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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR
GREAT GENERAL INTEREST AND DOES NOT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

Ralph E. Clark, appellant herein, seeks to invoke this Honorable Court's jurisdiction over this discretionary appeal. For the following reasons, jurisdiction is unwarranted, and the appeal should be dismissed.

Appellant argues that a guilty plea is not knowing, voluntary, and intelligent where the defendant is misinformed by the trial court that he will be subject to post-release control after his release from prison rather than parole. In his appeal to the Eleventh District Court of Appeals, appellant argued that his "guilty plea was not knowing, voluntary, and intelligent because the trial court repeatedly misinformed him that he would be subject to a limited period of post-release control upon his release from prison." *State v. Clark*, 11th Dist. App. No. 2006-A-0004 at ¶10, 2007-Ohio-1780. The Eleventh District Court of Appeals found that appellant's plea was in substantial compliance with Crim.R. 11 and that there was no prejudicial effect. *Id.* at ¶26-28.

In making its decision, the Eleventh District Court of Appeals reasoned that post-release control is not part of a defendant's sentence and that the "maximum penalty" that could be imposed upon appellant was life imprisonment. *Id.* at ¶21. The court found that "the trial court was under no duty to explain to [appellant] the circumstances of parole." *Id.* The court did not find the decision relied upon by appellant, *State v. Prom*, 12th Dist. App. No. CA2002-01-007, 2003-Ohio-6543, to be persuasive. *Id.* at ¶23. The court instead followed in the footsteps of the Fourth and First Appellate Districts in finding that appellant was aware of the maximum penalty

he faced, thus, rendering his plea voluntary. *Id.* at 24-25, See *State v. Hamilton*, 4th Dist. App. No. 05CA4, 2005-Ohio-5450, *State v. Baker*, 1st Dist. App. No. C-050791, 2006-Ohio-4902.



The discretionary appeal at bar presents neither a constitutional violation, an issue of great public or general interest, nor an issue of first impression. Therefore, appellant's bid for jurisdiction must fail.

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STATEMENT OF THE CASE AND FACTS

On May 13, 2005, an indictment was filed charging Ralph E. Clark, appellant herein, with one Count of Aggravated Murder with a gun specification, in violation of R.C. 2903.01(A); one Count of Murder with a gun specification, in violation of R.C. 2903.02(A); and one Count of Murder with a gun specification, in violation of R.C. 2903.02(B). On May 18, 2005, appellant was arraigned and entered a plea of not guilty to the charges in the indictment. On January 13, 2006, appellant entered a plea of guilty to Aggravated Murder with a three year gun specification under R.C. 2903.01 and R.C. 2941.145. Pursuant to a negotiated plea agreement, the State of Ohio dismissed Counts Two and Three of the indictment. No pre-sentence investigation was ordered and sentencing was scheduled for January 18, 2006.

Appellant was sentenced to life imprisonment with the possibility of parole after twenty-five years, in addition to three years imprisonment for the gun specification. The sentences were ordered to be served consecutively. The Eleventh District Court of Appeals affirmed appellant's negotiated plea of guilty and reversed the trial court's sentence as to financial penalties imposed outside of appellant's presence. *Clark* at ¶45.

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ARGUMENT

PROPOSITION OF LAW

A GUILTY PLEA TO A SENTENCE CARRYING A LIFE SENTENCE IS NOT KNOWING, VOLUNTARY, AND INTELLIGENT WHEN THE TRIAL COURT TELLS THE DEFENDANT THAT HE OR SHE WILL BE SUBJECT TO TIME-LIMITED POST-RELEASE CONTROL UPON RELEASE, INSTEAD OF INDEFINITE PAROLE.

Appellant argues that his guilty plea was not knowing, voluntary, and intelligent because the trial court informed him that, after his release, he would be subject to post-release control and the maximum penalty he would face as a post-release control sanction would be incarceration of not more than nine months and totaling no more than half of his original sentence. This argument lacks merit, as the record reveals that the trial court fully complied with Crim.R. 11(C)(2) when it accepted appellant's guilty plea.

Pursuant to Crim.R.11(C)(2), a trial court may not accept a plea of guilty without first addressing the defendant personally and doing all of the following:

- (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
- (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
- (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving his rights to jury trial, to confront witnesses against him or her, to have compulsory

process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

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“While literal compliance with the requirements of Crim.R. 11(C)(2) is the preferred practice, and is in some instances required, ‘the fact that the trial judge did not do so does not require vacation of the defendant’s guilty plea if the reviewing court determines that there was substantial compliance.’” *State v. Brown*, 11th Dist. No. 2003-G-2504, 2004-Ohio-1843, at ¶11, quoting, *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. “‘Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.’” *Id.*, quoting, *State v. Stewart* (1977), 51 Ohio St.2d 86, 92, 364 N.E.2d 1163. “Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect.” *Id.*, citing, *Stewart*, at 93. “The test is whether the plea would have otherwise been made.” *Id.*

Appellant argues that he was not aware of the maximum penalty he could receive as a result of his plea. However, as required by Crim.R. 11(C)(2)(a), the trial court explained to appellant the maximum penalty he could receive for pleading guilty to Aggravated Murder. The trial court advised appellant that the court will impose a sentence of life imprisonment, but that there are four modifying conditions. (T.p. plea hearing 11.) Appellant indicated that he understood this penalty. (T.p. plea hearing 12.) The court further indicated to appellant that he would be required to serve at least twenty-eight years and that he would be eligible for release at that time. (T.p. plea hearing 14.)

Appellant contends that his plea is invalid due to misinformation from the trial court relating to post-release control supervision. While the State concedes that appellant was misinformed with respect to post-release control supervision, this does not render appellant's plea invalid.

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While a defendant must be made aware of the maximum penalty he can receive before a trial court accepts his guilty plea, Crim.R.11 does not require a court to inform a defendant of possible sanctions for violating conditions of an early release from a maximum penalty. *State v. Hamilton*, 4th Dist. App. No. 05CA4 *4, 2005-Ohio-5450. Misinforming a defendant about the possibility of post-release control does not misstate the maximum penalty for Aggravated Murder. *Id.* "Because parole is not part of an offender's sentence, the maximum penalty is imprisonment for life." *Id.*

A defendant facing life imprisonment is aware that the maximum penalty is life in prison. *Id.* at *5. While the possibility of parole exists, there is no guarantee that a defendant will be granted a parole. *Id.* Early release from prison and subsequent return are both speculative, and the fact that they may occur does not change a defendant's maximum sentence. *Id.*

Appellant's argument has no merit, as it is based on speculation that appellant will get paroled. At no time did the trial court indicate to appellant that he would be guaranteed an early release from prison. In fact, when explaining to appellant about the possibility of post-release control or parole, the trial court makes frequent use of the word "if" as an indication that there is no guarantee of early release. (T.p. plea hearing 14.) Appellant is not subject to any greater penalty due to the court's post-release control information. He has at all times been subject to a maximum term of life imprisonment. Accordingly, the Eleventh District Court of Appeals did

not err in affirming appellant's guilty plea.

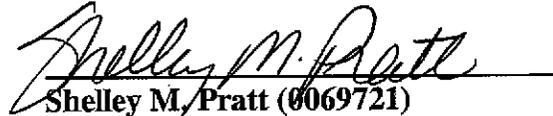
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CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests this Honorable Court to deny jurisdiction and dismiss the discretionary appeal at bar.

Respectfully submitted,

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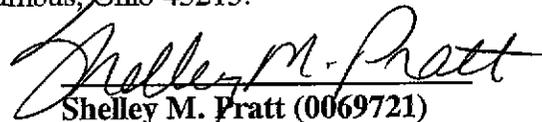
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Response to Jurisdiction has been served via ordinary U.S. Mail, postage prepaid, this 19th day of June, 2007, upon Stephen P. Hardwick, Counsel for Appellant, at Ohio Public Defender's Office, 8 East Long Street, Eleventh Floor, Columbus, Ohio 43215.



Shelley M. Pratt (0069721)

Assistant Prosecutor