

In the  
**Supreme Court of Ohio**

STATE OF OHIO, : Case No. 2008-331  
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 Plaintiff-Appellee, :  
 :  
 : On Appeal from the  
 v. : Madison County  
 : Court of Appeals,  
 DAVID HARRISON, : Twelfth Appellate District  
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 :  
 Defendant-Appellant. : Court of Appeals Case  
 : No. CA 2006-08-028  
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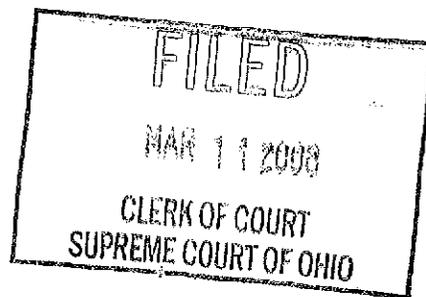
**MEMORANDUM OF APPELLEE STATE OF OHIO  
IN OPPOSITION TO JURISDICTION**

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## INTRODUCTION

This matter does not warrant the Court's review, as it does not raise a significant legal issue. The issues that Appellant claims to be significant and worthy of review have been fully appealed and soundly defeated.

This Court's ruling in *Hernandez v. Kelly* (2006), 108 Ohio St. 3d 395, is not applicable to the facts in this case. Appellant does not state correctly the holding in *Hernandez*. *Hernandez* does not stand for the legal proposition that "trial courts do not have jurisdiction to resentence citizens whose journalized sentences have expired." (Appellant's memorandum in support of jurisdiction p. 1.) Further, the Appellant's double-jeopardy argument is equally flawed. Logically, jeopardy cannot attach when a defendant withdraws his previously entered guilty plea. The plea withdrawal effectively removed any jeopardy that attached with the court's acceptance of appellant's guilty pleas. *State v. Strange* (12th Dist. 1990), 70 Ohio App. 3d 338.

The record, the decisions below, and even Appellant David Harrison's memorandum supporting jurisdiction fail to show that this case presents a substantial constitutional question for this Court to review. For all these reasons, the Court should not review this case.

## STATEMENT OF THE CASE AND FACTS

On May 2, 2002, dispatcher Denise Kohler of the Wapakoneta Police Department discovered a running tape recorder placed behind a trash can in the restroom of the ladies' locker room. The tape recorder belonged to Appellant, David Harrison, who was then the chief of police. Shortly after the discovery of his tape recorder, Appellant notified the city manager that he was retiring effective immediately. On May 8, 2002, based on these facts, the police department and the Ohio Bureau of Criminal Identification initiated an investigation which resulted in Appellant's conviction of numerous charges involving child pornography.

During the investigation, a floppy disk located in Appellant's office was seized and found which contained child pornography and log transfer files indicating mass file transfers between Appellant's office computer and his laptop computer. Investigators secured a search warrant which they executed on June 17, 2002, at Appellant's home. The electronic storage media seized during the searches revealed hundreds of images of suspected child pornography. Fifteen images were selected for prosecution. The investigation also contained voluminous internet searches for websites containing sexual content involving children.

On June 17, 2003, Appellant appeared with counsel in the Auglaize County Court of Common Pleas in front of visiting Judge Charles D. Steele,<sup>1</sup> and pleaded guilty to a bill of information containing six counts.

On that date, the matter was set for sentencing, and the court ordered that a presentence report be completed. On July 31, 2003, Appellant was sentenced to serve one year in prison and warned on the record of the possibility of post-release control. The court admonished Appellant that he could face three years of post-release control, when in fact the court should have informed Appellant that he would be receiving a mandatory five years of post-release control. Neither the special prosecutor nor defense counsel corrected the judge or the subsequent entry. Regardless, Appellant was made aware of the possibility of post-release control.

On November 12, 2003, the court filed a journal entry documenting a judicial release hearing held on October 3, 2003, in which the court denied Appellant's petition for judicial release. However, the court out of concern for Appellant's safety modified the sentence to

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<sup>1</sup> Because Appellant had been Chief of Police for Wapakoneta, a visiting judge was appointed, as was a special prosecutor, Lawrence Huffman. Special Prosecutor Huffman is not associated in any way with the special prosecutors in the case sub judice.

permit Appellant to serve the remainder of the sentence at the Auglaize County Jail instead being returned to prison.<sup>2</sup>

On February 18, 2005, the elected Auglaize County Prosecutor filed a motion to resentence Appellant to impose the mandatory five-year post-release-control term. Appellant submitted his opposition to the motion for resentencing on March 8, 2005.

On March 23, 2005, the court granted the State's motion to resentence Appellant, citing the errors made at the prior sentencing hearing. The court found that it did not have discretion in the ordering the five-year post-release-control term and neither did the Adult Parole Authority. The Court found that:

There is a conflict within this state as to the proper disposition when the sentencing court fails to properly advise an offender about post release control. Nevertheless, that conflict is not in play here as the statutory mandatory term of post release control supersedes any argument relating to the viability of a remand for resentencing. R.C. 2967.28 (B)(1) states that each sentence for a felony sex offense **shall** contain a five-year period of post release control. Because the court, and the Adult Parole Authority for that matter, has no discretion to avoid the imposition of post release control in this case, any order other than a resentencing would constitute an attempt to render the statutory mandatory term of five years of post release control a nullity. See *State v. Harris*, 2003 Ohio 1003.

Judge Steele entry granting resentencing, dated March 22, 2005.

On March 25, 2005, Appellant filed a writ of prohibition in the Third District Court of Appeals to prevent the trial court from proceeding with the resentencing. On March 31, 2005, the Third District Court of Appeals denied Appellant's writ of prohibition. *Harrison v. Steele, et al.*,

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<sup>2</sup> At this hearing, the court denied Appellant's petition for judicial release, which would normally cause Appellant to return to prison. Instead, the Judge circumvented that procedure and modified Appellant's sentence to have him serve the remainder of his time at the Auglaize County Jail. Appellee hypothesizes that this allowed Appellant to slip through the cracks of the system, thereby preventing the Adult Parole Authority the opportunity to place Appellant on post-release control.

2005-Ohio-1608. The Court of Appeals held that a “writ of prohibition will not lie to prevent an **anticipated** erroneous judgment.” (Emphasis added.) *Id.* at ¶ 5. It further held that Appellant failed to show that there was no other adequate remedy in the law to address his cause. *Id.* at ¶ 6. The court stated that the Appellant, if resentenced, could “seek a stay of the execution of the judgment and raise any error or irregularity in the re-sentencing order on appeal.” *Id.* at ¶ 8.

On March 29, 2005, the trial court permitted Appellant to withdraw his guilty pleas to all of the charges. Appellant appeared in court with counsel. The court engaged in direct conversation with Appellant before he withdrew his pleas. The court asked Appellant if he understood that the resentencing would pertain just to the mandatory post-release-control period of five years and that his prison sentence would not be changed. Appellant answered in the affirmative. The court then asked whether Appellant understood that his counsel had indicated that if the five years of post release control were imposed, he would take that matter up on appeal, to which Appellant answered affirmatively. The Court even suggested that defense counsel’s argument was “not without merit.” The Court then asked if it was Appellant’s desire to withdraw his former guilty pleas, to which Appellant indicated that it was his desire to do so.

Days prior to the withdrawal of the guilty pleas, a telephone conference took place between Defense Counsel Norman Sirak, visiting judge Charles D. Steele, and the yet-to-be-appointed new special prosecuting attorney, Scott A. Longo. During that telephone conference, counsel for Appellant told the judge that his client wanted to withdraw his previously entered guilty plea. Attorney Longo made it clear to all the parties that if Appellant withdrew his guilty plea, the state would seek a dismissal of the 2003 case and present the case to the grand jury for full consideration of all potential charges. All parties involved were made aware of the new special prosecuting attorney’s intentions. In spite of this, and after the court indicated its belief

that he may very well have an appellate issue, Appellant voluntarily withdrew his guilty plea on March 29, 2005.

On April 20, 2005, Special Prosecuting Attorney, Scott A. Longo, was appointed to represent the State of Ohio. On May 5, 2005, the State dismissed of *State of Ohio v. David Harrison*, Case No. 2003-CR-0083.

On June 23, 2005, the Auglaize County Grand Jury handed down a twenty-three count indictment against David Harrison. On July 5, 2005, Appellant David Harrison appeared with counsel, Leonard Yelsky, for arraignment on this case in the Auglaize County Court of Common Pleas, where he pleaded not guilty to all the charges and was released on his own recognizance. On October 6, 2005, the case was transferred to Madison County and assigned to Judge Robert D. Nichols.

After numerous pretrial motions and hearings, none of which included a motion to dismiss based upon double jeopardy, the matter proceeded to jury trial on March 6, 2006. The jury returned its guilty verdict on March 13, 2006. On April 7, 2006, Appellant, through his new attorney, Dean Boland, filed a writ of prohibition in the Twelfth District Court of Appeals asking for an order preventing the trial court from proceeding with sentencing. Subsequently, on May 8, 2006, fifty-three days after his conviction, Appellant filed a motion to dismiss before the Madison County Court of Common Pleas. On June 9, 2006, the Twelfth District Court of Appeals denied Appellant's writ of prohibition.

The trial court sentenced Appellant to an aggregate of six years of incarceration, with credit for time served. He appealed the verdicts, and the Twelfth District unanimously affirmed the convictions.

## **THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This case does not present any issue of public or great general interest. It does not concern a question of statewide interest, nor does it involve a substantial constitutional question. Appellant Harrison's case is unworthy of the Court's discretionary jurisdiction for two reasons. First, the issues presented in this case are unlikely to recur. Second, Ohio lower courts do not require further guidance on the issues presented.

### **A. The issues presented in this case are unlikely to recur.**

Rarely if ever has a defendant withdrawn his guilty plea *after* serving time in prison to contest the imminent imposition of a previously not imposed post-release-control sanction. Ordinarily, when a defendant has been found guilty or after entering a guilty plea and is confronted with an unexpected decision of the court that interferes with the prior guilty finding or plea, they will appeal. Oftentimes an appeal is the only formal way to correct such a perceived wrong by a convicted defendant. An appeal in this case after resentencing may well have been the most prudent option for Appellant. With full knowledge of the potential consequences, as well as the trial court explaining the court's position on the matter, Appellant chose to proceed with a plea withdrawal. Although unwise and difficult to understand, Appellant freely chose to withdraw his plea. This act allowed the State of Ohio to dismiss the original case and proceed to reinitiate the case in the grand jury. The conduct of Appellant is unlikely to occur again and therefore this matter is not worthy of this Court's discretionary review.

### **B. Ohio's lower courts do not require further guidance on the issues presented.**

Ohio's courts are aware of this Court's holding in *Hernandez* and do not require additional guidance on how to apply this precedent. Appellant does not identify any split among Ohio's appellate districts and offers no evidence of confusion among lower courts.

In response to the court's holding in *Hernandez*, the General Assembly amended R.C. 2929.19(B)(3)(c) and enacted R.C. 2929.191. The amended version of R.C. 2929.19(B)(3)(c) states that:

R.C. 2929.191 applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of this section and failed to notify the offender pursuant to division (B)(3)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

R.C. 2929.191(A)(1) states that if an offender was sentenced prior to July 11, 2006, and the trial court failed to notify the offender that he or she would be subject to post-release control, either at the hearing or in the sentencing judgment entry, the court may hold a new hearing subject to R.C. 2929.191(C) and prepare a new judgment entry to correct errors or add missing terms relating to post-release control. Although Appellant was resentenced after July 11, 2006, the trial court *did* notify him of post-release control, albeit the court's description of the potentially applicable term of PRC was incorrect. But R.C. 2929.191(A)(1) does not apply to Appellant because he chose not to be resentenced by voluntarily withdrawing his guilty plea.

Appellant has failed to show why this case raises a substantial constitutional question or why it involves a question of public or great general interest. Instead, he seeks only to relitigate meritless arguments that pertain only to his bizarrely postured case. There is no confusion by lower courts either in the applicability of *Hernandez* or the subsequent provisions that the legislature enacted to deal with cases that involve similar facts.

Finally, there is no split in authority among the lower courts that would require this Court's resolution.

## ARGUMENT

### State's Proposition of Law:

*In a criminal case, when a defendant voluntarily rescinds his guilty plea after serving a portion of his sentence, and when the original case is dismissed and he is later indicted, tried, and convicted, a subsequent sentencing violates neither double jeopardy nor due process.*

In support of Appellant's assertion that this Court should review his case, he cites this Court's ruling in *Hernandez v. Kelly*, (2006) 108 Ohio St. 3d 395. He incorrectly states that the holding in *Hernandez* was that trial courts do not have jurisdiction to re-sentence defendants whose journalized sentences have expired. Rather, *Hernandez* held that the Adult Parole Authority (APA) cannot impose post-release control (PRC) on a defendant when the trial court failed to notify the defendant either at the time of the plea or by the entry of conviction that he would be subject to post-release control.

*Hernandez* does not apply to this case. There, the appellant withdrew his guilty plea and the court did not re-sentence him. Further, unlike the defendant in *Hernandez*, Appellant received notice that he was subject to PRC, as the sentencing court notified him that he would be subject to up to *three* years of PRC (although he was subject to five years of PRC). This was done at the time of his plea and again at his sentencing. Although the court incorrectly informed him of the amount of PRC, Appellant received notice that he was going to be a candidate for PRC. Finally, it was the court that brought Appellant back for re-sentencing, not as in *Hernandez*, the APA.

The failure to impose a five-year mandatory post-release-control term makes a sentence void, not merely voidable. To do anything other than to remand the case for re-sentencing attempts to render the sentence a nullity. *State v. Harris*, 2003-Ohio-1003 ¶ 3. Where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to re-sentence the defendant. *State v. Beasley* (1984), 14 Ohio St. 3d 74. Appellant at the time of the

re-sentencing, unlike in *Hernandez*, had an adequate remedy at law, which was to appeal the resentencing. He chose to withdraw his guilty plea on the bill of information rather than to allow the resentencing to take place and appeal. This was so, even after the trial court explained to him in the courtroom and on the record that “it’s this Court’s opinion that his (counsel’s) argument is not without merit.” By contrast, in *Hernandez* the defendant objected to the imposition of PRC by the APA, not the judge’s original sentence. Because Appellant withdrew his guilty plea and was not therefore re-sentenced, any discussion of *Hernandez* is moot.

Appellant argues that his prosecution in Madison County should have been barred by double jeopardy. He is incorrect. A double jeopardy claim must be raised pretrial, and if not made then, it is waived under Crim. R. 12(H). Appellant did not raise a double jeopardy claim pretrial before the Madison County trial began. Double jeopardy is a defense which must be raised in the trial court, and does not affect the court’s jurisdiction but rather the sentence and judgment. *Foran v. Maxwell* (1962), 173 Ohio St. 561, 563.

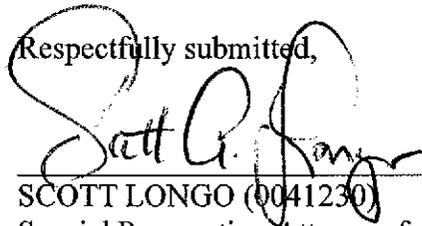
The original bill of information in this case was for six counts. The indictment was for twenty-three counts. Many of the dates contained in the counts covered by the indictment were different from the dates contained in the bill of information. In fact, the bulk of the indicted counts were completely different from those contained in the bill of information. Double jeopardy principles protect only against the imposition of multiple criminal punishments for the same offense, and then only when such occurs in successive proceedings. *State v. Fields* (12th Dist.), 1997 Ohio App. LEXIS 1243. Appellant’s plea withdrawal effectively removed any jeopardy that attached with the court’s acceptance of his guilty plea, and as a result, Appellant’s arguments regarding any double jeopardy claim are without merit. *State v. Strange* (1990), 70 Ohio App. 3d 338. Once the 2003 case was dismissed after the defendant withdrew his guilty plea, the defendant lost the ability to raise any objections regarding double jeopardy.

Lastly, Appellant argues that “another substantial constitutional question is whether counsel is effective in defending a case in which the key evidence is derived from computers, passed between computers and linked to Internet activity when counsel admits he is ignorant of technology issues.” (Appellant’s Motion in Support of Jurisdiction, p 2.) Counsel for Appellant, however, fails to substantiate why this would be a “substantial constitutional question.”

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his trial counsel was deficient, and that there is “a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington* (1984), 466 U.S. 668, 694. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 691. Ohio courts have found that “decisions regarding what stipulations should be made, what evidence is to be introduced, what objections should be made, and what pretrial motions should be filed, primarily involve trial strategy and tactics.” *State v. Cline*, 2006-Ohio-4782, ¶ 22 (citing *State v. Edwards* (10<sup>th</sup> Dist.1997), 119 Ohio App. 3d 106). Trial strategy issues do not otherwise raise this baseless argument to one that concerns a substantial constitutional issue and worthy of granting Appellant’s request for jurisdiction.

**CONCLUSION**

For the above reasons, this Court should deny jurisdiction in this case.

Respectfully submitted,  


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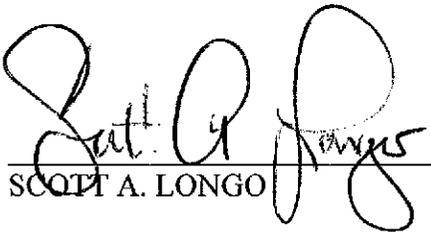
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum of Appellee State of Ohio in Opposition to Jurisdiction was served by U.S. mail this 11th day of March, 2008, upon the following counsel:

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