IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Appellee, vs. DAVID W. HARRISON, Appellant.	Case No.: 08-0331 (Discretionary Appeal) On appeal from the Madison County Court of Appeals Twelfth Appellate District Case No. CA 2006-08-028

REPLY BRIEF OF APPELLANT DAVID W. HARRISON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES III

ARGUMENT 1

Appellee's Proposition of Law I:

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

Appellee's Proposition of Law II:

A separate standard of review does not exist for claims of ineffective assistance of counsel when the case involves technology 3

CONCLUSION 7

CERTIFICATE OF SERVICE 8

APPENDIX Appx. Page

Journal Entry of Sentence Auglaize County Court of Common Pleas (July 31, 2003) ..... A

Portion of Appellee's Merit Brief in the Ohio Supreme Court (August 8, 2008) ..... B

TABLE OF AUTHORITIES

CASES:

ASHCROFT V. FREE SPEECH COALITION, 535 U.S. 234 (2002) 6
HERNANDEZ V. KELLY, 108 OHIO ST.3D 395 (2006) 1,2
STATE V. BRADY, 2007-OHIO-1779 6
STATE V. WILSON, 73 OHIO ST.3D 395 (1995) 2

OTHER:

HTTP://WWW.SCONET.STATE.OH.US/CERTIFICATION/DEFAULT.ASP 4

ARGUMENT

Appellee's Proposition of Law I:

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

The state repeats in its brief that Harrison "chose" to withdraw his guilty plea. The use of that adjective was addressed in Harrison's initial brief. Assuming it was Harrison's choice, he still needed a court with jurisdiction to activate that choice. He did not have one. The state offers no authority to contradict that in Harrison's brief leading to the conclusion the Auglaize County Court was without jurisdiction to accept Harrison's plea withdrawal.

The state claims Harrison was informed of post release control (hereinafter referred to as "PRC") in his sentencing entry following his plea in the case number 2003-CR-83. He was. He was informed that "PRC" was optional up to three (3) years. (See, Sentencing Entry, Ex. "A".). Properly interpreted, Harrison's "PRC" could be anywhere from zero (0) months to thirty-six (36) months. He was released from prison receiving zero (0) months "PRC". That fact ends his journalized sentence. It can be speculated as to why the Adult Parole Authority (hereinafter referred to as the "APA") did not impose any "PRC," but there is nothing in the record from which any court can determine the "APA's" reasoning. Even if some reasoning can be determined or the state believes the "APA" erred in not imposing "PRC," once Harrison was released without "PRC," no further re-sentencing is permitted. See, Hernandez v. Kelly, 108 Ohio St.3d 395 (2006). The state did not appeal the "APA's" reasoning at any point and does not argue the "APA's" choice to impose zero (0) months of PRC is contrary to law.

The state argues, without authority, that the attempted re-sentencing in case number 2003-CR-83 was permissible because the state brought Harrison back prior to the time when his

probation would have expired had it been ordered by the court and imposed by the "APA." No authority supports that contention. The duration of a sentence a court meant to impose cannot confer jurisdiction upon that court for the duration of that intended sentence. No authority supports that contention. Such a notion posits endless jurisdiction by courts who reflect into history recollecting sentences they intended to impose.

In its brief, the state concedes that without Harrison's plea withdrawal being valid, jeopardy attaches to the plea and conviction in case number 2003-CR-83. (See, Appellee's Brief, Ex. "B".). If this court determines the Auglaize County Court was without jurisdiction to accept Harrison's plea withdrawal, the double jeopardy violation is not disputed.

The state claims Harrison waived his jurisdictional challenge. A jurisdictional challenge to subject matter jurisdiction is not subject to the waiver doctrine and may be raised for the first time on appeal. State v. Wilson, 73 Ohio St.3d 40, 46 (1995).

This court released its decision in Hernandez v. Kelly, 108 Ohio St.3d 395 (2006) on January 12, 2006. Harrison's trial commenced on March 6, 2006. The Hernandez rule is retroactive to the enactment of the sentencing statute. As is later noted, it is de facto ineffective assistance of counsel for trial counsel to have failed to recognize the obvious import of that decision on Harrison's upcoming trial. Hernandez v. Kelly, 108 Ohio St.3d 395 (2006). Regardless of whether the trial court in the 2003 case realized it or not, it did not have jurisdiction to re-sentence Harrison. The legal authority explicitly held in Hernandez was applicable prior to the decision in Hernandez. Hernandez simply said what the sentencing statute said all along. Hernandez.

The state's claim that Harrison's double jeopardy claim is waived is without merit. Even should the court accept the proposition that his trial counsel's failure to raise the issue constitutes

waiver, that act alone is sufficient to establish trial counsel's ineffective assistance. In addition, the plain error standard is applicable to this clear double jeopardy violation.

The plea agreement counts and the later indictment counts are identical. The appellate opinion in this case at ¶12 held that the information and indictment arise from the same set of facts and circumstances. The state did not contest that holding in its brief or any cross-appeal. The double jeopardy problem is not eliminated by merely rewording indictment counts that are arising from the same set of facts and circumstances as Harrison's original plea.

The state had a contractual duty to abide by the terms of Harrison's plea agreement. It agreed not to charge him for anything related to the incident leading to his plea. He abandoned significant constitutional rights in pleading guilty. He served his entire journalized sentence. Later indicting for conduct for which the state contractually agreed not to charge in the plea agreement breaches that original plea agreement and should not have been permitted.

Appellee's Proposition of Law II:

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

The state argues that there is no authority for the assertion that a certain level of expertise is required to defend a computer related criminal case. This assertion should be viewed with some skepticism coming from the state. It is advantageous to the state to confront counsel in such cases who admit, as trial counsel here did, "I barely know how to turn one of these [a computer] on." Defense counsel who asks the state's key technology witness for "help" correcting counsel's mistakes with his understanding of technology, is the ideal opponent for the state in such a case as Harrison's. The state has a conflict of interest in arguing here that trial counsel was effective. If effective counsel means one whom the state can easily overwhelm and

maneuver around without counsel even knowing it is happening, then effective counsel in Ohio has a whole new definition.

There is long standing authority recognizing that being a lawyer does not equal effective ability in all legal areas. This Court has adopted over time more than ten (10) separate certification areas for attorneys. (See, http://www.sconet.state.oh.us/certification/Default.asp.). This Court recognizes the public is best served by informing it of attorneys with demonstrated experience and training in areas where they seek counsel. The era of computers and technology related criminal cases is newer than many of the court's recognized areas of specialization. The first personal computers began arriving in consumer's houses, for those who could afford the hefty price tags, in the mid 1980s. It was until the mid 1990s that the Internet became something usable to the average computer user. The necessary, but at times problematic, entanglement of technology in the lives of clients of the lawyers of our profession requires more than just hiring a computer expert for a lawyer to effectively represent a person whose liberty is at stake in a computer related case. Computers and technology were not just part of the case here -- all the key counts in this case were reliant upon evidence derived from a computer, and in some cases multiple computers with different Internet connections in different locations, used for different purposes, potentially with evidence of files being exchanged between them, etc.

This Court recognizes just one (1) specialization category related to criminal law, general criminal law advocacy. (See, http://www.sconet.state.oh.us/certification/Default.asp.). Technology makes this one (1) category too blunt an instrument to enable the public to ascertain whether their potential counsel can effectively handle the unique technological, and often unique legal issues of criminal cases such as Harrison's and the thousands (1000 +) of other computer related criminal cases in Ohio courts each year.

Not a week goes by without the typical lawyer being confronted with the latest local, state, or national seminar for "DUI attorneys." These seminars comprise an entire CLE day. They are dedicated to defending just one (1) type of case. That defense requires diligent attention to such cases, regular involvement in them, understanding the technology for measuring BAC which constant changes, the training for officers, knowledge about human biology related to these cases, etc. Precisely the same level of complexity applies to defending child pornography related cases involving computers, digital images, IP addresses, pixels, alteration, digital imaging experts, computer forensic experts, partially downloaded files, web cache folders, temporary internet folders, file sharing, P2P programs, virtual imaging, creation of exhibits, Photoshop, researching the origin of alleged contraband online, overbreadth and vagueness challenges, fair trial challenges, authentication issues and on and on.

Six (6) hour seminars are offered nationwide on the topic of just defending child pornography cases and those seminars cannot adequately cover all the numerous issues even within those six (6) hours. It is likely that most, if not all, attorneys passing the bar before 1990 did not use a computer in law school or college, did not use one for the formative years of their law practice, did not use one as an early prosecutor or defense attorney until the later 1990s. The Internet itself was not commercially viable until 1996 with the arrival of the Graphical User Interface. From that start, more than ten (10) years ago, so much has changed in the world of digital imaging technology and the defense of child pornography related crimes, it is unrealistic to expect that even an experienced criminal defense attorney, with no familiarity with computers beyond email, typing, booking plane tickets and searching Google, has the capacity to understand, consider, discuss with his clients and implement technology related arguments as they interweave with this area of the law. It is a disservice to the public to permit unqualified

counsel to accept payment for representation that requires skills he or she does not possess.

This Court has handled now three (3) separate cases involving child pornography prosecutions and each of them was heavily reliant on a sophisticated understanding of digital imaging technology articulated in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) and it's progeny across the country in federal and state courts. This Court's own opinions in State v. Tooley, 114 Ohio St. 3d 366 and the upcoming decision in State v. Brady, 07-0742 are replete with examples of the intricate discussions of technology and the law that rarely, if ever, appear in any other criminal matters uninvolved with computers, digital images and the like.

The failure to seek the exclusion of Hany Farid was not a strategic decision by trial counsel. Farid was the only witness presented to attempt to authenticate the key evidence in the child pornography counts. He admitted in prior cases misleading courts and completely disavows any ability to view digital images and know whether they are illegal or not. Failure to challenge the state's claimed authentication of its evidence was not a strategic decision. There is on downside for the client in losing such a challenge and a huge upside -- unauthenticated images do not get admitted as potential evidence against him. Harrison's merit brief contains sufficient additional examples to support an ineffective assistance finding by this Court.

Without a clear ruling from this court regarding trial counsel's ineffective assistance, this claim will continue to arise under similar circumstances to this case. Lawyers will continue to accept fees for criminal cases involving these intricate, sophisticated technological issues relying on a decade or two (2) of general criminal defense experience which will fail them in properly identifying, considering, researching, implementing and appealing the unique technological and legal issues of these cases.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests this Court issue the following orders:

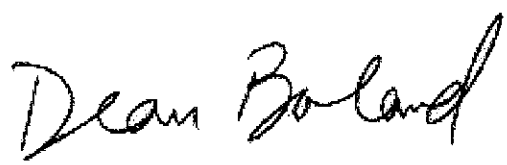
1. Reversal of Appellant's conviction and an order to the Madison County Common Pleas Court to dismiss Appellant's case;

2. Immediate, permanent suspension of the execution of his sentence pending the issuance of the dismissal by the Madison County Common Pleas Court;

3. That neither the Auglaize County Common Pleas Court nor the Madison County Common Pleas Court retain any jurisdiction over the Appellant for any matters relating to either the now dismissed case no. 2003-CR-0083 nor case no. 2005-CR-10-099, respectively, once it is dismissed.

4. An award of Attorney's Fees from the state for all Attorney's Fees paid by Appellant starting from the state's filing of the motion to re-sentence up to and including fees for his appeal to this court as a sanction against the state for its treatment of Appellant following this court's ordering of Appellant released from prison;

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Merit Brief of Appellant has been served via ordinary U.S. Mail, postage prepaid, this 27th day of August, 2008 upon the following Counsel for Appellee:

Scott A. Longo,
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Dean Boland (0065693)
COUNSEL FOR APPELLANT,
DAVID W. HARRISON

APPENDIX

Journal Entry of Sentence Auglaize County Court of Common Pleas
(July 31, 2003) .....A

Portion of Appellee's Merit Brief in the Ohio Supreme Court
(August 28, 2008) .....B

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

AUGLAIZE COUNTY
COMMON PLEAS COURT
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SUE ELLEN ...
CLERK OF COURTS

STATE OF OHIO Plaintiff	*	Case No. 2003-CR-83
vs.	*	JOURNAL ENTRY -- ORDERS ON SENTENCE
DAVID L. HARRISON Defendant	*	

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.

VOL 83 PAGE 634

EXHIBIT
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A

APPENDIX I

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

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 28th day of July 2005

SUE ELLEN KOHLER, CLERK OF COURT
By [illegible] Deputy Clerk

VOL 83 PAGE 634

7849

INTRODUCTION

Appellant David Harrison, the former police chief of the Wapakoneta police department, chose to withdrawal 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.

EXHIBIT
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