IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. 2007-0983 and
Plaintiff-Appellee,	:	2007-1047
	:	
v.	:	On Appeal from the
	:	Ashtabula County of Appeals,
RALPH E. CLARK,	:	Eleventh Appellate District, Case
	:	No. 2006-CA-4
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT RALPH E. CLARK

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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 postrelease control upon release, instead of indefinite parole.

I. Introduction

Postrelease control and parole are two very different sanctions. If a defendant does not understand whether he faces postrelease control or parole, he does not understand his sentence. And when a trial court describes a void sentence during the plea colloquy, it describes no sentence at all.

II. Discussion

Parole and postrelease control are two very different sanctions.

The State asserts that the failure to correctly explain postrelease control is like the failure to correctly explain parole, but unlike parole, postrelease control is a part of a defendant's sentence. Compare State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶21 ("trial courts in this state [must] include postrelease control as part of the sentence"), and Woods v. Telb, 89 Ohio St.3d 504, 512 ("post-release control is part of the original judicially imposed sentence"), with State ex rel. Hogan v. Ghee (1999), 85 Ohio St. 3d 150, 151, 707 N.E.2d 494, 495 (parole is a "conditional release[] before the expiration of a valid sentence"). So when a judge gives a defendant incorrect information about postrelease control, the judge is erroneously describing the termination of the sentence. By contrast, when a judge gives a defendant incorrect

information about parole, the judge is talking only about the potential for conditional release before the conclusion of the sentence.

Furthermore, the sentence described in Mr. Clark's plea agreement was very different than the sentence the court ultimately imposed. Postrelease control is a part of a defendant's sentence but it may only be imposed for a maximum of five years. R.C. 2967.28. Parole is an executive decision to relieve a defendant of part of his sentence, and in Mr. Clark's case, it can extend for life.

The theoretical differences translate into very real practical differences. A sentence that includes five years of postrelease control after twenty-three years in prison is far different than a sentence that includes a lifetime of restrictions, even after release. By contrast, if a defendant violates the terms of his postrelease control, he can only be imprisoned for half of his original prison term, and only in nine-month intervals. See, R.C. 2929.14(F)(1) and 2967.28. Here, the plea agreement gave Mr. Clark objectively wrong information about how his sentence will end. A defendant does understand his maximum sentence if the trial court misinforms him about what happens at the sentence's termination.

Because of the differences between postrelease control and parole, the cases concerning notification of parole rights do not apply to information concerning postrelease control.

The State's use of cases about parole to discuss misinformation about postrelease control demonstrates the inapplicability of those cases. The State asserts that since *parole* is not part of a sentence, mistakes involving

postrelease control don't matter. For example, the State starts one paragraph discussing the implications of the trial court's misinformation about postrelease control, but concludes with a sentence that discusses only parole, not postrelease control:

> Appellant contends that his plea is invalid due to misinformation from the trial court relating to postrelease control supervision. While the State concedes that appellant was misinformed with respect to postrelease control supervision, this does not render appellant's plea invalid. "[T]he trial court was under no duty to explain to [Mr. Clark] the circumstances of his parole."

State's brief at 4-5, quoting the court of appeals opinion in this case. The State's argument is a non-sequitur. It makes no sense to say that substantive misinformation about postrelease control does not matter because parole is not part of a criminal sentence.

The Fourth District makes a similar mistake, switching from a discussion about an error regarding postrelease control to the law concerning parole:

> The court's extraneous pronouncement regarding post-release control do not misstate the maximum penalty for the crime of aggravated murder. Because parole is not part of an offender's 'sentence, the maximum penalty is imprisonment for life.

State v. Hamilton, 4th Dist. No. 05CA4, 2005-Ohio-5450, at ¶13.

The sentence the trial court described in the plea colloquy was void.

Even on a theoretical level, a trial court that has described postrelease control to an inmate facing parole has not explained the maximum sentence. As this Court has explained, an illegal sentence is a nullity. State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶23-27; State v. Bezak, 2007-Ohio-

3250, 114 Ohio St. 3d 94, syllabus; State v. Beasley (1984), 14 Ohio St.3d 74, 75. A sentence for aggravated murder that includes postrelease control is void because postrelease control does not attach to sentences for the offense. R.C. 2967.28(B) and (C) (postrelease control attaches only to first, second, third, fourth, and fifth degree felonies). So when a trial court explains that postrelease control is part of a sentence for aggravated murder, the court is not explaining a sentence, the court is explaining a nullity.

If a defendant does not understand what happens at the end of a sentence, he does not understand the maximum sentence.

The explanations of postrelease control given to Mr. Clark shifted throughout the trial court proceedings. The plea agreement stated that he would be released from prison. "I understand that after I am released from prison, I may have a period of post-release control for five (5) years following my release from prison." Plea agreement at 1. At the plea colloquy and sentencing hearing, the trial court stated that postrelease control would be imposed "if" Mr. Clark was released. T.p. (plea hearing) 14-15, T.p. (sentencing) 38. The judgment entry of sentence omitted postrelease control entirely.

Given that the trial court and counsel could not consistently explain how Mr. Clark's sentence would end, it is not surprising that Mr. Clark would not understand his maximum sentence. This Court should vacate Mr. Clark's sentence.

CONCLUSION

Asking a citizen to plead guilty to aggravated murder is serious. If a defendant does not know how the sentence can end, the defendant does not understand the sentence. Describing five years of postrelease control when a defendant faces a lifetime of parole is not even close enough for government work.

This Court should reverse the decision of the court of appeals, vacate Mr. Clark's plea, and remand this case for trial.

Respectfully submitted,

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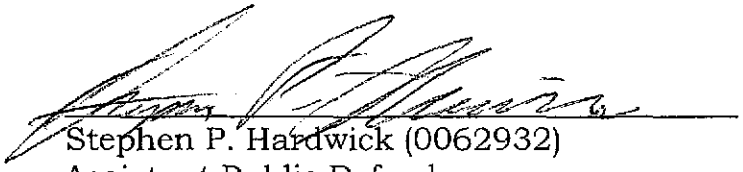

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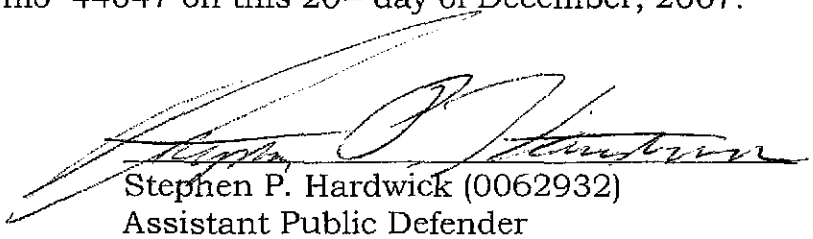
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY BRIEF OF APPELLANT RALPH E. CLARK** has been sent by U.S. Mail, postage prepaid to Shelley Pratt, Ashtabula County Assistant Prosecutor, Courthouse 25 West Jefferson Street, Jefferson, Ohio 44047 on this 20th day of December, 2007.



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