

ORIGINAL

IN THE SUPREME COURT OF OHIO

ON COMPUTER - JJ

HENRY HERNANDEZ,

Petitioner,

v.

BENNIE KELLY, Warden,

Respondent.

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Case No. 05-2258

HABEAS CORPUS

Original Action

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RESPONDENT'S RETURN OF WRIT

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Petitioner,	:	
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## I. Statement of The Case And Facts

On June 8, 1998, Hernandez was convicted of one count for possession of cocaine in an amount exceeding 1,000 grams, with major drug offender specifications and juvenile specifications (count 1), and one count of conspiracy to possess cocaine in an amount exceeding 1,000 grams, with major drug offender specifications and juvenile specifications (count 2). Hernandez was originally sentenced to ten years imprisonment for the possession of cocaine charge, and two to ten years imprisonment on the conspiracy to possess cocaine charge. Counts 1 and 2 were merged for purposes of sentencing. Also, Hernandez was sentenced to nine years imprisonment for the major drug offender and juvenile specifications to be served prior to and consecutive with the merged count 1 and 2 sentence, for a total aggregate sentence of nineteen years. (See Exhibit A, *State v. Hernandez*, Cuyahoga App. 74757 (February 24, 2000); Exhibit B, Entry). During this initial sentencing, Hernandez was informed that post-release control would be part of his sentence. (Transcript, p. 1939, attached as Exhibit C).

Hernandez appealed his conviction to the Eighth District Court of Appeals and on February 4, 2000 the Court of Appeals reversed and remanded the judgment of conviction on count 1, possession of cocaine in an amount exceeding 1,000 grams and count 2, conspiracy to possess cocaine. The court also reversed the major drug offender specifications on both counts, and vacated the juvenile specifications on both counts. The Court of Appeals amended count one to read as possession of cocaine in an amount of 500 grams to 1000 grams. (See Exhibit A, *State v.*

*Hernandez*).

Pursuant to the remand, on August 9, 2000 Hernandez pleaded guilty to the charges as amended and was sentenced to a prison term of seven years as to the amended count one, possession of cocaine in an amount of 500 grams to 1000 grams. (Exhibit D, Case No. CR-360708). There was no mention of post-release control during this new sentencing hearing. (Transcript, Exhibit E). Hernandez was released from prison at the end of his prison term in February 2005. Because he had been convicted of a first degree felony, the Adult Parole Authority (APA) placed Hernandez on post-release control pursuant to R.C. 2867.28(D)(1). On October 6, 2005, Hernandez was found guilty of violating the terms of his post-release control, and sanctioned to 160 days in prison. (See Exhibit F). His current prison sanction will be complete on March 11, 2006. He is presently incarcerated at the Lorain Correctional Institution.

**II. Bennie Kelly Has Proper Custody Of Hernandez By Virtue Of The Post Release Control Violation Prison Sanction Imposed By The Adult Parole Authority.**

Henry Herndandez was convicted of a felony of the first degree. See Exhibit E, Transcript, p. 3). Consequently, he is required by statute to serve five years on post-release control upon complete of his prison term. See R.C. 2967.28(B) and (D)(1). On October 6, 2005, the APA found Hernandez in violation of several conditions of his post-release control, and sanctioned him to 160 days in prison. (Exhibit F). The Department of Rehabilitation and Correction has custody of Hernandez as a result of the post-release control violation.

**III. The Adult Parole Authority Is Required By Statute To Place Inmates Like Hernandez On Mandatory Post-Release Control Pursuant To R.C. 2967.28(D)(1).**

**A. *State v. Jordan* does not limit the APA's authority to place certain inmates on mandatory post-release control.**

Hernandez alleges in his petition that he agreed in a plea bargain to a sentence without post-release control. And indeed, there is no mention of post-release control at the sentencing hearing. But the prosecutor may not simply bargain away the mandatory term of post-release control that is a part of every first degree felony sentence. *See* R.C. 2967.28(B).

Despite the fact that Hernandez may have been improperly sentenced, the APA's authority to place him on mandatory post release control is independent of the sentencing court's duty to notify Crangle of post-release control in the first instance. Recently, the Seventh District endorsed this position when it explained that the APA's authority to impose mandatory post-release control is independent of the formality of oral notification required by *State v. Jordan*, 2004-Ohio-6085, 104 Ohio St.3d 21.

Again, appellant was already on post-release control under the statute directing the parole board to do so; the remand merely allows previous procedural deficiencies to be remedied. The parole board acted under a journalized sentence and a statutory mandate while appellant was in prison, and it has continued authority under R.C. 2967.28(D)(2) to conform the continued post-release control to the trial court's new sentencing decision. In fact, the parole board is directed to act based upon the offender's crime, not the court's oral pronouncement. Compare 2967.28(B)(1) with R.C. 2967.28(D)(2).

*State v. Cloud*, Columbiana App. No. 01CO64, 2005-Ohio-1331, ¶25.

In *Cloud*, the defendant did not receive oral notification of the post-release control term, but it appeared in his sentencing entry. *See Id.*, ¶9. In this case, the facts are admittedly more difficult for the Adult Parole Authority. There was no notification to Hernandez at the plea and sentencing hearing, and no term of post-release control set forth in the sentencing entry. But the *Cloud* rationale is nevertheless applicable to this case. Procedural requirements of cases such as *Woods v. Telb* (2000), 89 Ohio St.3d 504, and *Jordan* aside, once Hernandez was convicted of a first degree felony, the APA is required to fulfill its statutory duty by placing Hernandez on a mandatory five year term of post-release control. As the Seventh District reminds us, the APA's authority for the imposition of post-release control for Hernandez flows not from the sentence, but from the statutory requirement imposed upon the APA by R.C. 2967.28. *State v. Cloud*, 2005-Ohio-1331, ¶25.

There is no case law to suggest that the Adult Parole Authority can ignore its statutory duty to impose post-release control on offenders subject to mandatory supervision pursuant to R.C. 2967.28(B) and (D)(1). In *Jordan*, this Court held that:

We stated [in *Woods*] that because the separation-of-powers doctrine precludes the executive branch of government from impeding the judiciary's ability to impose a sentence, the problem of having the Adult Parole authority impose postrelease control **at its discretion** is remedied by a trial court incorporating postrelease control into its original sentence. Consequently, unless a trial court includes post-release control in its sentence, the Adult Parole Authority is without authority to impose it.... Today, we reaffirm that holding.

*Jordan*, 2004-Ohio-6085, ¶ 19 (citing *Woods v. Telb* (2000), 89 Ohio St.3d at 512-513). But this Court was not faced with the issue of *mandatory* post-release control in *Woods*. In fact, the holding in *Woods* with respect to the APA's post-release control authority was explicitly limited to *discretionary* post-release control. See *Woods*, 89 Ohio St.3d at 509, n.3.

Moreover, *Jordan* was a direct appeal case, and its holding is directed to the state's trial courts. Consequently, *Jordan* is full of instruction for sentencing courts. But the APA gains no guidance from *Jordan*. The following paragraph from *Jordan* is particularly illustrative:

We, however, recognize that the use by courts of such terms as “mandatory postrelease control” and “discretionary postrelease control” can be misleading with regard to a *trial court's duty* to include postrelease control in a felony offender's prison sentence. While it is true that the Adult Parole Authority may exercise discretion in imposing postrelease control in certain cases, a *sentencing trial court* has no such discretion. Accordingly, if a *trial court* has decided to impose a prison term upon a felony offender, it is duty-bound to notify that offender at the sentencing hearing about postrelease control and to incorporate postrelease control into its sentencing entry, which thereby empowers the executive branch of government to exercise its discretion. See *Woods v. Telb*, 89 Ohio St.3d at 512-513, 733 N.E.2d 1103. Stated differently, even in cases under R.C. 2967.28(C) where the General Assembly has granted the Adult Parole Authority discretion to impose postrelease control, a *sentencing trial court* must notify the offender about postrelease control and include it in its judgment entry. Therefore, the distinction between discretionary and mandatory postrelease control is one without a difference with regard to the *duty of the trial court* to notify the offender at the sentencing hearing and to incorporate postrelease control notification into its journal entry. See R.C. 2967.28(B) and (C).

*Jordan*, 2004-Ohio-6085, ¶ 22 (emphases added). While this passage makes clear that there is no distinction between mandatory and discretionary post-release

control with respect to the duties placed upon the sentencing court, it elides the fact that there is a huge difference between mandatory and discretionary post-release control from the APA's perspective. While it makes sense that the APA may not exercise its *discretion* in imposing a sentence not imposed by a trial court, presumably the APA is *obligated* to carry out a statutory mandate regardless of whether the sentencing court satisfied its own mandate.

Indeed, while the above passage reiterates that a trial court is "duty-bound" to notify an offender about post-release control, so that the APA can "exercise its discretion," *Jordan* is silent on what is necessary in order to empower the APA to impose a *mandatory* post-release control term, where the APA has *no discretion*.

It is the APA's position that in cases such as Hernandez's, in which mandatory post-release control is required by statute, and the APA has no discretion whether to impose it, the APA has no choice but to impose post-release control pursuant to R.C. 2967.28(B) and (D)(1).

**B. The APA carries out its statutory duty by placing all mandatory post-release control inmates on supervision, regardless of the terms contained in the sentencing entry.**

The Ohio Adult Parole Authority (APA) currently supervises over 13,000 offenders on post-release control. Because APA policy leans heavily *against* placing offenders eligible for *discretionary* post-release control on supervision, the vast

majority (over 10,000) of those currently supervised are mandatory post-release control cases.<sup>1</sup>

In 2000, this Court held that because post-release control is “part of the original judicially imposed sentence,” the APA does not impede the judiciary’s ability to impose sentence by carrying out post-release control supervision and sanctions. *Woods v. Telb* (2000), 89 Ohio St.3d 504, 512. The Court went on to hold that “a trial court must inform the offender at sentencing or at the time of a plea hearing that post-release control is part of the offender’s sentence.” *Id.*, at 513.

Thus, *Woods* made it clear that: a) post-release control is a mandatory part of every judicially imposed sentence, and b) sentencing courts have a duty to notify offenders that post-release control is part of their sentence. *Woods*, 89 Ohio St.3d at 512-513. However, the Court had no occasion to explain the consequences if the sentencing court failed in its notification duty. Whether the term of post-release control was mentioned in an offender’s *sentencing entry* was not an issue in *Woods*. Thus, the APA had no reason to believe that that provision had to be present in the *sentencing entry* in order to carry out its statutory duty to impose post-release control.

After all, the statute that directs the APA to impose post-release control, R.C. 2867.28, makes no reference to the trial court, the sentencing hearing, or the sentencing entry. The legislature was quite concise in its instruction to the APA in R.C. 2967.28, particularly with respect to mandatory post-release control.

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<sup>1</sup> Hernandez is no exception. His term of post-release control is made mandatory by virtue of his F1 level conviction.

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offenders release from imprisonment....

(D)(1) Before a prisoner is released from imprisonment, the parole board shall impose upon a prisoner described in division (B) of this section... one or more post-release control sanctions to apply during the prisoner's period of post-release control.

Because of the mandatory nature of the post-release control portion of every felony sentence for which prison is imposed, combined with the volume of prisoners processed by the APA, the APA has relied on an assumption that the sentencing court has fulfilled its mandatory duty to notify every prisoner that post-release control is part of his sentence.

The APA's duty pursuant to R.C. 2967.28 is not conditional with respect to mandatory post-release control. The statute does not say that the APA shall impose post-release control *if* the sentencing court notifies the offender at sentencing. Instead, the statute imposes a mandatory duty on APA to impose post-release control on certain offenders. As this Court explained in *State v. Jordan*, 2004-Ohio-6085, ¶ 21, post-release control serves the important goal of "successfully reintegrating offenders into society after their release from prison." *Id.* In order to fulfill this goal and carry out its statutory duty, the APA must assume that the sentencing court applies the mandates set forth in the statute and *Woods* by imposing post-release control without regard to the language of the sentencing entry.

In the past, if an offender has challenged the propriety of his placement on post-release control because there is no indication in his sentencing entry that post-release control is part of the sentence, the APA has successfully defended any legal challenge to the imposition of post-release control by pointing to the sentencing court's notification about the post-release control term either in the transcript of the sentencing or plea hearing, as *Woods* instructs.

Now *Jordan* specifically instructs that the post-release control term must appear in the sentencing entry, and suggests that any sentence imposed without notification of post-release control is void. *Jordan*, 2004-Ohio-6085, ¶ 23-27. Therefore, the APA has changed its practice by checking every judgment entry upon a prisoner's reception. If there is no mention of post-release control in the sentencing entry, the sentencing court and the prosecuting attorney responsible for the conviction are notified, and a correction of the entry or resentencing (as necessary) is requested. However, the APA's request is not always honored. Regardless, because of the mandatory nature of the statute, the APA will continue to place inmates subject to mandatory post-release control on supervision even if the sentencing court fails to heed the notice provided that the sentence was improperly imposed.

**C. The remedy ordered in *Jordan* cannot be easily applied to this or other cases on collateral review.**

*Jordan* has created several problems in the practical application of its dictates. Because *Jordan* came up to this Court as a direct appeal, the issues dealt exclusively with the requirements imposed on the *trial courts* during sentencing,

and the remedy for correcting errors that occurred there. What *Jordan* does not address is how the opinion affects the APA's statutory mandate to supervise certain offenders, and how to correct a sentencing error that may not be discovered until after the direct appeal is completed and the offender is already on post-release control.

The events that transpired recently in the case of *State v. Crangle*, Summit County Common Pleas Case No. CR 1996-09-2317, illustrate these problems perhaps even better than the case at hand. In December 2004, soon after *State v. Jordan* was issued, it was discovered through a review of the record that there was no mention of post-release control the sentencing entry of a sex offender by the name of Thomas Crangle, who was being supervised on mandatory post-release control. At the APA's request, the Summit County Prosecutor, filed a motion in December 2004 asking Crangle's original sentencing judge to resentence Crangle, in light of *Jordan*. Despite the statutory requirements and this Court's holding in *Jordan* that the sentencing court is "duty-bound" to include post-release control in any sentence with a prison term, the sentencing court refused. The court held in June 2005 <sup>2</sup> that "Defendant indeed completed his sentence as ordered by this Court in 2001. Accordingly, in the absence of a direct appeal and with Defendant having completed his sentence as ordered by this Court, the Court finds that it does not have jurisdiction to act upon or consider the State's motion to resentence

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<sup>2</sup> It must be noted for the record that the trial court initially refused to rule on the motion for resentencing at all, and did not issue its decision denying the motion until the Adult Parole Authority had sued the court in mandamus seeking a resentencing.

Defendant.” (Exhibit G, Order and Journal Entry)<sup>3</sup>. The prosecutor’s motion for leave to appeal the entry denying resentencing was granted by the Ninth District Court of Appeals, and that appeal is currently pending.

The sentencing court’s decision in *Crangle* denying resentencing is directly contrary to this Court’s requirement that “when a trial court fails to properly discharge its statutory duty with respect to postrelease control notification, the sentence must be vacated and the matter remanded for resentencing.” *Jordan*, 104 Ohio St.3d at 28.

Concurrently with the Summit County resentencing action, Crangle filed a declaratory judgment action in Franklin County, seeking a declaration that the APA has no authority to supervise Crangle absent a resentencing. In that case, in light of the sentencing court’s refusal to correct its own error, the Franklin County Court recently issued a decision declaring the APA could no longer supervise Mr. Crangle. (Exhibit H, *Crangle v. Ohio Adult Parole Auth.*, Franklin Co. CCP No. 05CVH01-276). Consequently, the APA can no longer fulfill its statutory duty, and Mr. Crangle, a convicted sex offender, is at liberty without the supervision the legislature intended.

Similarly, the APA placed Mr. Hernandez on post-release control because his conviction for a first degree felony requires mandatory supervision. R.C.

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<sup>3</sup> Of course, the trial court’s decision was wrong factually on several counts. First, Crangle arguably was notified (in admittedly inapt language) that he would be subject to supervision at the conclusion of his prison term. Second, though Crangle had finished the sentence *as imposed*, he had not finished the sentence *required by statute*, which includes a five year extension for post-release control. In fact, his term of post-release control was not due to expire until 2006. And because the statutorily mandated sentence had not yet expired, the Court did have jurisdiction to correct it.

2867.28(D)(1). Upon reviewing the record in preparation to respond to this Court's writ, it was discovered that Hernandez was not informed at sentencing that he is required to be supervised on post-release control, and there is no post-release control term in his sentencing entry. (Transcript, Exhibit E; Entry, Exhibit D). The APA could not have discovered this error earlier; since the 2000 plea hearing and sentencing was not appealed no transcription had been made of the proceedings until the undersigned requested it.

Hernandez provides the perfect example of an offender for whom post-release control is mandatory, but because the sentencing court erred in conducting the sentencing hearing, post-release control was not properly made part of his sentence.

**IV. Neither Hernandez Nor Any Offender Similarly Situated May Avoid Mandatory Post-Release Control Due To The Sentencing Court's Failure Of Notification.**

**A. Hernandez is required to serve a term of post-release control pursuant to R.C. 2967.28(D)(1).**

*Jordan* holds unequivocally that a post-release control term cannot be wiped away by an improper sentencing:

[W]hile the court's lack of notification about postrelease control at the plea hearing could in some instances form the basis to vacate a plea, it cannot and does not form the basis to modify a sentence – or a portion thereof – impose by the trial judge not in conformity with the law. As we have decided, when a trial court fails to properly discharge its statutory duty with respect to postrelease control notification, the sentence must be vacated and the matter remanded for resentencing.

*Jordan*, 2004-Ohio-6085, ¶ 28. If the remedy on direct review is a remand for resentencing, what is the remedy on collateral review?

In this case, Hernandez asks this Court to release Hernandez from his prison sanction, and to release him from any further obligation to be supervised on post-release control. But *Jordan* holds that the remedy sought by Hernandez is unavailable. *Id.* Instead, this Court should hold that Hernandez is subject to supervision by the APA and required to serve post-release control by virtue of mandatory statutory provisions contained in R.C. 2867.28(B) and (D)(1).

To the extent that Hernandez alleges that by pleading guilty he bargained for a sentence without post-release control, the Court should hold that a prosecutor may not bargain away a mandatory term of the felony sentence. Thus, if Hernandez alleges that he entered a plea unknowingly, he should return to the trial court with a motion to vacate his plea.

**B. The APA requests direction from the Court on how to treat the thousands of offenders, like Hernandez, currently supervised on post-release control who were sentenced prior to *Jordan*.**

Frankly, it is uncertain how many others fall into the same category as Mr. Hernandez or Mr. Crangle. Potentially, there are three permutations of possible error that could occur at sentencing.

First, an offender may not have been informed of post-release control at sentencing, but a post-release control term is contained in the sentencing entry. This would not be discovered by the APA in its review of the record, and the APA would place an offender on post-release control unaware of the error.

Second, an offender may have been properly informed of post-release control at his sentencing hearing, but that notification is not recorded in the sentencing

entry. Third, an offender may *not* have been informed at sentencing and there is nothing contained in the sentencing entry. Henry Hernandez falls into this last category. Prior to *Jordan*, in either of these latter cases the APA presumed that the sentencing court had fulfilled its statutory duty of notification, and placed the offender on post-release control. Since *Jordan*, the APA has begun to put in place a procedure to notify sentencing courts if a sentencing entry is silent with respect to post-release control in an effort to get the error corrected. Nevertheless, owing to its statutory obligation, the APA still places these offenders on mandatory post-release control whether the sentence is repaired or not.

The difficulty now faced by the APA is how to treat possibly thousands of offenders currently supervised on post-release control whose sentencing might have suffered from any of these errors. Compounding this difficulty is the fact that the sentencing entry of a particular offender may or may not correctly reflect what took place at sentencing.

Prior to *Jordan*, there was no indication in any case law that suggested that the Adult Parole Authority had no authority to supervise offenders if the post-release control term did not appear in the sentencing entry. Therefore, the APA did not rely on the sentencing entry, and was left to rely on the presumption that the sentencing proceeding conformed to the law. Moreover, there is no case law to suggest that where the APA's duty to place an offender on post-release control is mandatory, that its ability to carry out its statutory obligations can be circumscribed by trial court error.

Now, in light of *Jordan*, the APA is left in a difficult position. On one hand, R.C. 2867.28(B) and (D)(1) requires the APA to impose post-release control on all inmates subject to mandatory post-release control. On the other hand, *Jordan* declares that sentences imposed without post-release control in the entry are possibly void, and at least one court has held that the APA is without authority to supervise even mandatory post-release control offenders if the sentencing entry contains no post-release control provision. This puts the APA in an untenable position. R.C. 2967.28 requires the APA to supervise certain offenders for up to five years, and that mandate exists seemingly independent of the sentencing court's statutory duty of notification. Now, in light of *Jordan*, some courts, such as Franklin County in the Crangle case explained above, are looking to judgment entries that are nearly 10 years old and declaring that the APA has no authority to supervise, despite the fact that the post-release control is mandatory, not discretionary, and despite the fact that the APA could not have anticipated that the post-release control term must appear in the sentencing entry to be valid.

The best solution is a holding from this Court which limits *Woods* and *Jordan* to discretionary post-release control, at least with respect to the effect of those cases on the duties of the APA. In order for the APA to fulfill its statutory obligation, it must be able to impose mandatory post-release control without regard to any errors committed by the sentencing court. At the very least, this Court should declare that *Jordan*, if applicable to mandatory post-release control cases, is not retroactive, and does not apply to cases that have already become final.

With regard to other offenders currently being supervised on mandatory post-release control who were not properly sentenced, this Court should first make clear that *Jordan* does not apply to any cases already final because their direct review has concluded. For those offenders, the Court should hold that the APA must impose mandatory post-release control, by virtue of the mandatory nature of the APA's statutory obligation. Accordingly, mandatory post-release control is a requirement regardless of the propriety of the sentencing hearing or sentencing entry.

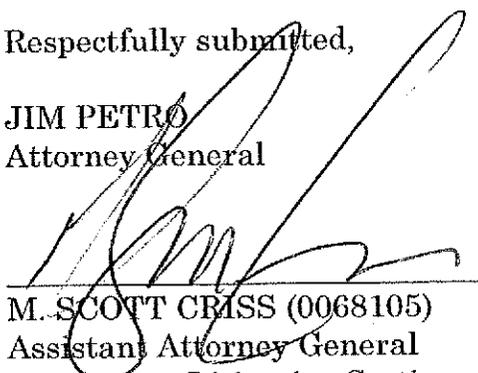
Alternatively, the Court should hold that regardless of the present posture of a criminal case – whether the conviction is final or not, whether the offender is currently in prison or not, and whether there was a direct appeal or not – *resentencing is absolutely required in all cases* in which the sentencing court did not properly inform an offender sentenced to prison that he will be subject to post-release control.

**V. Conclusion**

For the reasons set forth herein, the relief requested by Hernandez should be denied, and the Court should rule accordingly.

Respectfully submitted,

**JIM PETRO**  
Attorney General

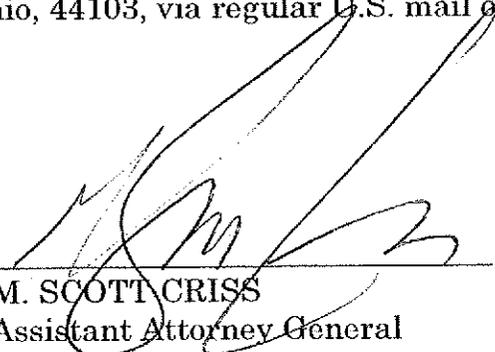


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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing *Respondent's Return of Writ* has been forwarded to John P. Parker, Counsel for Petitioner Henry Hernandez, 4403 St. Clair Ave., Cleveland, Ohio, 44103, via regular U.S. mail on this 23<sup>rd</sup> day of December, 2005.



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M. SCOTT CRISS  
Assistant Attorney General

STATE OF OHIO, Plaintiff-Appellee -vs- HENRY HERNANDEZ, Defendant-Appellant

NO. 74757

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2000 Ohio App. LEXIS 658

February 24, 2000, Date of Announcement of Decision

**PRIOR HISTORY:** [\*1]

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court. Case No. 360,708.

**DISPOSITION:**

Reversed and remanded; Juvenile specifications vacated on both counts.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant challenged his conviction in the Common Pleas Court (Ohio) of possession of cocaine in an amount exceeding 1,000 grams, in violation of Ohio Rev. Code Ann. § 2529.11, and conspiracy to possess cocaine in an amount exceeding 1,000 grams, in violation of *Ohio Rev. Code Ann. § 2923.01/2925.11*.

**OVERVIEW:** On appeal from his convictions for possession of over 1000 grams of cocaine, the appellant claimed 12 assignments of error, the most dispositive being error in jury instructions, and sufficiency and weight of the evidence supporting a juvenile specification of which he was convicted. The court found the lower court delivered two improper jury instructions. The lower court's delivery of an instruction that the substance found on appellant was cocaine removed the obligation of the prosecution to prove an essential element of the offense - namely that the substance was cocaine. The lower court's instruction that the jury needed to determine if appellant was a major drug offender instructed the jury on a question of law that was for the judge to determine. Finally, because those errors affected substantial rights and because the juvenile specification charged in the indictment was void, the judgment of conviction was vacated.

**OUTCOME:** The court vacated the convictions, finding the lower court improperly instructed the jury that the substance found on appellant was cocaine, when that matter was properly a jury question, and improperly instructed the jury on a matter of law which was for the judge to decide.

**COUNSEL:** For Plaintiff-Appellee: William D. Mason, Cuyahoga County Prosecutor, Jose Torres, Assistant Prosecutor, Cleveland, Ohio.

For Defendant-Appellant: John P. Parker, Cleveland, Ohio.

**JUDGES:** JUDGE ANNE L. KILBANE, KENNETH A. ROCCO, P.J., CONCURRING SEPARATELY; JAMES D. SWEENEY, J., CONCURS IN JUDGMENT ONLY; SEE SEPARATE OPINION.

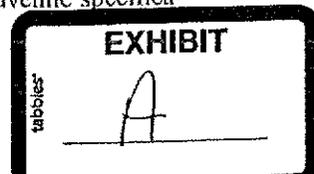
**OPINIONBY:** ANNE L. KILBANE

**OPINION:**

JOURNAL ENTRY AND OPINION

ANNE L. KILBANE, J.:

Appellant Henry Hernandez appeals from the May 29, 1998 judgment of conviction entered by Judge Nancy Margaret Russo after a jury found him guilty of Count 1, violation of R.C. 2529.11, possession of cocaine in an amount exceeding 1,000 grams, and Count 2, violation of *R.C. 2923.01/2925.11*, conspiracy to possess cocaine in an amount exceeding 1,000 grams. The jury also found Hernandez guilty of both the major drug offender and juvenile specifications charged on each count. Hernandez claims twelve assignments of error, the most dispositive being error in jury instructions, [\*2] and sufficiency and weight of the evidence supporting the juvenile specifica-



tion. n1 For the reasons that follow, we reverse and remand this matter for further proceedings but, for reasons other than those asserted by Hernandez, we vacate the judgment of conviction on the juvenile specifications.

n1 See the attached appendix for Hernandez' other assignments of error.

On February 8, 1998, Hernandez, Carlos Kincaid, and Angel Torres, Hernandez' brother-in-law, traveled by train to New York City. Torres said that Hernandez had promised him \$ 1,000 to help him pick up some "dope," i.e., cocaine. Upon their arrival, they went to the Bronx apartment of a man named David Reyes. Torres and Hernandez watched Reyes and Reyes' cousin prepare six baggies of cocaine in the kitchen and place them in the duffel bags of Torres and Kincaid. Hernandez then left, telling Torres and Kincaid, "I'll see you when we get home." Torres and Carlos later returned to the station, boarded the train, and went to different coach class [\*3] compartments. Torres did not see Hernandez either at the train station or on board the train.

The train arrived at the Amtrak station in Cleveland after 7:30 a.m. on February 10, 1998. Detectives George A. Seroka and Jody Remington of the Cleveland Police Department had watched about 15 people exit the train, including Torres and Kincaid. Torres exited the train behind Kincaid, and both carried duffel bags. They watched Hernandez exit from a first class train car located closer to the front of the train. After walking out of the station, Hernandez stood near Torres and Kincaid and watched as they threw their duffel bags into the trunk of a taxi. As the trunk closed, Remington saw Hernandez walk away from the taxi.

At that same time, Seroka noticed a Ford Explorer driven by Hernandez' girlfriend, Holly Morales, come down the Shoreway ramp and enter the Amtrak station parking lot. Morales was accompanied by three small children. Hernandez walked in the direction of the Explorer and, when it stopped, opened the hatch, placed his bag inside and got into the passenger's seat. After Torres and Kincaid got into the back seat of the taxi the Explorer and the taxi proceeded toward the exit. [\*4]

The police officers stopped the Explorer and taxi using another vehicle. Seroka, Remington, and Detectives Douglas Dvorak and Terrence Shoulders surrounded both vehicles. Both Dvorak and Shoulders identified themselves as police officers, advised Torres and Kincaid of their rights, and executed search warrants. Dvorak opened the duffel bags and, among articles of clothing, found a large amount of cocaine inside. Ser-

geant Brian Heffernan arrested Hernandez, but a search of his bag revealed no drugs.

At noon, Detective Charles Escalante and Remington executed a search warrant at Hernandez' apartment at 9823 Memphis Avenue, Brooklyn. They found a spiral notebook containing initials followed by numbers, a pager, miscellaneous papers, and other items. Escalante attributed the notebook and pager to drug trafficking activity.

Hernandez was indicted with four others on Possession of Drugs with Major Drug Offender and Juvenile specifications, Conspiracy to Possess Drugs with the same specifications, and Possession of Criminal Tools. At trial the judge granted a *Crim.R.* 29 motion on the Criminal Tools charge, and the jury convicted Hernandez of both counts which were merged. He was sentenced [\*5] to ten years on Counts 1 and 2, merged, and a consecutive sentence of nine years on the Major Drug Offender specification together with fines totaling \$ 40,000.

Hernandez asserts twelve assignments of error.

VIII. THE COURT'S JURY INSTRUCTIONS INVADED THE PROVINCE OF THE JURY AND DENIED THE APPELLANT A FAIR TRIAL UNDER THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION.

Hernandez contends the judge gave three improper and prejudicial instructions to the jury: (1) the jury could not consider the clothing of any witness when determining credibility; (2) instructing the jury to determine the Major Drug Specification; and (3) instructing the jury that exhibits 1-B through 5-B were, in fact, cocaine, a schedule two drug in various amounts.

The State counters that the clothing instruction was cautionary and Hernandez waived his right to assert error on any of the three instructions because no objection was made to any before the jury retired.

During trial Eugena Johnson Whitt, scientific examiner for the Cleveland Police Forensic Laboratory, testified she analyzed State's Exhibits 1-B through 5-B, the plastic-wrapped cocaine taken from the duffel bags, and that the packages [\*6] held a substance which tested positive for the presence of cocaine which totaled more than 1,000 grams in weight. She identified these exhibits as holding the following weights of a substance containing cocaine: 1-B contained 777.26 grams; 2-B contained 803.50 grams; 3-B contained 796.80 grams; 4-B contained 786.20 grams; 5-A contained 808.20 grams; and 5-B contained 499.52 grams.

We note that the judge instructed the jury on Count 1: the State charged that Hernandez "did knowingly obtain, possess, or use a controlled substance, to-wit: cocaine, a Schedule II drug, in an amount exceeding 1,000 grams" in violation of *R.C. 2925.11*, and on Count 2, that Hernandez did, "with the purpose to commit or to promote or facilitate the commission or possession of drugs, to-wit: cocaine, a Schedule II drug, in an amount exceeding 1,000 grams, did with another plan or aid in planning the commission of said felony" in violation of *R.C. 2923.01/2925.11*. The judge further instructed the jury that these counts each carried both a major drug offender specification and a juvenile specification.

When charging the jury, the judge "must state to it all [\*7] matters of law necessary for the information of the jury in giving its verdict. The court must also inform the jury that the jury is the exclusive judge of all questions of fact." *R.C. 2945.11*; see *State v. Braxton (1995)*, 102 Ohio App. 3d 28, 43, 656 N.E.2d 970, appeal not allowed (1995), 73 Ohio St. 3d 1425, 652 N.E.2d 798. A judgment of conviction may not be reversed because of "misdirection of the jury unless the accused was or may have been prejudiced thereby[.]" *R.C. 2945.83(D)*; *Crim.R. 33(E)(4)*; see, also, *Crim.R. 52(A)* (an error, defect, irregularity, or variance which does not affect substantial rights is harmless error and shall be disregarded). This court will not review a single, allegedly defective jury instruction in isolation but within the context of the entire charge. *State v. Thompson (1998)*, 127 Ohio App. 3d 511, 523, 713 N.E.2d 456, appeal not allowed (1998), 83 Ohio St. 3d 1451, 700 N.E.2d 334.

The failure to object to a jury instruction constitutes a waiver of all but plain error. *State v. Underwood (1983)*, 3 Ohio St. 3d 12, 444 N.E.2d 1332, [\*8] syllabus; see *Crim.R. 30(A)*. *Crim.R. 52(B)* provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The giving of an improper jury instruction does not constitute a plain error or defect under *Crim.R. 52(B)* unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long (1978)*, 53 Ohio St. 2d 91, 372 N.E.2d 804, paragraph two of the syllabus; *Thompson*, 127 Ohio App. 3d at 522. "Notice of plain error under *Crim.R. 52(B)* is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long*, 53 Ohio St. 3d at paragraph three of the syllabus.

#### A. Instruction on Element of Offense

Hernandez claims that the judge "invaded the province of the jury" by instructing the jury that the state's exhibits were, in fact, cocaine, and that each exhibit weighed a specified amount, thereby relieving the jury of

its duty to find that the state proved beyond a reasonable doubt an important element of the crime charged. The state asserts the lack of objection by his lawyer and [\*9] no plain error.

There is merit in Hernandez' argument. *Section 2925.11 of the Ohio Revised Code* establishes a sentencing scheme whereby the degree of the offense is determined by the amount of the controlled substance obtained, possessed, or used. Upon the trial of the accused, the trier of fact "shall determine the amount of the controlled substance involved at the time of the offense and, if a guilty verdict is returned, shall return the findings as part of the verdict. \* \* \* It is sufficient if the finding and return is to the effect that the amount of the controlled substance involved is the requisite amount \* \* \*." *R.C. 2925.03(E)* (application required by *R.C. 2925.11(G)*); see *R.C. 2925.75(A)*.

The subdivision under which Hernandez was charged, tried, and convicted, *R.C. 2925.11(C)(4)(f)*, provides that the possession or use of an amount of cocaine that is not crack cocaine in an amount exceeding 1,000 grams constitutes a felony of the first degree and carries with it a mandatory maximum sentence, in addition to the major drug offender specification. [\*10] In the instant case, *R.C. 2925.11(C)(4)(f)* required the state to prove beyond a reasonable doubt four elements, two wit: that Hernandez did *knowingly* obtain, possess, or use cocaine, a controlled substance, in an amount exceeding 1,000 grams. The judge, however, gave the following instruction:

Exhibits 1-B, 2-B, 3-B, 4-B, 5-B and 6-B are packages of cocaine, a Schedule II drug. These will not follow you to the jury room. You are instructed that these exhibits have been admitted as evidence in the case.

You are further instructed that: Exhibit 1-B is a package of cocaine, a Schedule II drug, in the amount of 777.26 grams; Exhibit 2-B is a package of cocaine, a Schedule II drug, in the amount of 803.50 grams; Exhibit 3-B is a package of cocaine, a Schedule II drug, in an amount of 796.80 grams; Exhibit 4-B is a package of cocaine, a Schedule II drug, in the amount of 786.20 grams; Exhibit 5-B is a package of cocaine, a Schedule II drug, in the amount of 499.52 grams.

Additionally, you are instructed that you may consider these exhibits as evidence during your deliberations.

Absent a stipulation of fact, the jury is the sole arbiter of [\*11] the facts, the credibility of the witnesses and the weight of the evidence. *R.C. 2945.11*; see 4 *Ohio Jury Instructions (1997) 405.20 § 1*. The jury may believe or disbelieve all or any part of the testimony of any witness. *OJI 405.20 § 1*. It is within the province of the jury to determine what testimony is worthy of belief and what testimony is not worthy of belief. *Id.*

Although Hernandez did not contest the testimony from Whitt, on the contents and weight of the identified exhibits, the instruction set forth above is contrary to the mandates of *R.C. 2945.11* because it effectually relieved the state from proving beyond a reasonable doubt two of the four elements of both the possession and conspiracy charges. First, the state did not have to prove that the identified exhibits were cocaine, a controlled substance; and second, it did not have to prove that the amount of the cocaine contained in the identified exhibits exceeded 1000 grams. n2 We, therefore, find the jury was misdirected in a manner which affected a substantial right, *i.e.*, the right to be proven guilty of each element of the offense beyond a reasonable doubt. [\*12] *R.C. 2901.05(A)* ("Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution."); *State v. Lockhart (1996), 115 Ohio App. 3d 370, 372, 685 N.E.2d 564* ("The state has the burden of proving every element of the crimes for which a defendant is charged."); see *In re Winship (1970), 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368* ("the due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

n2 The instruction left little more for the jury to do than simply add together the weight of the exhibits as given by the judge.

We are mindful of the judge's concern, as expressed in the transcript, of sending these exhibits into the jury room during deliberations, given the type of evidence involved and the need for security. [\*13] n3 Therefore, the judge properly advised the members of the jury that the exhibits would not follow it into its deliberations but that they had been admitted into evidence and may be considered as such during the deliberative process.

n3 In addition, defense counsel expressed his concern because Hernandez' name appeared on the bags.

#### B. Major Drug Offender Specification, R.C. 2941.1410

Hernandez also points out that the Major Drug Offender (MDO) specification contained in *R.C. 2941.1410* requires the judge to determine whether the offender is a major drug offender. In this case, the judge instructed the jury to do so. Hernandez argues that the phrase "major drug offender" is inherently prejudicial, that it put him in a light that lessened the presumption of his innocence, and that the instruction has no basis in the law.

In response, the state again contends his lawyer failed to object to the instruction but further submits that the instruction was [\*14] required because it assisted the jury in determining a question of fact.

We, again, find merit in Hernandez' argument. The judge read the definition of "major drug offender" as contained in *R.C. 2929.01(Y)* as the jury instruction on the specification:

"Major drug offender" means an offender who is convicted of or pleads guilty to the possession of, sale of, or offer to sell any drug, compound, mixture, preparation, or substance that consists of or contains at least one thousand grams of hashish; at least one hundred grams of crack cocaine; at least one thousand grams of cocaine that is not crack cocaine; at least two hundred fifty grams of heroin; at least five thousand unit doses of L.S.D.; or at least one hundred times the amount of any other schedule I or II controlled substance other than marihuana that is necessary to commit a felony of the third degree pursuant to *section 2925.03, 2925.04, 2925.05, 2925.06, or 2925.11 of the Revised Code* that is based on the possession of, sale of, or offer to sell the controlled substance.

See *R.C. 2925.01(DD)*.

Because Hernandez's lawyer did not object to this, we must review [\*15] this argument again applying the "plain error" standard. The MDO specification contained in *R.C. 2941.1410(B)* specifically requires the trial judge to determine the issue of whether an offender is a major drug offender. The reason is apparent; a specification is not an offense while standing alone. It "is, by its very nature, ancillary to, and completely dependent upon, the existence of the underlying criminal charge or charges to which the specification is attached." *State v. Nagel (1999), 84 Ohio St. 3d 280, 286, 703 N.E.2d 773*. The MDO specification does not require any specific finding

of fact or element independent of that attendant to the underlying criminal charge. Once the finder of fact has determined the guilt of the offender on the underlying charge, the question of whether the offender is a major drug offender also has been decided, e.g., a "major drug offender" is, as a matter of law, a person who has been convicted of possession of cocaine which is not crack cocaine in an amount, exceeding 1,000 grams. By the nature of the specification, there is no separate element subject to determination by the trier of fact. In essence, [\*16] the judge instructed the jury to determine a question of law, contrary to *R.C. 2945.11*.

This instruction is especially disturbing in light of the fact that the judge had also instructed the jury that exhibits 1-B through 5-B contained cocaine in an amount exceeding one thousand grams of cocaine. Because there was no factual question for the jury to decide in determining guilt on the MDO specification, the instruction allowed the jury to surmise that Hernandez deserved the utmost contempt when compared to someone who may have possessed less than 1,000 grams of cocaine. The general assembly not only understood that the MDO specification applied as a matter of law to certain factual determinations and was not a matter for the jury to consider, it also understood the potential for prejudice in allowing the jury to determine the specification. Based upon the foregoing, we find this argument meritorious as the instruction constitutes plain error which affects a substantial right.

### C. Witnesses' clothing

Finally, Hernandez claims that the judge erred when instructing the jury not to consider the clothing of a witness when determining credibility because such [\*17] an instruction has no foundation in law. He claims that the instruction was designed to refer to one of the witnesses, Torres, who wore jail clothes while testifying. The state points out that, again, Hernandez's lawyer did not object and the issue is, therefore, waived.

The judge gave an instruction on a test for credibility which mirrored that reflected at 4 *OJI* 405.20 § 3. "To determine the credibility of a witness," the judge instructed,

consider the interest or bias the witness has in the outcome of the verdict; the witness's appearance, manner, and demeanor while testifying before you \* \* \* and any or all other facts and circumstances surrounding the testimony which, in your judgment, would add or detract from the credibility and weight of the witnesses's testimony, except that you may not con-

sider the clothing worn by any witness when determining the credibility of that witness.

By failing to object, the lawyer waived this claim of error, *State v. Underwood* (1983), 3 *Ohio St. 3d* 12, 444 *N.E.2d* 1332, syllabus; see *Crim.R. 30(A)*, but, even with objection, we would not find error.

Before the state began its direct examination of Torres, Hernandez' [\*18] lawyer objected to the fact that Torres, as a witness, appeared in jail clothing rather than civilian clothing. When considering this objection in the context of the entire instruction, it is apparent that the judge gave the instruction complained of as a curative instruction since she previously instructed the jury to determine credibility of a witness based, in part, upon "appearance." Absent the curative instruction, Hernandez would have argued prejudice based upon that portion of the instruction telling the jury to determine credibility based upon a witness's appearance.

## XII. THE EVIDENCE OF THE JUVENILE SPECIFICATION WAS INSUFFICIENT AND AGAINST THE WEIGHT OF THE EVIDENCE.

Hernandez complains that the finding of "juvenile specification" was against the weight of the evidence because the state failed to show that he actually possessed any cocaine in the vicinity of a juvenile. Moreover, the state never proved that the taxi containing the cocaine was within 100 feet of a juvenile. The state counters that, at the time of his arrest on the possession charge, Hernandez was in constructive possession of cocaine and inside the same car as a juvenile thereby contending the [\*19] conviction on that specification must be affirmed.

While we conclude that Hernandez' conviction on the juvenile specification must be vacated, we do so for reasons other than those asserted. As mentioned *supra*, a specification is not an offense standing alone. A "juvenile specification" ordinarily increases the degree of the crime committed and, accordingly, the attendant penalty. See *R.C. 2925.75(A)*. One exception to that general rule occurs, for instance, where the amount of cocaine, which is not crack cocaine, associated with a trafficking offense exceeds 1000 grams. *R.C. 2925.03(C)(4)(g)*. In that case, the fact that the offense occurred within the vicinity of a juvenile is not relevant to either the degree of the offense or the subsequent penalty. The offense itself constitutes a felony of the first degree but carries with it the possibility of an additional mandatory prison term under *R.C. 2929.14(D)(3)(b)*. *Id.*

n4 *E.g.*, R.C. 2925.03(C)(4)(c) (where the amount of cocaine, not crack, involved in the trafficking offense exceeds 10 grams, but does not exceed 100 grams, the offense is a felony of the fourth degree; when the same offense is committed within the vicinity of a juvenile, it is a felony of the third degree); see also R.C. 2925.03(C)(4)(b), (d) & (e).

[\*20]

In the present case, the indictment charges Hernandez under R.C. 2925.11(C)(4)(f) for possession of cocaine in an amount exceeding 1,000 grams. n5 Like the trafficking offense discussed above, it does not carry with it a juvenile specification. In fact, R.C. 2925.11 does not contain a juvenile specification as defined in R.C. 2929.01(BB) for any amount of proscribed controlled substance. n6 But see, e.g., R.C. 2924.13 (permitting drug abuse); *supra* note 3. Because the juvenile specification charged in the indictment is void, the judgment of conviction is hereby vacated. See *State v. Saionz* (1969), 23 Ohio App. 2d 79, 84; 261 N.E.2d 135 (an indictment that does not charge an offense is void), citing, in part, *State v. Wozniak* (1961), 172 Ohio St. 517, 178 N.E.2d 800.

n5 A review of the bill of particulars filed May 7, 1998 shows that the prosecution hoped to prove the juvenile specification contained in R.C. 2925.01(BB). That section defines an offense "committed in the vicinity of a juvenile"; it does not contain a specification.

[\*21]

n6 Therefore, in the context of Hernandez' assignment of error, one can safely say that no amount of evidence will support a juvenile specification under R.C. 2925.11.

Based upon our conclusions regarding the merits of the Assignments of Error VIII and XII, Hernandez' remaining assignments of error are rendered moot and will not be addressed by this court. *App.R. 12(A)(1)(c)*.

We hereby reverse and remand the judgment of conviction on Count 1, possession of cocaine in an amount exceeding 1,000 grams in violation of R.C. 2925.11, and Count 2, conspiracy to possess cocaine in violation of R.C. 2923.01/2925.11. We also reverse and remand the judgment of conviction on the MDO specifications, R.C. 2941.1410, on both counts, and we vacate the judgment

of conviction on the juvenile specifications on both counts.

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

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Common Pleas [\*22] 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*.

JUDGE

ANNE L. KILBANE

KENNETH A. ROCCO, P.J., CONCURRING SEPARATELY;

JAMES D. SWEENEY, J., CONCURS IN JUDGMENT ONLY; SEE SEPARATE OPINION.

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; *Loc. App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)*, unless a motion for reconsideration with supporting brief, per *App.R. 26(A)* is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac. R. II*, Section 2(A)(1).

## APPENDIX

I. THE TRIAL COURT VIOLATED *CRIM.R. 12(E)* AND THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION WHEN IT FAILED TO CONDUCT A HEARING AND MAKE A RULING ON THE APPELLANT'S MOTION TO SUPPRESS ORAL STATEMENTS BEFORE TRIAL.

II. *CRIMINAL RULE 16* WAS VIOLATED WHEN THE STATE [\*23] PROVIDED DEFENSE COUNSEL WITH STATEMENTS MADE BY THE APPELLANT AFTER VOIR DIRE WAS COMPLETED.

III. THE TRIAL COURT IMPROPERLY DENIED THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE AND

DENIED HIM DUE PROCESS AND COMPULSORY PROCESS WHEN IT DENIED HIM THE OPPORTUNITY TO PRESENT THE TESTIMONY OF TWO DETECTIVES AT THE MOTION HEARING IN VIOLATION OF THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION.

IV. THE APPELLANT WAS DENIED DUE PROCESS AND COMPULSORY PROCESS WHEN THE COURT DENIED HIM THE OPPORTUNITY TO SUBPOENA DOCUMENTS AND PRESENT WITNESSES ON HIS BEHALF IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

V. THE TRIAL COURT ALLOWED IMPROPER OPINION TESTIMONY CONCERNING THE CONTENTS OF NOTEBOOKS SEIZED FROM APPELLANT'S APARTMENT.

VI. THE TRIAL COURT IMPROPERLY LIMITED THE SCOPE OF CROSS EXAMINATION IN VIOLATION OF DUE PROCESS AND ESTABLISHED OHIO LAW.

VII. THE TRIAL COURT ALLOWED HEARSAY AND OTHER TESTIMONY THAT WAS NOT RELEVANT TO THE INDICTMENT AND DENIED THE APPELLANT A FAIR TRIAL.

IX. THE TRIAL COURT IMPROPERLY SENTENCED THE APPELLANT TO NINE YEARS IMPRISONMENT FOR THE MAJOR DRUG OFFENDER SPECIFICATION AND [\*24] SUCH SENTENCE MUST BE VACATED.

X. THE TRIAL COURT'S PRISON SENTENCE IS NOT SUPPORTED BY THE RECORD AND THE TRIAL COURT'S FAILURE TO STATE ITS REASONS RATHER THAN CONCLUSION, MANDATES A REVERSAL PURSUANT TO 2929.11-.14.

XI. THE COURT'S IMPOSITION OF FINANCIAL SANCTIONS MUST BE VACATED BECAUSE THE COURT FAILED TO CONSIDER THE APPELLANT'S PRESENT AND FUTURE ABILITY TO PAY THE SANCTION UNDER R.C. 2929.19(B)(6).

CONCURBY: JAMES D. SWEENEY; KENNETH A. ROCCO

CONCUR:

CONCURRING OPINION

DATE: FEBRUARY 24, 2000

SWEENEY, JAMES D., J., CONCURRING:

I concur in judgment only and cite to concurring opinions in *State v. Thomas*, 1999 Ohio App. LEXIS 2141 (May 13, 1999), Cuyahoga App. Nos. 72536 and 72537, unreported, and *Garnett v. Garnett*, 1999 Ohio App. LEXIS 4295, \*5-9 (Sept. 16, 1999), Cuyahoga App. No. 75225, unreported.

CONCURRING OPINION

DATE: FEBRUARY 24, 2000

KENNETH A. ROCCO, P.J. CONCURRING:

I agree that the trial court erred by instructing the jury to find that the substance retrieved from the duffle bags was cocaine that totalled more than one thousand grams. This instruction deprived appellant of due process by removing the burden of proof from the state to prove each and every element of the crime beyond [\*25] a reasonable doubt. *In re Winship* (1970), 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068.

This error was compounded by the trial court's mistaken instructions asking the jury to decide the major drug offender specification. The jury was required to give double significance to the unconstitutional instruction by using it twice, to determine guilt and to determine the major drug offender specification.

For these reasons, I agree that the trial court's judgment must be reversed and this case must be remanded for a new trial. I would decline to address the other issues discussed in the majority opinion and do not agree with the reasoning expressed therein.

STATE OF OHIO, }  
CUYAHOGA COUNTY } SS.

IN THE COURT OF COMMON PLEAS

MAY TERM, 1998  
08 1998

TO-WIT: JUNE  
NO. CR 360708

STATE OF OHIO

PLAINTIFF

vs.

DEFENDANT

INDICTMENT POS DRGS W/MAJOR OFEN/JUV, CONSP  
POS DRUGS W/MDO/JUV, POSSESS  
CRIMINAL TOOLS

HENRY HERNANDEZ  
9823 MEMPHIS AVE #12  
BROOKLYN, OH 44112  
05/10/72  
ITN:

JOURNAL ENTRY

DEFENDANT IN COURT WITH COUNSEL JACK CARLIN. THE COURT CONSIDERED ALL OF THE REQUIRED FACTORS OF THE LAW.

ON A FORMER DAY THE JURY FOUND THE DEFENDANT TO BE GUILTY OF POSSESSION OF DRUGS WITH MAJOR OFFENDER AND OFFENDER/JUVENILE SPECIFICATIONS RC 2925.11 AS CHARGED IN COUNT 1; AND GUILTY OF CONSPIRACY POSSESSION OF DRUGS WITH MAJOR DRUG OFFENDER SPECIFICATIONS AND JUVENILE SPECIFICATIONS RC 2925.11 AS CHARGED IN COUNT 2. COUNT 5 WAS DISMISSED ON A PREVIOUS DAY UNDER RULE 29.

THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.

THE COURT IMPOSES A PRISON TERM OF 10 YEARS COUNT 1 AND 2 YEARS TO 10 YEARS ON COUNT 2, COUNTS 1 AND 2 MERGE FOR PURPOSES OF SENTENCING PLUS 9 YEARS FOR MAJOR DRUG OFFENDER SPECIFICATIONS TO BE SERVED PRIOR TO AND CONSECUTIVE WITH 10 YEARS FOR A TOTAL OF 19 YEARS AT LORAIN CORRECTIONAL INSTITUTION. THE SENTENCE INCLUDES ANY EXTENSIONS PROVIDED BY LAW. DEFENDANT'S DRIVER'S LICENSE IS SUSPENDED PERMANENTLY. DEFENDANT TO RECEIVE 119 DAYS JAIL TIME CREDIT FOR TIME SERVED AS OF JUNE 8, 1998. DEFENDANT NOT TO BE SENT TO THE SAME CORRECTIONAL INSTITUTION AS DEFENDANT ANGEL TORRES (DOB: 4/6/70; SSN: 073-58-7455; O/M).

DEFENDANT TO PAY COURT COSTS.  
FELONY SENTENCING FINDINGS PREPARED. O. S. J.

**FILED**  
JUN 10 1998  
GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY, OHIO

06-08-1998  
SENT MAB 06/10/98 09:41

JUDGE *Nancy Margaret Russo*  
NANCY MARGARET RUSSO

COPIES SENT TO:  
 Sheriff CP 6/10/98  
 Defendant

Other LORAIN & COST

EXHIBIT  
tabbles  
B

THE STATE OF OHIO, )  
 ) SS: NANCY M. RUSSO, J.  
COUNTY OF CUYAHOGA. )

IN THE COURT OF COMMON PLEAS

CRIMINAL DIVISION

74757

---oOo---

THE STATE OF OHIO, )  
 )  
Plaintiff, )

360708

VS. )

CASE NO. CR-360708-A

HENRY HERNANDEZ, )  
 )  
Defendant. )

C/A NO. 74757

---oOo---

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

VOLUME VIII

---oOo---

APPEARANCES:

On behalf of the State of Ohio:

Stephanie Tubbs Jones, County Prosecutor, by:  
Jose Torres, Asst. County Prosecutor.

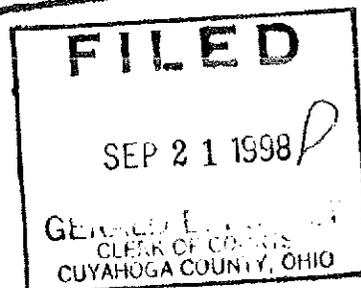
On behalf of the Defendant:

John H. Carlin, Esq.

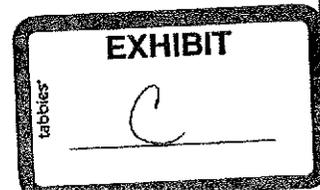


360708

Benjamin F. Watkins  
Official Court Reporter  
Cuyahoga County, Ohio



74757



1 MONDAY MORNING SESSION, JUNE 8, 1998

2 THE COURT: We're here  
3 today in the matter of State of Ohio versus  
4 Henry Hernandez, case number 360708. We're  
5 here today for purposes of sentencing, the  
6 defendant having previously been convicted  
7 by a jury.

8 The defendant is present in court  
9 today with his counsel, Mr. Jack Carlin.  
10 The prosecution is represented by Mr. Jose  
11 Torres.

12 Before I pass sentence, is there  
13 anything you would like to say, Mr. Carlin?

14 MR. CARLIN: Just briefly,  
15 Judge. My client exercised his  
16 constitutional right to go to trial and I'm  
17 sure this Court would not punish him for  
18 exercising such right.

19 The Court will remember and recall  
20 that before the trial began the offer of the  
21 prosecutor's office was expressed on the  
22 record which was 11 years. And his mother,  
23 who is up in years, would not like to see --  
24 not pass away while her son is in prison.

25 He exercised his right to a trial and

1 the jury returned this verdict. He didn't  
2 say anything in the trial and I think the 11  
3 years is certainly a heavy penalty to pay  
4 for the crimes charged.

5 THE COURT: Anything you'd  
6 like to say, Mr. Hernandez?

7 THE DEFENDANT: No, your Honor.

8 THE COURT: Mr. Torres, is  
9 there anything you would like to say?

10 MR. TORRES: Yes, your  
11 Honor. Considering the facts of this case,  
12 I would ask the Court to sentence the  
13 defendant to --

14 MR. CARLIN: I'm going to  
15 object, your Honor.

16 THE COURT: Overruled.

17 MR. TORRES: I'd ask the  
18 Court to sentence him to 19 years and to  
19 give him the maximum fine under the law. I  
20 would also ask the Court if Detective Dvorak  
21 could address the Court.

22 MR. CARLIN: Objection,  
23 Judge.

24 THE COURT: Overruled.

25 DETECTIVE DVORAK: Your Honor, just

1           briefly. The police in Cleveland,  
2           specifically us in the Second District vice  
3           and other officers, have known about Henry  
4           Hernandez since 1991 when he was first  
5           arrested.

6           Since that time he's picked up three  
7           other cases for drug law violation, three  
8           convictions, prison time, until by January  
9           of this year we've heard about him so many  
10          times that we were able finally to put a  
11          case against him in this case that was tried  
12          in your courtroom.

13          And by that time Henry Hernandez,  
14          with no known source of income, was sending  
15          people to New York, paying 1,000 a trip to  
16          pick up drugs for him, living in a nice  
17          apartment, nice cars, vacations in Hawaii  
18          and using his family and children and other  
19          people to run his drug business for him  
20          while he sat back and enjoyed the fruits of  
21          his illegal activity.

22          And I would just say that he should  
23          be sentenced accordingly.

24                   THE COURT:                   Mr. Hernandez,  
25                   for purposes of sentencing, counts one and

1 two merged. That applies to both time and  
2 to the amount of fines that are available to  
3 the Court to impose.

4 Therefore, the Court imposes on count  
5 one, on the body of the indictment, a period  
6 of ten years of incarceration and on the  
7 specification for major drug offender, a  
8 nine-year term will be serve consecutive to  
9 each other for a total of 19 years  
10 incarceration.

11 In addition, you are being fined  
12 \$20,000 on the body of count one and an  
13 additional \$20,000 as a mandatory fine for  
14 the major drug offender specification.

15 Additionally, your driver's license  
16 is hereby permanently revoked. The warden  
17 is directed that Henry Hernandez is to serve  
18 his period of incarceration at a facility  
19 other than that where Angel Torres is  
20 incarcerated and the docket is to so  
21 reflect.

22 Further, the Court finds that the  
23 defendant is a major drug offender and that  
24 a simple maximum term would demean the  
25 seriousness of the offense because the

1 offender's conduct is more serious than  
2 conduct normally constituting the offense  
3 and a simple maximum term is insufficient to  
4 punish the offender and protect the public  
5 because at least one seriousness factor  
6 outweighs the likelihood the offender will  
7 refrain from future crime.

8 Consecutive terms are imposed as the  
9 harm caused was great or unusual. The  
10 offender's criminal history requires  
11 consecutive sentences and consecutive  
12 sentences are necessary to fulfil the  
13 purpose of Ohio Revised Code 2929.11.

14 You have an automatic right to appeal  
15 since you were convicted by a verdict. You  
16 have the right to appeal this judgement of  
17 conviction of sentence and you have a right  
18 to have a notice of appeal timely filed  
19 within 30 days on your behalf.

20 Do you have any questions, Mr.  
21 Carlin?

22 MR. CARLIN: No, your Honor.

23 THE COURT: Any questions,  
24 Mr. Hernandez?

25 THE DEFENDANT: No.

1 THE COURT: The defendant is  
2 to be transported to Lorain Correctional  
3 Institute for service of sentence. You may  
4 receive bad time, the Parole Board may  
5 extend the prison term if you commit any  
6 criminal offense under the law of the state  
7 or United States while in prison.

8 Sentencing extension will be done  
9 administratively in accordance with Ohio  
10 Revised Code 2967.11 as part of any sentence  
11 this Court imposes. Each extension may be  
12 for 15, 30, 60 or 90 days. All sentence  
13 extensions will not exceed one half of your  
14 sentence, the sentence the Court has  
15 imposed, by the Parole Board.

16 You are being sent to prison and  
17 placed on post-release control by the Parole  
18 Board for a period of up to five years. If  
19 you violate the conditions of post-release  
20 control, the Parole Board may impose an  
21 additional sentence which includes a prison  
22 term of up to nine months. Remanded for  
23 transport.

24 MR. CARLIN: Credit for time  
25 served?

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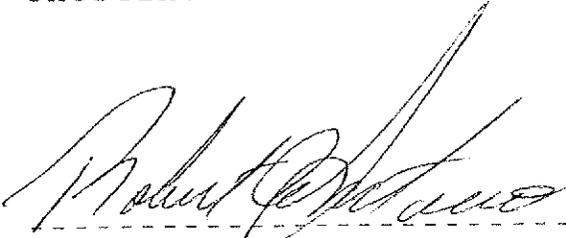
THE COURT: Credit for time  
serve is granted.

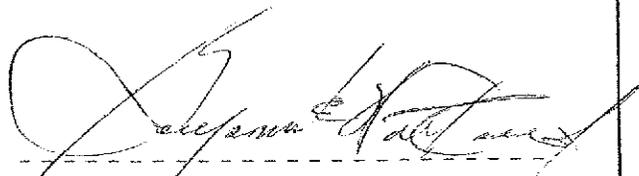
(Thereupon, Court was adjourned.)

- - - - -

C E R T I F I C A T E

1  
2 We, Robert A. Intorcio and Benjamin  
3 F. Watkins, Official Court Reporters for the Court  
4 of Common Pleas, Cuyahoga County, Ohio, do hereby  
5 certify that as such reporter we took down in  
6 stenotype all of the proceedings had in said Court  
7 of Common Pleas in the above-entitled cause; that  
8 we have transcribed our said stenotype notes into  
9 typewritten form, as appears in the foregoing  
10 Defendant's Transcript of Proceedings; that said  
11 transcript is a complete record of the proceedings  
12 had in the trial of said cause and constitutes a  
13 true and correct Transcript of Proceedings had  
14 therein.

15  
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17   
18 Robert A. Intorcio  
19 Official Court Reporter  
Cuyahoga County, Ohio

17   
18 Benjamin F. Watkins  
19 Official Court Reporter  
Cuyahoga County, Ohio.

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STATE OF OHIO,  
CUYAHOGA COUNTY

SS. IN THE COURT OF COMMON PLEAS

MAY TERM, 2000  
09 2000

STATE OF OHIO  
VS.

PLAINTIFF

TO-WIT: AUGUST  
NO. CR 360708

DEFENDANT

INDICTMENT POS DRGS W/MAJOR OFEN/JUV, CONSP  
POS DRUGS W/MDO/JUV, POSSESS  
CRIMINAL TOOLS

HENRY HERNANDEZ

JOURNAL ENTRY

CASE REVERSED AND REMANDED FROM COURT OF APPEALS, COURT OF APPEALS AMENDS CT 1 BY ADDING AMOUNT OF 500 GRAMS TO 1000 GRAMS AND DELETE SPECIFICATIONS AND ALSO DISMISSES COUNT 2. ATTORNEY JOHN PARKER PRESENT IN COURT. DEFENDANT ADDRESSES COURT.

DEFENDANT IS HEREBY RE-SENTENCED TO THE LORAIN CORRECTIONAL INSTITUTION FOR A TERM OF 7 YEARS AS TO COUNT 1 (AGREED SENTENCE OF 7 YEARS MANDATORY TIME). DEFENDANT TO BE GIVEN CREDIT FOR ALL TIME SERVED, SHERIFF TO CALCULATE TIME. DEFENDANT IS TO PAY COURT COSTS. IT IS HEREBY ORDERED THAT THE SENTENCE IMPOSED HEREIN BE FORTHWITH CARRIED INTO EXECUTION.

IT IS FURTHER ORDERED THAT THE CLERK OF COURT'S FORWARD CERTIFIED COPIES OF THIS ENTRY ALONG WITH A COPY OF THE COURT OF APPEALS JOURNAL ENTRY TO THE INSTITUTION THAT SAID DEFENDANT WAS SENTENCED TO.

THE STATE OF OHIO }  
Cuyahoga County. } SS. I, GERALD E. FURST, CLERK OF  
THE COURT OF COMMON PLEAS  
WITHIN AND FOR SAID COUNTY.

HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY  
TAKEN AND COPIED FROM THE ORIGINAL Journal Entry  
Journal Entry CR# 360708  
NOW ON FILE IN MY OFFICE.

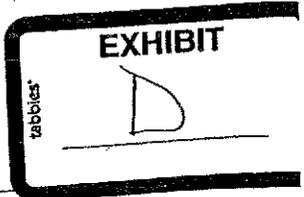
WITNESS MY HAND AND SEAL OF SAID COURT THIS 9th  
DAY OF November A.D. 2000

GERALD E. FURST, CLERK  
By Andrea McAffee Deputy

RECEIVED FOR FILING

AUG 22 2000

GERALD E. FURST, CLERK  
BY [Signature]



08-09-2000  
CA DMB 08/16/00 14:50

JUDGE [Signature]  
TIMOTHY MCCORMICK

COPIES SENT TO:

Sheriff 83800023  
 Defendant

Other

LORAIN & cost  
Manfield CI # 358168

11 8-28-00

EXHIBIT 1-B

1 THE STATE OF OHIO, )  
 2 COUNTY OF CUYAHOGA. ) SS: McCORMICK, J.

3 IN THE COURT OF COMMON PLEAS  
 4 (CRIMINAL BRANCH)

5 THE STATE OF OHIO, )  
 6 Plaintiff, )  
 7 v. ) Case No. CR-360708  
 8 HENRY HERNANDEZ, )  
 9 Defendant. )

10 DEFENDANT'S TRANSCRIPT OF PROCEEDINGS  
 11 - - -

12 Whereupon, the following proceedings were  
 13 had in Courtroom No. 20-C, the Justice  
 14 Center, before the Honorable Timothy  
 15 McCormick, August 9, 2000, upon, the  
 16 indictment filed heretofore.

17 APPEARANCES: - - -

18 On behalf of the State of Ohio:  
 19 William D. Mason, Prosecuting Attorney, by  
 20 Jose Torres, Assistant Prosecuting Attorney.

21 On behalf of the Defendant:  
 22 John Parker, Esq.

23  
 24 Bernice L. King  
 25 Official Court Reporter  
 Cuyahoga County, Ohio



1                   **WEDNESDAY MORNING SESSION, AUGUST 9, 2000**

2                   THE COURT:           We're here on  
3                   Case Number 360708-A, State of Ohio versus  
4                   Henry Hernandez.

5                   Present in court is the  
6                   defendant, along with counsel, John Parker.

7                   Present from the State of Ohio,  
8                   Assistant County Prosecutor, Jose Torres.

9                   MR. TORRES:           Thank you, your  
10                  Honor.

11                  In regards to the case of the  
12                  State of Ohio versus Henry Hernandez, Case  
13                  Number 360708, I have the opportunity of  
14                  extensively pre-trying this case with the  
15                  counsel for defense. And as a result of this,  
16                  and as a result of discussing this case with  
17                  the officers involved in this case, the state  
18                  will move the Court to make the following  
19                  amendments to the indictment:

20                  In regards to count one,  
21                  possession of drugs, in violation of section  
22                  2925.11, as charged, this is a felony of the  
23                  first degree, with a major drug offender  
24                  specification, and a juvenile specification.

25                  I will move the Court to delete

1 both specifications, and also amend the  
2 language that, instead of, in an amount  
3 exceeding one thousand grams, it should state  
4 that, in an amount exceeding 500 grams, but  
5 not exceeding one thousand grams.

6 With that amendment, count one is  
7 still a felony of the first degree; however,  
8 the mandatory term to be imposed, instead of  
9 ten years plus an additional one to ten, will  
10 be a term, or mandatory term of three, four,  
11 five, six, seven, eight, nine, or ten years, a  
12 mandatory fine of at least \$10,000, a  
13 discretionary fine of up to \$20,000, and a  
14 suspension of driver's license for a term of  
15 six months to five years.

16 The state will move the Court to  
17 nolle the remaining cases against this --  
18 excuse me, remaining counts against this  
19 defendant.

20 THE COURT: There is an agreed  
21 sentence; is that correct?

22 MR. TORRES: Yes, your  
23 Honor. It is my understanding, first, that  
24 the defendant will withdraw his previously  
25 entered plea of not guilty, and also agree

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with the term of seven years, mandatory seven years to be served by him, in regards to count one.

THE COURT: Thank you.

MR. PARKER: Thank you, your Honor.

On behalf Mr. Hernandez, that's a correct statement of the plea negotiations. No threats or promises have been made on my behalf in order to get my client to plead guilty. There have been extensive discovery both ways between me and the state.

My client understands everything he's doing here. He understands all the possible penalties as charged, and plea negotiations, and is ready to voluntarily change his plea.

THE COURT: Thank you.

Mr. Hernandez, have you heard what your attorney and the prosecutor said?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you have any questions?

THE DEFENDANT: No.

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THE COURT: How old are you?

THE DEFENDANT: 28.

THE COURT: How far did you go in school?

THE DEFENDANT: Finished school, got my G.E.D.

THE COURT: Are you presently under the influence of drugs, alcohol, or medication?

THE DEFENDANT: No, your Honor.

THE COURT: Are you undergoing psychiatric treatment?

THE DEFENDANT: No, your Honor.

THE COURT: What your attorney and the prosecutor have said is only a statement of what's intended to be done here this morning. No guilty plea can be effective until you state the plea yourself, in open court, and I accept that plea.

Before I ask you to enter a plea, I must, by law, ask you a series of questions, to determine if you understand the effect of your plea, and to determine whether your plea

1 is made knowingly, voluntarily and  
2 intelligently.

3 It's my duty to advise you that  
4 if you plead guilty to count one as amended,  
5 possession of drugs -- are the specs. deleted,  
6 Jose?

7 MR. TORRES: Yes, your Honor.

8 THE COURT: Deleting the  
9 specifications, the amendment reading an  
10 amount greater than 500, but less than a  
11 thousand grams. That is a felony of the first  
12 degree. It could carry anywhere from three to  
13 ten years in prison, in annual increments.  
14 Here, it's an agreed seven years.

15 You understand that?

16 MR. TORRES: Your Honor, I'm  
17 sorry to interrupt. It would be an amount not  
18 exceeding one thousand dollars, not less than  
19 one thousand grams, I apologize for that.

20 THE COURT: It's an amount not  
21 exceeding one thousand grams.

22 MR. TORRES: Yes, your Honor.

23 THE COURT: Do you understand  
24 that?

25 THE DEFENDANT: Yes, your

1 Honor.

2 THE COURT: Okay. We're  
3 talking about seven years actual time. There  
4 is no good time credit. You won't be subject  
5 to judicial release, shock probation, shock  
6 parole.

7 Do you understand that?

8 THE DEFENDANT: Yes, your

9 Honor.

10 THE COURT: You understand, if  
11 you plead guilty, that's an admission by you  
12 that you did the crime?

13 THE DEFENDANT: Yes, your

14 Honor.

15 THE COURT: Even though your  
16 lawyer may have discussed your rights at  
17 trial, it's my duty to explain it to you in  
18 open court.

19 First, you would have a right to  
20 a trial by a jury, or by a Judge without a  
21 jury, whichever you prefer.

22 You have the right to be  
23 represented by a lawyer. If you could not  
24 afford one, the Court would appoint one to  
25 represent you at no cost to you.

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At trial the prosecutor would have to produce its witnesses in open court, and you or your attorney would have the right to cross-examine those witnesses.

You could issue subpoenas to compel witnesses to come to court to testify on your own behalf. You could testify if you wished, but you could not be compelled to testify against yourself, and the prosecutor could not comment upon your failure to testify.

You'd be presumed innocent until the prosecutor proved your guilt by evidence beyond a reasonable doubt.

Do you understand those rights?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have any threats or promises been made to you to induce this plea?

THE DEFENDANT: No, your Honor.

THE COURT: Are you satisfied with your lawyer?

THE DEFENDANT: Yes, your

1 Honor.

2 THE COURT: Having said that,  
3 how do you plead to count one, as amended,  
4 possession of drugs, not greater than one  
5 thousand grams.

6 THE DEFENDANT: Guilty.

7 THE COURT: Let the record  
8 reflect the defendant has pled guilty. The  
9 Court accepts that plea, found it was made  
10 knowingly, voluntarily, and intelligently.

11 Upon the prosecutor's motion the  
12 remaining counts as to this defendant shall be  
13 dismissed.

14 Any reason why we should not go  
15 forward with sentencing?

16 MR. PARKER: No, Judge. Since  
17 it's an agreed sentence, I just ask the Court  
18 to credit him for time served.

19 THE COURT: Mr. Hernandez, do  
20 you wish to say anything to the Court?

21 THE DEFENDANT: No, your  
22 Honor.

23 THE COURT: Very good.  
24 Seven years L.C.I., sheriff to  
25 transport, credit for all timed served.

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MR. PARKER: Thank you very  
much, your Honor.

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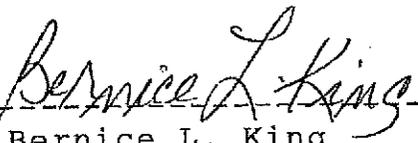
(Court is adjourned.)

- - -

011

**C E R T I F I C A T E**

I, Bernice L. King, Official Court Reporter for the Court of Common Pleas, Cuyahoga County, Ohio, do hereby certify that as such reporter I took down in stenotype all of the proceedings had in said Court of Common Pleas in the above-entitled cause; that I have transcribed my said stenotype notes into typewritten form, as appears in the foregoing Transcript of Proceedings; that said transcript is a complete record of the proceedings had in the trial of said cause and constitutes a true and correct Transcript of Proceedings had therein.



-----  
Bernice L. King  
Official Court Reporter  
Cuyahoga County, Ohio

# ADULT PAROLE AUTHORITY Notice of Findings of Release Violation Hearing

Name	HERNANDEZ, HENRY	Offender #	358 168	Date	9-22-05
Location	State Office Building - 615 West Superior Avenue, 9 <sup>th</sup> Floor, Cleveland, Ohio 44113				

I. This to advise you that you were found to have committed the following release violation(s) as written in the Notice of Release Violation Hearing Form dated \_\_\_\_\_.

**Rule(s) #:**

1 PAROLE RULE #3 To wit On or about June 19, 2005, you were in the State of Texas without the written permission of the Adult Parole Authority. *A/M*

2 PAROLE RULE #8: To wit On or about June 19, 2005, you were detained by the members of the Texas Department of Public Safety State Troopers, and failed to report this arrest to your supervising officer by the next business day *A/M*

3 PAROLE RULE #11: To wit. On or about June 19, 2005, you associated with Hector Chavez, Jr inmate #423 927 who has a criminal background, and could influence you to engage in criminal activity, without the prior permission of the Adult Parole Authority *A/M*

**II. Summary of evidence used in arriving at findings:**

*You admitted and they to based on the following  
 offense arrested by the State of Texas State Trooper  
 on 6-19-05 after a routine Trooper stop. Offender  
 also was in possession w/ another parolee  
 Hector Chavez Jr. Offender found \$18,000.00 in vehicle  
 belongs to offender Chavez. Offender never said  
 permission from him to leave the State.  
 Offenders also Jennifer Pesto provided hid w/  
 a package regarding offender pointed allegations which  
 on suspension. However offender has never provided traffic  
 violation was made in a vehicle w/ another parolee w/ prior  
 drug traffic conviction. Any money seized was in vehicle  
 which offender reported illegal ~~was~~ activity.*

DRC 3304 (Rev 07/03) DISTRIBUTION WHITE - VSP Officer CANARY - Unit PINK - Jail/Reception Center GOLDENROD - Offender



# ADULT PAROLE AUTHORITY Sanction Receipt

Name <b>HERNANDEZ, HENRY</b>	Offender # <b>358 168</b>
---------------------------------	------------------------------

III. It has been determined that you are guilty of violating a condition(s) of your release. The following will be imposed:

A. Revocation of Release. You are further notified that you will be returned to the appropriate Department of Rehabilitation and Correction institution as soon as practical where you will be notified of any future release consideration hearings.

B. See "Sanction Order"

C.  Incorporate sanction receipt dated: \_\_\_\_\_

D. Other Sanction. \_\_\_\_\_

1) Tsc SAP

2) To report as instructed

3) To reside only at APT approved residence

4) No contact w/ Hector Chavez Jr

Hearing Officer <i>[Signature]</i>	Date <b>10-6-05</b>
---------------------------------------	------------------------

I have read (been read) and understand the foregoing

Offender Signature <i>[Signature]</i>	Date
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I certify that this notice was hand-delivered to the above on:

Date <b>10-6-05</b>	Time <b>10:20 AM</b>	Date <b>10-6-05</b>
Witness Signature <i>[Signature]</i>		

PAGE 2  
HERNANDEZ, HENRY  
358 168

**You are alleged to have committed the following violation(s): (Continued)**

**1. PAROLE RULE #3** I will not leave the State of Ohio without written permission of the Adult Parole Authority

To wit: On or about June 19, 2005, you were in the State of Texas without the written permission of the Adult Parole Authority.

Admit:  Admit with Mitigation:  Deny:

**2. PAROLE RULE #8** I will report any arrest, citation of a violation of the law, conviction or any other contact with a law enforcement officer to my supervising officer no later than the next business day I will not enter into any agreement or other arrangement with any law enforcement agency which might place me in the position of violating any law or condition of my supervision, unless I have obtained permission in writing from the Adult Parole Authority, or from the Court

To wit On or about June 19, 2005, you were detained by the members of the Texas Department of Public Safety State Troopers, and failed to report this arrest to your supervising officer by the next business day

Admit:  Admit with Mitigation:  Deny:

**3. PAROLE RULE #11:** I agree not to associate with persons having a criminal background and/or persons who may have gang affiliation, or who could influence me to engage in criminal activity, without the prior permission of my supervising officer

To wit On or about June 19, 2005, you associated with Hector Chavez, Jr inmate #423 927 who has a criminal background, and could influence you to engage in criminal activity, without the prior permission of the Adult Parole Authority.

Admit:  Admit with Mitigation:  Deny:

YR/vp  
rec'd for typing 9-22-05  
date typed 9-22-05

09/30/2005  
15:27

STATE OF OHIO  
DIVISION OF PAROLE AND COMMUNITY SERVICES

Page: 1 of 5

> COMMUNITY CORRECTIONS INFORMATION SYSTEM (CCIS) <

CCIS#: C263742.00

>>>>

TYPE OF REPORT: VIOLATION REPORT

<<<<

OFFENDER NAME: HERNANDEZ, HENRY

INMATE#: A358168.00

GENDER: MALE  
ALIAS: TORRES, ANGEL

RACE: BLACK  
SSN#: ████████-0589 <<

DOB: 05/10/1972  
FBI: 858186LA5  
BCI: B328747

HEIGHT/WEIGHT: 5' 10" /181  
HAIR / EYE: BRO / BRO  
EMPLOYED: ( ) YES (X) NO  
CHILD SUPPORT: ( ) YES (X) NO  
COUNTY:

RESIDENCE: 11395 CHEYENNE TRAIL #102  
PARMA HEIGHTS, OH 000044130

SCARS/MARKS/TATTOOS:

TYPE OF RELEASE: PRC POST RELEASE CONTROL  
PARENT INSTITUTION: MANSFIELD CORRECTIONAL INSTITUTION

OFFENDER TYPE. ( ) A SENTENCING COUNTY : CUYAHOGA  
( ) B SENTENCING JUDGE : N. RUSSO

SUPERVISION LEVEL: BASIC MEDIUM DOCKET# : CR360708

IN CUSTODY: YES VIOLATOR AT LARGE: NO

SEX OFFENDER: - STATE : OHIO

SUPERVISION DATE: 02/07/2005 <<< SENTENCE: 007.00 TERM  
MAX. EXPIRATION: 02/06/2010 <<< CRIME: POSS. OF DRUGS, WEAPONS/DRUG

SUPERVISION PERIOD: 5.00 <<<

REPORTING OFFICER: ROY, YOLANDA  
REPORTING UNIT: A0901 CLEVELAND 1

STAFFING DATE: 09/23/2005 ASSIGNED DATE: 09/30/2005  
DICTATION DATE: 09/23/2005 TYPING/COMPLETED DATE: 09/30/2005

FOLLOW-UP: 10/23/2005 - VIOLATION SUPPLEMENT

**VIOLATION HEARING REPORT**  
**HERNANDEZ, HENRY**  
**INST#: 358168 CCIS#:263740**  
**PAGE 2.**

**I. INTRODUCTION:**

<b>ARREST DATE:</b>	9/15/05
<b>ARRESTING AGENCY:</b>	ADULT PAROLE AUTHORITY
<b>DATE OF APA HOLD:</b>	9/15/05
<b>DATE OF AVAILABILITY:</b>	9/15/05
<b>BOND POSTED:</b>	N/A
<b>DATE VIOLATIONS SERVED:</b>	9/22/05
<b>DATE JLS/SANCO SCREENS REVIEWED BY SUPERVISOR:</b>	PATRICK ALLEN - 9/22/05
<b>AMOUNT OF PRC SUPERVISION TIME REMAINING (IF APPLICABLE)</b>	1270 DAYS

**II. VIOLATIONS & CORROBORATION:**

**PAROLE RULE #3:** I will not leave the State of Ohio without written permission of the Adult Parole Authority  
**TO WIT:** On or about 6/19/05, you were in the State of Texas without the written permission of the Adult Parole Authority

**PAROLE RULE #8:** I will report any arrest, citation of a violation of the law, conviction or any other contact with a law enforcement officer to my supervising officer no later than the next business day I will not enter into any agreement or other arrangement with any law enforcement agency which might place me in the position of violating any law or condition of my supervision, unless I have obtained permission in writing from the Adult Parole Authority, or from the Court  
**TO WIT:** On or about 6/19/05, you were detained by the members of the Texas Department of Public Safety State Troopers and failed to report this to your supervising officer by the next business day

**PAROLE RULE #11:** I agree not to associate with persons having a criminal background and/or persons who may have gang affiliation, or who could influence me to engage in criminal activity, without the prior permission of my supervising officer  
**TO WIT:** On or about 6/19/05, you associated with Hector Chevez Jr, Inmate #423927 who has a criminal background and could influence you to engage in criminal activity without the prior permission of the Adult Parole Authority

**CORROBORATION:**

On 6/19/05, at approximately 1:38 a.m., the Texas State Troopers stopped a vehicle traveling at a high rate of speed. The individuals in the vehicle were identified as Hector Chavez Jr, who was the driver and Henry Hernandez was identified as the passenger. Mr. Hernandez's address was listed as 11395 Cheyenne Trail in Parma Heights, Ohio 44130. The subjects were detained by the State Troopers and transported to the Department of Public Safety in Laredo Texas Sub District office.

The subject was released pending further investigation.

**VIOLATION HEARING REPORT  
HERNANDEZ, HENRY  
INST#: 358168 CCIS#:263740  
PAGE 3.**

On 6/18/05, the subject reported for his monthly contact and did not request a travel permit. Furthermore, he reported on 7/21/05 and 8/18/05 and failed to mention he was out of state and had contact with law enforcement

Please note that Hector Chevez Jr , is currently on supervision to Officer Ken Kaufman in Mansfield 3

**III. OFFENDER'S STATEMENT:**

The subject was arrested on 9/15/05, by members of the Adult Parole Authority At the time of the arrest, the subject stated the following: "I drove down there with a friend because he needed someone to go with him" "The money wasn't mine and I was not arrested so I didn't think I needed to tell you "

**IV. CRIMINAL HISTORY: CRIMINAL HISTORY: The criminal history listed below should only include criminal history from the time of release from the institution for current institution number. Please attach prior criminal history. If a prior criminal history cannot be located, it will need to be entered in this section.**

PRIOR RECORD: Please refer to the attached PSI

<u>Adult:</u> <u>Date</u>	<u>Offense</u>	<u>Place</u>	<u>Disposition</u>
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**Minor Traffic Convictions (Adult):**

Please refer to the attached PSI

**Pending Charges (Adult):**

Please refer to the attached PSI.

**Supervision Adjustment (Adult):**

Please refer to the attached PSI

**VIOLATION HEARING REPORT**  
**HERNANDEZ, HENRY**  
**INST#: 358168 CCIS#:263740**  
**PAGE 4.**

**SECURITY THREAT GROUP PARTICIPATION:**

None known.

**V. SUPERVISION ADJUSTMENT:**

The subject was released from Mansfield Correctional Institution on 2/7/05. He was approved to reside with his mother, Vidolina Hernandez at 11395 Cheyenne Trail Apartment 102 in Parma Heights, Ohio 44130. The subject reported to the office on 2/8/05, and met with Officer Charlene Martin. He signed conditions of supervision and was informed to return on 2/17/05.

On 2/17/05, the subject reported and completed his supervision plan. He is on 5 year Post Release Control and was informed that he would be required to report monthly.

The subject reported monthly as directed but had difficulty obtaining employment until 6/20/05. He obtained full time employment with Home Improvement Specialist. The subject continued to report monthly and submit check stubs until his arrest on 9/15/05. Details are as follows:

On 6/19/05, at approximately 1:38 a.m., the Department of Public Safety State Trooper observed a vehicle traveling at a high rate of speed, 81 mph in a 65 mph zone. The vehicle, a 2002 red Ford Focus with Texas license plate #R642MX, was pulled over for the traffic violation. The officer was handed both the driver's and passenger's identification and both were issued in Ohio. The driver was identified as Hector Chevez Jr., inmate #423927. The passenger was Henry Hernandez inmate #358168.

The driver and passenger were separated and questioned about their trip. They were both asked how long they would be in Texas and the driver stated until the following weekend, but when the subject was asked he stated 2 days. The trooper asked the passenger if he had ever been arrested and he replied "no". The trooper then ran both subjects' names through LEADS. The trooper was informed that both had extensive arrests for drugs and non-drug offenses. The trooper called for back up and a search was conducted.

The trooper discovered a large amount of currency in several bundles wrapped in rubber bands which were again wrapped in white cellophane material in a black DVD player case. The subject informed the trooper that he was not aware of the money. Both the driver and passenger were transported to the Laredo, Texas District Office and a count of the money was taken, which was \$18,109.00.

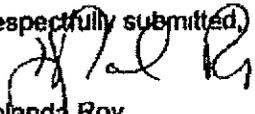
The driver was charged with money laundering (F-3). The subject was released pending further investigation.

**VIOLATION HEARING REPORT  
HERNANDEZ, HENRY  
INST#: 358168 CCIS#:263740  
PAGE 5.**

**VI. RECOMMENDATION:**

The subject was released from the institution for a possession of drugs charges on 2/7/05. On 6/19/05 he violated his condition by going out of state with a known convicted felon and failing to inform his supervising officer of police contact. Therefore, we are requiring the subject serve 120 prison sanction days.

**SUPERVISOR'S SIGNATURE:**

Respectfully submitted,  


Yolanda Roy  
State Parole Officer  
Cleveland Unit A0901

APPROVED BY,



Patrick Allen  
Unit Supervisor  
Cleveland Unit A0901

YR/y  
date typed 9/30/05

cc: Ernest Winston, Case Review Analyst  
file

10/18/2005  
16:35

STATE OF OHIO  
DIVISION OF PAROLE AND COMMUNITY SERVICES

Page: 1 of 2

> COMMUNITY CORRECTIONS INFORMATION SYSTEM (CCIS) <

CCIS#: C263742.00

>>>>

TYPE OF REPORT: VIOLATION SUPPLEMENT

<<<<

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OFFENDER NAME: HERNANDEZ, HENRY  
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INMATE#: A358168.00  
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GENDER: MALE  
ALIAS: TORRES, ANGEL

RACE: BLACK  
SSN#: ████████-0589 <<

DOB: 05/10/1972  
FBI: 858186LA5  
BCI: B328747

HEIGHT/WEIGHT: 5' 10" /181  
HAIR / EYE: BRO / BRO  
EMPLOYED: ( ) YES (X) NO  
CHILD SUPPORT: ( ) YES (X) NO  
COUNTY:

RESIDENCE: 11395 CHEYENNE TRAIL #102  
PARMA HEIGHTS, OH 000044130

SCARS/MARKS/TATTOOS:

TYPE OF RELEASE: PRC POST RELEASE CONTROL  
PARENT INSTITUTION: MANSFIELD CORRECTIONAL INSTITUTION

OFFENDER TYPE: ( ) A SENTENCING COUNTY : CUYAHOGA  
( ) B SENTENCING JUDGE : N. RUSSO

SUPERVISION LEVEL: BASIC MEDIUM DOCKET# : CR360708

IN CUSTODY: YES VIOLATOR AT LARGE: NO

SEX OFFENDER: - STATE : OHIO

SUPERVISION DATE: 02/07/2005 <<< SENTENCE: 007.00 TERM  
MAX. EXPIRATION: 02/06/2010 <<< CRIME: POSS. OF DRUGS, WEAPONS/DRUG

SUPERVISION PERIOD: 5.00 <<<

REPORTING OFFICER: ROY, YOLANDA  
REPORTING UNIT: A0901 CLEVELAND 1

STAFFING DATE: 10/17/2005 ASSIGNED DATE: 10/18/2005  
DICTATION DATE: 10/17/2005 TYPING/COMPLETED DATE: 10/18/2005

FOLLOW-UP: 03/11/2006 - RELEASE FROM CUSTODY

PPY  
PPY

DIANA ZALESKI

2005 JUN -6 PM 1:45

SUMMIT COUNTY  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

THE STATE OF OHIO,

Plaintiff,

vs.

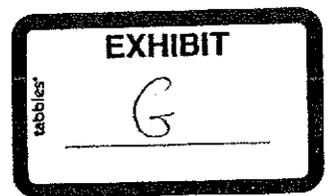
THOMAS CHARLES CRANGLE  
aka CRANGKEL,

Defendant.

) Case No. CR 1996 09 2317  
)  
)  
) JUDGE JAMES E. MURPHY  
)  
)  
) ORDER AND JOURNAL ENTRY  
)  
)  
)  
)

On November 6, 1996, Defendant Thomas Charles Crangle aka Crangkel entered a plea of guilty to Count Three as alleged in the indictment, to wit, a violation of R.C. 29076.05(A)(4), and the Court informed Defendant of his potential term of imprisonment under the Revised Code of two, three, four or five years of actual incarceration, up to a \$10,000 fine, and when released from prison, either three, four, or five years of community control. On November 26, 1996, Defendant was sentenced to term of mandatory imprisonment of five years, but neither the sentencing entry, nor the sentencing transcript, make specific reference to community control.

The State of Ohio filed its Motion for Resentencing in this matter more than eight years later, on December 8, 2004, relying upon *State v. Jordan*, 2004-Ohio-6085, 104 Ohio St.3d 21, decided by the Ohio Supreme Court on December 1, 2004, and Defendant responded in opposition. Both the State and Defendant have briefed the issues for the Court.



RY  
5Y

On May 19, 2005, Harry Hageman, Deputy Director, Division of Parole and Community Services, Department of Rehabilitation and Corrections, State of Ohio, caused to be filed in the Ninth Judicial District Court of Appeals a Petition for Writ of Mandamus to compel this Court to vacate and void Defendant's original sentence and resentence Defendant based on the *Jordan* decision, relating that Defendant had "completed his prison term in 2001".

Upon consideration, the Court finds the State's motion not well taken, and the same is hereby ordered denied. This Court finds that it sentenced on Defendant on November 26, 1996, and that no appeal of any kind, by any party, was perfected with respect to such sentencing. The Court further finds that Defendant indeed completed his sentence, as ordered by this Court, in 2001. Accordingly, in the absence of a direct appeal, and with Defendant having completed his sentence as ordered by this Court, the Court finds that it does not have jurisdiction to act upon or consider the State's motion to resentence Defendant. Although the Court is mindful of the recent decision in *Jordan*, this Court cannot exercise jurisdiction in the present matter as requested by the State, as the same would exceed the jurisdiction of this Court.

Accordingly, it is the Order of this Court that the State of Ohio's "Motion for Resentencing", and its request to schedule a hearing thereon, is DENIED.

IT IS SO ORDERED.

  
JUDGE JAMES E. MURPHY

cc: Assistant Prosecutor Kristina D. Raynes  
Assistant Public Defender Stephen P. Hardwick