

In the
Supreme Court of Ohio

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

MERIT BRIEF OF APPELLEE STATE OF OHIO

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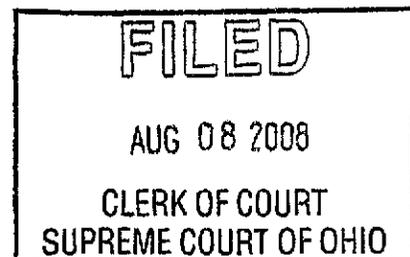


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INTRODUCTION

Appellant David Harrison, the former police chief of the Wapakoneta police department, chose to withdraw a guilty plea rather than to be resentenced to two additional years of post-release control. He knowingly withdrew his plea while being fully aware, and counseled by the trial court, that he could appeal the resentencing to the Third District Court of Appeals.

The Auglaize County trial court acted properly by bringing Harrison back for resentencing prior to the expiration of the time he was to be on post-release control. Harrison was aware that his original sentence included a period of post-release control because (1) Judge Steele explained post-release control on the record; (2) Judge Steele explicitly included post-release control in the court's judgment entry of sentence; and (3) Harrison reviewed and signed the plea form with an explanation of the five-year post-release control being imposed.

By choosing to withdraw his guilty plea, he is precluded now from claiming that his due process rights had been violated. Additionally, by choosing to withdraw his plea rather than allow the resentencing to proceed and then appeal the resentencing, his double jeopardy rights have not been violated by his subsequent prosecution. 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 Harrison's guilty pleas.

Harrison relies heavily on this Court's ruling in *Hernandez v. Kelly* (2006), 108 Ohio St. 3d 395. *Hernandez* is not applicable to the facts in this case, and Harrison does not correctly state this Court's holding. *Hernandez* does not stand for the legal proposition that "trial courts do not have jurisdiction to resentence citizens whose journalized sentences have expired." Rather, this Court held that the Adult Parole Authority cannot impose post-release control where post-release control was not included in the trial court's journal entry and explained to the defendant at the time of sentencing.

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 department's ladies' locker room. (Trial Tr. pp. 27-28) The tape recorder belonged to David Harrison, who was then the chief of police. (Trial Tr. p. 187) Shortly after the discovery of his tape recorder, Harrison notified the city manager that he was retiring effective immediately. (Trial Tr. 671-672) On May 8, 2002, based on these facts, the City of Wapakoneta requested that the Ohio Bureau of Criminal Identification and Investigation initiate an investigation into Harrison's activities.

During the investigation, law enforcement seized a floppy disk located in Harrison's office. The disk contained child pornography and log transfer files. (Trial Tr. pp. 338, 350, 354-55) The log transfer files show mass file transfers between Harrison's office computer and his laptop computer. (Trial Tr. p. 361) Investigators secured a search warrant for Harrison's house, which they executed on June 17, 2002. (Trial Tr. pp. 364-67, 436) The electronic storage media seized during the searches revealed hundreds of images of suspected child pornography. (Trial Tr. p. 522) The investigation also revealed voluminous Internet searches for websites containing sexual content involving children. (Trial Tr. pp. 606-607)

On June 17, 2003, Harrison appeared with counsel in the Auglaize County Court of Common Pleas before a visiting judge, the Honorable Judge Charles D. Steele, and pled guilty to a bill of information containing six counts, which were:

Count One: Obstruction of Official Business, in violation of O.R.C. 2921.31 (A), a felony of the fifth degree;

Count Two, Three and Four: Unauthorized Use of Computer, Cable, or Telecommunication property or service, in violation of O.R.C. 2913.04 (B), a felony of the fifth degree;

Count 5: Pandering Obscenity Involving a Minor, in violation of O.R.C. 2907.321 (A)(5), a felony of the fourth degree;

Count 6: Pandering Obscenity, in violation of O.R.C. 2907.32, a felony of the fifth degree.
(Appendix A)

On July 31, 2003, Harrison was sentenced to serve one year in prison. The court incorrectly informed Harrison during the sentencing and in its journal entry of sentence that he was subject to an optional three-year period of post-release control. The court should have informed Harrison that he would be receiving a mandatory five years of post-release control. Ohio Revised Code 2967.28(B) provides that for a felony sex offense a sentence shall include a requirement that the offender be subject to a period of post release control imposed by the Parole Board for a period of five years. Neither the special prosecutor nor defense counsel corrected the judge or the journal entry of sentence. Regardless of this error, Harrison knew that post-release control was a part of his sentence.

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 Harrison's petition for judicial release. However, the court, out of concern for the former chief of police's safety, modified the sentence to permit Harrison to serve the remainder of his time at the Auglaize County Jail instead being returned to prison. The failure to return Harrison to prison to serve the remainder of his sentence, contributed to the Adult Parole Authority's failure to impose the post-release control portion of his sentence.

On February 18, 2005, the elected Auglaize County Prosecutor moved to resentence Harrison to impose the mandatory five-year post-release-control term. On March 23, 2005, the court granted the State's motion to resentence Harrison, citing the errors made at the prior sentencing hearing. The trial court, relying on *State v. Harris*, 2003-Ohio-1003, concluded that it did not have discretion in ordering the five-year post-release-control term and neither did the Adult Parole Authority. The Court noted 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. (Emphasis added.)

Journal Entry March 22, 2005. (Appendix B)

On March 25, 2005, Harrison filed a petition for 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 Harrison's petition for a writ of prohibition. *Harrison v. Steele, et al.* 2005-Ohio-1608 (Appendix C). 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 Harrison failed to show that there was no other adequate remedy in the law to address his cause. *Id.* at ¶ 6. The court stated that Harrison, if resentenced, could "seek a stay of the execution of the judgment and raise any error or irregularity in the resentencing order on appeal." *Id.* at ¶ 8.

On March 29, 2005, the trial court proceeded with the re-sentencing of Harrison, who appeared in court with counsel. The court engaged in a direct conversation with Harrison. Tr. p.3. The court asked Harrison if he understood that the resentencing would pertain to just the mandatory post-release-control period of five years and that his prison sentence would not be changed, to which Harrison answered in the affirmative. Tr. pp. 3-4. The court then asked whether Harrison 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. Tr. p. 4. Again, Harrison answered affirmatively. The Court even suggested that defense counsel's argument was "not

without merit.” Tr. p. 4. The Court then asked if it was Harrison’s desire to withdraw his former guilty plea, to which Harrison indicated that it was his desire to do so. Tr. p. 4. (See attached transcript, Appendix D)

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, nearly three months after Harrison withdrew his guilty plea; the Auglaize County Grand Jury indicted David Harrison in a twenty-three count indictment. (Appendix E). At no time prior to the indictment did Harrison object to the court accepting his plea withdrawal, nor was an appeal filed on this issue until after his conviction. On July 5, 2005, Harrison appeared with counsel, Leonard Yelsky, in the Auglaize County Court of Common Pleas for arraignment on this indictment. On October 6, 2005 at Harrison’s request, the Auglaize County court transferred his case to Judge Robert D. Nichols of the Madison County common pleas court.

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, Harrison, through his new counsel, Dean Boland, filed a petition for a writ of prohibition in the Twelfth District Court of Appeals asking for an order preventing the trial court from proceeding with sentencing. On June 9, 2006, the Twelfth District Court of Appeals denied Harrison’s petition for a writ of prohibition. On May 8, 2006, fifty-three days after his conviction, Harrison filed a motion to dismiss before the Madison County Court of Common Pleas. This request was denied by the Judge Nichols.

The trial court sentenced Harrison to an aggregate term of six years incarceration, with credit for the one year already served. Harrison appealed the verdicts, and the Twelfth District

unanimously affirmed the convictions on December 28, 2007. This Court granted Harrison's request for jurisdiction and this appeal is now before the Court.

State of Ohio's Proposition of Law 1:

When a criminal 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, the subsequent prosecution does not violate either the defendant's double jeopardy or due process rights.¹

A. *Hernandez v. Kelly* is distinguishable.

Harrison cites *Hernandez v. Kelly* (2006), 108 Ohio St. 3d 395, to support his arguments on *res judicata*, lack of subject matter jurisdiction, double jeopardy, and due process in his first four proposition of law. Harrison's reliance on *Hernandez* is misplaced and erroneous.

Hernandez is distinguishable from this case. Harrison 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** cannot impose post-release control 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.

In *Hernandez*, the sentencing court, at re-sentencing, failed to advise properly the defendant of the term of post-release control and failed to incorporate that advisement in the journal entry. *Id.* at ¶4. After his release from confinement, troopers stopped Hernandez for a speeding violation and found \$18,000 in his car. *Id.* at ¶6. The Adult Parole Authority conducted a hearing and determined that Hernandez violated his parole and sentenced him to 160 days in prison. Hernandez filed a writ of habeas corpus demanding his release from prison because the

¹ This Proposition responds to Harrison's first four propositions of law dealing with, subject matter jurisdiction, double jeopardy, and due process.

court did not notify him at his sentencing hearing that he would be subject to supervision. *Id.* at ¶10. This Court found that Hernandez was challenging the Adult Parole Authority's imposition of the five years post-release control; he did not challenge the judge's sentencing. *Id.* at ¶12. In fact, Hernandez was essentially asking the court to enforce the trial court's sentence as per the entry.

In the case at bar, there are important distinguishing facts. The court informed Harrison about post-release control at three distinct and documented times: (1) in the plea agreement he signed, (2) on the record, by the Judge, at sentencing, and (3) the court's journal entry of sentence. The plea agreement that Harrison signed indicates that the offender, David Harrison, understands that if he is sentenced to prison for a felony sex offense, after his release from prison he will have a mandatory five years of post-release control. (Appendix F). Additionally, the trial court did advise Harrison at sentencing that he could be subject to up to three years post-release control (Appendix G), and reflected that warning in the Journal Entry. (Appendix H).

Although the original trial court incorrectly informed him of the amount of post-release control, Harrison received notice that he would be subject to post-release control. Most importantly, it was the court, not the Adult Parole Authority, which brought Harrison back for re-sentencing.

Finally, because of his voluntary withdraw of his guilty plea to the Bill of Information, Harrison was never re-sentenced by the original trial court nor was the additional term of post-release control imposed upon Harrison.

By contrast, in *Hernandez* the defendant objected to the imposition of post-release control by the Adult Parole Authority, not the judge's original sentence. Because Harrison withdrew his guilty plea and was not therefore re-sentenced, any discussion of *Hernandez* is misplaced.

B. *Res Judicata* prevents defendants from relitigating issues which could have been raised on direct appeal.

The State contends that the doctrine of *res judicata* prevented the lower courts in this case from reviewing the issue of whether the Auglaize Court of Common Pleas had the proper jurisdiction to bring the Harrison back for re-sentencing. Harrison's withdrawal of his guilty pleas and the State's dismissal of the original case prevented the Madison County trial court, and the Twelfth District Court of Appeals, from considering lack of jurisdiction by the original trial court. Essentially, Harrison waived any objection or appeal on jurisdiction when he withdrew his guilty plea.

Although not entirely clear from Harrison's Merit Brief, in Proposition of Law IV, Harrison appears to be arguing that the Madison County Court of Common Pleas and the Twelfth District Court of Appeals erroneously relied upon the doctrine of *res judicata* in denying his claim of lack of jurisdiction by the original trial court. Harrison seemingly argues that the Third District Court of Appeals denial of his Writ of Prohibition, which was decided before this Court's decision in *Hernandez*, is now void because of *Hernandez*. This might be relevant had Harrison appealed the denial of the petition for a Writ of Prohibition by the Third District Court of Appeals or had appealed the imposition of additional time under post-release control. However, Harrison's voluntary withdrawal of his plea and the subsequent dismissal by the State removes these issues from consideration, as properly held by the Madison County Court of Common Pleas and the Twelfth District Court of Appeals.

In *State v. Widman* (9th Dist.), 2001 Ohio App. LEXIS 2157, 3-4, the Ninth District Court of Appeals held:

Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial,

which resulted in that judgment of conviction, or on an appeal from that judgment.

“* res judicata is directed at procedurally barring convicted defendants from relitigating matters which were, or could have been, litigated on direct appeal.”** (Emphasis added.)

In this case, Harrison had the ability to appeal to the Third District Court of Appeals the issues of jurisdiction, double jeopardy, and due process. He waived that right to appeal when he withdrew his guilty plea and failed to take any action prior to the State’s dismissal of the Bill of Information and presentation to the Grand Jury.

C. The Auglaize County Court of Common Pleas had proper jurisdiction to bring Harrison back for re-sentencing.

If this Court finds that the doctrine of *res judicata* does not apply, then the State submits that the original trial court had the jurisdiction to bring Harrison back for re-sentencing under the holding in *State v. Harris*, 2003-Ohio-1003. The *Harris* Court held that the imposition of the mandatory term of five years post-release control was not discretionary and “any order other than a remand would constitute an attempt to render the sentence a nullity”. ¶ 3.

The failure to impose a five-year mandatory post-release-control term makes a sentence void, not merely voidable. ¶ 3. When a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the defendant. *State v. Beasley* (1984), 14 Ohio St. 3d 74.

Harris and *Beasley* were the established precedent at the time of Harrison’s re-sentencing. Harrison suggests that the original trial court should have been able to predict this Court’s forthcoming decision in *Hernandez* and hold that it did not have jurisdiction to bring Harrison back for re-sentencing. *Hernandez* was decided nearly one full year after Harrison’s attempted re-sentencing date.

Furthermore, this case is distinguished from *Hernandez* because unlike *Hernandez*, Harrison had an adequate remedy at law: to be re-sentenced and to directly appeal. Judge Steele

did make it quite clear to Harrison at the hearing that appealing the imposition of additional time of post-release control was not “without merit” and emphasized that Harrison’s attorney indicated that he would be filing that appeal, should re-sentencing take place. (See transcript of resentencing, March 29, 2005 ¶4)(Appendix C).

Harrison could have raised the issue of proper subject matter jurisdiction to the Third District Court of Appeals. Harrison waived that opportunity by withdrawing his guilty plea and not appealing the original trial court’s acceptance of the withdrawal prior to the dismissal by the State. Therefore, Harrison’s claim of improper jurisdiction is not properly before the Court.

D. Harrison’s claim of double jeopardy fails procedurally and on the merits.

Harrison’s claim of a violation of the double jeopardy clause was not properly raised at the trial court level. A double jeopardy claim must be raised pretrial, and if not made then, it is waived under Crim. R. 12(H). In *Akron v. Kirby* (1996), 113 Ohio App.3d 452, 463, the Ninth District Court of Appeals held that, when a double jeopardy argument is apparent at the time of trial, a defendant's failure to raise it before the trial court results in its waiver on appeal. See *State v. Awan* (1986), 22 Ohio St. 3d 120, 489 N.E.2d 277, syllabus. Harrison did not raise a double jeopardy claim until fifty-three days after the jury returned their guilty verdict. Accordingly, Harrison has waived any double jeopardy claim.

If this Court chooses to review the merits of Harrison’s claim, then the State contends that Harrison has failed to meet the standard for a double jeopardy claim. The double jeopardy clause provides that “no person [shall] be subject to the same offense to be twice put in jeopardy of life or limb.” *Hudson v. United States* (1997), 522 U.S. 93, 98. The rule for determining whether a person has been subjected to prosecution for the same offense is set forth in *Blockburger v. United States* (1932), 284 U.S. 299, “(T)he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not”. *Id.* at 304.

To sustain a claim of double jeopardy, it must appear: (1) that there was a former prosecution in the same state for the same offense; (2) that the same person was in jeopardy on the first prosecution; (3) that the parties are identical in the two prosecutions; and (4) that the particular offense, on the prosecution of which jeopardy attached, was such an offense as to constitute a bar. *State v. Strange* (12th Dist. 1990), 70 Ohio App. 3d 338.

In the case at bar, Harrison was originally charged in a six count Bill of Information, which was outlined previously and has been attached for this Court's review. After that Bill of Information was dismissed, the new Special Prosecutor presented the case to the Grand Jury, which handed down a twenty-three count indictment (Appendix E):

Count One and Two: Unauthorized Use of Computer, Cable, or Telecommunication property or service, in violation of O.R.C. 2913.04 (B), a felony of the fifth degree;

Count Three: Theft in Office, in violation of O.R.C. 2921.41 (A)(1), a felony of the third degree;

Count Four: Criminal Trespass, in violation of O.R.C. 2911.21 (A)(1)/(2), a misdemeanor of the fourth degree;

Counts Five, Six and Seven: Pandering Obscenity, in violation of O.R.C. 2907.32 (A)(1), a felony of the fifth degree;

Counts Eight to Twenty Two: Illegal Use of Minor in nudity-oriented material or performance, in violation of O.R.C. 2907.323 (A)(1), a felony of the second degree;

Counts Eight to Twenty Two: Illegal Use of Minor in nudity-oriented material or performance, in violation of O.R.C. 2907.323 (A)(1), a felony of the second degree;

Count Twenty-three: Tampering with Evidence, in violation of O.R.C. 2921.12 (A)(1), a felony of the third degree.

Between the two documents, only three counts are remotely similar. Each document contains at least two counts of Unauthorized Use of Computer, Cable, or Telecommunication property or service, in violation of R.C. 2913.04 (B), a felony of the fifth degree; and each document contains at least one count of Pandering Obscenity, in violation of R.C. 2907.32, a

felony of the fifth degree. However, the counts are not identical for two reasons: (1) the dates in each document cover different time periods, and (2) it is impossible to tell from the Bill of Information what actions or materials are alleged to be the basis of the charges.

The remainder of the twenty counts in the indictment is clearly not the same as was presented in the Bill of Information. Pandering Obscenity involving a minor is a completely different crime than illegal use of a Minor in nudity-oriented material or performance. In a pandering charge, there is a requisite element that the offender sought to distribute or sell the material. There is no requirement under illegal use of a minor in nudity-oriented material or performance that the offender sought to distribute or sell the material or performance. Additionally, in the Bill of Information, Harrison was charged with Obstruction of Official Business, which he was not charged with in the indictment. Also, the Bill of Information charged Harrison with a third count of Unauthorized Use of Computer, Cable, or Telecommunication property or service, which does not appear in the indictment.

Applying the *Blockburger* test to the charges of the Bill of Information and the subsequent indictment, the logical conclusion is that the indictment contained new and separate charges that required proof of additional facts that were not required to be proven in the charges contained in the Bill of Information. Therefore, Harrison's claim of double jeopardy fails on the merits and procedurally.

E. Harrison's rights were not violated by the trial court setting the matter for re-sentencing.

Harrison raises a claim of a violation of his due process rights for the first time in his Memorandum in Support of Jurisdiction and his Merit Brief. He now claims the original trial court allegedly "extracted a plea withdrawal" from him by giving him the choice of being re-sentenced or to withdraw his plea. Transcripts of the proceedings of the plea withdrawal offer a

completely different account of the events. Furthermore, Harrison's failure to raise this issue before this brief constitutes a waiver of all but plain error.

Criminal Rule 52(B) allows a court to correct a "plain error," despite the fact that there was no objection presented at trial. This rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection. *State v. Barnes*, 94 Ohio St. 3d 21, 27, 2002-Ohio-68. First, there must be an error. *State v. Hill* (2001), 92 Ohio St. 3d 191, 200, 2001-Ohio-141. Second, the error must be plain. *Barnes*, 94 Ohio St. 3d at 27. "To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings." *Id.* Third, the error must have affected the defendant's "substantial rights." *Id.* In other words, the trial court's error must have affected the outcome of the proceeding. *Id.*; *Hill*, 92 Ohio St. 3d at 205. The burden is on the defendant to demonstrate a violation of his substantial rights. *State v. Perry*, 2004-Ohio-297 at ¶14.

The word "may" in Criminal Rule 52(B), however, connotes that the court has discretion in correcting any perceived errors. This Court has recognized the discretionary aspect of the plain error doctrine, warning courts to notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* (quoting *State v. Long* (1978), 53 Ohio St. 2d 91.)

The United States Supreme Court held in *United States v. Vonn*, (2002), 535 U.S. 55, 122 S. Ct. 1043, 152 L. Ed. 2d 90, in finding that the defendant waived objections to sentencing, that "a silent defendant has the burden to satisfy the plain error rule." *Id.* at 59. The Court reasoned that otherwise "a defendant could choose to say nothing about a plain lapse" and "simply relax and wait to see if his sentence later struck him as satisfactory..." *Id.* at 73.

This theory is further explained in *State v. Lynn, Conti, et al.*, (1966), 5 Ohio St. 2d 106,

110:

One who complains of error must give the trial court a chance to avoid error by calling the court's attention to any alleged error. It is fundamental that one cannot sit idly by while an error is committed by the trial court and then later complain that error. To so hold would promote useless litigation that could have been promptly cut short by a correct ruling in the trial court. Thus, there must be a ruling sought and acted upon before the trial court can be put in error and there must be error committed before a reviewing court can reverse a judgment.

Harrison has failed to demonstrate any good cause for this Court to grant him a relief from the waiver of the objections. Harrison has failed to demonstrate plain error on the part of the original trial court.

In essence, Harrison re-states his proper jurisdiction claim. The due process clause is a constitutional provision that prohibits the government from unfairly or arbitrarily depriving a person of life, liberty, or property. Due process guarantees the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case. *Black's Law Dictionary 7th Ed.*

Harrison's due process rights were in no way violated by the original trial court's setting the matter for a re-sentencing hearing and permitting him to withdraw his guilty plea. Harrison was present at the hearing and represented by counsel. Furthermore, the court made is explicitly clear that it believed Harrison had an argument for appeal of the re-sentencing. Harrison was given every opportunity to raise the issues present to the appropriate reviewing court- the Third District Court of Appeals. Instead, he withdrew his guilty plea.

Harrison attempted in the second trial court to piggyback his claims of proper jurisdiction to his untimely motion to dismiss by asserting that the second trial court's jurisdiction arose from the original trial court's jurisdiction. The Madison County Court of Common Pleas properly held that its jurisdiction arose from the twenty-three count indictment that had been handed

down. (See Journal Entry of June 26, 2006). The trial court ruled that *Hernandez* did not apply to the facts in this case before it and that if *Hernandez* applied to any case, it was the original case in Auglaize County, however now a moot point because that case had been dismissed after Harrison's voluntary withdraw of his guilty plea.

State of Ohio's Proposition of Law 2:

*A separate standard of review does not exist for claims of ineffective assistance of counsel when the case involves technology.*²

Harrison claims that his counsel was ineffective during his trial, asserting that counsel did not conduct his trial in a manner that he believes was required for a criminal case that involved the use of computer-related technology. Once again, Harrison cannot cite any case as authority for his assertion that a certain level of expertise is required to defend a computer related criminal case.

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* (10th Dist.1997), 119 Ohio App. 3d

² This Proposition responds to Harrison's fifth proposition of law dealing with, ineffective assistance of counsel.

106). Trial strategy issues do not otherwise raise this baseless argument to one that concerns a substantial constitutional issue and worthy of granting Harrison's requested relief.

Essentially, Harrison argues that trial counsel was ineffective because he did not employ the same tactics that his appellate counsel would have employed. Again, Harrison does not apply the facts of his case to *Strickland*. The U.S. Supreme Court in their Decision in *Strickland* warned:

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. **Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.** See *United States v. Decoster*, 199 U. S. App. D. C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation **could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.** ***

The purpose is simply to ensure that criminal defendants receive a fair trial. (Emphasis added.)
Strickland, 466 U.S. at 688-89.

Harrison has the burden of showing that his counsel's alleged deficient performance prejudiced his trial. *Strickland v. Washington* (1984), 466 U.S. 668, 694. The State will try to address each one of Harrison's contentions of ineffective assistance of counsel.

A. Failure to seek exclusion of State expert Dr. Farid does not amount to ineffective assistance of counsel.

In order for Harrison to succeed on his claim of ineffective assistance of counsel, he must demonstrate that (1) reasonably competent counsel would have sought exclusion of Dr. Farid's testimony, (2) that if counsel had moved to exclude, that there was a reasonable probability that the trial court would have granted the motion and (3) that there exists a reasonable probability that the exclusion of the testimony would have resulted in Harrison's acquittal.

Harrison argues that trial counsel failed to object to the fact that Dr. Hany Farid failed to properly "authenticate" the images found on Harrison's computers, thereby failing to establish

the use of “real” children in the nudity oriented material or performance. Harrison’s argument is flawed in that he confuses authentication of evidence with proving an element of the offense.

In *State v. Bettis* (June 13, 2005), 2005 Ohio 2917, 2005 Ohio App. LEXIS 2724, the Twelfth District Court of Appeals held that digital images must follow Ohio R. Evid. 901(a) that “the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” In *Bettis*, the defendant argued that the charges against him for the illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323(A)(1) and pandering sexually-oriented matter involving a minor in violation of R.C. 2907.322(A)(5) should be dismissed because the state failed to authenticate that the photographs in question were photographs of real children. *Id.* at *2. The *Bettis* Court disagreed with this argument and reasoned that:

The officer described how he obtained the computer hard drive, found the material in specific computer directories, and retrieved the material from those directories on the hard drive and produced the photographs from the images. *Id.* at *4.

Because the officer testified that the digital images were taken from the defendant’s computer and the evidence presented were photographs of the actual images on the computer, the *Bettis* Court agreed the photographs were properly authenticated. *Id.* at *4.

In *State v. Huffman*, (2006) 165 Ohio App.3d 518, 2006 Ohio 1106, the First District Court of Appeals held that authentication of digital images is satisfied when the state offers evidence “to show that each exhibit was what the state claimed it to be—images obtained from disks recovered from Huffman’s office.” *Id.* at 530. Instead of authenticating it as a scene or depiction in a photograph, it must be authenticated as being what it claims to be—a digital file retrieved from the defendant’s computer.

The testimony of Lee Lerussi and Allan Buxton at trial indicated where these images were recovered from within the home computer, the laptop and floppy disk 5. (T.pp.399-415, 515-31). The testimony indicated how they were retrieved using En Case and where within the computer hard drive or floppy disk they were located. (T.pp.399-415, 515-31). The Twelfth District Court of Appeals agreed that this was sufficient to authenticate the images and the trial court properly admitted them for the jury to consider. *Harrison* 2007-Ohio-7078 ¶ 47.

Harrison seems to argue that because Dr. Farid did not opine as to the ultimate question for the jury to decide, whether the images were of “real” children, that trial counsel was deficient in his representation. In *State v. Tooley*, 114 Ohio St. 3d 366, this Court ruled that the permissive inference under Ohio's R.C. 2907.322(B)(3), that a person depicted in nudity-oriented material is a minor if the material represents that the person is a minor, simply allows the State to prove its case with circumstantial evidence, as it has always been permitted to do.

The images were properly authenticated by Lerussi and Buxton, therefore trial counsel was not ineffective for failing to object to Dr. Farid’s methodology because it was not offered to authenticate the images. Applying *Strickland*, trial counsel’s performance was not deficient nor was Harrison prejudiced by his actions. There existed no greater probability that the outcome would have been different, aside from unsupported assertions from Harrison’s counsel to the contrary.

B. State witness, Joe Corrigan, did not testify as expert at trial.

Harrison makes a blanket statement that Computer Forensics Specialist Joe Corrigan was permitted to testify as an expert on computer forensics without being qualified as an expert, without citing to any portion of the transcripts in support of his argument. Joe Corrigan gave background information as to his education, training and experience. (T.pp. 585-87). Furthermore, Corrigan explained his involvement in the analysis of Harrison’s office computer and what images he discovered through that analysis, as well as to the Internet searches that were

found to have been conducted by Harrison. (T.pp. 587-636). The testimony of Joe Corrigan was based upon his findings during his examination of the Harrison's office computer. No opinion was ever offered or elicited from this witness. (T.pp.585-636). Corrigan's testimony was purely factual. Accordingly, Harrison's argument is unsubstantiated and must fail.

C. Alleged "misuse" of Computer Forensics Expert and failure to use a "qualified" digital imaging expert do not amount to ineffective assistance of counsel.

In these two arguments, Harrison contends that trial counsel was ineffective for not only "misusing" the testimony of the defense expert, Mark Vassel, but also was ineffective for having failed to use a "qualified" digital imaging expert. Harrison does not direct this Court to any portion of the transcript in which the testimony of Vassel was objectionable or "misused." Furthermore, Harrison has failed to establish how the lack of a digital imaging expert prejudiced him at trial. As the Court of Appeals held below, Harrison has "****failed to set forth anything more than unsupported conclusions in support of these alleged errors to overcome the presumption that counsel's conduct at trial fell within the wide range of reasonable professional assistance or trial strategy." Harrison 2007-Ohio-7078 at ¶50, citing *State v. Cline*, 2006-Ohio-4782 at ¶22.

D. Trial counsel was not ineffective for failing to file a motion to dismiss based upon a speculative claim that he was denied a "fair trial."

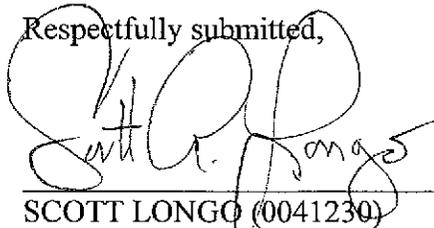
Harrison's merit brief is completely lacking in any substantive argument in regard to his claim that he was denied a "fair trial." Harrison fails to set forth any standard of review nor does he direct this Court to any facts in the record that support his claims. Harrison does not even state what the alleged error is that denied him a "fair trial." Harrison merely cites to two cases, *State v. Brady*, 2007-Ohio-1779 (pending review by this Court), and a Delaware County trial court unreported decision in *State v. Lescalleet*, 06-CRI-06-0287. Harrison does not explain how these cases apply to the facts in his case, let alone explain what each of these courts held in their

decisions. Harrison's claim of ineffective assistance of counsel is unsupported by any factual allegations and any legal analysis.

CONCLUSION

The State respectfully submits, pursuant to the arguments offered, that the trial court and the court of appeals committed no error prejudicial to Harrison in the instant case. The State, therefore, contends that the judgment of the Twelfth District Court of Appeals should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott Longo", is written over a horizontal line. The signature is stylized and cursive.

SCOTT LONGO (0041230)

Special Prosecuting Attorney for Auglaize County

30 East Broad Street, 26th Floor

Columbus, Ohio 43215

614-644-0729

614-466-6172 fax

slongo@ag.state.oh.us

Counsel for Plaintiff-Appellee

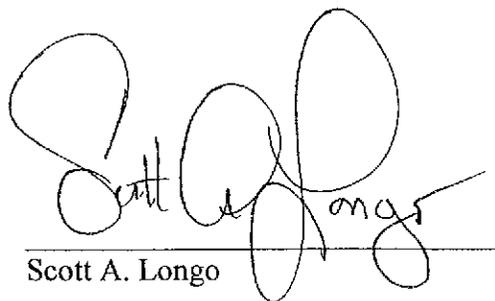
State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellee, State of Ohio was served by U.S. mail this 8th day of August, 2008, upon the following counsel:

Dean Boland
18123 Sloane Avenue
Lakewood, Ohio 44107

Counsel for Defendant-Appellant
David Harrison



Scott A. Longo

APPENDIX

APPENDIX A

AUGLAIZE COUNTY
COMMON PLEAS COURT
FILED

03 JUN 17 PM 1:32

SUE ELLEN KOHLER
CLERK OF COURTS

BILL OF INFORMATION

Criminal Rule 7(B)

STATE OF OHIO
AUGLAIZE COUNTY

COMMON PLEAS COURT
CASE NO. 2003.CR.0083

COUNT ONE

I, Lawrence S. Huffman, duly appointed, acting, and qualified Special Prosecutor of Auglaize County says, by way of information, that on or about May 2, 2002 in Auglaize County, Ohio, one David L. Harrison, did, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of an act within the public official's official capacity, by his actions, hamper and impede a public official in the performance of the public official's lawful duties in violation of Section 2921.31(A) of the Revised Code of Ohio and against the peace and dignity of the State of Ohio.

COUNT TWO

I, Lawrence S. Huffman, duly appointed, acting, and qualified Special Prosecutor of Auglaize County says, by way of information, that on or about May 23, 2000 in Auglaize County, Ohio, one David L. Harrison, did knowingly gain access to a computer, computer system, or computer network without the consent of, or beyond the scope of the express or implied consent of the owner of the computer, computer system, or computer network or other person authorized to give consent by the owner in violation of Section 2913.04(B) of the Revised Code of Ohio and against the peace and dignity of the State of Ohio.

COUNT THREE

I, Lawrence S. Huffman, duly appointed, acting, and qualified Special Prosecutor of Auglaize County says, by way of information, that on or about March 21, 2002, and at various and diverse times until on or about April 29, 2002, one David L. Harrison, did knowingly gain access to a computer, computer system, or computer network without the consent of, or beyond the scope of the express or implied consent of the owner of the computer, computer system, or computer network or other person authorized to give consent by the owner in violation of Section 2913.04(B) of the Revised Code of Ohio and against the peace and dignity of the State of Ohio.

COUNT FOUR

I, Lawrence S. Huffman, duly appointed, acting, and qualified Special Prosecutor of Auglaize County says, by way of information, that on or about May 27, 1998, and at various and diverse times until on or about April 25, 2002, one David L. Harrison, did knowingly gain access to a computer, computer system, or computer network without the consent of, or beyond the scope of the express or implied consent of the owner of the

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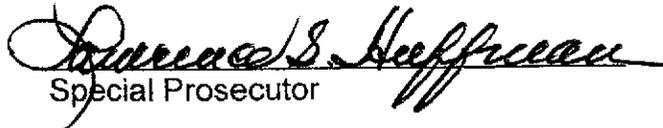
computer, computer system, or computer network or other person authorized to give consent by the owner in violation of Section 2913.04(B) of the Revised Code of Ohio and against the peace and dignity of the State of Ohio.

COUNT FIVE

I, Lawrence S. Huffman, duly appointed, acting, and qualified Special Prosecutor of Auglaize County says, by way of information, that on or about July 25, 2000, and at various and diverse times until on or about January 20, 2002, one David L. Harrison, did buy, procure, possess or control obscene material that has a minor as one of its participants in violation of Section 2907.321(A)(5) of the Revised Code of Ohio and against the peace and dignity of the State of Ohio.

COUNT SIX

I, Lawrence S. Huffman, duly appointed, acting, and qualified Special Prosecutor of Auglaize County says, by way of information, that on or about April 2, 2001, and at various and diverse times until on or about April 26, 2002, one David L. Harrison, with knowledge of the character of the material or performance involved, did unlawfully buy, procure, possess and control obscene material with purpose to violate division (A)(2) or (4) of this Section in violation of Section 2907.32(A)(5) of the Revised Code of Ohio and against the peace and dignity of the State of Ohio.


Special Prosecutor

Case no.:
Criminal Docket: _____ Page _____

COMMON PLEAS COURT Auglaize County, Ohio

THE STATE OF OHIO vs. DAVID L. HARRISON

Information for: OBSTRUCTING OFFICIAL BUSINESS (2921.31(A));
UNAUTHORIZED USE OF A COMPUTER (2913.04(B) 3 COUNTS;
PANDERING OBSCENITY INVOLVING A MINOR (2907.321(A)(5));
PANDERING OBSCENITY(2907.32(A)(5))

Filed: 6/17/03

SUE ELLEN KOHLER, Clerk of said Court

By: Debra K. Furst
Deputy Clerk

VERIFICATION

State of Ohio, Auglaize County

LAWRENCE S. HUFFMAN, being duly sworn according to law, says that he is the Special Prosecutor of said County and that the allegations and charges set forth in the within Information are true as he verily believes.

Lawrence S. Huffman
Special Prosecutor

Sworn to before and subscribed in my presence this 17th day of June, 2003.

SUE ELLEN KOHLER, Clerk of said Court
By: Debra K. Furst
Deputy Clerk

On this 25th day of June, 2003, the within named DAVID L. HARRISON, Defendant, arraigned, and pleads _____ guilty to this Information.

SUE ELLEN KOHLER, Clerk of said Court
By: Debra K. Furst
Deputy Clerk

APPENDIX B

IN THE COURT OF COMMON PLEAS OF AUGLAIZE COUNTY, OHIO

2005 MAR 23 PM 2:33

STATE OF OHIO
Plaintiff

SUE ELLEN KOHLER
CLERK OF COURTS

vs.

CASE NO. 2003-CR-783
ENTRY

DAVID L. HARRISON
Defendant,

This matter comes on upon the State of Ohio's Motion to Re-Sentence Defendant to a Five Year Term of Mandatory Post Release Control and Orders on Implementation of Said Post Release Control, and the Memoranda of the parties.

On June 17, 2003, at the defendant's arraignment on a Bill of Information the defendant entered a plea of guilty to one count of Obstructing Official Business in violation of R.C. 2921.31(A), a misdemeanor of the 2nd degree; three counts of Unauthorized Use of a Computer, each in violation of R.C. 2913.04(B), each a felony of the 5th degree; one count of Pandering Obscenity Involving a Minor in violation of R.C. 2907.321(A)(5), a felony of the 4th degree; and one count of Pandering Obscenity, in violation of R.C. 2907.32(a)(5), a felony of the 5th degree.

During the guilty plea dialogue the court erroneously advised the defendant that as part of his sentence for these offenses he may receive up to three years of post release control after release from prison. In fact, the court should have advised the defendant that the violations of R.C. 2907.321(A)(5) and R.C. 2907.32(A)(5) would result in a mandatory imposition of five years of post release control upon release from prison. Neither the State of Ohio nor the defendant objected to or otherwise pointed out to the court the erroneous statement regarding the mandatory imposition of five years of post release control.

On July 31, 2003, the defendant's sentencing hearing was held. The court sentenced the defendant to be incarcerated with the Department of Corrections for 90 days for Count I, 6 months for Counts II, III, and IV, 12 months for Count V, and 11 months for Count VI, all terms to run concurrently.

The court also again erroneously informed the defendant that as part of his sentence he may be given up to three years of post release control upon his release from prison. In fact, the court should have sentenced the defendant to five years of post release control upon release from prison for violations of R.C. 2907.321(A)(5) and R.C. 2907.32(A)(5). Neither the State of Ohio nor the

defendant objected to or otherwise pointed out to the court erroneous sentence regarding the imposition of post release control.

On October 3, 2003, a hearing was held on the defendant's Motion for Judicial Release. The court denied the defendant's Motion for Judicial Release. However, due to safety concerns expressed prior to sentencing and prior to the hearing on Judicial Release arising from the defendant's former position as the Chief of Police of the City of Wapakoneta, the court ordered that the remaining term of the defendant's prison sentence be served at the Auglaize County Jail.

The defendant served the remainder of his prison sentence at the Auglaize County Jail and was released. The defendant was not placed on post release control by the Adult Parole Authority.

R.C. 2967.28(A)(3) defines "Felony sex offense" as a violation of a section contained in Chapter 2907. of the Revised Code that is a felony. In this case the defendant was convicted of violations of 2907.321(A)(5) and R.C. 2907.32(A)(5), both felony sex offenses.

R.C. 2967.28(B) provides: Each sentence to a prison term ... **for a felony sex offense ... shall** include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods: (1) ... **for a felony sex offense, five years.**

R.C. 2967.28(B)(2) provides in part: In no case shall the board reduce the duration of the period of control imposed by the court for an offense described in division (B)(1) of this section....

R.C. 2967.28(D)(1) provides: Before the 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.

In this case the court erred during the guilty plea dialogue and at sentencing when it erroneously informed the defendant that he may receive up to three years of post release control. R.C. 2967.28(B) requires a mandatory imposition of five years of post release control for a felony sex offense.

Further, the fact that the Parole Authority failed to impose post release control before the defendant was released from his term of imprisonment does not meet the mandatory statutory requirement of R.C. 2967.28(D)(1).

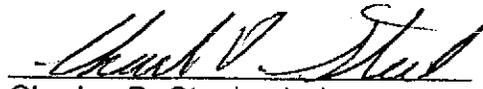
There is a conflict within this state as to the proper disposition when the sentencing court fails to properly advise an offender about post release control. Nevertheless, that conflict is not in play here as the statutory mandatory term of post release control supersedes any argument relating to the 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 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 WL 760156 (Ohio App. 8 Dist.) 2003-Ohio-1003).

The court, therefore, orders this matter set for resentencing in accordance with the requirements of R.C. 2967.28 (B).

The court further will grant the defendant leave prior to the resentencing hearing to withdraw his pleas of guilty to Counts V and VI since the court erroneously informed the defendant of the terms of post release control for those counts during the guilty plea dialogue.

So Ordered.

Dated: March 22, 2005


Charles D. Steele, Judge

Copy to:

Prosecuting Attorney
Attorney for Defendant

State of Ohio, Auglaize County, SS. I Sue Ellen Kohler, Clerk of the Court of Common Pleas within and for said County, hereby certify that the foregoing is a true and correct copy of the original record on file in this office. In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court at Wapakoneta, Ohio. this <u>19th</u> day of <u>May</u> , 2006 SUE ELLEN KOHLER, CLERK OF COURT By <u>Jan M. Eckhardt</u> Deputy Clerk

88 PAGE 785

APPENDIX C

2005 Ohio 1608, *; 2005 Ohio App. LEXIS 1554, **

DAVID L. HARRISON, RELATOR v. JUDGE CHARLES D. STEELE, ET AL., RESPONDENTS

CASE NO. 2-05-14

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, AUGLAIZE COUNTY

2005 Ohio 1608; 2005 Ohio App. LEXIS 1554

March 31, 2005, Decided

SUBSEQUENT HISTORY: Related proceeding at State v. Harrison, 2007 Ohio 7078, 2007 Ohio App. LEXIS 6161 (Ohio Ct. App., Madison County, Dec. 28, 2007)

DISPOSITION: [**1]

CASE SUMMARY:

PROCEDURAL POSTURE: Relator individual filed a complaint for a writ of prohibition against respondent judge to keep the judge from conducting a "resentencing hearing" in the individual's criminal case.

OVERVIEW: The individual was convicted and sentenced, fully served the imposed term of incarceration, and was ordered to appear for "resentencing" for the purpose of correcting two uncontested mistakes in the judge's notification of postrelease control. The court held that the judge clearly had jurisdiction over matters relating to further proceedings in the individual's criminal case. The individual made no showing that a "resentencing judgment" would not be subject to review on appeal pursuant to Ohio Rev. Code Ann. § 2505.02. Consequently, a writ of prohibition could not issue.

OUTCOME: The complaint for a writ of prohibition was dismissed.

CORE TERMS: writ of prohibition, resentencing, ordinary course of law, criminal case, adequate remedy, unambiguously, anticipated, sentence, tribunal, patently, postrelease, amend

LEXISNEXIS(R) HEADNOTES

Civil Procedure > Remedies > Writs > Common Law Writs > Prohibition
Governments > Courts > Authority to Adjudicate

HN1 ⚡ A writ of prohibition is an extraordinary writ issued by a higher court to a lower court or tribunal to prevent usurpation or exercise of judicial powers or functions for which the lower court or tribunal lacks jurisdiction.

Civil Procedure > Remedies > Writs > Common Law Writs > Prohibition
Evidence > Procedural Considerations > Burdens of Proof > General Overview

HN2 ⚡ In order to be entitled to a writ of prohibition, a relator must establish that: (1) a respondent is about to exercise judicial or quasi-judicial power, (2) the exercise of such power is unauthorized by law, and (3) denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists.

0010

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Remedies > Writs > General Overview

HN3 It is well settled that prohibition will only lie where an inferior court patently and unambiguously lacks jurisdiction over a cause.

Civil Procedure > Remedies > Writs > General Overview

HN4 Prohibition will not lie to prevent an anticipated erroneous judgment.

JUDGES: ROBERT R. CUPP, THOMAS F. BRYANT, RICHARD M. ROGERS, JUDGES.

OPINION

JOURNAL ENTRY

[*P1] This cause comes before the court on relator's complaint for writ of prohibition and motions to stay resentencing and to amend complaint, and upon respondents' motion to dismiss.

[*P2] Initially, the court finds that the motion to amend complaint is well taken and the complaint shall be amended to reflect the proper names and addresses of respondents.

[*P3] The complaint seeks an order prohibiting respondent, presiding judge in relator's criminal case, from conducting a "resentencing hearing" on Tuesday, March 29, 2005. It is alleged that relator was convicted and sentenced, fully served the imposed term of incarceration, and was ordered to appear for "resentencing" for the purpose of correcting two uncontested mistakes in respondent's notification of postrelease control. It is also appears that relator was never placed on postrelease control by the Ohio Parole Board, apparently, because he was permitted to serve the end of his sentence in the Auglaize County Jail.

[*P4] **[**2]** **HN1** A writ of prohibition is an extraordinary writ issued by a higher court to a lower court or tribunal to prevent usurpation or exercise of judicial powers or functions for which the lower court or tribunal lacks jurisdiction. *State ex rel. Winnefeld v. Butler Cty. Ct. of Common Pleas* (1953), 159 Ohio St. 225, 112 N.E.2d 27.

[*P5] **HN2** In order to be entitled to a writ of prohibition, relator must establish that: (1) respondent is about to exercise judicial or quasi-judicial power, (2) the exercise of such power is unauthorized by law, and (3) denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists. *State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335, 1997 Ohio 340, 686 N.E.2d 267. It **HN3** is well settled that prohibition will only lie where an inferior court patently and unambiguously lacks jurisdiction over the cause. *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 1996 Ohio 340, 671 N.E.2d 236. **HN4** Prohibition will not lie to prevent an anticipated erroneous judgment. *State ex rel. Heimann v. George* (1972), 45 Ohio St.2d 231, 344 N.E.2d 130.

[*P6] Upon consideration of same the court finds that a writ of prohibition will not issue in this **[**3]** matter as it is not clear that respondent "patently and unambiguously" lacks jurisdiction over the cause. Furthermore, there clearly exists an adequate remedy in the ordinary course of law. See *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 1998 Ohio 275, 701 N.E.2d 1002.

[*P7] Respondent, as trial court in relator's criminal case, clearly has jurisdiction over

0011

matters relating to further proceedings in the action. Although it is unclear whether respondent may properly vacate the sentence it previously imposed, pursuant to *State v. Jordan*, 104 Ohio St. 3d 21, 2004 Ohio 6085, 817 N.E.2d 864, and without an appeal by the State, that question is not before this court. Rather, such questions relate only to an anticipated erroneous judgment.

[*P8] Moreover, other than bare allegation, relator makes no showing that a "resentencing judgment" would not be subject to review on appeal pursuant to R.C. 2505.02. To the contrary, relator may seek to stay execution of the judgment and raise any error or irregularity in the re-sentencing order on appeal. For this reason, we find that relator has an adequate remedy in the ordinary course of law. See *State ex rel. Jackson v. Miller* (1998), 83 Ohio St. 3d 541, 1998 Ohio 4, 700 N.E.2d 1273. **[**4]**

[*P9] Accordingly, the complaint fails to state a claim upon which relief by writ of prohibition can be granted and the motion to dismiss is well taken. The motion to stay resentencing is denied.

[*P10] It is therefore **ORDERED, ADJUDGED and DECREED** that the complaint for writ of prohibition be, and hereby is, dismissed at the costs of relator for which judgment is hereby rendered.

ROBERT R. CUPP/s/

THOMAS F. BRYANT/s/

RICHARD M. ROGERS/s/

JUDGES

DATED: March 31, 2005

Service: Get by LEXSEE®

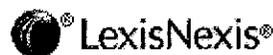
Citation: 2005 ohio 1608

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Date/Time: Thursday, July 31, 2008 - 9:32 AM EDT

* Signal Legend:

-  - Warning: Negative treatment is indicated
 -  - Questioned: Validity questioned by citing refs
 -  - Caution: Possible negative treatment
 -  - Positive treatment is indicated
 -  - Citing Refs. With Analysis Available
 -  - Citation information available
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APPENDIX D

IN THE COURT OF COMMON PLEAS
OF AUGLAIZE COUNTY, OHIO

STATE OF OHIO	*	CASE NO. 2003-CR-83
Plaintiff	*	
	*	
Vs.	*	RESENTENCE/ WITHDREW GUILTY PLEAS
	*	
DAVID HARRISON	*	MARCH 29, 2005
Defendant	*	

BE IT REMEMBERED, that heretofore, to wit, at the January Term. A.D., 2005, of the Court of Common Pleas, Criminal Division, within and for the County of Auglaize, State of Ohio, came the parties hereto: State of Ohio, Plaintiff, by Prosecuting Attorney Edwin Pierce, Auglaize County Courthouse, Wapakoneta, Ohio 45895 and Defendant, David Harrison, represented by Attorney Norman Sirak, 75 Public Square, Suite 800, Cleveland, Ohio 44113.

They came to be heard by the Honorable Charles D. Steele, sitting by assignment.

* * * * *

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1 THE COURT: This is Case No. 2003-CR-0083, STATE OF OHIO
2 VS. DAVID L. HARRISON. Present in court Ed Pierce,
3 Prosecuting Attorney, Norman Sirak, Attorney for the
4 Defendant, and the Defendant, David L. Harrison. This
5 matter comes on today for resentencing pursuant to the
6 Court's entry and order of March 22nd of 2005 and filed on
7 March 23rd of 2005, finding that the Court had erred at the
8 original sentencing hearing by failing to sentence the
9 Defendant to a mandatory five (5) years of Post Release
10 Control for violations of Ohio Revised Code Section
11 2907.321(A)(5) and Revised Code Section 2907.32(A)(5). The
12 Court has further granted the Defendant leave to withdraw
13 his guilty pleas in this case due to the fact that at the
14 arraignment and guilty plea, the Court had advised the
15 Defendant that his sentence for these offenses to which he
16 was pleading may result in three (3) years of Post Release
17 Control rather than the mandatory five (5) years of Post
18 Release Control. At this time, does the Defendant wish to
19 withdraw his pleas of guilty in this case?

20 MR. SIRAK: Your Honor, on behalf of my client, he wishes
21 to WITHDRAW his guilty pleas.

22 THE COURT: Mr. Harrison, is that your wish?

23 DAVID HARRISON: Yes Sir, Your Honor, it is my wish.

24 THE COURT: Do you understand that the sole purpose of
25 this sentencing only deals with the issue of the five (5)

1 years of mandatory Post Release Control and your prison
2 sentence wouldn't be changed. Do you understand that?

3 DAVID HARRISON: I understand, Your Honor.

4 THE COURT: And that your attorney has indicated that if
5 the five (5) years of Post Release Control are imposed that
6 he would, of course, take that to the Court of Appeals and
7 it's this Court's opinion that his argument is not without
8 merit. Do you understand that?

9 DAVID HARRISON: Yes Sir, Your Honor.

10 THE COURT: And knowing all that, is it still your desire
11 to withdraw your pleas of guilty in this case?

12 DAVID HARRISON: Yes, Sir.

13 THE COURT: Alright. Thank you. You may sit down. The
14 Court will set this matter for a pre-trial. After court
15 today we'll get together and see what would be a good day to
16 set this for pre-trial. Is there anything further at this
17 time by the Defendant?

18 MR. SIRAK: Yes, Your Honor. We'd like to put a motion
19 in for the court to ask the,- or to consider,- ask the
20 Prosecutor to consider recusing himself. In the first
21 proceeding the Prosecutor recused himself because he had a
22 conflict of interest with my client. We think that that
23 conflict of interest continues, so we would ASK the Court to
24 consider and the Prosecutor to consider recusing themselves
25 and finding a special Prosecutor.

1 THE COURT: Mr. Pierce, what I'm gonna do is, I'm gonna
2 give you two (2) weeks and that's about when we'll have this
3 Pre-trial set in order to respond to that Motion or I guess
4 so you can consider whether or not you, in fact, want to
5 recuse yourself. Court will set bond in this case as a FIVE
6 THOUSAND DOLLAR (\$5,000.00) unsecured personal surety bond
7 under the Court's standard O.R. bond conditions. The
8 Probation Office can go over with the Defendant what those
9 conditions are. Anything else?

10 MR. PIERCE: One thing for clarification, Your Honor.
11 Your entry indicated that you would be granting leave to the
12 Defendant to withdraw his previously entered pleas of guilty
13 to two (2) of the counts which he had stood convicted, those
14 being counts, -

15 THE COURT: IV and V, I believe or V and VI.

16 MR. PIERCE: V and VI.

17 THE COURT: V and VI.

18 MR. PIERCE: According to the entry, V and VI. Just so
19 that the record's clear, is this a complete withdraw of the
20 guilty pleas at this point?

21 THE COURT: When the Defendant entered those pleas of
22 guilty, they were part of a negotiated plea on a Bill of
23 Information that included all of the counts and I'm sure
24 that all of the counts in some way were considered by the
25 Defendant when he made that plea, therefore, I'm going to

1 ALLOW him if he wishes to withdraw his pleas in all of the
2 counts. Is that the Defendant's desire?

3 MR. SIRAK: Yes, it is, Your Honor.

4 THE COURT: Also I'm not exactly sure what kind of speedy
5 trial issues that we are facing. Does the Defendant wish to
6 waive his speedy trial rights?

7 MR. SIRAK: Yes, Your Honor, the Defendant would waive
8 speedy trial.

9 THE COURT: Alright. You understand, Mr. Harrison, that
10 you have the right to have this tried within two hundred and
11 seventy (270) days from when you were first indicted.
12 However, it's the Court's opinion that the time was tolled
13 from the time that you entered the guilty plea until today
14 when you withdrew it and so I think really you only had one
15 (1) day credit for that two hundred and seventy (270) days;
16 however, by waiving that, that's not an issue at all. Do
17 you understand that?

18 DAVID HARRISON: Yes, Your Honor.

19 THE COURT: And it's your desire to waive any speedy
20 trial issues that may come up?

21 DAVID HARRISON: Yes, Your Honor.

22 THE COURT: Alright. Anything else?

23 MR. PIERCE: We would REQUEST that Mr. Sirak put that
24 Speedy Trial Waiver in writing signed by the Defendant
25 pursuant to the rules, Your Honor.

1 THE COURT: Okay. The Court would ask that you do that
2 before the next pre-trial.

3 MR. SIRAK: Absolutely.

4 THE COURT: Anything further?

5 MR. PIERCE: No, Your Honor.

6 THE COURT: If I can see Counsel in Chambers following
7 this. Court's Adjourned.

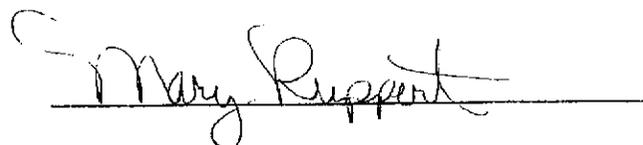
8 ADJOURNED.

9 *****

CERTIFICATE OF REPORTER:

I, Mary F. Ruppert, Assistant Court Reporter for the Common Pleas Court, Auglaize County, Ohio, duly appointed therein, do hereby certify that the foregoing transcript, consisting of pages 1 thru 7, is a true and complete transcript as transcribed by me of the proceedings conducted in that Court on the 29th day of March, 2005, before the Honorable Frederick D. Pepple, Judge of said Court, and I do further certify that I only did the typing of the hearing, and that Diana Kantner was personally present in the Courtroom during all of the said proceedings.

Signed and certified by me this 8th day of April, 2005.



Assistant Court Reporter

0021

APPENDIX E

6-23-2005/BCI

AUGLAIZE COUNTY
COMMON PLEAS COURT
FILED

INDICTMENT
Criminal Rule 6, 7

2005 JUN 23 PM 3:11

SSE ELLEN KOHLER
CLERK OF COURTS

THE STATE OF OHIO
Auglaize County, ss.

COURT OF COMMON PLEAS
Case No.: _____

Of the Term May in the year Two Thousand Five

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 3rd day of May 1999 and the 2nd day of May, 2002, at Auglaize County, Ohio, DAVID L. HARRISON in any manner and by any means, including, but not limited to, computer hacking, did knowingly gain access to, attempt to gain access to, or cause access to be gained to any computer, computer system, computer network, cable services, cable system, telecommunications device, telecommunications service, or information service without the consent of, or beyond the scope of the express or implied consent of, the owner of the computer, computer system, computer network, cable service, cable system, telecommunications device, telecommunications service, or information service or other person authorized to give consent. Said act is a felony of the fifth degree in violation of Ohio Revised Code Title 29, §2913.04(B), and against the peace and dignity of the State of Ohio.

COUNT TWO

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 3rd day of May 1999 and the 2nd day of May, 2002, at Auglaize County, Ohio, DAVID L. HARRISON in any manner and by any means, including, but not limited to, computer hacking, did knowingly gain access to, attempt to gain access to, or cause access to be gained to any computer, computer system, computer network, cable services, cable system, telecommunications device,

telecommunications service, or information service without the consent of, or beyond the scope of the express or implied consent of, the owner of the computer, computer system, computer network, cable service, cable system, telecommunications device, telecommunications service, or information service or other person authorized to give consent. Said act is a felony of the fifth degree in violation of Ohio Revised Code Title 29, §2913.04(B), and against the peace and dignity of the State of Ohio.

COUNT THREE

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 27th day of May 1998 and the 2nd day of May, 2002, at Auglaize County, Ohio, DAVID L. HARRISON as a public official or party official did commit any theft offense, as defined in Division (K) of §2913.01 of the Revised Code, when the offender used the offender's office in aid of committing the offense or permitted or assented to its use in aid of committing the offense and the value of property or services stolen is five thousand dollars or more. Said act is a felony of the third degree in violation of Ohio Revised Code Title 29, §2921.41(A)(1), and against the peace and dignity of the State of Ohio.

COUNT FOUR

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 1st day of March 2002 and the 18th day of April, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, without privilege to do so, knowingly enter or remain on the land or premises of another; and/or knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard. Said act is a misdemeanor of

the fourth degree in violation of Ohio Revised Code Title 29, §2911.21(A)(1)/(2), and against the peace and dignity of the State of Ohio.

COUNT FIVE

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 25th day of July, 2000, at Auglaize County, Ohio, DAVID L. HARRISON did, with knowledge of the character of the material or performance involved, create, reproduce, or publish any obscene material, to wit: image 0000zoofree101.jpg, physical Location on HD 559,104, when the offender knows that the material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when the offender is reckless in that regard. Said act is a felony of the fifth degree in violation of Ohio Revised Code Title 29, §2907.32(A)(1), and against the peace and dignity of the State of Ohio.

COUNT SIX

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 25th day of July, 2000, at Auglaize County, Ohio, DAVID L. HARRISON did, with knowledge of the character of the material or performance involved, create, reproduce, or publish any obscene material, to wit: image0000zoofree113.jpg, physical Location on HD 596,992, when the offender knows that the material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when the offender is reckless in that regard. Said act is a felony of the fifth degree in violation of Ohio Revised Code Title 29, §2907.32(A)(1), and against the peace and dignity of the State of Ohio.

COUNT SEVEN

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 25th day of July, 2000, at Auglaize County, Ohio, DAVID L. HARRISON did, with knowledge of the character of the material or performance involved, create, reproduce, or publish any obscene material, to wit: image 0000zoofree118.jpg, physical Location on FD 617,472, when the offender knows that the material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when the offender is reckless in that regard. Said act is a felony of the fifth degree in violation of Ohio Revised Code Title 29, §2907.32(A)(1), and against the peace and dignity of the State of Ohio.

COUNT EIGHT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 25th day of July, 2000, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 00010nudepreteens04.jpg, physical Location on Floppy Disk5 686,592, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT NINE

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 16th day of December, 1999 and the 17th

day of May, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 102 file offset number 112181248, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT TEN

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 16th day of December, 1999 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 104 file offset number 112443392, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT ELEVEN

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0002.jpg physical sector / location 77674367, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT TWELVE

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0004.jpg physical sector / location 77673855, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT THIRTEEN

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0005.jpg physical sector / location 776744431, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT FOURTEEN

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0006.jpg physical sector /

location 77674399, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT FIFTEEN

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0007.jpg physical sector / location 23336031, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT SIXTEEN

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0008.jpg physical sector / location 23335999, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT SEVENTEEN

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of

Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0017.jpg physical sector /location 77673791, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT EIGHTEEN

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0021.jpg physical sector / location 77673951, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT NINETEEN

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0022.jpg physical sector / location 77673983, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT TWENTY

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0023.jpg physical sector / location 77674303, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT TWENTY-ONE

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0025.jpg physical sector / location 23354335, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

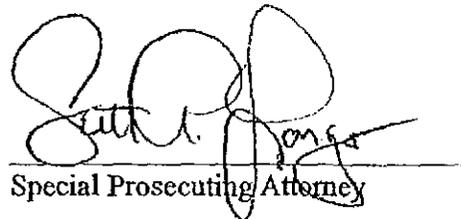
COUNT TWENTY-TWO

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that at or between the 22nd day of May, 2001 and the 17th day of June, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, create, direct, produce, or transfer any material or performance, to wit: image 0026.jpg physical sector /

location 22912799, that shows the minor in a state of nudity. Said act is a felony of the second degree in violation of Ohio Revised Code Title 29, §2907.323(A)(1), and against the peace and dignity of the State of Ohio.

COUNT TWENTY-THREE

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 2nd day of May, 2002, at Auglaize County, Ohio, DAVID L. HARRISON did, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, alter, destroy, conceal or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation. Said act is a felony of the third degree in violation of Ohio Revised Code Title 29, §2921.12(A)(1), and against the peace and dignity of the State of Ohio.


Seth A. Jones
Special Prosecuting Attorney

APPENDIX F

IN THE AUGLAIZE COUNTY COMMON PLEAS COURT
CRIMINAL DIVISION

AUGLAIZE COUNTY
COMMON PLEAS COURT
FILED

STATE OF OHIO

CASE NO.: 2003 JUN 25 AM 9:22

Plaintiff

SUE ELLEN KOHLER
CLERK OF COURTS

vs.

NEGOTIATED
PLEA AGREEMENT

David L. Harrison

Defendant

Pursuant to Criminal Rule 11, the following plea negotiations have taken place between the State of Ohio and the Defendant through defense counsel, Thomas R. Kuhn.

_____ The defendant would ask for leave of Court to withdraw the defendant's previously entered pleas of Not Guilty to Count _____ of the Indictment.

_____ The State of Ohio would ask for leave of Court to Amend as follows:

Count _____, _____, a felony of the _____ degree (with/without) specifications amended to a charge of _____, Section _____ of the Ohio Revised Code, a felony of the _____ degree, (with/without) specifications.

Count _____, _____, a felony of the _____ degree (with/without) specifications amended to a charge of _____, Section _____ of the Ohio Revised Code, a felony of the _____ degree, (with/without) specifications.

Count _____, _____, a felony of the _____ degree (with/without) specifications amended to a charge of _____, Section _____ of the Ohio Revised Code, a felony of the _____ degree, (with/without) specifications.

Count _____, _____, a felony of the _____ degree (with/without) specifications amended to a charge of _____, Section _____ of the Ohio Revised Code, a felony of the _____ degree, (with/without) specifications.

Count _____, _____, a felony of the _____ degree (with/without) specifications amended to a charge of _____, Section _____ of the Ohio Revised Code, a felony of the _____ degree, (with/without) specifications.

The State of Ohio would file a Bill of Information charging the defendant

NOTICE:

Restitution figures must be included in all sentencing entries. Negotiations must include exchange of all information on restitution, and consultation with victims must include discussion about what restitution is owed, the documentation to support it, and what the limitations are on such orders.

The Court will no longer accept plea negotiations unless the following certificate is presented to the Court with respect to restitution:

_____ The parties agree that the offender will pay restitution to the following victims in the following amounts. (Include names and addresses for distribution for each victim.)

Victim #1 (name and address)

_____ in the amount of \$ _____.

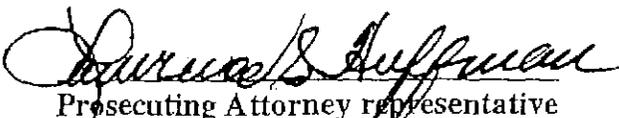
Victim #2 (name and address)

_____ in the amount of \$ _____.

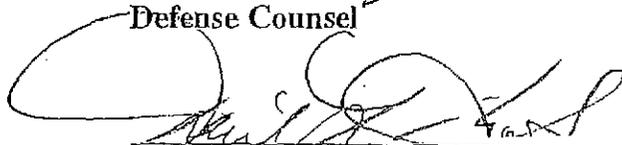
(Use more sheets if more victims are to receive restitution.)

There is no restitution due from the offender.

Restitution is disputed and the parties request a hearing on the same.


Prosecuting Attorney representative


Defense Counsel


Defendant

APPENDIX G

IN THE COURT OF COMMON PLEAS
OF AUGLAIZE COUNTY, OHIO

STATE OF OHIO
Plaintiff

VS.

DAVID HARRISON
Defendant

*
*
*
*

CASE NO.: 03-CR-83
BILL OF INFORMATION
JUNE 17, 2003

BE IT REMEMBERED, that heretofore, to wit, at the May Term A.D., 2003 the Court of Common Pleas, Criminal Division within and for the County of Auglaize County, State of Ohio, came the parties hereto: State of Ohio, Plaintiff, by Special Prosecuting Attorneys, Craig Gottschalk and Lawrence Huffman, Auglaize County Courthouse, Wapakoneta, Ohio 45895. Also present was Defendant, David Harrison, represented by Attorney Thomas R. Kuhn, 973 W. North Street, Lima, Ohio 45805.

They came to be heard by the Honorable Charles D. Steele, Sitting by Assignment.

* * * * *

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1 THE COURT: This is Case No. 2003-CR-0083, STATE OF OHIO
2 VS. DAVID L. HARRISON. Present in Court, the State of Ohio
3 represented by Attorney Lawrence Huffman, the Defendant,
4 David L. Harrison and the Defendant's Attorney, Thomas Kuhn.
5 Will the Defendant please rise. (Defendant complying.) Mr.
6 Harrison, this is an arraignment hearing on a Bill of
7 Information filed by the Prosecuting Attorney. In the Bill
8 of Information, the Prosecuting Attorney alleges that you
9 have committed the following offenses: Obstruction of
10 Official Business, a misdemeanor of the second degree. I
11 haven't done misdemeanors for a long time, what's the
12 penalty on that?

13 MR. KUHN: Ninety (90) days, Your Honor, seven hundred and
14 fifty dollars (\$750.00).

15 THE COURT: It carries a penalty of ninety (90) days
16 incarceration as a maximum and a maximum fine of seven
17 hundred fifty dollars (\$750.00). In Count II, III and IV,
18 Unauthorized Use of a Computer, each a felony of the fifth
19 degree, each carrying a maximum term of incarceration of
20 twelve (12) months and each carrying a maximum fine of
21 twenty-five hundred dollars (\$2,500.00). And in Count V,
22 Pandering Obscenity Involving a Minor, a felony of the
23 fourth degree, which carries a maximum term of incarceration
24 of eighteen (18) months and a maximum fine of five thousand
25 dollars (\$5,000.00). And in Count ^{XXX}V, Pandering Obscenity,

XXX - Court Reporter's Note: The Court said V

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1 also a felony of the fifth ~~degree~~, which carries a maximum
2 term of incarceration of twelve (12) months and a maximum
3 fine of twenty-five hundred dollars (\$2,500.00).

4 The purpose of this ~~hearing~~ is to ensure you know and
5 understand your rights ~~and the~~ charges against you. You
6 have the right to retain Counsel and a reasonable right to a
7 continuance to secure Counsel. If you cannot afford
8 Counsel, one would be appointed for you at no cost to you.
9 You have the right to bail if the offense is bailable, and
10 you need make no statement at any point in these proceedings
11 but any statement you do make can and may be used against
12 you. You will also be requested to enter a plea to the
13 charges against you. Mr. Harrison, are you presently
14 represented by an attorney regarding these charges?

15 DAVID HARRISON: Yes, I am.

16 THE COURT: And have you retained Mr. Kuhn?

17 DAVID HARRISON: Yes.

18 THE COURT: Mr. Harrison, since the charges against you
19 in Counts II, III, IV, V, and VI are felonies, you have an
20 absolute constitutional right to ask and to require that the
21 charges first be submitted to a Grand Jury consisting of
22 nine (9) persons. If the Grand Jury returns an Indictment,
23 you would be required to answer for each of these charges.
24 However, you may if you so desire in giving up taking your
25 case to the Grand Jury, you may consent in writing to

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1 proceeding on this case by way of an Information filed by
2 the Prosecuting Attorney. Do you understand what I've just
3 said?

4 DAVID HARRISON: Yes, Your Honor.

5 THE COURT: And do you understand what the Grand Jury is?

6 DAVID HARRISON: Yes, Your Honor.

7 THE COURT: And do you understand that without your
8 consent, you can only be charged with the Counts in II, III,
9 IV, V, and VI by the action of a Grand Jury?

10 DAVID HARRISON: Yes, Your Honor.

11 THE COURT: Your right to require an Indictment by the
12 Grand Jury is so important that the law requires that if
13 you wish to give up the Grand Jury, you must do so in
14 writing. Do we have a waiver of Grand Jury form?

15 MR. HUFFMAN: Judge, if I'm not mistaken, it's on the back
16 of the Indictment. It's page 3, - I'm sorry, page 3 of the
17 Information I believe is where the Clerk put that.

18 THE COURT: The paper which I now give to your attorney
19 states that you've been told of your rights to a Grand Jury
20 and that you nevertheless wish to proceed by way of
21 Information filed by the Prosecuting Attorney. If you want
22 to give up your right to a Grand Jury and to proceed with
23 this case by way of Information, I would ask that you read
24 that carefully and sign the paper. If you do not want to
25 give up that right then do not sign the paper. Please read

1 it carefully and discuss any questions you have with your
2 attorney. (Reviewing form) ~~Let~~ the record show that the
3 Defendant signed the Grand Jury Waiver Form in open Court.
4 Mr. Harrison, the law provides you cannot be brought to
5 trial in this case unless a certain document is given to
6 you. In this case this document is called a Bill of
7 Information. It says that the Prosecuting Attorney believes
8 you have committed crimes, describes the nature of those
9 crimes and when they were committed. Have you received a
10 copy of the Bill of Information?

11 DAVID HARRISON: Yes, Your Honor.

12 THE COURT: Have you had that more than twenty-four (24)
13 hours?

14 MR. KUHN: Your Honor, we would waive the twenty-four (24)
15 hour waiting period. Also waive the reading of it.

16 THE COURT: You understand you do have a right to have
17 that for twenty-four (24) hours?

18 DAVID HARRISON: Yes, Your Honor.

19 THE COURT: Your attorney's indicated that you wish to
20 waive that right and to waive the reading of the Bill of
21 Information; is that correct?

22 DAVID HARRISON: Yes, Your Honor.

23 THE COURT: At this time, I'll ask you how you plead to
24 the charge in Count I of the Indictment?

25 DAVID HARRISON: Guilty, Your Honor.

1 THE COURT: And how do you plead to the charge in Count
2 II of the Indictment?
3 DAVID HARRISON: Guilty, Your Honor.
4 THE COURT: And how do you plead to the charge in Count
5 III of the Indictment?
6 DAVID HARRISON: Guilty, Your Honor.
7 THE COURT: And how do you plead to the charge in Count
8 IV of the Indictment?
9 DAVID HARRISON: Guilty, Your Honor.
10 THE COURT: Excuse me, I'm sorry, the Bill of
11 Information; guilty?
12 DAVID HARRISON: Guilty, Your Honor.
13 THE COURT: And how do you plead to Count V in the Bill
14 of Information?
15 DAVID HARRISON: Guilty, Your Honor.
16 THE COURT: And how do you plead to Count VI in the Bill
17 of Information?
18 DAVID HARRISON: Guilty, Your Honor.
19 THE COURT: Before accepting your plea, I'm obligated to
20 ask you some questions to determine if you know and
21 understand the rights you are giving up, the consequences of
22 the guilty pleas and that you are changing your pleas of
23 your own freewill, or that you are making your plea of your
24 own freewill. Please state your full and correct name for
25 the record.

1 DAVID HARRISON: David Lee Harrison, Sr.

2 THE COURT: And how old are you?

3 DAVID HARRISON: Fifty (50).

4 THE COURT: What schooling have you had?

5 DAVID HARRISON: I have a Bachelor's Degree.

6 THE COURT: Can you read, write and understand the
7 English language?

8 DAVID HARRISON: Yes, Your Honor.

9 THE COURT: The offense for which you are charged in
10 Count I states that, "No person without privilege to do so
11 and with purpose to prevent, obstruct or delay the
12 performance of a public official of an act within the public
13 official capacity by his actions shall hamper or impede a
14 public official in the performance of the public official's
15 lawful duties in violation of Ohio Revised Code Section
16 2921.31(A)." The offense for which you are pleading in
17 Counts II, III and IV each state that, "No person shall
18 knowingly gain access to a computer, computer system or a
19 computer network without the consent or beyond the scope of
20 the expressed or implied consent of the owner of the
21 computer, computer system or computer network or other
22 person authorized to give consent by the owner." The
23 offense for which you are pleading in Count V states that,
24 "No person shall buy, procure, possess or control obscene
25 material that has a minor as one of its participants." And

1 the offense to which you are pleading in Count VI states
2 that, "No person with knowledge of the character of material
3 or performance involved shall unlawfully buy, procure,
4 possess and control obscene material with the purpose to
5 violate Division (A)(2) or (4) of Section 2907.32(A)(5) of
6 the Ohio Revised Code." Have you read the plea agreement?

7 MR. KUHN: He has not, Your Honor. We were just filling it
8 out.

9 THE COURT: Okay. Why don't you take time to go through
10 that with him.

11 (Mr. Kuhn reviewing plea agreement with David Harrison.)

12 THE COURT: Mr. Harrison, have you read the plea
13 agreement?

14 DAVID HARRISON: Yes, Your Honor, I have.

15 THE COURT: Do you understand everything in that
16 agreement?

17 DAVID HARRISON: Yes, Your Honor.

18 THE COURT: Do you understand the nature of the charges
19 against you?

20 DAVID HARRISON: Yes, Sir.

21 THE COURT: Do you understand that by pleading guilty you
22 waive, that is give up your right to have a jury or court
23 trial on a plea of not guilty, a trial in which the
24 prosecution must prove your guilt beyond a reasonable doubt,
25 the right to require your accusers to appear before you and

1 confront you with the evidence they have, the right to cross
2 examine accusers and ask them questions that are proper, the
3 right to have the Court compel witnesses to appear and
4 testify in your behalf and in your defense, the right to
5 testify if you want to or refuse to testify if you do not
6 want to and your refusal would have no bearing on your guilt
7 or innocence and the right to appeal the judgment of the
8 trial Court should its ruling or a verdict be against you.
9 Do you waive these rights and your right to a jury trial and
10 freely elect to have this Court accept your plea of guilty
11 here and now?

12 DAVID HARRISON: Yes, Your Honor.

13 THE COURT: Mr. Huffman, would you please state the facts
14 of the State's case?

15 MR. HUFFMAN: Thank you, Judge. This may take awhile so I
16 don't mind if the Court asks the Counsel and the Defendant
17 be seated.

18 THE COURT: Go ahead and have, - sit down, please.

19 MR. HUFFMAN: Judge, I want to point out first that it
20 would appear, just from the simple reading of the
21 Information, that these charges basically involve a period
22 of time ending about one (1) year ago. And about one (1)
23 year ago, Your Honor, is the time frame involved in Count I
24 of the Information. At that time it would be the State's
25 contention that the Defendant learned, had reason to know,

1 suspected or had some apprehension that certain activities
2 of his had been discovered or at least would be investigated
3 to the point where there would be a discovery of those
4 activities. And at that time, the Defendant undertook to
5 basically what, in less sophisticated charges might be
6 phrased is, "get rid of the evidence". In other words, he
7 took a computer. These are, - basically these charges all
8 involve computer crime. And that he, - I'm not computer
9 literate enough to be, - tell the Court precisely how he did
10 it but he, in effect attempted to erase and to eliminate
11 from the computer system that he had, certain information,
12 certain evidence which basically is evidence in addition to
13 what is set forth in Counts II through VI. The fact being,
14 Judge, he just didn't get it all done.

15 Very quickly, Judge, Mr. Harrison had, - basically there
16 were three (3) computers involved. He had a computer in his
17 office at the Police Department. Mr. Harrison at that time
18 was serving as Chief of Police and he had a computer in his
19 office at the Police Department. He also had a computer at
20 home and he had a laptop computer. And he had these three
21 (3) computers hooked together so that he could, for
22 instance, take information which was on the office computer
23 and however computer people do that, he could cause that to
24 be sent to his computer at home or to a laptop. He could do
25 it the other way around. He could have images on his

1 computer at home. He could cause that to be on his computer
2 at the office.

3 So Count I, Judge, what he did back in May of 2002,
4 when he became suspicious or learned or was sure or whatever
5 that an investigation was going to be ongoing, he attempted
6 to eliminate the, in effect, the incriminating material that
7 was on the computer. He didn't get that all done and we
8 have resurrected or recreated and otherwise have available
9 that evidence. So that's what Count I was involving, Judge.
10 Now if we see these, - this occurred about May 2nd of 2002.

11 We undertook at that time, Judge, an investigation of
12 the computer activity of Mr. Harrison. We employed the
13 Computer Crimes Division of the Attorney General's Office at
14 BCI who have computer people there who conducted this
15 investigation for us. It is correct, Judge, that it has
16 taken approximately one (1) year to conclude that
17 investigation and I can only say, not by way of excuse but
18 by way of explanation that the material that had to be, so
19 to speak, sorted through was truly massive. The initial
20 report of the Computer Crimes Division of the BCI to Mr.
21 Gottschalk, who's my assistant in this matter, the initial
22 report was three (3) two (2) inch ring binders and that's
23 only just samples of what we have. So that's why we're one
24 (1) year away from this. Now Judge, I'm gonna talk to you
25 about, - tell you the circumstances of Counts V and VI and

1 Mr. Gottschalk, who's a little more computer savvy than I am
2 has a little better handle on Counts II, III and IV
3 specifically.

4 Count V, Judge, involves as the Information says, it
5 involves procuring, possessing or controlling obscene
6 material that has a minor as one of its participants in
7 violation of 2907.321(A)(5) of the code. Found on the
8 computer disks, hard drives and other storage mechanisms in
9 this computer system that Mr. Harrison had under his control
10 were numerous photographs of children. Obviously children
11 in the photographs and observation of photographs makes it
12 very clear that they are children engaged in a variety of
13 sexual activity from sexual intercourse to forms of oral
14 sex, homosexual sex. I mean, there are,- and if you know
15 Judge, in Count V we have an indication that that's between
16 July 25, 2000 and at various other times between then and
17 January 2nd of 2002, simply because, Judge, I,- there was no
18 use I felt, to make a separate count for each photograph or
19 separate count for each date. But during that,- the period
20 set forth in Count V, he did have on his computer and able
21 to display to himself those images of children engaged in
22 sexual activities.

23 Judge, Count VI of the Indictment is basically the same
24 set of facts except that the persons depicted in the images
25 or photographs or whatever you,- whatever the correct

1 computer term would be for pictures, that Mr. Harrison there
2 had stored on the computer and possessed them in the
3 language of the statute a variety, a large variety of
4 photographs of adult persons engaged in various sexual
5 activity from sexual intercourse to oral sex to homosexual
6 sex, people displaying sexual organs, those things which
7 meet the description of the prohibited activity in Count VI.
8 Again Judge, we picked two (2) dates here, April 2, 2001, up
9 to April 28, 2002, bringing it right up to just a few days
10 before, so to speak, the house of cards came tumbling down
11 here. And certainly could, upon request of the Court,
12 exhibit the images, pictures which constitute the violation
13 in Count VI of the Information. Some of those images both
14 as to the sexual activity of the minors, sexual activities
15 of the adults, Judge, are found both on his computer at home
16 and on the computer which he had available to him in which
17 he used constantly here in the office. So unless the Court
18 has any questions of me, of the activity which is involving
19 Counts I, V or VI and if you do, Judge, I'll be happy to try
20 to answer any questions about that.

21 THE COURT: The only question I would have, all these
22 offenses occurred in Auglaize County, Ohio; correct?

23 MR. HUFFMAN: Yes, Sir. All of the events occurred in
24 Auglaize County. The computer was located, - both computers,
25 the office computer, the home computer, the laptop, all

1 are, - were located in and found in Auglaize County. And we
2 believe that all of the activity of Mr. Harrison involved in
3 procuring, storing, possessing the images occurred here in
4 Auglaize County. As to Count I, certainly the attempt, so
5 to speak, to wipe out the evidence or to clear up some of
6 the incriminating, - and then I want to say, Judge, some he
7 was successful and that's, you know, that's why we brought
8 Count I. He was successful in getting rid of some of the
9 computer images, some of the material that was on the
10 computer but not all.

11 THE COURT: Thank you. Is Mr. Gottschalk going to talk
12 about II, III and IV?

13 MR. GOTTSCHALK: Yes. Thank you, Your Honor. Your
14 Honor, with regards to Count II, on or about May 23rd of
15 2000, the BCI & I people were able to ascertain that
16 Internet websites were accessed by the office computer, the
17 office computer being the computer at the Wapakoneta Police
18 Station here in Auglaize County, Ohio. By looking at what's
19 called an Internet history, they were able to ascertain that
20 on that date certain websites by name were accessed. Those
21 websites dealt with issues of child pornography, pornography
22 in general and other obscene materials. As was stated by
23 Mr. Huffman, an Internet history is basically a listing of
24 every website that the computer has accessed. It's a
25 massive amount of information. Therefore, we decided to

1 limit the actual Count II to just the one particular day
2 where we saw instances of accessing all three (3) of the
3 different types of materials that we were talking about, the
4 child pornography, the obscene materials and the adult
5 pornography. And, those were done without the consent or
6 beyond the consent obviously of the City of Wapakoneta or
7 the Wapak Police Department.

8 With regards to Count III, Your Honor, again doing a
9 search of the computer that the folks at BCI & I were able
10 to ascertain that certain searches were conducted from the
11 computer used by Chief Harrison at the Wapak Police
12 Department. A computer that, by the way, only he had access
13 to as I understand it. By researching the various different
14 types of searches that were conducted on the E-bay website,
15 and E-bay is an online auction service. People put up
16 things to buy. People put up things to sell. They bid
17 online over their computers. They sell things by way of
18 this website and the website facilitates it by dividing the
19 various types of things for sale into categories. And you
20 can conduct searches of all the things that are for sale to
21 find what you're looking for. One of the things that was
22 searched for, - several items that were searched for were
23 items dealing with wire fox terriers, items dealing with
24 women's panties, used panties, things of that nature which
25 were obviously beyond the scope of the consent expressed or

1 implied in the City of Wapak or the Wapakoneta Police
2 Department. Those searches that we were able to ascertain
3 that were conducted were conducted during hours of
4 employment, during hours that the Defendant was scheduled to
5 be working and as I said, obviously not connected in any
6 manner to any lawful purpose or within any scope authorized
7 by his employer.

8 THE COURT: So they can tell the day and the time these
9 different things were done?

10 MR. GOTTSCHALK: They were actually able to in certain
11 circumstances, print up the screen that he would have seen
12 on that day and time with the actual search topic typed in.
13 And that's the evidence that they were able to gather from
14 the computer. So yes, we can tell what time it was, what
15 the actual search was, the date and what the screen itself
16 physically looked like. There are even instances in our
17 binders that Mr. Huffman referenced where you could see
18 photos of the items that were on sale under that particular
19 category in E-bay.

20 Count IV, Your Honor, deals with the unauthorized usage
21 of what's called a photo editor. A photo editor is a piece
22 of software, something that was added on to the computer
23 after it was purchased by the City of Wapak for the
24 Defendant's usage. What a photo editor does is that it
25 allows you to scan images or use a digital camera to

1 transfer images to the computer. Once those images are on
2 the computer, the photo editor can change, modify the
3 images. You can take heads, place them on different bodies,
4 you can change the color of hair, you can put fake teeth on
5 people, all different kinds of things. You can put two (2)
6 people from separate pictures into one (1) to make it appear
7 as if they were in the same place at the same time. From
8 May 27, 1998, and at various diverse times until April 25,
9 2002, the people at BCI & I were able to ascertain that this
10 software program was accessed, meaning opened up. I don't
11 know how familiar the Court is with computers, but if you
12 have a program that you want to go to, you have to click on
13 it or open it up somehow. This program was opened up
14 approximately eight thousand six hundred ninety-nine (8,699)
15 times over the course of a period of approximately a little
16 less than four (4) years. There is no consent or authority
17 to use a photo editor granted by the City of Wapak as we can
18 ascertain. There's no use for a law enforcement official to
19 have a photo editor. Basically what it does is it modifies,
20 changes and otherwise corrupts a photograph. And we were
21 able ascertain that maybe perhaps only that it was accessed
22 that number of times, not what was actually done, although
23 we do have evidence of modified pictures, obviously not
24 connected to any lawful purpose. That would constitute the

1 facts surrounding Counts II, III and IV. If the Court has
2 any questions, I'd be more than willing to answer them.

3 THE COURT: No questions, thank you.

4 MR. GOTTSCHALK: Thank you.

5 THE COURT: Mr. Harrison, please rise. (Defendant
6 complying) Are these the offenses to which you are pleading
7 guilty?

8 DAVID HARRISON: Yes, Your Honor.

9 THE COURT: Have you discussed the matter, the plea and
10 the present charges fully and completely with your attorney,
11 Mr. Kuhn?

12 DAVID HARRISON: Yes, Your Honor.

13 THE COURT: Are you satisfied with the service and advice
14 of your attorney up to the present time?

15 DAVID HARRISON: Yes, Your Honor.

16 THE COURT: Do you understand no one can compel you to
17 plead guilty?

18 DAVID HARRISON: Yes, Your Honor.

19 THE COURT: Are you pleading guilty freely and
20 voluntarily?

21 DAVID HARRISON: Yes, Your Honor.

22 THE COURT: Do you understand that in the event I accept
23 your plea, the only thing that remains to be done is to pass
24 sentence. That includes a sentence of years to a State
25 penal institution and in this case that could be a sentence

1 in Count I of up to sixty (60) days. Is that what it is,
2 sixty (60) days, I'm not sure.

3 MR. GOTTSCHALK: Ninety (90), Your Honor.

4 MR. HUFFMAN: It's ninety (90), Judge.

5 THE COURT: Ninety (90) days. On Count II, III and IV it
6 could be a sentence of up to twelve (12) months for each
7 count, with a maximum fine of twenty-five hundred dollars
8 (\$2,500.00). In Count V, it could be a sentence of up to
9 eighteen (18) months with a maximum fine of five thousand
10 dollars (\$5,000.00) and in Count VI it could be a maximum
11 sentence of twelve (12) months, with a maximum fine of
12 twenty-five hundred dollars (\$2,500.00). Do you understand
13 that?

14 DAVID HARRISON: Yes, Your Honor.

15 THE COURT: That any prison term stated would be served
16 without credit for good time. That you may be given up to
17 three (3) years of Post Release supervision after released
18 from prison and if you violate that supervision, the Parole
19 Board could return you to prison for up to fifty percent
20 (50%) of the sentence imposed by the Court. If the
21 violation would result from a conviction for a felony
22 offense, the Court may impose a prison term for the
23 violation up to the remaining period of Post Release Control
24 or one (1) year, whichever is greater, together with the

1 sentence for the new felony offense. Do you understand
2 that?

3 DAVID HARRISON: Yes, Your Honor.

4 THE COURT: That if you are granted Community Control and
5 you violate the conditions imposed, you could be given a
6 longer period of Community Control, greater restrictions or
7 a prison term up to the maximum term stated. Do you
8 understand that?

9 DAVID HARRISON: Yes, Sir.

10 THE COURT: Your sentences could be concurrent with each
11 other or consecutive to one another, which means you could
12 face a maximum term of incarceration of sixty-nine (69)
13 months. That's what I have, is that what you figured out?
14 Maximum term of incarceration of sixty-nine (69) months and
15 a maximum fine of fifteen thousand seven hundred and fifty
16 dollars (\$15,750.00). Do you understand that?

17 DAVID HARRISON: Yes, Sir.

18 THE COURT: Are you a citizen of the United States?

19 DAVID HARRISON: Yes.

20 THE COURT: Are you presently on probation, parole, Post
21 Release supervision or Community Control for any other
22 offense?

23 DAVID HARRISON: No.

24 THE COURT: Have you been induced to plead guilty by any
25 threats, promises or offers of reward?

1 DAVID HARRISON: No, Your Honor.

2 THE COURT: Are you in good health mentally and
3 physically?

4 DAVID HARRISON: Reasonably, Your Honor.

5 THE COURT: Okay. What problems do you have?

6 DAVID HARRISON: Well I'm currently taking medication for
7 hypertension and chronic depression and I am currently under
8 the care of a licensed therapist.

9 THE COURT: Okay. What kind of medications are you
10 taking?

11 DAVID HARRISON: I'm taking blood pressure medication, is
12 Verapamil and Deponit or Lozol. I'm taking Wellbutrin and
13 other medications for allergies.

14 THE COURT: Okay. Anything about those medications that
15 would cause you not to understand what you're doing here
16 today?

17 DAVID HARRISON: No, Your Honor.

18 THE COURT: Mr. Kuhn, you've had a chance to talk to your
19 client. Do you feel that he understands the consequences of
20 the guilty pleas today?

21 MR. KUHN: I do, Your Honor.

22 THE COURT: Anything about your medical or psychological
23 condition that would cause you not to understand what you're
24 doing here today?

25 DAVID HARRISON: No, Your Honor.

1 THE COURT: Are you pleading guilty because you're guilty
2 as charged?

3 DAVID HARRISON: Yes, Your Honor.

4 THE COURT: You, - we've already executed the petition or
5 the plea form?

6 MR. KUHN: We have, Your Honor.

7 THE COURT: Alright. The Court FINDS that the
8 Defendant's plea is freely, voluntarily, and understandably
9 made. Let the record show that the Defendant enters a plea
10 of GUILTY to Counts I, II, III, IV, V and VI of the Bill of
11 Information. Mr. Huffman, were there any arrangements or
12 plea bargains which may have influenced this plea?

13 MR. HUFFMAN: Judge, I know of none. I can say, Judge,
14 that the only indication that I have given to Mr. Kuhn of
15 any attitude, action, opinion, whatever of the State from
16 this point on is that should the Court offer to the
17 Defendant a release today on his own recognizance, we would
18 not object to that. I did tell Mr. Kuhn that. I also told
19 Mr. Kuhn and I believe that is probably in the plea bargain
20 agreement, that at the time of sentencing in this case, the
21 State's position is that we will make no recommendation to
22 the Court with regard to sentencing feeling, as I always
23 have, that sentencing is the prerogative of the Trial Court
24 and that that judgment of the Trial Court should be, so to

1 speak, untainted by any influence of the Prosecutor, one way
2 or the other. That's it, Judge.

3 THE COURT: Thank you, Mr. Huffman. Mr. Kuhn, is that
4 your understanding?

5 MR. KUHN: It is, Your Honor.

6 THE COURT: Mr. Harrison, as I previously informed you,
7 one of the purposes of this hearing is to determine the
8 conditions of pre-trial release in this case. The, - Mr.
9 Huffman has indicated that the State has no opposition to a
10 release on a personal surety bond and you have appeared here
11 voluntarily. Therefore, the Court's going to ORDER you to
12 be RELEASED upon the execution of a PERSONAL SURETY BOND. I
13 believe that's at the Probation Office?

14 BAILIFF: At the Clerk's Office.

15 THE COURT: At the Clerk's Office, under the Court's
16 standard conditions in this type of a case. The Court is
17 also going to ORDER a PreSentence Investigation. The Court
18 will set this matter for sentencing but at this time the
19 Court doesn't know what the schedules, - my schedule or yours
20 so we'll get back to you. It will be in approximately five
21 (5) or six (6) weeks I would suggest. Is there anything
22 further at this time?

23 MR. KUHN: No, Sir.

24 MR. HUFFMAN: Not from the State, Judge.

25 THE COURT: Court's ADJOURNED.

1 MR. KUHN: Thank you, Your Honor.

2 ADJOURNED.

3 *****

CERTIFICATE OF REPORTER:

I, Diana I. Kantner, Official Court Reporter for the Common Pleas Court, Auglaize County, Ohio, duly appointed therein, do hereby certify that the foregoing, consisting of pages 1 through 25 is a true and complete transcript as transcribed by me of the proceedings conducted in that Court on the 17th day of June, 2003, before the Honorable Charles D. Steele, sitting by assignment, and I do further certify that I only did the typing of the hearing, and that Mary Ruppert, Assistant Court Reporter was personally present in the courtroom during all of the said proceedings.

Signed and certified to by me that transcript has been completed this 28th day of January, 2004.

Diana I. Kantner

Official Court Reporter

State of Ohio, Auglaize County, SS.
I Sue Ellen Kohler, Clerk of the Court of Common Pleas within and for said County, hereby certify that the foregoing is a true and correct copy of the original record on file in this office.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court at Wapakoneta, Ohio.
this 19th day of May 2006
SUE ELLEN KOHLER, CLERK OF COURT
By Jan Meckstroth Deputy Clerk

APPENDIX H

IN THE COURT OF COMMON PLEAS
AUGLAIZE COUNTY, OHIO
CRIMINAL DIVISION

AUGLAIZE COUNTY
COMMON PLEAS COURT
FILED
03 JUL 31 PM 2:55
JOE ELLEN
CLERK OF COURTS

STATE OF OHIO
Plaintiff

vs.

DAVID L. HARRISON
Defendant

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*
* Case No. 2003-CR-83
*
* JOURNAL ENTRY --
* ORDERS ON SENTENCE
*
*
*
*

On July 31, 2003, Defendant's Sentencing Hearing was held pursuant to Ohio Revised Code §2929.19. Defense Attorney Thomas R. Kuhn and Todd Kohlreiser and Attorney Lawrence S. Huffman and Craig Gottschalk, Special Prosecuting Attorneys were present. Defendant was afforded all rights pursuant to Criminal Rule 32. The Court has considered the record, oral statements, any Victim Impact Statement and Pre-Sentence Report prepared, and information and letters submitted by the Defendant to be considered in mitigation of his punishment, as well as the principles and purposes of sentencing under Ohio Revised Code §2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code §2929.12.

The Court finds that pursuant to R.C. §2929.13(B):

- The Defendant held a public office or position of trust and the offense related to that office or position and the Defendant's position facilitated the offense.

The Court finds the Defendant has been convicted of BILL OF INFORMATION--COUNT I--OBSTRUCTING OFFICIAL BUSINESS, a violation of Ohio Revised Code §2921.31(A), a MISDEMEANOR of the 2ND degree; BILL OF INFORMATION--COUNTS II, III & IV--UNAUTHORIZED USE OF A COMPUTER, violations of Ohio Revised Code §2913.04(B), FELONIES of the 5TH degree; BILL OF INFORMATION--COUNT V--PANDERING OBSCENITY INVOLVING A MINOR, a violation of Ohio Revised Code §2907.321(A)(5), a FELONY of the 4TH degree and BILL OF INFORMATION--COUNT VI--PANDERING OBSCENITY, a violation of Ohio Revised Code §2907.32(A)(5), a FELONY of the 5TH degree.

It is the sentence of the Court that the Defendant be incarcerated with the Department of Rehabilitation and Corrections, Orient, Ohio,

BILL OF INFORMATION--COUNT I - for a term of NINETY (90) DAYS.

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BILL OF INFORMATION—COUNT II—for a term of SIX (6) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

BILL OF INFORMATION—COUNT III—for a term of SIX (6) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

BILL OF INFORMATION—COUNT IV—for a term of SIX (6) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

BILL OF INFORMATION—COUNT V—for a term of TWELVE (12) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

BILL OF INFORMATION—COUNT VI—for a term of ELEVEN (11) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

The above sentences shall run CONCURRENTLY for a total prison sentence of TWELVE (12) MONTHS.

The Court having engaged in the analysis required in Revised Code Section 2929.14(B) finds that the shortest prison terms possible in Counts Five and Six would demean the seriousness of the offenses, and will not adequately protect the public from future crime by the offender or others.

The Court has further notified the Defendant that Post Release Control is OPTIONAL in this case for THREE (3) years, as well as the consequences for violating conditions of Post Release Control imposed by the Parole Board under Ohio Revised Code §2967.28. The Defendant is ORDERED to serve as part of this sentence any term of Post Release Control imposed by the Parole Board, and any prison term for violation of that Post Release Control.

The Defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Correction. Credit for -0- days is granted as of this date along with future custody days while the Defendant awaits transportation to the appropriate State institution. The Defendant is ORDERED to pay costs of prosecution

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and any fees permitted pursuant to R.C. §2929.18(A)(4) through the Office of the Clerk of Courts.

The Court does advise the Defendant of the following:

- a) That the Defendant has a right to appeal;
- b) That if the Defendant is unable to pay the cost of an appeal, the Defendant has the right to appeal without payment;
- c) That if the Defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;
- d) That if the Defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;
- e) That the Defendant has a right to have a notice of appeal timely filed on his behalf.

Costs assessed to the Defendant. Judgment for costs.

The Clerk of Courts shall cause a copy of this Journal Entry to be served on Attorney Thomas R. Kuhn, 973 W. North Street, Lima, Ohio 45805 and Special Prosecutor Lawrence S. Huffman, 127-129 N. Pierce Street, P.O. Box 546, Lima, Ohio 45802-0546 by Regular U.S. Mail, and a copy on the Auglaize County Sheriff, the Ohio Adult Parole Authority by hand delivering the same, and a copy upon the Warden of the Corrections Reception Center, Orient, Ohio and to the Defendant by Personal Service by the Auglaize County Sheriff. The Court further ORDERS that a copy of the Pre-Sentence Investigation Report, sealed by the Court, be served upon the Warden together with said copy of this Entry, in accordance with law.

IT IS SO ORDERED.



JUDGE CHARLES D. STEELE
Sitting by Assignment

State of Ohio, Auglaize County, SS.

I, Sue Ellen Kohler, Clerk of the Court of Common Pleas within and for said County, hereby certify that the foregoing is a true and correct copy of the original record on file in this office:

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court at Wapakoneta, Ohio:

this 19th day of May, 2006

SUE ELLEN KOHLER, CLERK OF COURT
Jean M. Eckstein Deputy Clerk

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Scott A. Longo

From: Erin Rosen
Sent: Friday, August 08, 2008 9:25 AM
To: Scott A. Longo

STATEMENT OF FACTS

On May 2, 2002, dispatcher Denise Kohler of the Wapakoneta Police Department discovered a running tape recorder behind a trash can in the restroom of the ladies' locker room. (T.pp.27-28). The recorder was identified as belonging to the Appellant, who was chief of police. (T.p.187). Shortly after the discovery of his tape recorder, Appellant notified the city director that he was retiring, effective immediately. (T.pp.671-72).

The Bureau of Criminal Identification and Investigation was called in to investigate. On May 8, 2002, Special Agent Lee Lerussi discovered suspected child pornography on a floppy disk located in Appellant's office. (T.pp.338, 350, 354-55). S.A. Lerussi also discovered log transfer files that indicated mass file transfers between the Appellant's office computer and his laptop computer. (T.p. 361). A search warrant was secured and executed on June 17, 2002, at Appellant's home. (T.pp.364-67, 436). The laptop and home computer were seized, as were hundreds of floppy disks. (T.pp. 364-66). SA Lerussi assigned to forensic analysts from his office to assist him in reviewing the hard drives and media seized. (T.pp. 437, 511). An analysis of all the media revealed numerous of images of suspected child pornography, but only fifteen images were selected for prosecution. (T.p.522). The investigation also revealed voluminous internet searches for websites containing sexual content involving children. (T.pp.606-607).

*Erin G. Rosen
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1-866-534-6277 (e-fax)*

Scott A. Longo

From: Erin Rosen
Sent: Friday, August 08, 2008 9:29 AM
To: Scott A. Longo
Subject: Page 5

End of 2nd paragraph-- " Madison County Court of Common Pleas"..... Right now it appears as "Madison County court of common pleas"

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