

ORIGINAL

IN THE SUPREME COURT OF OHIO

ERNEST HOLLINGSWORTH

Petitioner,

-vs-

DEB TIMMERMAN-COOPER, Warden

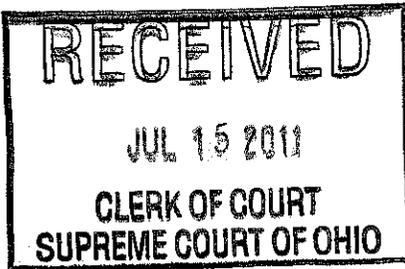
Respondent.

\* Case No. 11-1095  
\* On Review of the Certified  
\* Questions from the United States  
\* District Court, Southern District of  
\* Ohio, Western Division  
\*  
\* U.S. District Court Case No.  
\* 1:08-CV-00745  
\*

PRELIMINARY MEMORANDUM OF PETITIONER ERNEST HOLLINGSWORTH

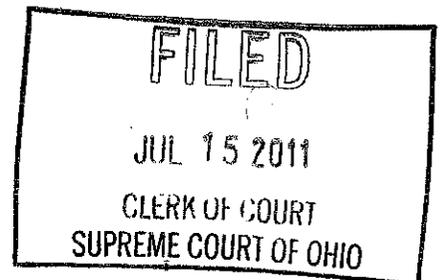
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## STATEMENT OF THE CASE AND FACTS

Hollingsworth was charged with marihuana possession. R.C. 2925.11(A). Because the marihuana weighed in excess of 20,000 grams, he faced a mandatory-minimum term of 8-years imprisonment. R.C. 2925.11(C)(3)(f). Trial counsel filed a motion to suppress. That motion was overruled. In the middle of trial, Hollingsworth pled no contest to the indictment and was sentenced to the 8-year mandatory-minimum term.

After conviction, Hollingsworth and his new attorney developed both new and previously ignored evidence related to the motion to suppress. For example, he developed significant statistical evidence regarding the patrol officer's pattern of race discrimination during traffic stops; and he developed evidence that the drug dog that alerted to his vehicle was not properly trained and lacked current certificates. Hollingsworth filed a post-conviction petition based on ineffective assistance due to his trial counsel's failure to investigate and present this new and previously ignored suppression evidence. However, the appellate court determined that Hollingsworth's petition was filed out of time, and dismissed it. This court accepted Hollingsworth's case to decide when the statute-of-limitations for a post-conviction petition begins to run, but dismissed it after oral argument as improvidently granted. *State v. Hollingsworth*, 118 Ohio St.3d 1204, 2008-Ohio-1967.

Hollingsworth next filed a habeas petition in federal court. He asserted the same ineffective-assistance claim that was presented in state court. After deciding that the missed statute-of-limitations was not a valid procedural bar to habeas review, the federal court held that Hollingsworth's no-contest plea and

resulting conviction operated as proof of a waiver of his right to effective assistance during pretrial proceedings. Hollingsworth objected to this. He contended, *inter alia*, that Ohio law and this court's holding in *Elevators Mutual Insurance Co. v. J. Patrick O'Flaherty's, Inc.*, 125 Ohio St.3d 362, 2010-Ohio-1043 precluded the state's use of Hollingsworth's no-contest plea and resulting conviction as evidence of a waiver of the right to effective assistance during pretrial proceedings.

The federal court conceded that Hollingsworth's objection was colorable and has certified the following question to this court: whether the state may use a defendant's no-contest plea and the resulting conviction as evidence of a waiver of a constitutional right in a subsequent collateral attack on that conviction under Ohio's post-conviction statute, R.C. 2953.21, or the federal habeas statute, 28 U.S.C. § 2254.

## ARGUMENT

### **PROPOSITION OF LAW NO I:**

The state is prohibited under Crim.R. 11(B)(2) and Evid.R. 410 from using a defendant's no-contest plea and resulting conviction as evidence of a waiver of a constitutional right in a subsequent collateral attack on the criminal conviction.

### **PROPOSITION OF LAW NO II:**

The state may use any other relevant evidence, except a no-contest plea and resulting conviction, as proof of a waiver of a constitutional right in a collateral attack on the criminal conviction, provided that the waiver is knowing, intelligent, voluntary, and affirmatively found in the trial record.

When a rule or statute is unambiguous, it must be applied and not interpreted. Crim.R. 11(B)(2) and Evid.R. 410 are both unambiguous. Crim.R. 11(B)(2) provides that " \* \* \* the plea [of no contest] or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." In

turn, Evid.R. 410 states that " \* \* \* the following is not admissible in any civil or criminal proceeding against the defendant who made the plea \* \* \* : a plea of no contest or the equivalent plea from another jurisdiction." That is why this court in *Elevators Mutual Insurance Co. v. J. Patrick O'Flaherty's, Inc.*, 125 Ohio St.3d 362, , 2010-Ohio-1043 applied these Rules, and held that neither (i) a no-contest plea nor (ii) the resulting conviction could be used as evidence in subsequent litigation. According to *Elevators Mutual*, this prohibition is expressed by the Rules in absolute terms, and any exception must come from a rule amendment and not judicial activism. *Id.* at ¶16.

In the instant case, the federal court believes that the *Elevators Mutual* holding should mean less than it says. The federal court held that Hollingsworth's no-contest plea operated as proof of an implied waiver of his right to effective assistance during pretrial proceedings. But this holding was wrong under Ohio law in two regards: (1) an Ohio no-contest plea and resulting conviction cannot be used as evidence in subsequent post-conviction litigation; and, (2) an Ohio no-contest plea waives only those constitutional rights identified in Crim.R. 11(C)(2)(c), which does not encompass the right to effective assistance during pretrial proceedings. This court should accept the federal court's certified question and correct its erroneous view of Ohio criminal procedure regarding no-contest pleas and resulting convictions.

A. *Hollingsworth's no-contest plea and conviction under Ohio law*

As stated above, *Elevators Mutual* bars the evidentiary use of a no-contest plea or the resulting conviction in subsequent litigation. This rule extends to the

present case and the state's efforts to use Hollingsworth's no-contest plea and resulting conviction as evidence of his waiver of the right to effective assistance during pretrial proceedings.

But, importantly, *Elevators Mutual* does not extend to the underlying facts of Hollingsworth's no-contest plea and his resulting conviction. For example, in *Elevators Mutual* the insurer was permitted to prove that the insured's business fire was actually arson with witness testimony and exhibits. *Id.* at ¶20. Likewise, in the instant case, the state is free to prove Hollingsworth's alleged waiver of his right to effective assistance by introducing evidence apart from his no-contest plea or resulting conviction. That proof might include the terms of the plea agreement, the plea colloquy, or any other relevant evidence.

B. *The constitutional rights waived in an Ohio no-contest plea and resulting conviction*

In the instant case, Hollingsworth's plea agreement and plea colloquy did not contain any express waivers of any right, like effective assistance, beyond those rights identified in Crim.R. 11(C)(2)(c). Crim.R. 11(C)(2)(c) requires the waiver of five constitutional rights during a no-contest plea: (1) the right to trial; (2) the right to confront witnesses at trial; (3) the right to compulsory process for obtaining witnesses at trial; (4) the right to proof beyond a reasonable doubt; and (5) the right to remain silent during the trial. Effective assistance is not among the rights waived during a no-contest plea under Ohio criminal procedure.

In this way, Hollingsworth's case proceeded in the ordinary procedural fashion: the no-contest plea, made under Crim.R. 11(C)(2)(c), expressly

extinguished Hollingsworth's constitutional trial rights but left open a future claim for ineffective assistance during pretrial proceedings.

Ohio law has long operated in this way. For example, in *State v. Blackert*, 9<sup>th</sup> Dist., 2006-Ohio-6670, the defendant pled no contest and was convicted of receiving stolen property with respect to a truck. He was sentenced to a 1-year term to be served consecutively to a 1-year sentence for the theft of the very same truck. *Id.* at ¶2-3. On post-conviction review, the appellate court held that the defendant received ineffective assistance because his trial counsel failed to appreciate and argue that the theft and receiving stolen property charges for the same truck were allied offenses, which barred the consecutive sentences. *Id.* at ¶6. The appellate court did not find, as the federal court would have it, that the no-contest plea and resulting conviction impliedly waived the defendant's effective assistance during pretrial proceedings.

C. *The consequences of the federal court's proposed construction of Ohio law*

Indeed, the federal court's waiver construction regarding an Ohio no-contest plea and resulting conviction would upset well-settled law regarding both the waiver doctrine and effective assistance in pretrial proceedings.

Regarding waiver, both the Ohio and U.S. Supreme Courts demand that a knowing, intelligent, and voluntary relinquishment of a constitutional right appear affirmatively in the trial record. *State v. Adams* (1989), 43 Ohio St.3d 67, 69, quoting *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, quoting *Aetna Ins. Co. v. Kennedy* (1937), 301 U.S. 389, 393. But Ohio law would change on this point if an Ohio no-contest plea were construed as evidence of an *implied waiver* of the

right to effective assistance during pretrial proceedings. The change would be that an Ohio defendant would be waiving a constitutional right that was never mentioned in the plea colloquy, effectively overruling this court's decision in *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶18.

Regarding effective assistance, both the Ohio and U.S. Supreme Courts hold that the right to effective assistance extends to pretrial proceedings. But Ohio law would change on this point if an ineffective assistance claim could not survive an Ohio no-contest plea. It would mean, for example, that an Ohio defendant who pled no contest would be forever barred from arguing that his trial attorney failed to convey a plea-bargain, or that his trial attorney failed to properly explain or even mention the immigration consequences from his no-contest plea and conviction, *Padilla v. Kentucky* (2010), 559 U.S. \_\_\_\_, 130 S.Ct. 1473, or that his trial attorney, like here, failed to identify and litigate a viable suppression issue, *Kimmelman v. Morrison* (1986), 477 U.S. 365.

Moreover, the federal court's construction of Ohio law would result in wasted judicial resources. That is because a defendant will be unable to depend on the Crim.R. 11(C)(2)(c) plea colloquy as the full expression of his waived rights, and will take cases to trial only to preserve pretrial issues. In many cases, these trials will proceed on uncontested facts, consuming unnecessary judicial, prosecutorial, and community resources. This contradicts public policy, which is currently embodied under Crim.R. 12(H) and permits a suppression motion to survive a no-contest plea. *Defiance v. Kretz* (1991), 6 Ohio St.3d 1, syllabus.

Finally, Opinion 2001-6 from the Ohio Board of Commissioners on Grievances and Discipline states that it is a violation of legal ethics for a defense

attorney or prosecutor to negotiate a waiver of post-conviction effective-assistance claims. While this opinion does not address whether "\* \* \*" such waivers are legal or constitutional[,] it does add to Hollingsworth's argument in this case. It would be arbitrary if Ohio ethics *prohibited* a lawyer from negotiating a post-conviction waiver of effective assistance in a no-contest plea, yet Ohio criminal procedure *required* an implied and silent waiver of that very right in the very same plea.

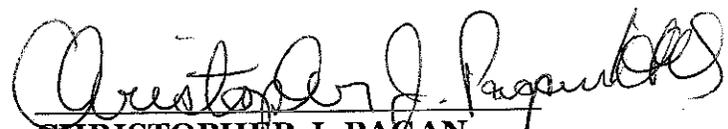
### CONCLUSION

The federal court erred in its construction of Ohio law. An Ohio no-contest plea and resulting conviction cannot be used in evidence during subsequent post-conviction litigation to prove a waiver of effective assistance during pretrial proceedings. Further, the plea colloquy based on Crim.R. 11(C)(2)(c) for a no-contest plea does not touch upon effective assistance during pretrial proceedings, and cannot operate as an implied waiver of that right.

To prove a waiver of effective assistance during pretrial proceedings for post-conviction purposes, the state is authorized under Ohio law to use any evidence, other than a no-contest plea or resulting conviction, to establish that the waiver was both (i) knowing, intelligent, and voluntary, and (ii) in the trial record.

To the Court, the instant Preliminary Memorandum is

Respectfully submitted,

  
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### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon M. Scott Criss, Ohio Attorney General's Office, 150 E. Gay Street, 16<sup>th</sup> Floor, Columbus, OH 43215, on this 13<sup>th</sup> day of July, 2011.

  
CHRISTOPHER J. PAGAN