

IN THE SUPREME COURT OF OHIO

ORIGINAL
ON COMPUTER - TAI

Henry Hernandez

Case No. 05-2258

Petitioner,

HABEAS CORPUS

vs.

Original Action

Bennie Kelly, Warden

Respondent

PETITIONER'S REPLY TO RESPONDENT'S RETURN OF WRIT

John P. Parker
0041243
4403 St. Clair Avenue
Cleveland, Ohio 44103
216-881-0900
johnpparker@earthlink.net

Counsel for Petitioner

Jim Petro, Esq.
Attorney General
M. Scott Criss
Ass't. Attorney General
150 E. Gay Street, 16th Floor
Columbus, OH 43215-6001

Counsel for Respondent

FILED
DEC 28 2005
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SUPREME COURT OF OHIO

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SUPREME COURT OF OHIO

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BRIEF

I.

The narrow and primary issue before this court is whether there is legal authority to incarcerate Henry Hernandez. Mr. Hernandez has cited clear authority from this Court which states that the APA does not have the authority to place a prisoner on post release control unless it has been ordered by the trial court through its sentencing journal entry after the prisoner was advised in court that post release control is part of his sentence. Woods v. Telb, 89 Ohio St.3d 504, 2000 Ohio 171; State v. Jordan, 104 Ohio St.3d 21, 2004 Ohio 6085.

The respondent does not dispute the law as it relates to this case but simply states, in essence, it does not matter what the courts rule, it matters what the legislature states.

This court must rule that Mr. Hernandez is incarcerated without legal authority and order his immediate release.

A secondary issue concerns whether, once released, can the APA place Mr. Hernandez on post release control and continue his supervision. If Senate Bill 2's "Truth in Sentencing" law means anything, it should be that a defendant can rely on the sentence agreed to by him, the State of Ohio and the trial judge and imposed in open court. The state must not be allowed to—in this case—five years later place him on supervision and then revoke his supervision and sentence him to prison. Post release control is a function of the executive branch of government. The judiciary is independent and decides the "sentence" to be imposed. The APA has usurped this sentencing power of the trial court in clear contravention of the Ohio and federal constitutions and the rulings from this Court. If the state of Ohio wants to place Mr. Hernandez on post release control, even though it agreed in August of 2000 that it would not, then it must institute a delayed

appeal of the agreed sentence or some other legal action and allow the lower courts to decide the issue.

Mr. Hernandez believes and the record reflects that he has served the agreed upon sentence and that he has no further obligation to the State of Ohio. This court must enforce the plea bargain and release Mr. Hernandez from any further obligation in the underlying case, i.e. order that he is not to be placed on post release control.

In the alternative, this court must only order his immediate release and let the State of Ohio pursue whatever legal remedy it believes it has through the lower courts.

II.

The respondent claims that in preparing the return of writ it was discovered for the first time that Hernandez was not informed at sentencing concerning his obligations on post release control and that the sentencing entry did not contain an order that post release control was part of his judicially imposed sentence. (Return of Writ, page12)

However, undersigned counsel had a telephone conversation with Traci Tallheimer of the Ohio Adult Parole Authority November 17, 2004 concerning the APA's intention of placing Mr. Hernandez on post release control. In short, counsel informed Ms. Tallheimer that the APA had no authority, according to the Supreme Court of Ohio, to place Mr. Hernandez on post release control because the trial judge did not order it.

Counsel then sent a letter to Ms. Tallheimer on December 13, 2004 documenting this conversation and advising the APA once again that the Supreme Court of Ohio had recently released the case of State v. Jordan, 104 Ohio St. 3d 21, 2004 Ohio 6085 which affirmed an

earlier decision that held that “Unless a trial court includes post release control in its sentence, the Adult Parole Authority is without authority to impose it.” (See attached letter, Exhibit 1)

Contrary to its position stated in the Return of Writ, the APA did have the opportunity to know of Mr. Hernandez’s situation and in fact was informed orally and in writing several months before Mr. Hernandez was placed on post release control that it had no authority to do so. The APA ignored counsel’s warnings and ignored the clear and unambiguous rulings from this Court that it had no authority to place Mr. Hernandez on post release control. Further, the APA took no legal action to have Mr. Hernandez re-sentenced or to institute a delayed appeal of the sentence imposed and agreed to by the State, i.e. sevens years incarceration with no post release control. Instead, the APA performed a judicial function without legal authority. See Woods, supra, at 512 “...post- release control is part of the original judicially imposed sentence.”

The APA’s brazen stance that it does not have to follow the clear and unambiguous decisions of the Supreme Court of Ohio is troubling, to say the least. The APA has decided that it will decide the sentence even though this Court has said in Woods and Jordan that it does not have authority to do so.

It does not matter whether the post release control is discretionary or mandatory. Post release control is a judicial function and not an executive function as this court has made clear. Contrary to the respondent’s position in the Return of Writ (page 6), Jordan is not silent on what is necessary for the APA to impose a mandatory period of post release control. Both Woods and Jordan require a trial court order, i.e. a sentencing court order, because post release control is authorized only by a judicial order.

The U.S. Supreme Court decided over 200 hundred years ago “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule....This is the very essence of judicial duty.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

The APA’s duty is defined by this Court’s interpretation of the law with respect to post release control. Without judicial authorization, the APA is without authority to place Mr. Hernandez on supervision or revoke his supervision and sentence him to prison.

The APA’s blunt assertion that it will continue to place inmates on post release control in the absence of judicial authorization (Return of Writ, page 9) reflects a fundamental misunderstanding of the separation of powers and basic constitutional law. If necessary, this court will be required, on a case by case basis, of enforcing its decisions in Woods and Jordan.

This court must order the release of Mr. Hernandez immediately. By doing so, it will be upholding the separation of powers guaranteed in the Ohio and federal constitutions. This court must further order that the APA must not place Mr. Hernandez on a period of post release control; in the alternative, the issue of whether there may be a period of post release control must be decided by the lower courts if the State of Ohio institutes proper legal proceedings seeking such an order.

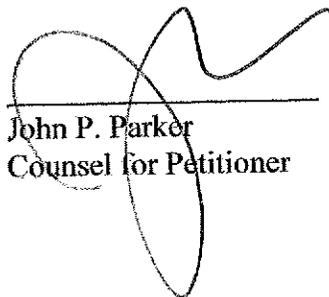
III.

It must be noted that Mr. Hernandez is incarcerated for violating the terms of his post release control which would be constitutionally protected conduct but for the fact that the "parole" rules prohibit the conduct. In particular, leaving the State of Ohio without permission, report any contact with a law enforcement officer and associating with a person with a criminal background without permission. (Return of Writ, Appendix F) Mr. Hernandez has not been charged or convicted of violating any criminal statute.

IV.

Mr. Hernandez requests that the Respondent be ordered to pay his attorney's fees in this action (\$2,000.00) and such further relief as this Honorable Court deems appropriate.

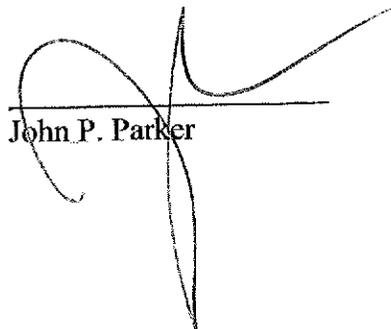
Respectfully submitted,



John P. Parker
Counsel for Petitioner

SERVICE

A copy of the foregoing document was served on Jim Petro, Attorney General, M. Scott Criss, Ass't. Attorney General, 150 E. Gay Street, 16th Floor, Columbus, Ohio 43215-6001 this 27th day of December 2005 via regular U.S. mail.



John P. Parker

Appendix

John P. Parker
Attorney at Law
The Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103
216.881.0900

December 13, 2004

johnpparker@earthlink.net

Traci Tallheimer
Ohio Parole Board
1050 Freeway Drive North
Columbus, OH 43229

Re: Henry Hernandez
358-168

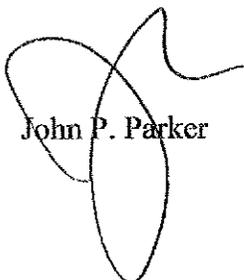
Dear Ms. Tallheimer,

I write concerning my client, Henry Hernandez. We spoke on the telephone on or about November 17, 2004 concerning whether Mr. Hernandez would be placed on Post Release Control once released from prison. The trial judge did not place Mr. Hernandez on post release control. My understanding is that if the trial judge does not include post release control in the sentencing journal entry, then the Parole Board does not have the authority to impose post release control. You expressed an opinion that the Parole Board would place Mr. Hernandez on pre regardless of what the trial court ordered in its sentencing journal entry.

I write today to emphasize that the Ohio Supreme Court has decided that "Unless a trial court includes post release control in its sentence, the Adult Parole Authority is without authority to impose it." Woods v. Telb, 89 Ohio St.3d 504; State v. Jordan, 104 Ohio St.3d 21, 2004 Ohio 6085, paragraph 19 (December 1, 2004).

If the Parole Authority places Mr. Hernandez on post release control improperly, then he will pursue all legal remedies.

Respectfully,



John P. Parker

Exhibit 1



STATE OF OHIO, } SS. IN THE COURT OF COMMON PLEAS
 CUYAHOGA COUNTY }
 STATE OF OHIO } PLAINTIFF
 VS. }
 HENRY HERNANDEZ } DEFENDANT

TO-WIT: AUGUST 09 MAY TERM, 2000
 NO. CR 360708 2000

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

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. FUERST, 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 Criminal
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. 20 05

GERALD E. FUERST, Clerk
 By Andrea McAffey Deputy

RECEIVED FOR FILING
 AUG 22 2000
 GERALD E. FUERST, CLERK
 BY PO

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

JUDGE [Signature] TIMOTHY MCCORMICK

COPIES SENT TO:
 Sheriff 8280008
 Defendant

Other LORCI & cost
Manfield CI # 358168

EXHIBIT 1-B

11 8-28-00

10/05/2005 11:07 2167874224

ADULT PAROLE AUTHORITY

PAGE 11/29

UNIT: A0901
DATE OF HOD: 9-15-05
WHERE CONFINED: _____
RECEPTION CENTER: _____

DATE OF HEARING: 10-6-05
TOTAL PRISON TERM SANCTION: 1278
PRISON SANCTION USED: _____
TOTAL JAIL TIME: 8
PRISON SANCTION AVAILABLE: 1270

INSTITUTION: MAJL
DATE OF BIRTH: 05/10/1972

SANCTION IMPOSED: 160
SOCIAL SECURITY NUMBER: ██████████-0588

HERRNANDEZ, HENRY, NO. A358168.00, was serving a sentence of confinement in a state correctional institution operated by the Department of Rehabilitation and Correction, and was released to post release control on 2-7-05 under the supervision of the Ohio Adult Parole Authority. On 10-6-05 a hearing was held as pursuant to Section 2967.22 of the Revised Code.

8 Available days previously served in local custody credited in full on 9-22-05.

As a result of a finding of guilt on Rule(s) # 3, 8, 11 a prison term of 160 days shall be served.

The prison term shall begin effective 10-6-05.

Upon release, report in person, to PO 107
M. COV, Asst. Dir.

Additional sanctions:
See Sanction Receipt

CC: Offender
Unit
Parole Board
ASA Field Services

BY: Mil K
HEARING OFFICER
Komay
Print Last Name

ADULT PAROLE AUTHORITY Sanction Receipt

Name: HERNANDEZ, HENRY	Offender #: 358 168
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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: _____

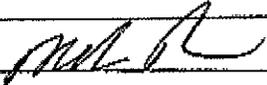
D. Other Sanction: _____

1) Tsc SAP

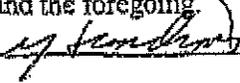
2) To report as instructed

3) To reside only at APH approved residence

4) No contact w/ Hector Chavez Jr.

Hearing Officer: 	Date: 10-6-05
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I have read (been read) and understand the foregoing.

Offender Signature: 	Date:
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I certify that this notice was hand-delivered to the above on:

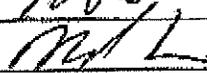
Date: 10-6-05	Time: 10:00 AM	Date: 10-6-05
Witness Signature: 		

Exhibit 2-B

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, 9th 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
 Offender arrested by the State of Texas State Trooper
 on 6-18-05 after a routine Trooper Stop. Offender
 also seen in passenger w/ another parolee
 Hector Chavez Jr. Offender found \$10,000 in vehicle
 belongs to Offender Chavez. Offender never rec'd
 permission from him to leave the State.
 Offenders also jumped back parole (H.D. w/
 a package regarding offender parolee attributes while
 on supervision. However offender has never been stopped
 conviction was made in a vehicle w/ another parolee w/ paper
 from Trooper, conviction. My monitor never saw you in violation
 which indicates repeated illegal activity.*

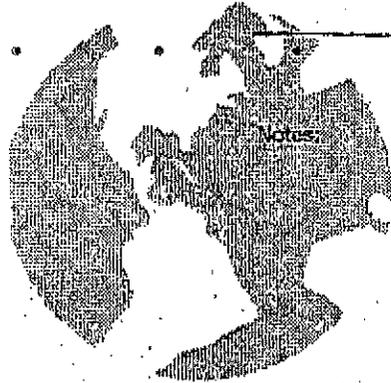
Exhibit 2-C

Adult Parole Authority
615 West Superior Ave.
Room 960
Cleveland, OH 44113
(216) 787-3010
Fax: (216) 787-4224

facsimile transmittal

To: John Parker Fax: 881.3928
From: Yolanda Prof Date:
Re: Pages: 4
CC:

- Urgent
- For Review
- Please Comment
- Please Reply
- Please Recycle



CONFIDENTIAL

Exhibit 2-D