23-5799

No. _____

In the

Supreme Court of the United States

Donald L. Missimer, Jr.,

Petitioner,

v.

The State of Ohio,

Respondent,

On Petition for Writ of Certiorari
To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

Donald L. Missimer, Jr.
Petitioner, pro se
Mansfield Corr. Institution
P.O. Box 788
Mansfield, Ohio 44901

23-5799

In the

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

This case is from the Supreme Court of Ohio.

The Opinion of the Ohio Supreme Court, which is the highest State court to review the merits, appears at Appendix A to the Petition, and is reported at *State ex rel. Missimer v. Forshey*, 2023-Ohio-2355, 2023 Ohio LEXIS 1386, 2023 WL 4496930 (Ohio July 13, 2023).

JURISDICTION

This Petition results from a judgment in the state courts, in the State of Ohio.

The date on which the highest state court to decide the Petitioner's case was July 13, 2023; a copy of which appears at Appendix 1.

No Petition for rehearing was filed in the state court.

No extension of time to file this Petition for a writ of certiorari was sought or granted.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(a).

The controversy at issue herein existed at all stages of review, and not merely at the time the Complaint was filed; and the Petitioner possesses a legal cognizable interest and personal stake in the outcome of this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, § 4(B):

> The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

Ohio Revised Code § 1.42:

> Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Ohio Revised Code § 2901.04:

> (A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.
>
> (B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.
>
> (C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.
>
> (D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

Ohio Revised Code § 2909.01 (1992 version):

As used in sections 2909.01 to 2909.07 of the Revised Code, an 'occupied structure' is any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

* * *

(D) In which at the time any person is present or likely to be present."

Ohio Revised Code § 2929.11(B)(3) (1992 version):

(3) For and aggravated felony of the third degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be two, three, four, or five years, and the maximum term shall be ten years;

Ohio Revised Code § 2929.11(D) (1992 version):

(D) Whoever is convicted of or pleads guilty to a felony of the third or fourth degree and did not, during the commission of that offense, cause physical harm to any person or make an actual threat of physical harm to any person with a deadly weapon, as defined by section 2923.11 of the Revised Code, and who has not previously been convicted of an offense of violence shall be imprisoned for a definite term, and, in addition, may be fined or required to make restitution.

Ohio Revised Code § 2911.12 (1992 version):

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined in section 2913.01 of the Revised Code, or any felony.

(B) Whoever violates this section is guilty of burglary, a felony of the second degree.

Ohio Revised Code § 2911.13 (1992 version):

> (A) No person[,] by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense as defined by section 2913.01 of the Revised Code, or any felony.
>
> ...
>
> (C) Whoever violates this section is guilty of breaking and entering, a felony of the fourth degree.

Ohio Revised Code 2725.04(D):

> (D) A copy of the commitment or cause of detention of such person shall be exhibited, if it can be procured without impairing the efficiency of the remedy; or, if the imprisonment or detention is without legal authority, such fact must appear.

Ohio Revised Code 2945.75:

> (A) When the presence of one or more additional elements makes an offense one of more serious degree:
>
> (1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.
>
> (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

STATEMENT OF THE CASE

The outcome of this case effects the rights of every Ohio defendant subject to a void judgment entered in excess jurisdiction.

In 1992, the Petitioner was charged with Burglary under R.C. 2911.12(A), which stated, in the version in effect in 1992:

> No person, by force, stealth, or deception, shall trespass in an **occupied structure** as defined in section 2909.01 of the Revised Code, or in a separately secured or separately **occupied portion thereof**, with purpose to commit therein any theft offense as defined in section 2913.01 of the Revised Code, or any felony.

(Emphasis added); See, e.g., *State v. Wolbert*, 1992 Ohio App. LEXIS 2448, at **[*2]** (Ohio Ct. App., Stark County May 4, 1992).

The Relator's indictment tracked the language of R.C. 2911.12(A), which expressly states the element "occupied structure", but does not expressly set out the element "when any person is present or likely to be present". However, the version of R.C. 2909.01 in effect in 1992, defined "occupied structure" as:

> R.C. 2911.12, as it existed at the time of the offense in question, stated:
>
> > (A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined in section 2913.01 of the Revised Code, or any felony.
> >
> > (B) Whoever violates this section is guilty of burglary, a felony of the second degree.
>
> R.C. 2909.01 defines "occupied structure" as pertinent to the case sub judice as follows:
>
> > "As used in sections 2909.01 to 2909.07 of the Revised Code, an 'occupied structure' is any house, building, [***3] outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

"* * *

"(D) In which at the time any person is present or likely to be present."

State v. Steen, 18 Ohio App. 3d 68 (Ohio Ct. App., Van Wert County July 17, 1984).

REASONS FOR GRANTING THE WRIT

I. The State Supreme Court's reason for Dismissing the State Habeas Corpus Petition, and Appeal of Right below, Violates the Petitioner's Substantive and Procedural Constitutional Rights:

The Action below was Appeal of Right in the Supreme Court of Ohio, from an Action in Habeas Corpus filed originally in the state Court of Appeals, wherein the Ohio Supreme Court affirmed the Court of Appeals' dismissal of the Petition, stating:

> Missimer did not attach to his petition complete records of his incarcerations and releases as required by R.C. 2725.04(D). Therefore, the court of appeals correctly dismissed his petition for a writ of habeas corpus.

Id., *State ex rel. Missimer v. Forshey*, 2023-Ohio-2355, paragraph 9.

Earlier in the decision, the Ohio Supreme Court correctly stated:

> Missimer avers that he was first released on parole in May 1999. Between 1999 and 2004, Missimer was arrested and his parole was revoked several times, and he was sentenced to ten months in prison for passing bad checks. He avers that he then served a 17-year sentence in New York, that he was returned to an Ohio correctional facility in June 2021, and that he has now served more than 12 years for his 1992 burglary conviction.

Id., *State ex rel. Missimer v. Forshey*, 2023-Ohio-2355, paragraph 3.

In stating these facts, the Petitioner was not making them part of his claim, but rather, making a statement of facts regarding the entirety of his incarceration, and in responding to Warden Forshey's claim that the Petition should be dismissed for a perceived failure on the part of the Petition to attach "all relevant commitment papers".

R.C. 2725.04(D) states:

> (D) A copy of the commitment or cause of detention of such person shall be exhibited, if it can be procured without impairing the efficiency of the remedy; or, if the imprisonment or detention is without legal authority, such fact must appear.

One problem with this affirmation is that R.C. 2725.04(D) requires a copy of the commitment, not a "complete records of his incarcerations and releases", which is an impermissible addition to the statute by judicial interpretation.

A second problem with this affirmation is the "commitment" envisioned by R.C. 2725.04(D) is the trial court's judgment entry imposing the sentence which causes the "commitment". As a matter of law, only a court has the power to impose a sentence and "commit" a person to prison, where the executive department's Parole Board only has the power to grant and rescind early releases; and the Parole Board's act of rescinding a grant of parole in not a commitment, but an act within a commitment; and it is a stretch, by judicial interpretation, to label a revocation of parole as a "commitment paper". In fact, it is well established that when a person is released on parole, he is still under detention, albeit a lesser restrictive form, and thus, he is still subject to the "commitment" of the trial court while he is semi-free on parole. See, e.g., *State v. Harvey*, 2017-Ohio-5512 (Ohio Ct. App., Lake County June

26, 2017), citing *Jones v. Cunningham*, 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963):

> In *Jones*, the Court held that a defendant released on parole is in custody for purposes of federal habeas corpus because a paroled prisoner is released into the parole board's custody and also because the board's custody involves significant restraints on a parolee's freedom. *Id.* at 241-243.

While Jones was a case based on Virginia statutes, not only is Ohio law substantively identical in this regard, as shown in *Harvey, supra*, but the Ohio Supreme Court has cited Jones in asserting this same rule of law in relation to Ohio statutes:

> ... "[T]erm of imprisonment," a phrase which is defined in an analogous statute, R. C. 5145.01, as "the duration of the state's legal custody and control over a person sentenced * * *." **Parole is recognized as a type of legal custody, and, therefore, constitutes a part of a person's "term of imprisonment" within the meaning of R. C. 5143.05.** (See *Jones v. Cunningham* [1963], 371 U.S. 236.) This definition of parole is clearly established by R. C. 2967.01(E), which states that "legal custody of a parolee shall remain in the Department of Rehabilitation and Correction until a final release is granted by the authority." Read together, R.C. 5143.05 and 2967.01(E) require that the Authority retain custody of reformatory inmates for the duration of the minimum sentence, but state no limitation as to the use of parole as a form of custody. Thus, R. C. 5143.05 does not in any way limit the discretion of the Authority to grant parole to a reformatory inmate.

State ex rel. McKee v. Cooper, 40 Ohio St. 2d 65, 74 (Ohio December 11, 1974).

This means that, as long as the actual "commitment" is in force and effect, the Parole Board's act of rescinding a grant of parole in not a new commitment, but an act within a court's commitment (regardless of the validity of the "commitment").

BALLENTINE'S LAW DICTIONARY, 2010, available on LexisNexis ®, defines "commitment" as:

> Commitment.
>
> A warrant of authority, otherwise known as a mittimus, for confining a person to prison or jail; the delivery to jail, for want of bail, for detention pending action by the grand jury or trial, of one accused of crime. 21 Am J2d Crim L § 450; the delivery of a person under sentence of confinement to a jail or prison to the institution and the placing of him under confinement therein. *People v Rutan,* 3 Mich 42, 49 the confinement of an insane person.
>
> Authority
>
> 29 Am J Rev ed Ins Per § 34.

BALLENTINE'S LAW DICTIONARY, 2010, available on LexisNexis ®, further defines "mittimus" as "A warrant of commitment to jail or prison"; and "committitur" as "A record entry of a defendant's commitment."

The definitions of "commitment" all show a "commitment" is an act or document where a court of competent jurisdiction "commits" a person to jail or prison. Nowhere in any of the 27 results found in BALLENTINE'S LAW DICTIONARY does it even mention parole revocation, or a parole board, as only a court of competent jurisdiction has judicial power necessary to order a valid commitment; whereas a parole boards act of revoking a grant of parole is not a "commitment", but an act within a commitment by a non-judicial entity with no power to cause a commitment.

Another problem with this affirmation, and the underlying dismissal, is that part of the claim was that the trial court imposed the wrong sentence, and the entire valid sentence, had it been imposed, had fully expired prior to the first time the

Petitioner was paroled, making the parole papers entirely irrelevant as even the first grant and revocation of parole were illegal.

The State Courts' "construction" of R.C. 2725.04(D) to include documents beyond the "commitment" issued by the trial court constitutes an impermissible addition to the statute by judicial interpretation. See, e.g., *Nichols v. United States*, 578 U.S. 104 (U.S. April 4, 2016):

> "We interpret criminal statutes, like other statutes, in a manner consistent with ordinary English usage." *Abramski v. United States*, 573 U.S. 169, 196, 134 S. Ct. 2259, 2277, 189 L. Ed. 2d 262, 288 (2014) (Scalia, J., dissenting); F*lores-Figueroa v. United States*, 556 U.S. 646, 652, 129 S. Ct. 1886, 173 L. Ed. 2d 853 (2009).

Ohio law also sets out this this legal principle, as R.C. § 1.42, Common and technical use, states:

> Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

See also, *Cincinnati City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 122 Ohio St. 3d 557, 559 (Ohio July 30, 2009):

> R.C. 2335.39 does not define "organization." When a word is not defined, we use its common, ordinary, and accepted meaning unless it is contrary to clear legislative intent. Hughes v. Ohio Dept. of Commerce, 114 Ohio St.3d 47, 51, 2007 Ohio 2877, 868 N.E.2d 246, P 14. We also read the word in context using rules of grammar and common usage. R.C. 1.42.

Therefore, since the term, "commitment" is not defined by statute in Ohio, the Ohio Supreme Court, and the Ohio Court of Appeals, are bound to apply the common, ordinary usage, which, according to the American Heritage College Dictionary, as

well as the above-cited BALLENTINE'S LAW DICTIONARY, 2010, available on LexisNexis ®, is a court order committing a person to prison; not a grant or revocation of parole issued within an existing commitment.

II. The Indictment and guilty plea Are sufficient to Convict and Impose Sentence for Burglary as a felony of the second degree:

This is an easy issue as the United States Supreme Court has repeatedly held that the maximum sentence a trial court can impose is the maximum sentence allowed by statute solely on the basis of the facts alleged in the indictment, and either found by a jury in its verdicts, or admitted by a defendant as part of his guilty plea. See, e.g., *Blakely v. Washington*, 542 U.S. 296 (U.S. June 24, 2004); Ap*prendi v. New Jersey*, 530 U.S. 466 (U.S. June 26, 2000).

Obviously, since Ohio Courts are bound by United States Supreme Court decisions, and the Constitution, Ohio has applied the same principle regarding jury verdicts:

> R.C. 2945.75(A)(2) which requires that a guilty verdict state either the degree of the offense of which the offender is found guilty or that the additional elements that make an offense one of a more serious degree are present. If neither is included, R.C. 2945.75(A)(2) directs that "a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

State v. Pelfrey, 112 Ohio St. 3d 422, 424 (Ohio February 7, 2007).

Federal and U.S. Constitutional law also apply this principle to the charging document, showing a defendant cannot be convicted or sentenced for any element not set out in the complaint, indictment, or information; and Ohio courts

have no excuse for ignoring this fundamental fact, as it is specifically set out in R.C. 2945.75:

> (A) When the presence of one or more additional elements makes an offense one of more serious degree:
>
> > (1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

In 1992, the Petitioner was charged with Burglary under R.C. 2911.12(A), which stated, in the version in effect in 1992:

> R.C. 2911.12, as it existed at the time of the offense in question, stated:
>
> > "(A) No person, by force, stealth, or deception, shall trespass in an **occupied structure** as defined in section 2909.01 of the Revised Code, or in a separately secured or separately **occupied portion thereof**, with purpose to commit therein any theft offense as defined in section 2913.01 of the Revised Code, or any felony.
> >
> > "(B) Whoever violates this section is guilty of burglary, a felony of the second degree."

(Emphasis added); See also, *State v. Wolbert*, 1992 Ohio App. LEXIS 2448, at **[*2]** (Ohio Ct. App., Stark County May 4, 1992).

The Relator's indictment tracked the language of R.C. 2911.12(A), which expressly states the element "occupied structure", but does not expressly set out the element "when any person is present or likely to be present". However, the version of R.C. 2909.01 in effect in 1992, defined "occupied structure" as:

R.C. 2909.01 defines "occupied structure" as pertinent to the case sub judice as follows:

> "As used in sections 2909.01 to 2909.07 of the Revised Code, an 'occupied structure' is any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:
>
> "* * *
>
> "(D) In which at the time any person is present or likely to be present."

State v. Steen, 18 Ohio App. 3d 68 (Ohio Ct. App., Van Wert County July 17, 1984).

Although the definition of "occupied structure" set out in R.C. 2909.01 includes three provisions in subdivisions (1), (2), and (3) that state "whether or not any person is likely to be present", the language in subdivision (4) "At the time, any person is present or likely to be present" not only necessarily includes the possibility that nobody is actually present, but nothing in subdivision (4) separates itself from the element "whether or not any person is likely to be present".

Additionally, although the "Committee Comment to H 511" states that the several divisions of the definition of "occupied structure" does not require the actual presence of another person, neither does the element "or likely to be present":

> Commentary
> 1974 Committee Comment to H 511
>
> This section supplies a definition of "occupied structure" for use not only in connection with the arson offenses, but also for use elsewhere in the new code, e.g., sections 2911.11 and 2911.12 (aggravated burglary and burglary). **The definition's general concept is that the actual or likely presence of a person in a structure, regardless of the nature of the structure itself, creates a more serious risk of harm from commission of**

> **arson, burglary, and related offenses, and thus warrants more severe treatment of offenders.**
>
> **Under division (A) of the section, all dwellings are classed as occupied structures, regardless of the actual presence of any person.** Whether or not the dwelling is used as a permanent or temporary home is immaterial, so long as it is maintained for that purpose. Thus the definition includes not only the mansion on Main Street, but also the summer cottage, and the tin shack in the hobo jungle. It does not include an abandoned dwelling. Division (B) complements division (A) by classing as occupied any structure which is actually being used as a dwelling, even though it is not maintained as such.
>
> **Under division (C), all structures which at the time are specially adapted for overnight accommodation, are classed as occupied structures.** This includes the tent set up for shelter and sleeping, the steamer which maintains passenger staterooms, and the cabin cruiser or houseboat which at the time is made up for sleeping accommodations. The tent camper rigged for an overnight stay is an occupied structure, but would not come under the definition when collapsed for travel.
>
> **Division (D) classes as occupied all structures in which at the time any person is present or likely to be present.** This includes the otherwise deserted warehouse in which a watchman is on the scene, and also includes the retail store which is open for business but which is momentarily empty because everyone has stepped out to watch a parade. In the first case, someone is actually present. In the second case, someone is likely to be present.

(Emphasis added.)

Nothing in any statute or Committee Comment removes the requirement of *pari materia* to read "present or likely to be present into R.C. 2911.12(A)(1). Rather, the definition set out in R.C. 2909.01 requires this result under the rule of *pari materia*; the Committee Comment simply shows that the term "occupied structure" has been extended to include permanent, temporary structures, and even motor vehicles, that are not traditionally considered "occupied structures".

In fact, it is this judicial misinterpretation, as in *State v. Fowler*, 4 Ohio St.3d 16, holding that a structure was "occupied" even without the presence or likely presence of another person, that led to the express addition of the element "when another person other than an accomplice of the offender is present" to R.C. 2911.12(A)(1) (see Ohio Am.Sub.S.B. 2), while leaving a violation of that provision a second degree felony.

What's more, some of these misinterpretations opined that the only thing needed for a structure to qualify as "occupied" was that some person had recently been in the structure, even if the structure had been completely abandoned for the night, as is most often the case with businesses that involve Breaking and Entering, rather than Burglary, when "abandoned" on off hours. These unnecessary, and in fact unlawful, "interpretations", outright defy the statute, especially as explained by the Commentary; 1974 Committee Comment to H 511:

Not only does the second paragraph of the Commentary; 1974 Committee Comment to H 511, state "Under division (A) of the section, all **dwellings** are classed as occupied structures, regardless of the actual presence of any person", but the third paragraph states:

> ... This includes the tent set up for shelter and sleeping, the steamer which maintains passenger staterooms, and the cabin cruiser or houseboat which at the time is made up for sleeping accommodations. The tent camper rigged for an overnight stay is an occupied structure, **but would not come under the definition when collapsed for travel**.

(Emphasis added.)

The common meaning of the plain and unambiguous statute, as well as the bold highlighted phrase in the Committee Comments, where it follows a list of other types of non-permanent "structures", would inform a reader of average intelligence that anything used for a shelter becomes "unoccupied" when the occupants all leave, regardless of whether it is a hobo's refrigerator box in an alley, or a proper residence. In fact, Ohio courts have more recently determined that even permanent residence are "unoccupied" when the resident(s) are known to the offender to not be home. See, e.g., *State v. Cole*, 2016-Ohio-2936, (Ohio Ct. App., Cuyahoga County 2016) (State failed to present sufficient evidence of the "present or likely to be present" element of second-degree felony burglary with respect to two of the victims because the State failed to elicit from those victims any evidence that they were likely to be present at the time the burglary occurred since the burglary occurred at the time that they were regularly at work. However, the evidence supported a finding of guilt for third-degree felony burglary.).

> This court has repeatedly stated that " 'if the meaning of a statute is clear on its face, then it must be applied as it is written.'" *Hartmann v. Duffey*, 95 Ohio St.3d 456, 2002 Ohio 2486, P 8, 768 N.E.2d 1170, quoting *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.* (1994), 69 Ohio St. 3d 521, 524, 1994 Ohio 330, 634 N.E.2d 611. "Thus, if the statute is unambiguous and definite, there is no need for further interpretation." Id. "To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts." *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.* (1994), 69 Ohio St. 3d 521, 524, 1994 Ohio 330, 634 N.E.2d 611, quoting *Iddings v. Jefferson Cty. School Dist. Bd. of Edn.* (1951), 155 Ohio St. 287, 44 Ohio Op. 294, 98 N.E.2d 827.

State v. Pelfrey, 112 Ohio St. 3d 422, 425 (Ohio February 7, 2007).

It is well settled and established that an indictment that tracks the language of a statute defining an offense, where an element essential to a greater level or degree of the offense is omitted from the statute, the indictment is sufficient to charge only the least degree of the offense. See, e.g., R.C. 2945.75:

> (A) When the presence of one or more additional elements makes an offense one of more serious degree:
>
> > (1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.
> >
> > (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

Courts have also held that where an element essential to an offense is not expressly set out in the statute defining the offense, the indictment must still set out and allege the element, or the indictment is sufficient to charge only the least degree of the offense (or no offense if the omitted element is required for every degree of the offense[1]).

> It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, -- it must descend to particulars.'" *United States v. Cruikshank*, 92 U.S. 542, 558. An indictment not framed to apprise the defendant "with reasonable certainty, of the

[1] That the Indictment does not charge an offense because it omits an essential element is not part of the claim since the omission of the element in this case allows a third degree felony, but not the second degree for which the illegal sentence was imposed.

> nature of the accusation against him . . . is defective, although it may follow the language of the statute." *United States v. Simmons*, 96 U.S. 360, 362. "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; . . ." *United States v. Carll,* 105 U.S. 611, 612. "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 487. See also *Pettibone v. United States*, 148 U.S. 197, 202-204; *Blitz v. United States*, 153 U.S. 308, 315; Keck v. United States, 172 U.S. 434, 437; *Morissette v. United States*, 342 U.S. 246, 270, n. 30. Cf. United States v. Petrillo, 332 U.S. 1, 10-11. That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions.

Russell v. United States, 369 U.S. 749, 765-766 (U.S. May 21, 1962).

This is also expressed in case law dealing with culpable mental states that are not expressly set out, but necessarily implied by statute(s) and Ordinances: See, e.g., *State v. Belser*, 988 N.E.2d 14 (Ohio Ct. App., Hamilton County 2013) (where a statute lacks a culpable mental state and does not clearly indicate an intent to impose strict liability pursuant to R.C. 2901.21(B), the State is required to prove that a defendant acted recklessly); *State v. Shugars*, 165 Ohio App. 3d 379 (Ohio Ct. App., Hamilton County 2006), overruled in part, *State v. Morgan*, 181 Ohio App. 3d 747 (Ohio Ct. App., Hamilton County 2009). (Where a municipal code does not mention a specific culpable mental state, the State is required to prove recklessness; where the complaint did not state a culpable mental state, and the State did not assert that

defendant had recklessly violated the ordinance, the State failed to allege an essential element and defendant's conviction of a violation of the municipal code is improper despite defendant's guilty or no contest plea.)

This is not a challenge to the sufficiency of the Indictment, but rather, a challenge to what the presumably valid Indictment actually charged, and the what level of jurisdiction or authority to impose sentence the Petitioner's guilty plea to only the facts alleged in the Indictment provided the trial court; and whether, as a result of the omitted element, the valid sentence, had it been imposed, is expired, entitling the Petitioner to immediate release?

It has been held that where an Indictment tracks the language of a statute, the failure to include an essential element not explicitly set out in statute does not invalidate an Indictment: See, e.g., *State v. Thompson*, 2017-Ohio-9044, [*P39] (Ohio Ct. App., Columbiana County December 13, 2017):

> Regardless, *Colon* I was overruled, and *Colon* II was overruled to the extent it held an indictment is defective when it omits the mental state even though it tracks the language of the statute. *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶ 45. The Horner Court held: "When an indictment fails to charge a mens rea element of the crime, but tracks the language of the criminal statute describing the offense, the indictment provides the defendant with adequate notice of the charges against him and is, therefore, not defective." *Id.* "[A]n indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state." (Emphasis added.) *Id.* at ¶ 54.

However, the fact that the Indictment is not invalidated by the omission of the essential element does not absolve the State of the duty to prove the element beyond

a reasonable doubt; nor does it cause the uncharged element to be "admitted" for *Blakely* and *Apprendi* purposes, or for purposes of R.C. 2945.75's limitation on the degree of conviction and sentencing authority.

Because the rule of *pari materia* requires the courts to read all related statutes together, the element "At the time, any person is present or likely to be present" is an essential element of Second-Degree Burglary under R.C. 2911.12, and to impose a penalty for a felony of the second degree under R.C. 2929.11 (1992-1993 version); without which, the indictment and guilty plea were sufficient to charge and convict the Petitioner for an offense of the least degree, and to impose a penalty for the offense of the least degree, pursuant to R.C. 2945.75, which states in pertinent part:

> (A) When the presence of one or more additional elements makes an offense one of more serious degree:
>
> (1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.
>
> (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

Under *Blakely* and *Apprendi*, the fact that the Petitioner admitted only such elements as were expressly set out in the indictment is substantially the same as if a jury had found all of the elements expressly set out in the indictment in a verdict.

If violence had been involved, which it was not alleged in the indictment, under R.C. 2929.11(B)(3), it would have been an "aggravated felony of the third degree

subject to an indeterminate sentence with a maximum of ten years. However, under R.C. 2929.11(D), the absence of these additional elements makes the maximum possible sentence a flat term of two years.

Based upon the indictment and guilty plea, the maximum possible term was two years flat, which caused the valid term, had it been imposed, to have expired years before the very first parole had been granted, not only making the parole papers entirely irrelevant, but entitling the Petitioner to immediate release at any time after April 1994.

However, since the Petitioner initially missed this fact when drafting his State Petition (he presented these facts later in the Original proceedings), even considering the original argument, that the maximum valid indefinite sentence would have ten years, and considering that parole is still custody, and because the sentence continues to run while on parole, the entirety of the Petitioner's valid sentence would have fully expired well prior to the Petitioner having left Ohio for New York, still making the parole papers entirely irrelevant; and still resulting in the entire sentence having expired prior to the Petitioner having left the State of Ohio, and prior to the New York sentence being imposed.

III. If the Rule of *Pari Materia* Does Not Require the Element of "Any Person is Present or Likely to Be Present" To Be Read into the 1992 Version of R.C. 2911.12(A)(1), the Provision Would Violate Due Process as It Would Have Set Out the Exact Same Offense as Breaking and Entering Under R.C. 2911.13 As a Result of Judicial Interpretation:

Before Ohio Am.Sub.S.B.2 was enacted on July 1, 1996, which expressly added the element of the presence of a third party to R.C. 2911.12(A)(1) (Burglary), the only substantive difference between R.C. 2911.12(A)(1), and R.C. 2911.13 (Breaking and Entering), was that Burglary set out the element "occupied structure", and Breaking and Entering set out "unoccupied structure". "Unoccupied structure" would have been a distinguishing element, except that judicial interpretation removed the difference between the terms by opining that no person needed to be present in order for a structure to be "occupied" under R.C. 2911.12, making the "occupied" element satisfied even when the structure was "unoccupied".

> R.C. 2911.12, as it existed at the time of the offense in question, stated:
>
> > "(A) No person, by force, stealth, or deception, shall trespass in an **occupied** structure as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined in section 2913.01 of the Revised Code, or any felony.
> >
> > "(B) Whoever violates this section is guilty of burglary, a **felony of the second degree**."
>
> (Emphasis added.)
>
> R.C. 2911.13, as it existed at the time of the offense in question, stated:
>
> > (A) No person[,] by force, stealth, or deception, shall trespass in an **unoccupied** structure, with purpose to commit therein any theft offense as defined by section 2913.01 of the Revised Code, or any felony.
> >
> > ...
> >
> > (C) Whoever violates this section is guilty of breaking and entering, a felony of the fourth degree.

Ordinary usage defined "unoccupied" as nobody being present at a particular point in time; it has absolutely nothing to do if someone had, at some point in time, been in the structure, then left, causing the structure to remain forever "occupied" even when nobody is present.

Ohio court interpretation of the pre-1996 statutes to allow "occupied" to include even when nobody is present or likely to be present is a stretch at best; at worst, it is an impermissible addition of language to statutes that do not contain, envision, or allow this stretch and alteration of such an easy definition to the prejudice of the Petitioner, contrary to R.C. 2901.04 requirement that:

> (A) Except as otherwise provided in division (C) or (D) of this section, **sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.**
>
> (B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.
>
> (C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.
> (D) **Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state**, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

(Emphasis added.)

IV. The Illegal Sentence Imposed by the Trial Court was Beyond the Jurisdiction Invoked by the Indictment and Granted by the Guilty Plea; and the Illegal Sentence is Void for Being in Excess of Jurisdiction Granted by Law for the Offense Charged in the Indictment:

Article IV, § 4, of the Ohio Constitution provides that "The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law."

> The basis for the jurisdiction of the Court of Common Pleas, as, in fact, of all the courts in Ohio, is found in Section 1, Article IV of the Constitution. In regard to the Court of Common Pleas, specifically, Section 4, Article IV of the Constitution, provides:
>
> "The jurisdiction of the Courts of Common Pleas, and of the judges thereof, shall be fixed by law."
>
> As was said by Ranney, J., more than a century ago:
>
> **"The Constitution itself confers no jurisdiction whatever upon that court [Court of Common Pleas], either in civil or criminal cases.** It is given a capacity to receive jurisdiction in all such cases, but it can exercise none, until 'fixed by law.'" *Stevens v. State*, 3 Ohio St., 453.
>
> That this has generally been considered the law is evidenced by the following statement found in 14 Ohio Jurisprudence (2d), 584, Section 166:
>
> "The Courts of Common Pleas are the constitutional courts of general original jurisdiction in Ohio, **but they are capable of exercising only such jurisdiction as is conferred by the Legislature. The Constitution itself confers no jurisdiction whatever upon the Common Pleas Court, either in civil or criminal cases, but merely gives that court capacity to receive jurisdiction which shall be fixed by law.** The Constitution declares that the jurisdiction of the Courts of Common Pleas, and of the judges thereof shall be fixed by law. This constitutional provision is not self-executing, but must be enforced by appropriate legislation, and in this sense, therefore, the jurisdiction of the Common Pleas Court can be said to be statutory."

State ex rel. Miller v. Keefe, 168 Ohio St. 234, 236-237, 152 N.E.2d 113, 115-116, 1958 Ohio LEXIS 405, *5-6, 6 Ohio Op. 2d 18 (Ohio July 16, 1958) (Emphasis added).

Older decisions of the Ohio Supreme Court on the subject of illegal sentences were based upon sound law and legal reasoning, include cases such as *Colegrove v. Burns*, 175 Ohio St. 437, 195 N.E.2d 811, 1964 Ohio LEXIS 1017, 25 Ohio Op. 2d 447 (Ohio January 22, 1964), for one example of many, wherein the Court rightly held that "Crimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute. A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law".

See also, *State v. Beasley*, 14 Ohio St. 3d 74, 75, 471 N.E.2d 774, 775, 1984 Ohio LEXIS 1246, *4, 14 Ohio B. Rep. 511 (Ohio December 12, 1984), where the Ohio Supreme Court stated:

> Crimes are statutory, as are the penalties therefor, and the only sentence which a trial judge may impose is that provided for by statute * * *. A court has no power to substitute a different sentence for that provided for by law."
>
> Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.

These decisions, and others, recognized that (1) the "statutory power" to impose a sentence is jurisdictional; (2) that disregarding those mandatory statutes was a disregard to the very statutes that granted the Courts of Common Pleas jurisdiction to act; (3) that, without saying the magic words, "excess of jurisdiction", any sentence not specifically authorized by a duly enacted "mandatory statutory sentencing provision" was a sentence that was "in excess of jurisdiction"; and (4) such a non-statutory sentence was void regardless of the fact that the court has both subject matter and personal jurisdiction.

> ... The cases are clear that the term jurisdiction means that the judge must have both jurisdiction over the person and subject matter .... See, *Thompson v. Heither*,

> 235 F.2d 176 (6th Cir. 1956) and cases cited therein; *Ryan v. Scoggin*, 245 F.2d 54 (10th Cir. 1957). A third element, however, also enters into the concept of jurisdiction as used in this context. **The third element is the power of the Court to render the particular decision which was given**. See, *Cooper v. Reynolds*, 77 U.S. 308, 316, 10 Wall. 308, 19 L. Ed. 931 (1870); *National Malleable & Steel Castings Co. v. Goodlet*, 195 F.2d 8 (7th Cir. 1952); *City of Phoenix v. Greer*, 43 Ariz. 214, 29 P. 2d 1062 (1934).
>
> ... **"Excess of jurisdiction" as distinguished from entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized and therefore void, because conditions which alone authorize exercise of judicial power in the particular case are wanting and judicial power is not lawfully invoked**. *Pogue v. Swink*, 365 Mo. 503, 284 S.W. 2d 868 (1955).
>
> Consequently, the third element in the concept of jurisdiction as used in the context of judicial immunity necessitates an inquiry into whether the defendant's action is authorized by any set of conditions or circumstances. **This inquiry begins with an examination of the statutes under which defendant Gary** (a judge) **presumed to act.**

Wade v. Bethesda Hospital, 337 F. Supp. 671, **61 Ohio Op. 2d 147** (S.D. **Ohio** September 8, 1971) (emphasis added).

After making many proper rulings declaring illegal sentences void where courts exceeded their statutory sentencing jurisdiction, the Ohio Supreme Court began backing off from this principle of law, despite that it is the law of the land; but even in its watered down decisions such as *State v. Fischer*, 128 Ohio St. 3d 92, the decision demonstrates, beyond debate, that the Ohio Supreme Court fully knows and agrees with the United States Supreme Court's statement "When the court goes out of these limitations, its action, to the extent of such excess, is void", as *Fisher* states "We further hold that although the doctrine of res judicata does not preclude review of a void sentence...". *Id., Fischer*, ¶ 40. (Now *Henderson, infra,* says there are no void sentences.)

Fischer, and its progeny, repeat the same "excess of jurisdiction" concept, while carefully avoiding that label, by showing that all parts of a criminal judgment that do not exceed the Trial Court's jurisdiction remain valid and subject to res judicata, while the parts of a sentence that

exceed the Trial Court's statutory jurisdiction are void and subject to correction" at any time, on direct appeal or by collateral attack", as has always been true of all void judgments.

Despite the fact that the jurisdiction of Ohio's Courts of Common Pleas is strictly, pursuant to Article IV, Section 4, of the Constitution of Ohio, despite the fact that it is well settled that acting outside of that jurisdiction even when the courts have subject matter jurisdiction causes the judgment to be in excess of jurisdiction and void, and despite the fact that the Ohio Supreme Court adopted *Wade* as Ohio law, as shown by the citation "**61 Ohio Op. 2d 147**", the Ohio Supreme Court now attempts to render all judgments valid and merely "voidable" with a mere stroke of their self-empowering stroke of a pen in *State v. Henderson* (2021), 161 Ohio St. 3d 285.

The act of gradually watering down case law that existed well prior to the current Ohio Supreme Court Justices having even been in law school, and ignoring the law of the land set out in United States Supreme Court decisions that were rendered even before the Ohio Supreme Court's current Justices' grandparents were born, culminated in the unconstitutional decision rendered in *State v. Henderson* (2021), 161 Ohio St. 3d 285, where, by the stroke of a pen, the Ohio Supreme Court purports to "repeal" remedies, retrospectively validate void judgments by declaring there are no longer "void" judgments in criminal cases, and all formerly "void" judgments are now merely "voidable", placing "void judgment"/"void sentencing" remedies out of reach, including the constitutional and common law remedy of an "inherent power" collateral attack of a void judgment; the statutory remedy of a Post-conviction Petition, - since the impossibility of a "void" judgment means no judgment can be "rendered void" under the meaning of R.C. chapter 2953; as well as the constitutional and statutory remedy of Habeas Corpus, which requires a lack of jurisdiction, since the Courts of Common Pleas now have jurisdiction to render all judgments in criminal cases if they have any jurisdiction at all.

Henderson exceeds the jurisdiction of the Ohio Supreme Court; purports to do away with void judgments and sentences, even where those judgments and sentences are rendered and imposed without or in excess of statutory authority. By doing so, *inter alia*, *Henderson* exceeds the jurisdiction of the Ohio Supreme Court and violates Ohio's version of "Separation of Powers" as it "Legislates from the bench" to amend Ohio and Federal law and remove or "repeal" statutory, common law, and constitutional remedies; expands Common Pleas jurisdiction to impose merely "voidable" sentences that no statute grants them jurisdiction to impose, limits the constitutional, Statutory, and Common Law jurisdiction of all Ohio Courts to hear and finally determine the remedies affected by *Henderson's* unconstitutional judicial fiat, and abridges individuals' rights to access Courts for redress of injuries and grievances, Due Process of Law, and Equal Protection of the Law. And *Henderson* is itself unconstitutional as written and void.

Prior to *Henderson*, when defendants were sentenced, Ohio Courts honored the "illegal and void sentencing doctrine" that is not only Federal law (See, e.g., *State v. Fischer*, 128 Ohio St.3d 92, which cites Federal decisions, as well as decisions from other states), but is also the law of all states, and is the "law of the Land" as no Court of any American Jurisdiction has the jurisdiction necessary to impose an illegal or void sentence; and an "illegal sentence" is always void.

Henderson outright declared:

> Our decision today restores the traditional understanding of what constitutes a void sentence. 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.

While the phrase "any sentence based on an error in the court's exercise of that jurisdiction is voidable" is technically correct, the Ohio Supreme Court classified jurisdiction errors, including "excess of jurisdiction", as this mere error in exercising jurisdiction in order to make all judgments voidable, rather than void.

In re Bonner, 151 U.S. 242, 255-258, 14 S. Ct. 323, 325-326, 38 L. Ed. 149, 151-152, 1894 U.S. LEXIS 2052, *24-31 (U.S. January 15, **1894**), more fully quoted below, contradicts and belies *Henderson's* assertion that *Henderson's* decision "restores the traditional understanding of what constitutes a void sentence" because:

> [A]part from any question as to whether the court below had jurisdiction to try the offence charged ... There is consequently no escape from the conclusion that the judgment of the court sentencing the petitioner ... was in violation of the statutes ... The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void." The court added: "This is not a case of mere error, but one in which the court below transcended its powers ... It cannot pass beyond those limits in any essential requirement in either stage of these proceedings ... When the court goes out of these limitations, its action, to the extent of such excess, is void. **If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess.**

Bonner was not the first case on this subject, and being that *Bonner* precedes Henderson by 127 years, and *Bonner* held a sentence void for the very thing *Henderson* purports to undue and change, it's very difficult to understand to what "tradition" *Henderson* refers.

After *Henderson*, the Ohio Supreme Court was forced to take a step back when confronted with a Claim under *Johnson v. Zerbst*, 304 U.S. 458 (U.S. May 23, 1938):

> We recently clarified 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," *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 27, but **the declaration in *Zerbst* that a Sixth Amendment violation renders an associated conviction void remains in force.**

> Appellees argue that the United States Supreme Court overruled *Zerbst* in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). **This is incorrect.** Edwards changed the standard for what constitutes a waiver of the right to counsel (in the context of a police interrogation), but it did not overrule the holding in *Zerbst* that if there is no valid waiver of the right to counsel at trial, then the resulting conviction is void.

State ex rel. Ogle v. Hocking Cty. Common Pleas Court (2021), 167 Ohio St. 3d 181, paragraphs 13 and 14 (Emphasis added).

In speaking on the subject of a judgment being void for being in "excess of jurisdiction" in the context of criminal sentencing, the United States Supreme Court stated:

> **[A]part from any question as to whether the court below had jurisdiction to try the offence charged, the detention of the petitioner in the penitentiary upon sentences, neither of which was for imprisonment longer than one year, was in violation of the laws of the United States, and that he was, therefore, entitled to be discharged from the custody of the warden of the institution.** "A sentence simply of 'imprisonment,'" said the court, "in the case of a person convicted of an offence against the United States -- where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary -- cannot be executed by confinement in that institution, except in cases where the sentence is 'for a period longer than one year.' **There is consequently no escape from the conclusion that the judgment of the court sentencing the petitioner to imprisonment in a penitentiary, in one case for a year and in the other for six months, was in violation of the statutes of the United States. The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void.**" The court added: "**This is not a case of mere error, but one in which the court below transcended its powers**," citing *Ex parte Lange*, 18 Wall. 163, 176; Ex parte Parks, 93 U.S. 18, 23; *Ex parte Virginia*, 100 U.S. 339, 343; *Ex parte Rowland*, 104 U.S. 604, 612; *In re Coy*, 127 U.S. 731, 738; and *Hans Nielsen, Petitioner*, 131 U.S. 176, 182.
>
> ...
>
> We are ... of opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. **It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. .... It is plain that such court has jurisdiction to render a particular judgment only when the offence charged is within the class of offences placed by the law under**

> **its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void**. Proceeding within these limitations, its action may be erroneous, but not void.
>
> ... **When the jury have rendered their verdict, the court has to pronounce the proper judgment upon such verdict -- and the law, in prescribing the punishment, either as to the extent, or the mode, or the place of it, should be followed. If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess.**

In re Bonner, 151 U.S. 242, 255-258, 14 S. Ct. 323, 325-326, 38 L. Ed. 149, 151-152, 1894 U.S. LEXIS 2052, *24-31 (U.S. January 15, 1894) (Emphasis added).

Because the Indictment charged a third degree felony, the trial court exceeded its jurisdiction invoked by the indictment when it imposed a penalty prescribed by law for a second degree felony; that sentence is void for being in excess of the trial court's jurisdiction as a matter of United States Supreme Court and United States Constitutional Law, and the decision in Henderson is unconstitutional and void.

CONCLUSION

For the foregoing reasons, the Supreme Court of the United States should GRANT the Petitioner for a Writ of Certiorari, vacate the decision and judgment of the Supreme Court of Ohio, and Order the Petitioner's immediate release.

Respectfully submitted,

Donald L. Missimer Jr.

Donald L. Missimer, Jr.