Court on the following proposition of law, filed by the state as a cross-appellant: "The General Assembly legislatively clarified the definition of sexually violent predator through 150 H.B. 173. The Amendment's application to defendants who committed an offense prior to April 29, 2005 does not violate the Ex Post Facto Clause of the United States Constitution or Retroactivity Clause of the Ohio Constitution." *See State v. Townsend*, Ohio S.Ct. No. 2019-0606. *Frierson* and *Clipps* were also accepted for review by the Ohio Supreme Court and held for the decision in *Townsend*. *See State v. Frierson*, Ohio S.Ct. No. 2019-0899; *State v. Clipps*, Ohio S.Ct. No. 2019-1429. The Ohio Supreme Court heard argument in *Townsend* on June 16, 2020.

The issue accepted for review by the Ohio Supreme Court is precisely the same issue on appeal in the case at hand. The Ohio Supreme Court could very well agree with this majority; however, until it does so, I would affirm the trial court's decision.

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JAN 28 2021

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 109023

v.

MICHAEL STANSELL, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: VACATED AND REMANDED
RELEASED AND JOURNALIZED: January 28, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-97-356129-ZA

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Assistant Prosecuting Attorney, *for appellee.*

Cullen Sweeney, Cuyahoga County Public Defender, and John T. Martin, Assistant Public Defender, *for appellant.*

ON RECONSIDERATION[1]

LARRY A. JONES, SR., J.:

{¶ 1} Pursuant to App.R. 26(A)(1)(a), plaintiff-appellee, the state of Ohio, has filed an application for reconsideration of this court's opinion in *State v. Stansell*, 8th Dist. Cuyahoga No. 109023, 2020-Ohio-3674 ("*Stansell III*"). The test regarding whether to grant a motion for reconsideration under App.R. 26(A)(1(a) "'is whether the motion * * * calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by [the court] when it should have been.'" *State v. Dunbar*, 8th Dist. Cuyahoga No. 87317, 2007-Ohio-3261, ¶ 182, quoting *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1982). The state contends that our decision in *Stansell III* improperly failed to consider *State v. Stansell*, 8th Dist. Cuyahoga No. 100604, 2014-Ohio-1633 ("*Stansell II*"). We agree and therefore issue this reconsidered opinion.

{¶ 2} The within case is defendant-appellant, Michael Stansell's second appeal to this court over the issue of whether the trial court erred by not vacating his sexually violent predator specifications. For the reasons that follow, we vacate the specifications and remand for resentencing.

---

[1]The original decision in this appeal, *State v. Stansell*, 8th Dist. Cuyahoga No. 109023, 2020-Ohio-3674, released on July 9, 2020, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized opinion in this appeal. *See* App.R. 22(C); *see also* S.Ct.P.R. 7.01.

I.

{¶ 3} In 1997, a 38-count indictment was filed against Stansell, charging him with sexually oriented crimes against two minor boys. In 1998, pursuant to a plea agreement, Stansell pleaded guilty to two counts of rape of a child under age 13, one count of rape with a sexually violent predator specification, two counts of corruption of a minor, one count of gross sexual imposition with a sexually violent predator specification, and one count of pandering obscenity.

{¶ 4} As part of the plea negotiation, Stansell and the state recommended an agreed sentence of 20 years to life to the trial court; the trial court imposed the recommended sentence and classified Stansell as a sexual predator. The "life tail" was purportedly mandatory due to the sexually violent predator specifications. Prior to this case, Stansell had never been convicted of a sexually oriented offense and, therefore, the sexually violent predator specifications were based on the charges contained in the indictment in this case. However, the version of R.C. 2971.01(H) defining sexually violent predator that was in effect at the time required that for an offender to be so labeled, he or she had to have had a prior sexually oriented conviction.

{¶ 5} Stansell filed a motion to withdraw his guilty plea on the ground that his counsel was ineffective because counsel failed to tell him about the allied offenses statute; the trial court denied the motion. This court upheld the denial of the motion in *State v. Stansell*, 8th Dist. Cuyahoga No. 75889, 2000 Ohio App.

LEXIS 1726 (Apr. 20, 2000) ("*Stansell I*"). Stansell did not raise the issue of his life tail in *Stansell I*, his direct appeal.

{¶ 6} In 2004, the Ohio Supreme Court issued a decision in a certified conflict case, *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, holding that a "[c]onviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)(1) if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment." *Id.* at syllabus.

{¶ 7} Four months after *Smith* was decided, the Ohio Legislature amended R.C. Chapter 2971, which governs "sentencing of sexually violent predators." The introduction to the bill, which amended the statute, states, in relevant part, that the amendment was made "to clarify that the Sexually Violent Predator Sentencing Law does not require that an offender have a prior conviction of a sexually violent offense in order to be sentenced under that Law." *See* 126 Am.Sub. H.B. 473.

{¶ 8} In 2013, Stansell filed his first motion to vacate the sexually violent predator specifications. The trial court denied the motion, and Stansell appealed. This court, relying on the Ninth and Tenth Appellate Districts' decisions, respectively, in *State v. Ditzler*, 9th Dist. Lorain No. 13CA010342, 2013-Ohio-4969, and *State v. Draughon*, 10th Dist. Franklin Nos. 11AP-703 and 11AP-995, 2012-Ohio-1917, found that *Smith* did not have retroactive application. *Stansell II* at ¶ 14-16.

{¶ 9} Specifically, this court cited the Ninth District's reasoning as follows:

> The Supreme Court of Ohio has held that "[a] new judicial ruling may be applied only to cases that are pending on the announcement date." *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶ 6, 819 N.E.2d 687, citing *State v. Evans*, 32 Ohio St.2d 185, 186, 291 N.E.2d 466 (1972). Thus, "[t]he new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies." *Ali* at ¶ 6.

Stansell II at ¶ 15, quoting *Ditzler* at ¶ 11.

{¶ 10} Because Stansell's case was not pending at the time *Smith* was decided, this court held that it had no retroactive application. *Stansell II* at ¶ 16. Stansell attempted to file a delayed appeal to the Ohio Supreme Court; the court denied the motion for delayed appeal. *State v. Stansell*, 140 Ohio St.3d 1413, 2014-Ohio-3785, 15 N.E.3d 882.

{¶ 11} In 2019, this court decided *State v. Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317. The defendant in *Frierson* was charged in 2016 with sexually oriented offenses that contained sexually violent predator specifications; the crimes were alleged to have occurred in 1997. The defendant did not have any prior convictions for sexually oriented offenses. The defendant was found guilty on several of the charges, as well as the sexually violent predator specifications. On appeal to this court, he challenged his convictions on the specifications, contending that they violated the Ex Post Facto Clause of the United States Constitution.

{¶ 12} This court agreed, reasoning as follows:

> Under the plain language in R.C. 2971.01(H)(1) as it existed at the time of Frierson's offenses, he was not eligible for the enhanced, indefinite sentencing under R.C. 2971.03 because he did not qualify as

> a sexually violent predator. As the Ohio Supreme Court stated in *Smith* [104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283], the words of R.C. 2971.01(H)(1) as it existed during the relevant periods clearly indicated that at the time of indictment, the person must have already been convicted of a sexually violent offense in order to be eligible for the specification. The legislature's subsequent amendment of the statute following *Smith* was not mere "clarification" as the state argues, but a significant and substantive change to the definition of "sexually violent predator," allowing, for the first time, the underlying conduct in an indictment to satisfy the specification without a prior conviction. As applied to Frierson, this amendment greatly enhanced his potential punishment by subjecting him to the indefinite sentencing found in R.C. 2971.03 whereas he was not subject to an enhanced sentence prior to the amendment. Therefore, we find that amended R.C. 2971.01(H)(1), as applied to Frierson, violates the Ex Post Facto Clause of the United States Constitution.

Frierson at ¶ 12.

{¶ 13} After *Frierson* was decided, Stansell filed his second motion to vacate the sexually violent predator specifications. The trial court denied the motion, and this appeal ensues.

{¶ 14} Stansell's sole assignment of error reads: "The trial court erred as a matter of law in denying appellant's motion to vacate sexually violent predator specification and re-sentence defendant."[2]

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[2]After *Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317, this court reversed "life-tail" sentences on sexually violent predator specifications in two other cases: *State v. Townsend*, 8th Dist. Cuyahoga No. 107186, 2019-Ohio-1134, and *State v. Clipps*, 8th Dist. Cuyahoga No. 107747, 2019-Ohio-3569. *Frierson*, *Townsend*, and *Clipps* were all accepted by the Ohio Supreme Court upon the state's appeal. *See State v. Frierson*, 2019-Ohio-3797, 131 N.E.3d 961; *State v. Townsend*, 2019-Ohio-3797, 131 N.E.3d 956; and *State v. Clipps*, 2020-Ohio-122, 137 N.E.3d 1200. *Frierson* and *Clipps* are being held pending the decision in *Townsend*, which was recently released in *State v. Townsend*, Slip Opinion 2020-Ohio-5586 (Dec. 10, 2020). In *Townsend*, the Ohio Supreme Court affirmed this court's judgment that the ex post facto clause was violated by the application of the amended version of R.C. 2971.01(H)(1) to a defendant who

II.

{¶ 15} Initially, we note that the sentence imposed on Stansell was an agreed sentence. Under R.C. 2953.08(D)(1), "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

{¶ 16} In other words, a sentence that is "contrary to law" is appealable by a defendant; however, an agreed-upon sentence may not be appealed if (1) both the defendant and the state agree to the sentence, (2) the trial court imposes the agreed sentence, and (3) the sentence is authorized by law. R.C. 2953.08(D)(1). If all three conditions are met, the defendant may not appeal the sentence.

{¶ 17} In light of the above, we must determine whether Stansell's sentence is authorized by law. In *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, the Ohio Supreme Court held that "[a] sentence is 'authorized by law' only if it comports with all mandatory sentencing provisions." *Id.* at paragraph two of the syllabus.

{¶ 18} At the relevant time, Stansell did not, under R.C. 2971.01(H)(1), qualify for the enhanced, indefinite sentencing terms because he did not qualify as a sexually violent predator, that is, he did not have a prior conviction for a sexually oriented offense. Because his sentence was not authorized by law as it existed at

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committed his or her offense prior to the amendment of the statute but was charged and convicted after the amendment.

the time of his sentencing, we are able to review it even though it was an agreed-upon sentence.

{¶ 19} We start by considering the impact *Stansell II* has on our review. As mentioned, in *Stansell II*, a panel of this court found that *Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, could not be applied retroactively.[3] This court decided the issue of Stansell's sexually violent predator status solely on *Smith*, stating that "[r]egardless of whether the principles of res judicata apply here, * * * the trial court did not err in denying appellant's motion to vacate." *Stansell II* at ¶ 6.

{¶ 20} Under the doctrine of stare decisis, courts adhere to precedent to create an orderly and predictable system of law. *Hall v. Rosen*, 50 Ohio St.2d 135, 138, 363 N.E.2d 725 (1977), *overruled on other grounds, Johnson v. Adams*, 18 Ohio St.3d 48, 47 N.E.2d 866 (1985). However, the doctrine does not absolve a court of its duty to analyze each case as it is presented. *Shearer v. Shearer*, 18 Ohio St.3d 94, 95, 480 N.E.2d 388 (1985). Moreover, "[n]othing less than a decision by the Supreme Court of Ohio renders * * *" a decision stare decisis. *John Hancock Mutual Life Ins. Co. v. Jennings*, 17 Ohio Law Abs. 583, 8, 1934 Ohio Misc. LEXIS 1235.

{¶ 21} At the time of *Stansell II*, the law regarding void sentences and res judicata was that void sentences were "not precluded from appellate review by

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[3]Again, *Smith* held that, under the sexually violent predator statute as it existed at that time, a defendant could not be convicted of a sexually violent predator specification based solely on the presently indicted conduct.

principles of res judicata and may be reviewed at any time, on direct appeal or by collateral attack." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 40. And at that time, under Ohio law, improperly imposed sentences were deemed void despite the trial court having jurisdiction over the case and the defendant. *See, e.g., State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961 (trial court's failure to fully comply with the statutory requirements related to postrelease control rendered sentence void).

{¶ 22} With the above in mind, we believe that we are not bound under the doctrine of stare decisis to follow *Stansell II*. At the time of *Stansell II*, whether res judicata prevented Stansell from successfully appealing his sentence necessarily depended on the propriety of the sentence. "If a judge imposes a sentence that is unauthorized by law, the sentence is unlawful. 'If an act is *unlawful* it [is] not erroneous or voidable, but it is wholly unauthorized and void.'" (Emphasis sic.) *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 21, quoting *State ex rel. Kudrick v. Meredith*, 24 Ohio N.P. (n.s.) 120, 124, 1922 Ohio Misc. LEXIS 262 (1922).

{¶ 23} Because Stansell could not qualify as a sexually violent predator at the time he was sentenced, his life-tail sentence was unlawful and res judicata did not apply. "If a judgment is void, the doctrine of res judicata has no application, and the propriety of the decision can be challenged on direct appeal or by collateral attack." *State v. Holmes*, 8th Dist. Cuyahoga No. 100388, 2014-Ohio-3816, ¶ 13.

Thus, at the time of *Stansell II*, Stansell's failure to raise this issue in his direct appeal was irrelevant.

{¶ 24} Further, at that time, the law was that "when the trial court disregards statutory mandates, '[p]rinciples of res judicata, including the doctrine of the law of the case, do not preclude appellate review. The sentence may be reviewed at any time, on direct appeal or by collateral attack.'" *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 22, quoting *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, at ¶ 30.

{¶ 25} The law at the time Stansell was indicted and sentenced did not allow for a sexually violent predator specification based on the conduct of the current indictment. *Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, merely clarified that, but that was the law before *Smith*. This court clarified that in *Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317, noting that the amendment to the statute in the wake of *Smith* was "a significant and substantive change to the definition of 'sexually violent predator,' allowing, for the first time, the underlying conduct in an indictment to satisfy the specification without a prior conviction." *Id.* at ¶ 12. *Frierson* made clear that "[u]nder the plain language in R.C. 2971.01(H)(1) as it existed at the time of [the] offenses, [the defendant] was not eligible for the enhanced, indefinite sentence * * * because he did not qualify as a sexually violent predator." *Id.*

{¶ 26} We recognize that at the time of our decision in *Stansell III*, the Ohio Supreme had issued the first of two decisions, *State v. Harper*, 160 Ohio

St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, seemingly reversing course on the voidness doctrine in criminal sentencing. In *Harper*, the court considered what to do when a trial court errs in how it imposes postrelease control. Specifically, postrelease control was properly imposed but the consequences of violating it were not fully journalized. The court held that the defendant was barred under the principles of res judicata from challenging the imposition of postrelease control because he failed to make the challenge in his direct appeal. The *Harper* court went back to the "traditional understanding of void and voidable sentences." *Id.* at ¶ 34.

> "[A] judgment of conviction is void if rendered by a court having either no jurisdiction over the person of the defendant or no jurisdiction of the subject matter, i.e., jurisdiction to try the defendant for the crime for which he was convicted. Conversely, where a judgment of conviction is rendered by a court having jurisdiction over the person of the defendant and jurisdiction of the subject matter, such judgment is not void, and the cause of action merged therein becomes res judicata as between the state and the defendant."

Id. at ¶ 22, quoting *State v. Perry*, 10 Ohio St.2d 175, 178-179, 226 N.E.2d 104 (1967).

{¶ 27} Although *Harper* was released at the time of our decision in *Stansell III*, the Ohio Supreme Court had not spoken at that time as to whether its shift on void and voidable sentences would apply to all types of sentencing errors. Moreover, *Harper* involved a situation where the trial court improperly imposed something it was allowed to — postrelease control — whereas, here, the court imposed a life tail when it was not allowed to. In other words, the trial court exceeded the statutory authority given to it for sentencing Stansell.

{¶ 28} The Ohio Supreme Court did consider the universal application of *Harper* on sentencing after our decision in *Stansell III*, when it released *State v. Henderson*, Slip Opinion 2020-Ohio-4784, and held that a "sentence is void only if the sentencing court lacks jurisdiction over the subject matter of the case or personal jurisdiction over the accused." *Henderson* at ¶ 27. In *Henderson*, the trial court was statutorily required to sentence the defendant to a life tail, but did not do so. The state, 18 years later, sought to impose the life tail. The Ohio Supreme Court held that the sentence was not void because the trial court had jurisdiction over the case and the defendant, and the state had had a full and fair opportunity to object to or challenge the trial court's sentence and did not.

{¶ 29} This case is different from *Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, and *Henderson* because, here, Stansell, is serving more time than what was statutorily permitted at the time he was indicted and sentenced. The same was not true for the defendants in *Harper* and *Henderson*. The sentence in this case, therefore, implicates Stansell's constitutional rights.

{¶ 30} The United States Supreme Court has recognized that res judicata is generally inapplicable "where life or liberty is at stake." *Sanders v. United States*, 373 U.S. 1, 8, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); *see also Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 558 N.E.2d 1178 (1990). Res judicata "'is to be applied in particular situations as fairness and justice require, and * * * is not to be applied so rigidly as to defeats the ends of justice or so as to work an injustice.'" *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 386-387, 653 N.E.2d 226 (1995)

(Douglas, J., dissenting), quoting 46 American Jurisprudence 2d, Judgments, Section 522, at 785-787 (1994), and citing *Goodson v . McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 202, 443 N.E.2d 978 (1983).

{¶ 31} Finally, "[j]udges have no inherent power to create sentences." *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, at ¶ 22, citing Griffin & Katz, *Ohio Felony Sentencing Law*, Section 1:3, at 4, fn. 1 (2008), and *Woods v. Telb*, 89 Ohio St.3d 504, 507-509, 733 N.E.2d 1103 (2000). Rather, judges are duty-bound to apply sentencing laws as they are written. *Fischer* at *id.* Both *Harper* and *Henderson*, Slip Opinion 2020-Ohio-4784, recognize that res judicata does not preclude collateral attack of actions that a trial court does without authority. The trial court here imposed a sentence outside of its authority; *Harper* and *Henderson* should not serve as a bar to this court's review.

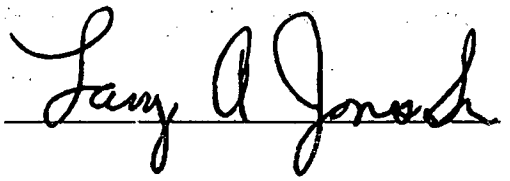
{¶ 32} In light of the above, Stansell's convictions on the sexually violent predator specifications are vacated and the case is remanded for resentencing without those specifications.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



LARRY A. JONES, SR., JUDGE

PATRICIA ANN BLACKMON, P.J., AND
MARY EILEEN KILBANE, J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

JAN 28 2021

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Greg Hircik Deputy

Case law Caution State v. Stansell, 2021-Ohio-2036

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

June 17, 2021, Released; June 17, 2021, Journalized

No. 109023

Reporter

2021-Ohio-2036 * | 173 N.E.3d 1273 ** | 2021 Ohio App. LEXIS 2003 *** | 2021 WL 2473818

STATE OF OHIO, Plaintiff-Appellee, v. MICHAEL STANSELL, Defendant-Appellant.

Subsequent History: Discretionary appeal allowed by State v. Stansell, 165 Ohio St. 3d 1403, 2021-Ohio-3631, 2021 Ohio LEXIS 2082, 175 N.E.3d 547, 2021 WL 4891544 (Oct. 20, 2021)

Motion granted by State v. Stansell, 166 Ohio St. 3d 1463, 2022-Ohio-1152, 2022 Ohio LEXIS 710, 185 N.E.3d 97, 2022 WL 1020618 (Apr. 6, 2022)

Appeal dismissed by State v. Stansell, 2022-Ohio-2064, 2022 Ohio LEXIS 1195 (Ohio, June 21, 2022)

Prior History: [***1] Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-97-356129-ZA.

State v. Stansell, 2021-Ohio-203, 2021 Ohio App. LEXIS 224, 166 N.E.3d 1287, 2021 WL 303444 (Ohio Ct. App., Cuyahoga County, Jan. 28, 2021)

Disposition: AFFIRMED.

Core Terms

sentence, trial court, void, voidable, res judicata, continuing jurisdiction, en banc, modify, specifications, personal jurisdiction, subject-matter, convictions, sexually violent predator, final sentence, direct appeal, collateral attack, vacate, facto, statutory limitation, sentencing error, reconsidered, offenses, doctrine of res judicata, sentencing court, impose sentence, postconviction, void judgment, void-sentence, offender, exceeds

Case Summary- Overview

HOLDINGS: [1]-The panel decision erred by finding that sentences that exceeded statutory limitations were void. Because the sentencing court had subject-matter jurisdiction over the case

and personal jurisdiction over defendant, any sentencing error, including the imposition of a sentence that exceeded statutory limitations, was not void, but voidable.

Outcome

Judgment affirmed.

Counsel: Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Assistant Prosecuting Attorney, for appellee.

Cullen Sweeney, Cuyahoga County Public Defender, and John T. Martin, Assistant Public Defender, for appellant.

Judges: MARY J. BOYLE, ADMINISTRATIVE JUDGE. FRANK D. CELEBREZZE, JR., KATHLEEN ANN KEOUGH, EILEEN A. GALLAGHER, EILEEN T. GALLAGHER, MICHELLE J. SHEEHAN, LISA B. FORBES, and EMANUELLA D. GROVES, JJ., CONCUR; SEAN C. GALLAGHER, J., CONCURS WITH SEPARATE OPINION; LARRY A. JONES, SR., J., DISSENTS WITH SEPARATE OPINION with MARY EILEEN KILBANE and ANITA LASTER MAYS, JJ.

Opinion by: MARY J. BOYLE

Opinion

[**1274] EN BANC DECISION AND JOURNAL ENTRY AND OPINION

MARY J. BOYLE, A.J.:

[*P1] Pursuant to App.R. 26(A)(2), Loc.App.R. 26, and McFadden v. Cleveland State Univ., 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, the en banc court has determined that a conflict exists between State v. Stansell, 8th Dist. Cuyahoga No. 100604, 2014-Ohio-1633, 10 N.E.3d 795 ("Stansell II"), and the reconsidered opinion in State v. Stansell, 8th Dist. Cuyahoga No. 109023, 2021-Ohio-203, 166 N.E.3d 1287 ("Stansell III reconsidered opinion"), and frames the question for en banc review as follows:

Where a defendant's sentence exceeds statutory limitations, is the sentence void?1Link to the text of the note

THE EN BANC DECISION

[*P2] HN1 We find that where a defendant's sentence exceeds statutory limitations, [***2] the sentence is voidable, but not void, unless the sentencing court lacked subject-matter jurisdiction over the case or personal jurisdiction over the defendant.

[*P3] HN2 In State v. Harper, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, the Ohio Supreme Court "realign[ed] its void-sentence jurisprudence" with the "traditional understanding" that a void judgment is one that is rendered without subject-matter jurisdiction over the case or personal jurisdiction over the parties. Harper at ¶ 4. The Ohio Supreme Court explained that it had created exceptions to this traditional rule, but these exceptions "burdened" courts with unnecessary litigation and "undermin[ed] the finality of criminal judgments." Id. at ¶ 3. The court held that if a trial court has subject-matter jurisdiction over the case and personal jurisdiction over the accused, an error in the trial court's imposition of postrelease control renders the court's judgment voidable, not void, and not subject to collateral attack. Id. at ¶ 4-5. The court cautioned "prosecuting attorneys, defense counsel, and pro se defendants throughout this state that they are now on notice that any claim that the trial court has failed to properly impose postrelease control in the sentence must be brought on appeal from the judgment of conviction [***3] or the sentence will be subject to res judicata." Id. at ¶ 43.

[*P4] [**1275] In State v. Brooks, 8th Dist. Cuyahoga No. 108919, 2020-Ohio-3286, this court extended the holding in Harper to apply to sentencing errors outside of the context of postrelease control. Brooks at ¶ 9. Brooks had filed a petition for postconviction relief arguing that his sentence of "life, without the possibility of parole until serving twenty (20) years" was void because it was contrary to the language of then R.C. 2929.03(C)(2) that stated, "twenty full years." (Emphasis sic.) Id. at ¶ 4. This court found that the sentencing court had subject-matter jurisdiction over Brooks's case and personal jurisdiction over him, and that pursuant to Harper, Brooks's sentence could be challenged only on direct appeal. Id. at ¶ 9.

[*P5] This court followed Brooks in State v. Starks, 8th Dist. Cuyahoga No. 109444, 2020-Ohio-4306, where Starks was sentenced to life imprisonment, without the parole eligibility after twenty years that former R.C. 2929.03 required. Starks argued in a postconviction motion that his sentence was void because it was "not authorized by statute." Id. at ¶ 10. However, applying Harper and Brooks, we found that the sentencing court had subject-matter jurisdiction over Starks's case and personal jurisdiction over him, and that any sentencing error would render his sentence voidable, not void. Id. at ¶ 15. We therefore found that Starks [***4] could challenge his sentence only on direct appeal, and his postconviction argument was barred by the doctrine of res judicata. Id. at ¶ 15-16.

[*P6] After we released Brooks and Starks, the Ohio Supreme Court also extended Harper to sentencing errors beyond postrelease control in State v. Henderson, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776. Former R.C. 2929.02(B) required the trial court to sentence Henderson to an indefinite sentence of 15 years to life, but the trial court instead sentenced him to "15 years" without the life tail. Id. at ¶ 39-40. When the state challenged the sentence via a postconviction motion, the Ohio Supreme Court found that "there is no dispute that the sentence is unlawful" but that the error rendered the sentence voidable, not void, and the state could not correct the error in a postconviction motion. Id. at ¶ 40.

[*P7] HN3 Based on Harper and Henderson, the current void-sentence jurisprudence of the Ohio Supreme Court is clear: if the sentencing court has subject-matter jurisdiction over the case and personal jurisdiction over the defendant, any sentencing error renders the sentence voidable, not void. We must apply this bright-line rule to the question for en banc review: sentences that exceed statutory limitations, so long as the trial court had subject-matter jurisdiction over [***5] the case and personal jurisdiction over the defendant, are likewise voidable, not void.

[*P8] HN4 The Ohio Supreme Court created no exception to its realigned void-sentence jurisprudence for sentences that exceed statutory limitations. Under Henderson, as long as "the court has jurisdiction over the case and the person, any error in the court's exercise of that jurisdiction is voidable." (Emphasis added.) Id. at ¶ 34. The court did not limit its holding to specific types of errors or to situations where an error causes the defendant to spend less time incarcerated than statutorily mandated. Indeed, the court explained in Henderson that one of the reasons it was realigning its void-sentence jurisprudence was because the previous case law "created uncertainty, inconsistency, frustration, and confusion" regarding how to apply the voidness doctrine to particular judgments. Id. at ¶ 32. By realigning the void-sentence doctrine to "the traditional understanding of what constitutes a void judgment," the court meant to "remove that confusion" [**1276] and "restore predictability and finality to trial-court judgments and criminal sentences." Id. at ¶ 33. It intended to narrow void judgments to those rendered by a court without subject-matter [***6] jurisdiction over the case or personal jurisdiction over the accused. Id. at ¶ 38.

[*P9] The Stansell III reconsidered opinion's holding that sentences exceeding statutory limitations are void is therefore against the Ohio Supreme Court's precedent in Harper and Henderson. The holding also conflicts with this court's opinion in Starks that a sentence "not authorized by statute" was voidable, not void, despite the harsh reality that Starks is now spending life in prison without the parole eligibility to which he was entitled under former R.C. 2929.03.

[*P10] We recognize that the application of the Ohio Supreme Court's current void-sentence jurisprudence can be unjust, especially in cases like this one and Starks where the sentencing error is not challenged on direct appeal and causes the defendant to spend "unwarranted time incarcerated." Henderson, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, at ¶ 48 (O'Connor, C.J., concurring in judgment only). We echo the concerns expressed in Chief Justice O'Connor's concurring in judgment only opinion in Henderson that the majority opinion "elevate[s] predictability and finality over fairness and substantial justice." Id. at ¶ 47. However, we are constrained to follow the Ohio Supreme Court's holdings in the majority opinions in Harper and Henderson [***7] .

[*P11] HN5 We therefore hold that so long as the sentencing court has subject-matter jurisdiction over the case and personal jurisdiction over the defendant, any sentencing error, including the imposition of a sentence that exceeds statutory limitations, is not void, but voidable. To secure and maintain uniformity of decisions within the district, we vacate the panel decision issued in State v. Stansell, 8th Dist. Cuyahoga No. 109023, 2021-Ohio-203, 166 N.E.3d 1287, and issue this decision as the final decision in this appeal.

MARY J. BOYLE, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., KATHLEEN ANN KEOUGH, EILEEN A. GALLAGHER, EILEEN T. GALLAGHER, MICHELLE J. SHEEHAN, LISA B. FORBES, and EMANUELLA D. GROVES, JJ., CONCUR;

SEAN C. GALLAGHER, J., CONCURS WITH SEPARATE OPINION; LARRY A. JONES, SR., J., DISSENTS WITH SEPARATE OPINION with MARY EILEEN KILBANE and ANITA LASTER MAYS, JJ.

Concur by: SEAN C. GALLAGHER

Concur

SEAN C. GALLAGHER, J., CONCURRING:

[*P12] Although I fully concur with the majority's conclusion that State v. Harper, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, and State v. Henderson, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776 (collectively "Harper/Henderson"), apply to preclude collateral attacks of any sentencing error and not just those that inure to the benefit of a defendant, there are two additional points that should be discussed.

[*P13] First and foremost, the Ohio Supreme Court resolved the question we [***8] are answering in this en banc review even before Stansell III was released. State ex rel. Romine v. McIntosh, Slip Opinion No. 2020-Ohio-6826, 162 Ohio St. 3d 501, 165 N.E.3d 1262 (imposing sentences upon allied offenses in violation of R.C. 2941.25 renders the conviction voidable even though the offender was subject to a greater punishment than the legislature authorized). Thus, our review is based on correcting an erroneous decision that contradicted binding authority — no new ground is being trod. More [**1277] important, there is a trend, not limited to this case, of appellate panels suggesting that the law on finality of criminal judgments may be set aside based on policy determinations. This sets a dangerous precedent that we should strive to curtail.

I. The Ohio Supreme Court has already concluded that a sentence punishing an offender in excess of that which is legislatively authorized, renders the sentence voidable and subject to correction only in the direct appeal.

[*P14] Under Harper/Henderson, any errors in the imposition of the final sentence are voidable, and can be corrected only through a direct appeal rather than through a collateral attack in a postconviction proceeding. In the panel decision, State v. Stansell, 8th Dist. Cuyahoga No. 109023, 2021-Ohio-203, 166 N.E.3d 1287 ("Stansell III" reconsidered opinion), the defendant filed a motion to vacate what he asserted to be [***9] a void sentence in 2019. Id. at ¶ 11-13. The sentence was originally imposed in 1998, so the trial court denied the motion. Id. In the appeal of the collateral proceeding, the panel concluded that the doctrine of res judicata did not preclude the trial court from modifying what was deemed to be an erroneous sentence because "res judicata is generally inapplicable 'where life or liberty is at stake.'" Id. at ¶ 30, quoting Sanders v. United States, 373 U.S. 1, 8, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). The dissent maintains this position in this en banc review. According to the original panel, "the 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 III concluded that the sentence imposed was void and subject to collateral attack despite Harper/Henderson. Stansell III at ¶ 23 and 29.

[*P15] No matter how well intentioned, intermediate appellate panels lack authority to disregard binding precedent. The sole question presented for the panel's review was whether the trial court correctly determined that it lacked continuing jurisdiction to modify the final sentence, i.e., erred in determining whether the imposed sentence was void (in which case the trial court maintained continuing jurisdiction to modify [***10] the sentence) or merely voidable (in which case the trial court lacked jurisdiction to modify the final sentence). State v. Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19. The panel did not resolve that question, but instead bypassed the jurisdiction issue and concluded that res judicata did not apply based on issues of equity and fairness, and as a result, the trial court erred by not modifying the final sentence. Stansell III at ¶ 29.

[*P16] Lost in this debate is the fact that appellate panels cannot independently modify or collaterally attack a final judgment that the trial court had no jurisdiction to alter. In other words,

the appellate panel is not an independent arbiter of the validity of a final sentence and cannot substitute its view for that of the trial court where the issue was one of continuing jurisdiction. The trial court either had jurisdiction to modify the underlying sentence or did not have jurisdiction. An appellate panel cannot create its own jurisdiction merely to modify or change a result the panel finds unfair or unpalatable; the sole question in this type of case is whether the trial court correctly resolved the question of its jurisdiction to modify a final sentence.

[*P17] This inquiry is not about the constitutionality of a proceeding or the [***11] apparent error in imposing a sentence beyond the maximum permitted by law; it is about whether a trial court has continuing jurisdiction after entering the final entry of conviction in a criminal case. See, e.g. State v. Apanovitch, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, ¶ 38-39 (trial court lacked jurisdiction to consider [**1278] the defendant's claim as being either a petition for postconviction relief or a motion for new trial under Crim.R. 33, and without another basis to secure the trial court's jurisdiction, the motion must be denied). Once a court of competent jurisdiction renders a final sentence in a criminal action, that court's continuing jurisdiction to act in postconviction proceedings is limited. State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 23, citing Zaleski. There must be a jurisdictional basis for the trial court to act. Apanovitch at ¶ 38-39.

[*P18] A defendant can invoke the trial court's continuing jurisdiction following the issuance of a final sentencing entry in several ways, for example, through (1) filing a motion to correct a void judgment under Zaleski; (2) filing a timely or successive petition for postconviction relief under R.C. 2953.21; (3) filing a motion for a new trial under Crim.R. 33; or (4) filing a postsentence motion to withdraw a plea under Crim.R. 32.1. Because the trial court's jurisdiction to consider postconviction motions or petitions [***12] is limited, the initial inquiry is whether the trial court may invoke its continuing jurisdiction to consider the particular postconviction motion filed. If the motion does not demonstrate that the sentence is void, that it is a timely petition for postconviction relief or motion for a new trial, or is not properly considered as a postsentence motion to withdraw a plea, the trial court simply lacks jurisdiction to consider the merits of the motion filed following the final entry of conviction. See, e.g., Apanovitch.

[*P19] A trial court possesses continuing jurisdiction only for the purposes of vacating a void judgment. Id. If the judgment is not void, the court lacks a basis to assert its continuing jurisdiction to act, and denying the motion merely reflects the ministerial task of disposing of the active motion on the court's docket. Although this concept is derived from the principles of res judicata, it should not be confused with the affirmative defense of res judicata. Jurisdiction and res judicata are two distinct concepts. Res judicata may be considered only if the trial court possesses continuing jurisdiction over the criminal conviction. State v. Holdcroft, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 14. The scope of an appeal in this situation [***13] is limited to determining whether the trial court correctly denied the motion to vacate the void judgment, in other words, whether the trial court correctly determined that it lacked jurisdiction to modify the final sentence.

[*P20] Although the doctrine of res judicata can impact the postconviction, collateral proceedings, that is an affirmative defense and the tribunal must first possess jurisdiction in order to consider the applicability of the res judicata doctrine. Simply put, application of res judicata does not exist in a vacuum. State ex rel. McGirr v. Winkler, 152 Ohio St.3d 100, 2017-Ohio-8046, 93 N.E.3d 928, ¶ 17, citing State ex rel. Lipinski v. Cuyahoga Cty. Common Pleas Court, Probate Div., 74 Ohio St.3d 19, 20-21, 1995- Ohio 96, 655 N.E.2d 1303 (1995), and State ex rel. Flower v. Rocker, 52 Ohio St.2d 160, 162, 370 N.E.2d 479 (1977); State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967) (res judicata applies and "may operate" to prevent consideration of a collateral attack based on a claim that could have been raised on direct appeal from the voidable sentence).

[*P21] In order to apply or consider the doctrine of res judicata to a final sentence, the trial court must first possess continuing jurisdiction to modify the final sentence — in other words, res judicata could potentially be considered in situations in which the trial court is reviewing a void sentence but has no bearing on the trial court's lack of continuing jurisdiction to modify a sentence that is merely voidable. [**1279] Flower at 162 (writ of prohibition was not warranted because the [***14] court had jurisdiction to rule on the affirmative defense of res judicata). The dissent's observation regarding an exception to the doctrine of res judicata did not obviate the impact of Harper/Henderson with respect to the trial court's lack of continuing jurisdiction to modify a sentence that is voidable. The affirmative defense of res judicata is never implicated in that situation because a trial court must possess continuing jurisdiction to consider the merits of the res judicata defense. Since a sentence that is merely voidable cannot be collaterally attacked, the doctrine of res judicata is irrelevant. It is not res judicata that binds the trial court's action, but instead is the trial court's lack of jurisdiction. Holdcroft at ¶ 14.

[*P22] Further, even if we set aside the issue of the trial court's lack of jurisdiction to modify the sentence, the Ohio Supreme Court has already resolved the question posed for our review en banc: Where a defendant's sentence exceeds statutory limitations, is the sentence void? In McIntosh, Slip Opinion No. 2020-Ohio-6826, the Ohio Supreme Court reaffirmed its commitment to the Harper/Henderson rationale and concluded that that even if a trial court "has imposed greater punishment than the legislature authorized[,]" [***15] such a sentence is not void Id. at ¶ 15-16. In that case, the defendant was sentenced to what were deemed allied offenses by the trial court before imposing sentence in direct violation of R.C. 2941.25. Despite this sentencing error imposing a greater punishment than authorized, McIntosh concluded that the defendant must timely appeal those sentences. Id. Importantly, McIntosh did not distinguish Harper/Henderson based on the fact that the offender was sentenced in excess of that which was legally permitted. Id. at ¶ 15.

[*P23] Instead, it was concluded that "[t]he imposition of compound sentences for allied offenses is an error in the exercise of jurisdiction, to be challenged at sentencing and remedied

on direct appeal." Id. at ¶ 13. In so concluding, McIntosh expressly overruled State v. Williams, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 28, in which it was concluded that "the imposition of separate sentences for those offenses — even if imposed concurrently — is contrary to law" and the sentences are considered void. Sentences exceeding that which is statutorily permitted necessarily fall under the ambit of Harper/Henderson. Id. Under McIntosh, the imposition of separate sentences for allied offenses, even if imposed concurrently, renders the sentence voidable, but not subject to collateral attack [***16] despite the fact that the offender is being punished in excess of what the law permits. As it applies to our discussion, Stansell's conclusion, limiting Harper/Henderson to situations in which the challenged sentence is less than required by law, was superseded by McIntosh and controls our en banc review.2Link to the text of the note

[*P24] [**1280] The motion to vacate the void sentence at issue in this case was properly denied by the trial court under Harper/Henderson because the trial court lacked continuing jurisdiction to modify the final sentence that was merely voidable. Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, at ¶ 19.

II. Finality of convictions are essential to the administration of the criminal justice system.

[*P25] In the panel opinion (Stansell III), Harper/Henderson was distinguished on the basis that a defendant should not serve a greater punishment than legislatively authorized because res judicata should not be applied "'in particular situations as fairness and justice require, and * * * is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice.'" Stansell III at ¶ 30, quoting Grava v. Parkman Twp., 73 Ohio St.3d 379, 386-387, 1995- Ohio 331, 653 N.E.2d 226 (1995) (Douglas, J., dissenting), quoting 46 American Jurisprudence 2d, Judgments, Section 522, at 785-787 (1994), and Goodson v. McDonough Power Equip., Inc., 2 Ohio St.3d 193, 202, 2 Ohio B. 732, 443 N.E.2d 978 (1983). Omitted from the quoted language is Justice Douglas's admonition that "the public policy underlying the principle [***17] of res judicata must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which to present his case." Grava at 386. Under Ohio law, all defendants have the opportunity to challenge the legality of their conviction, at times through multiple means, but the notion espoused in the panel decision, that justice requires circumvention of finality through successive appeals twenty years after the imposition of the sentence, seems to only inure to the benefit of the defendant.

[*P26] This attempt to obviate principles of finality from criminal convictions presents a cautionary tale, further exemplified by the dissent's reliance on Sanders v. United States, 373 U.S. 1, 8, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963), for the proposition that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." In Sanders, the Court was discussing the "familiar principle" that res judicata was inapplicable in habeas proceedings. However, while res judicata may not bar review in a habeas proceeding, "federal habeas corpus relief does not lie for errors of state

law[,]" including errors in sentencing procedures. Gibboney v. Ransom, E.D.Pa. No. 19-cv-3534, 2019 U.S. Dist. LEXIS 203153, 12-13 (Nov. 19, 2019), quoting Richmond v. Lewis, 506 U.S. 40, 51, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992), and Lewis v. Jeffers, 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). Sanders is inapplicable.

[*P27] The principle [***18] of finality is "essential to the operation" of the criminal justice system. Teague v. Lane, 489 U.S. 288, 309, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). "Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions 'shows only that "conventional notions of finality" should not have as much place in criminal as in civil litigation, not that they should have none.'" (Emphasis sic.) Id., quoting Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U.Chi.L.Rev. 142, 150 (1970); see also State v. Chaney, 8th Dist. Cuyahoga No. 88529, 2007-Ohio-2231, ¶ 4 (citing Teague with approval). Harper/Henderson resurrected the lost notion of finality in criminal convictions. Although the practical applications of Harper/Henderson preclude either the state or the defendant from perpetually reopening convictions, that does not result in an unjust [**1281] application of law. All parties have the opportunity to their day in court to fully challenge any conviction.

[*P28] Further, a defendant-centric application of justice generally ignores a victim's rights. If, as the Stansell III panel concludes, it would be "unjust" to preclude a defendant from perpetually challenging his sentence until finding a sympathetic ear, should the victim not be offered that same opportunity to [***19] see that the perpetrator of their crime has been punished within the bounds of the law? In Henderson, the legislature authorized a life sentence with the possibility of parole after 15 years. The victim was in a sense entitled to have the perpetrator of the crime imprisoned for life. Instead, the trial court mistakenly imposed a definite 15-year term of imprisonment. That sentence, despite not being authorized by law, was deemed voidable and not subject to collateral attack. Id. To suspend the rule of finality for defendants, to the exclusion of victims of the crimes, seems to provide a class of persons an advantage not available to all. This is not a path taken lightly considering Ohio's constitutional amendment to secure victim's rights in criminal proceedings. Article I, Section 10a of the Ohio Constitution ("Marsy's Law").

[*P29] From the victim's perspective, how does justice permit that windfall to the defendant when the defendant would be entitled to perpetually challenge his sentence as exceeding that which is authorized? All too often, it seems that the sense of what is just and fair focuses on the defendant to the exclusion of the victim. The combination of Harper/Henderson and McIntosh can be deemed many things, but at the [***20] least, it provides an equal playing field for all parties in the criminal justice system.

III. There is no merit to Stansell's appeal.

[*P30] There is no need to dwell on the merits of Stansell's claims. As the panel recognized, this is Stansell's second appeal to this court over the issue of whether the trial court erred by not vacating his sexually violent predator specifications. Stansell III at ¶ 2. Stansell's claims rely on application of State v. Smith, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, syllabus, in which the Ohio Supreme Court held that a "[c]onviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)(1) if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment." Stansell's convictions predated Smith.

[*P31] In State v. Stansell, 2014-Ohio-1633, 10 N.E.3d 795, ¶ 14 (8th Dist.) ("Stansell II"), the panel concluded that "Smith does not have retroactive application to closed cases." Id., citing State v. Draughon, 10th Dist. Franklin Nos. 11AP-703 and 11AP-995, 2012-Ohio-1917, and State v. Ditzler, 9th Dist. Lorain No. 13CA010342, 2013-Ohio-4969. Stansell's claims were overruled, and this ends any need for further inquiry into this matter. Stansell challenged his conviction and lost. Id., delayed appeal denied, State v. Stansell, 140 Ohio St.3d 1413, 2014-Ohio-3785, 15 N.E.3d 882. Further, Stansell II's conclusion was in keeping with constitutional norms. Styers v. Ryan, 811 F.3d 292, 297 (9th Cir.2015), citing Griffith v. Kentucky, 479 U.S. 314, 323, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ("When a constitutional rule is [***21] announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final."). There is no need for the further [**1282] expenditure of judicial resources in this matter.

[*P32] Accordingly, I concur with the majority's conclusion, only insofar as the Ohio Supreme Court has already resolved the question we are tasked with answering. Because finality in convictions should be equally applied as against defendants and the state, which represents Ohio citizens and the victims, the rationale advanced in the panel decision must be rejected. On this basis, Stansell's motion to vacate a void judgment was properly denied. Since there is no need for the panel to consider anything further, I would affirm on the merits.

Dissent by: LARRY A. JONES, SR.

Dissent

LARRY A. JONES, SR., J., DISSENTING:

[*P33] Respectfully, I dissent. As I said in the Stansell III reconsidered opinion, I believe this case is distinguishable from Harper and Henderson. Specifically, unlike the defendants in Harper and Henderson, in this case, Stansell will end up serving more time that what was statutorily allowed at the time he was indicted and sentenced. This case is the perfect example of what the United States [***22] Supreme Court spoke about regarding the doctrine of res judicata — that is, that "[c]onventional notions of finality of litigation have no place where life or liberty is at

stake and infringement of constitutional rights is alleged." Sanders v. United States, 373 U.S. 1, 8, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

[*P34] Accordingly, I dissent.

DECISION OF THE MERIT PANEL

LARRY A. JONES, SR., P.J.:

[*P35] This matter has been returned to the original merit panel3Link to the text of the note for disposition after the en banc court majority opinion determined that where a defendant's sentence exceeds statutory limitations, the sentence is voidable; it is only void if the sentencing court lacked subject-matter jurisdiction over the case or personal jurisdiction over the defendant. In light of the en banc court's majority opinion, we are again called on to apply the law as resolved by the en banc court and address the other argument raised in Stansell's original appellate brief. Stansell's assignment of error reads: "The trial court erred as a matter of law in denying Appellant's Motion to Vacate Sexually Violent Predator Specification and Re-Sentence Defendant."

[*P36] In this appeal, Stansell challenges his sentence on two grounds: first, contending that it is void and, second, contending that it is a violation of [***23] ex post facto law. As the writer of this majority merit panel opinion, I am constrained to follow the law as determined by the en banc majority court; consequently, this majority opinion of the merit panel affirms the trial court's decision.

Factual and Procedural History

[*P37] In 1997, Stansell was sentenced for certain rape offenses that included two "life-tail" sexually violent predator specifications. The law at the time did not allow the specifications for offenders who had not previously been convicted of a sexually oriented offense. Stansell did not have any prior convictions for a sexually oriented offense. Stansell filed a direct appeal from his convictions, but did not challenge the sexually violent predator specifications. State v. Stansell, 8th Dist. Cuyahoga No. 75889, 2000 Ohio App. LEXIS 1726 (Apr. 20, 2000) ("Stansell I"). [**1283] In 2004, in State v. Smith, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, the Ohio Supreme Court found that the specifications could not be applied to defendants who, like Stansell, lacked prior convictions for sexually oriented offenses.

[*P38] In 2014, Stansell brought his first challenge to his specifications in State v. Stansell, 8th Dist. Cuyahoga No. 100604, 2014-Ohio-1633, 10 N.E.3d 795 ("Stansell II"). This court declined to adopt Stansell's argument that his sentence was void and refused to apply the Ohio Supreme Court's decision in Smith retroactively.

[*P39] This appeal started in [***24] 2019, when Stansell again challenged the specifications. State v. Stansell, 2020-Ohio-3674, 154 N.E.3d 1179 (8th Dist.) ("Stansell III"). In the original panel opinion, the majority found Stansell's sentence to be void under an ex post facto rationale and vacated his sexually violent predator specifications. In doing so, the majority relied on the void sentencing doctrine as it existed prior to the Ohio Supreme Court's decisions in State v. Harper, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, and State v. Henderson, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776.

[*P40] Upon reconsideration, the panel issued a reconsidered opinion distinguishing the holdings in Harper and Henderson from this case based on the fact that the trial court exceeded its statutory authority in sentencing Stansell in 1997. State v. Stansell, 8th Dist. Cuyahoga No. 109023, 2021-Ohio-203, 166 N.E.3d 1287 ("the reconsidered opinion"). The reconsidered opinion acknowledged that it was not following the decision in Stansell II in regards to voidness.

[*P41] As discussed in the en banc portion of this opinion, the reconsidered opinion's interpretation of Harper and Henderson conflicted with State v. Brooks, 8th Dist. Cuyahoga No. 108919, 2020-Ohio-3286, and State v. Starks, 8th Dist. Cuyahoga No. 109444, 2020-Ohio-4306. It has now been decided by a majority of this court en banc that where a defendant's sentence exceeds statutory limitations, the sentence is voidable; it is only void if the sentencing court lacked subject-matter jurisdiction over the case or personal jurisdiction over the defendant. We now apply [***25] that law to Stansell's contention raised in his original brief that his sentence is void, and address the remaining issue of whether his sentence was in violation of ex post facto principles.

Analysis

[*P42] In regard to the void and voidable distinction, the common pleas court had subject-matter jurisdiction over Stansell's case. The court also had personal jurisdiction over Stansell. Thus, the sentence cannot be void; if anything, it could only be subject to vacation on the ground that it was voidable. Under Harper, "[w]hen the sentencing court has jurisdiction to act, sentencing errors * * * render the sentence voidable, not void, and the sentence may be set aside if successfully challenged on direct appeal." Id. at ¶ 42. Because Stansell did not challenge his sentence on direct appeal, it must stand.

[*P43] We likewise find that Stansell's appeal does not withstand a challenge based on ex post facto law. Article I, Section 10, U.S. Constitution forbids state legislatures from passing any ex post facto law. "The Clause is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" California Dep't of Corrections v. Morales, 514 U.S. 499, 504, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995), quoting Collins v. Youngblood, 497 U.S. 37, 41-43, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); see also Beazell v. Ohio, 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216 (1925). "Of central concern in an Ex Post Facto Clause analysis is

whether the defendant had 'fair warning' [**1284] and therefore [***26] notice of the change in the law." State v. Townsend, Slip Opinion No. 2020-Ohio-5586, ¶ 10, 163 Ohio St. 3d 36, 167 N.E.3d 954, quoting Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

[*P44] Here, the version of R.C. 2971.01(H)(1) in effect when Stansell committed the crimes defined a sexually violent predator as a person who had previously been convicted of a sexually oriented offense. Although it is true that Stansell did not fit the definition of sexually violent predator because he did not have a prior conviction, the law was not applied retroactively to him; therefore, there was no ex post facto implication.

[*P45] Stansell cites the following cases in support of his ex post facto challenge: State v. Clipps, 8th Dist. Cuyahoga No. 107747, 2019-Ohio-3569, State v. Frierson, 8th Dist. Cuyahoga, 2019-Ohio-317, 129 N.E.3d 1004, and State v. Townsend, 8th Dist. Cuyahoga No. 107186, 2019-Ohio-1134.4Link to the text of the note Those cases are all distinguishable from this case, however, because the successful ex post facto challenge in those cases related to crimes that were committed before the April 2005 amendment to the definition of a sexually violent predator, but upon which the state sought to have the amended statute apply. The court elaborated, for example, in Townsend as follows:

In this case, the statutory change created more than "a sufficient risk of a higher sentence" by actually imposing a sexually-violent-predator specification on Townsend that had not applied when he committed his crimes. Townsend received a harsher sentence based on the difference between [***27] the sentencing scheme in place when he committed his crimes and the sentencing scheme in place when he was indicted. The amendments to R.C. 2971.01(H)(1) resulted in a new definition of "sexually violent predator" that allowed, for the first time, the underlying conduct in an indictment to satisfy the specification without a prior conviction. As a result, the amendment enhanced Townsend's punishment by subjecting him to indefinite sentencing under R.C. 2971.03. Without the sexually-violent-predator specification, Townsend would have faced a definite term of three to 10 years for the first-degree felony offenses (rape and kidnapping) that he committed before April 29, 2005. Here, the trial court imposed a prison sentence of five years to life for each of the 2003 offenses in Counts 1, 2, 3, 7, and 11 and ten years to life for the 2005 offense in Count 9. Given the harsh consequences that the new sentencing scheme imposed on Townsend, we have no difficulty concluding that enforcing the new sentencing scheme against him did not comport with "principles of 'fundamental justice.'"

(Citations omitted) Townsend at ¶ 12, quoting Peugh v. United States, 569 U.S. 530, 544, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013), and Peugh at 546, quoting Carmell v. Texas, 529 U.S.513, 531, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000). Here, Stansell was not sentenced to a higher sentence because of a statutory change; thus [***28] ex post facto law is not implicated here.

Conclusion

[*P46] For the reasons discussed above, the sentence was not void because the trial [**1285] court had subject-matter jurisdiction over the case and personal jurisdiction over Stansell. Any argument that it was voidable is res judicata since Stansell failed to raise it in his direct appeal. Further, because Stansell was not sentenced to a higher sentence due to a statutory change, there was no ex post facto violation. Thus, Stansell's sole assignment of error is overruled.

[*P47] Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE, MARY EILEEN KILBANE, J., and, EMANUELLA D. GROVES, J., CONCUR

Footnotes

1Link to the location of the note in the document

The state claims that the panel's finding in the Stansell III reconsidered opinion conflicts with Stansell II and State v. Speed, 8th Dist. Cuyahoga No. 105543, 2018-Ohio-277, regarding whether Stansell's sentence is void due to his sexually violent predator specification and whether his challenge to it is barred by res judicata. The state frames the conflict question as follows: "Whether the Ohio Supreme Court's decision in State v. Smith, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, 818 N.E.2d, applies retroactively to closed cases that became final prior to Smith being decided."

2Link to the location of the note in the document

The natural question that arises from this change is, what relief could a defendant who failed to appeal a ruling have if the state moved to impose a penalty that was more than the maximum? In State ex rel. Fraley v. Ohio Dept. of Rehab. & Corr. 161 Ohio St.3d 209, 2020-Ohio-4410, 161

N.E.3d 646, a writ of mandamus was granted to prevent the Ohio Department of Rehabilitation and Correction ("ODRC") from adding additional time to the original sentence issued in error, concluding that any errors in the final entry of conviction must be timely challenged and cannot be unilaterally corrected by the trial court or the ODRC. Id. at ¶ 17. It logically follows, that offenders seeking to challenge an allegedly erroneous sentence must do so in a timely direct appeal. If the error is not timely challenged, it could only be raised in a motion to reopen the appeal under App.R. 26(B) or, if no appeal had been filed, as a delayed appeal under App.R. 5(A).

3Link to the location of the note in the document

At the time the last opinion in this case was issued, State v. Stansell, 8th Dist. Cuyahoga No. 109023, 2021-Ohio-203, 166 N.E.3d 1287, Judge Patricia Blackmon was on the merit panel for this case. Judge Blackmon has since retired, and Judge Emanuella Groves has assumed Judge Blackmon's docket.

4Link to the location of the note in the document

Clipps, Townsend, and Frierson were accepted by the Ohio Supreme Court for review. The court has affirmed this court's decisions in all three cases vacating certain sexually violent predator specifications as violating ex post facto law. See State v. Clipps, 162 Ohio St.3d 313, 2020-Ohio-6748, 165 N.E.3d 31; State v. Townsend, Slip Opinion No. 2020-Ohio-5586, 163 Ohio St. 3d 36, 167 N.E.3d 954; and State v. Frierson, 162 Ohio St.3d 193, 2020-Ohio-6749, 164 N.E.3d 453.

State v. Stansell, 175 N.E.3d 547
Copy Citation

Supreme Court of Ohio

October 20, 2021, Decided

2021-0948.

Reporter
175 N.E.3d 547 * | 2021 Ohio LEXIS 2082 ** | 165 Ohio St. 3d 1403 | 2021-Ohio-3631 | 2021 WL 4891544

State v. **Stansell**.

Notice:

DECISION WITHOUT PUBLISHED OPINION

Prior History:

173 N.E.3d 1273, 2021-Ohio-2036 [**1].

State v. **Stansell**, 2021-Ohio-2036, 2021 Ohio App. LEXIS 2003, 173 N.E.3d 1273, 2021 WL 2473818 (Ohio Ct. App., Cuyahoga County, June 17, 2021)

Judges: Kennedy, Fischer, and DeWine, JJ., dissent. W. Scott Gwin, J., of the Fifth District Court of Appeals, sitting for Stewart, J.

Opinion

[*547] APPEALS ACCEPTED FOR REVIEW

[*548] Kennedy, Fischer, and DeWine, JJ., dissent.

W. Scott Gwin, J., of the Fifth District Court of Appeals, sitting for Stewart, J.

State v. Stansell, 167 Ohio St. 3d 565
Copy Citation

Supreme Court of Ohio

May 24, 2022. Submitted: June 21, 2022. Decided

No. 2021-0948

Reporter
167 Ohio St. 3d 565 * | 2022-Ohio-2064 ** | 195 N.E.3d 129 *** | 2022 Ohio LEXIS 1195 **** | 2022 WL 2202966

THE STATE OF OHIO, APPELLEE, v. **STANSELL**, APPELLANT.

Prior History:

APPEAL from the Court of Appeals for Cuyahoga County, No. 109023, 2021-Ohio-2036 [****1].

State v. **Stansell**, 2021-Ohio-2036, 2021 Ohio App. LEXIS 2003, 173 N.E.3d 1273, 2021 WL 2473818 (Ohio Ct. App., Cuyahoga County, June 17, 2021)

Headnotes

Appeal dismissed as having been improvidently accepted

Counsel: Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van and Frank Romeo Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

Cullen Sweeney, Cuyahoga County Public Defender, and John T. Martin, Assistant Public Defender, for appellant, Michael **Stansell**.

Dave Yost, Ohio Attorney General, Benjamin M. Flowers, Solicitor General, and Zachery P. Keller, Deputy Solicitor General, urging affirmance for amicus curiae Ohio Attorney General.

Timothy Young, Ohio Public Defender, and Addison M. Spriggs, Assistant Public Defender, for amicus curiae Office of the Ohio Public Defender, in support of appellant.

Judges: O'CONNOR, C.J., and KENNEDY, FISCHER, DEWINE, DONNELLY, GWIN, and BRUNNER, JJ., concur. W. SCOTT GWIN, J., of the Fifth District Court of Appeals, sitting for STEWART, J.

Opinion

[**P1] [***130] **[*565]** This cause is dismissed as having been improvidently accepted.

O'CONNOR, C.J., and KENNEDY, FISCHER, DEWINE, DONNELLY, GWIN, and BRUNNER, JJ., concur.

W. SCOTT GWIN, J., of the Fifth District Court of Appeals, sitting for STEWART, J.

No. 23-3056

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MICHAEL STANSELL,

Movant.

ORDER

Before: CLAY, THAPAR, and LARSEN, Circuit Judges.

Michael Stansell, an Ohio prisoner proceeding pro se, moves for an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b)(3)(A). Because Stansell raised his first proposed claim in a prior § 2254 petition and because his second proposed claim does not rely on a new, retroactively applicable, rule of constitutional law or newly discovered evidence of his actual innocence, we deny the motion.

In 1998, Stansell pleaded guilty to two counts of rape of a child under 13, one count of rape with a sexually violent predator ("SVP") specification, two counts of corruption of a minor, one count of gross sexual imposition with an SVP specification, and one count of pandering obscenity. The trial court imposed a "life-tail" sentence of 20 years to life in prison. The Ohio Court of Appeals affirmed, and the Ohio Supreme Court denied leave to file a delayed appeal. *State v. Stansell*, No. 75889, 2000 WL 426547, at *6 (Ohio Ct. App. Apr. 20, 2000), *app. denied*, 747 N.E.2d 252 (Ohio 2001).

Stansell filed a petition for a writ of habeas corpus, which the district court dismissed, finding that Stansell's claims were both procedurally defaulted and time-barred. Stansell did not appeal. Years later, he returned to state court and filed a motion to vacate the SVP specifications, which the trial court denied. The Ohio Court of Appeals affirmed but remanded to the trial court

for the limited purpose of imposing post-release control. *State v. Stansell*, 10 N.E.3d 795, 799 (Ohio Ct. App. 2014).

Stansell then moved our court for leave to file a second or successive habeas petition. Concluding that authorization was unnecessary in light of the recently amended judgment imposing post-release control, we denied the motion as unnecessary and transferred Stansell's habeas petition to the district court for consideration. *In re Stansell*, 828 F.3d 412, 418, 420 (6th Cir. 2016). In his petition, Stansell argued that he was deprived of due process, because the indictment and evidence were insufficient to support the SVP specifications, and his life-tail sentence should be vacated. The district court denied the § 2254 petition, finding that the claim was both procedurally defaulted and meritless. We denied Stansell's application for a certificate of appealability. *Stansell v. Eppinger*, No. 17-3988, slip op. at 3 (6th Cir. Jan. 23, 2018).

Stansell returned to state court and, relying on recent state-law precedent, again moved to vacate the SVP specifications. The trial court denied the motion, but the Ohio Court of Appeals, both initially and on reconsideration, vacated the trial court's judgment and remanded the case with instructions to resentence Stansell without the SVP specifications. *State v. Stansell*, 166 N.E.3d 1287, 1294 (Ohio Ct. App. 2021); *State v. Stansell*, 154 N.E.3d 1179, 1183 (Ohio Ct. App. 2020). The Ohio Court of Appeals explained that the version of Ohio Revised Code § 2971.01(H)(1) that was in effect when Stansell was sentenced authorized an SVP specification only if a defendant had been convicted of a sexually oriented offense on a prior occasion. *Stansell*, 154 N.E.3d at 1183. Stansell has no such prior conviction and, therefore, "could not qualify as a sexually violent predator at the time he was sentenced." *Id.*; *see Stansell*, 166 N.E.3d at 1292. The Ohio Court of Appeals found that, although the life-tail sentence was an agreed-upon sentence, it was not authorized by law and was void. *Stansell*, 154 N.E.3d at 1183; *see Stansell*, 166 N.E.3d at 1292. The Ohio Court of Appeals subsequently granted en banc review, however, and vacated its panel decisions. *State v. Stansell*, 173 N.E.3d 1273, 1276 (Ohio Ct. App. 2021) (en banc). It found that, although Stansell's sentence exceeded statutory limitations, that merely rendered his sentence "voidable, but not void." *Id.* at 1274. The Ohio Supreme Court initially granted leave to

appeal, *State v. Stansell*, 175 N.E.3d 547 (Ohio 2021), but later dismissed the appeal as improvidently accepted. *State v. Stansell*, 195 N.E.3d 129 (Ohio 2022).

Stansell now moves for leave to file a second or successive § 2254 petition in which he would raise two claims. First, he would argue that the state courts violated his due process rights by denying his requests to reduce the maximum penalty of life imprisonment. He contends that the life sentence is void because it is based on the SVP specification, which is "not authorized by law." Second, Stansell would argue that his maximum sentence of life imprisonment constitutes cruel and unusual punishment in violation of the Eighth Amendment.

This court may authorize the filing of a second or successive habeas petition only if the applicant "makes a prima facie showing" that the petition contains a new claim that relies on (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; or (2) facts that "could not have been discovered previously through the exercise of due diligence" and that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2), (b)(3)(C). Any claim that was raised in a prior § 2254 petition is subject to dismissal. 28 U.S.C. § 2244(b)(1).

Stansell's first proposed claim for relief is subject to dismissal because he raised it in the habeas petition that he filed in 2015. Stansell's second proposed claim identifies a new ground for relief but is not based on a new, retroactively applicable rule of constitutional law or newly discovered evidence of Stansell's actual innocence. Stansell contends that the Ohio Court of Appeals' recent recognition of the impropriety and voidability of the SVP specification qualifies as new evidence. But a new state-court decision is not evidence, and, in any event, "actual innocence means factual innocence, not mere legal insufficiency." *Souter v. Jones*, 395 F.3d 577, 590 (6th Cir. 2005) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). At most, the Ohio Court of Appeals decision addressed the legal validity of his sentence, not his innocence. Therefore, it does not qualify as new evidence.

For the foregoing reasons, we **DENY** Stansell's motion for authorization to file a second or successive habeas petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3056

In re: MICHAEL STANSELL,

Movant.

Before: CLAY, THAPAR, and LARSEN, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon the motion by Michael Stansell to authorize the district court to consider a second or successive 28 U.S.C. § 2254 petition for a writ of habeas corpus.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the motion for authorization is DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk