

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS	3
The Warden Does Not Oppose Review of the Certified Question	
A. Crim. R. 11(B)(2) and Evid. R. 410(A)(2) do not prohibit use of a defendant’s no contest plea in a collateral attack of the conviction that resulted from the plea	6
1. The United States Supreme Court has long held that criminal defendants, by pleading guilty, waive the right to raise allegations on constitutional error that occurred prior to the plea.....	6
B. <i>Elevators Mutual</i> does not bar the use of a defendant’s no contest plea in a subsequent post-conviction or habeas proceeding	8
CONCLUSION	11
CERTIFICATE OF SERVICE.....	12

INTRODUCTION

Ohio Crim. R. 11(B)(2) and Evid R. 410 provide that a “no contest” plea “shall not be used against the defendant in any subsequent civil or criminal proceeding.” Crim. R. 11(B)(2). As this Court so recently held in *Elevators Mut. Ins. Co. v. J. Patrick O’Flaherty’s, Inc.*, 125 Ohio St. 3d 362, 365, 2010 Ohio 1043, “the purpose behind the inadmissibility of no contest pleas in subsequent proceedings is to encourage plea bargaining as a means of resolving criminal cases by removing any civil consequences of the plea. The rule also protects the traditional characteristic of the no contest plea, which is to avoid the admission of guilt. The prohibition against admitting evidence of no contest pleas was intended generally to apply to a civil suit by the victim of the crime against the defendant for injuries resulting from the criminal acts underlying the plea.” *Id.*, 2010 Ohio 1043, ¶14 (citations omitted).

Petitioner Ernest Hollingsworth asks this Court to expand the holding of *Elevators Mutual* from a prohibition on using the plea in an unrelated civil proceeding to a prohibition on using the plea in post-conviction review and habeas proceedings. As the federal district court opined in its certification order, that result would be “absurd.” To be sure, both post-conviction petitions filed pursuant to R.C. 2953.21 and federal habeas petitions filed pursuant to 28 U.S.C. 2254(a) are civil in nature and collateral to the criminal proceedings. But there can be no doubt that each is a part of the direct line of challenges to the criminal conviction, and cannot and should not be considered “subsequent” proceedings as contemplated by Crim. R. 11(B)(2).

Decades of well-settled precedent from the United States Supreme Court stand for the proposition that once a defendant enters a plea and permits the state to enter a conviction against him, he can no longer raise constitutional errors that occurred before the plea. *United States v. Broce* (1989), 488 U.S. 563, 572; *Tollett v. Henderson* (1973), 441 U.S. 258, 266-67; *Brady v.*

United States (1970), 397 U.S. 742; see also *Baker v. United States* (6th Cir. 1986), 781 F.2d 85. Whether the plea was one of guilty or no contest is irrelevant; a plea of no contest stands on equal footing with a guilty plea. *North Carolina v. Alford* (1970), 400 U.S. 25, 37; *United States v. Freed* (6th Cir. 1982), 688 F.2d 24, 25. Crim R. 11(B)(2) was never intended to be used as a shield by a criminal defendant to thwart the rule of law consistently followed by the United States Supreme Court, which does not permit review of constitutional errors alleged to have occurred before a plea.

This Court should embrace the opportunity presented by the certified question to explain conclusively that all waivers – express and implied – arising from a defendant’s plea can be enforced against the defendant in later collateral proceedings that challenge the validity of his conviction.

STATEMENT OF THE CASE AND FACTS

In 2004, a Hamilton County Grand Jury issued an indictment charging Hollingsworth with one count of Possession of Marijuana (R.C. 2925.11(A)) and one count of Trafficking in Marijuana (R.C. 2925.03(A)(2)). Hollingsworth, through retained counsel, entered a plea of not guilty to the indictment and the case was set for trial.

Prior to trial, Hollingsworth filed a motion to suppress evidence and statements on the grounds that they were obtained as the result of an unreasonable and unconstitutional stop and search of Hollingsworth's vehicle. A hearing was held on the motion and the trial court subsequently issued findings of fact and conclusions of law overruling Hollingsworth's motions to suppress.

A jury trial commenced on January 26, 2005. However, on January 28, 2005, Hollingsworth executed a waiver of trial by jury, withdrew his original plea of not guilty, and entered a plea of no contest to the indictment. The trial court accepted his plea and found him guilty as charged. During the plea colloquy, Hollingsworth specifically reserved the right to appeal the trial court's ruling on the motion to suppress. Hollingsworth was immediately sentenced to eight years incarceration.

Represented by his trial counsel, Hollingsworth filed a timely appeal to the First District Court of Appeals, setting the suppression issue as his single assignment of error. In a judgment entry filed on October 12, 2005, the Court of Appeals affirmed the judgment of the trial court. Hollingsworth did not perfect an appeal to this court.

While his direct appeal was pending, Hollingsworth filed a *pro se* petition for post-conviction relief alleging ineffective assistance of trial counsel. Soon thereafter, Hollingsworth retained new counsel, who filed a supplemental post-conviction petition to include seven

additional claims, each alleging that his trial counsel provided ineffective assistance at various points prior to his no contest plea. On September 27, 2006, the trial court issued its findings of fact and conclusions of law denying the petition for post-conviction relief.

Hollingsworth timely appealed the denial of his post-conviction petition. On August 22, 2007, the Court of Appeals affirmed the trial court without reaching the merits. Instead, the court ruled that pursuant to R.C. 2953.21(A)(2), the trial court had no jurisdiction to consider Hollingsworth's petition because it was untimely filed.

Hollingsworth appealed the decision of the Court of Appeals to this court, which initially accepted jurisdiction to hear the appeal. However, the court later dismissed the appeal as improvidently granted. In a concurrence to the dismissal, former Chief Justice Moyer explained that the plain language of the post-conviction statute compelled the outcome reached by the Court of Appeals, but suggested legislative changes to the law to prevent potentially inequitable outcomes in the future. *State v. Hollingsworth*, 118 Ohio St.3d 1204, 2008-Ohio-1967.

Turning to the federal courts, Hollingsworth filed a federal petition for habeas corpus relief. He carried forward the same claims he had raised in his post-conviction petition. The Warden filed a motion to dismiss, explaining that Hollingsworth's untimely post-conviction petition in the state courts barred federal habeas review of his claims. The federal court, apparently giving weight to the concurrence of the former Chief Justice, held that the procedural default relied upon by the state court was not sufficient to bar federal review.

The Warden subsequently filed an answer, arguing that the claim was not reviewable because Hollingsworth's no contest plea operated as a waiver of claims of error occurring prior to the plea. The Magistrate Judge agreed, and recommended dismissing the petition. Hollingsworth objected, arguing that Crim. R. 11(B)(2) barred use of his no contest plea against

him in the federal habeas corpus proceeding. The Magistrate Judge again opined that the waiver was valid and enforceable, but in an abundance of caution, recommended that the question be certified to this court. The district court agreed, and certified the following question to this court:

Do Ohio R. Crim. P. 11(B)(2) and Ohio R. Evid. 410(A)(2), which prohibit the use of a defendant's no contest plea against the defendant "in any subsequent civil ... proceeding" apply to prohibit the use of such a plea in a subsequent civil proceeding which is a collateral attack on the criminal judgment which results from the no contest plea, such as a petitioner for post-conviction relief under Ohio Revised Code 2953.21, or a federal habeas corpus action under 28 U.S.C. 2254?

THE WARDEN DOES NOT OPPOSE REVIEW OF THE CERTIFIED QUESTION

A. **Crim. R. 11(B)(2) and Evid. R. 410(A)(2) do not prohibit use of a defendant's no contest plea in a collateral attack on the conviction that resulted from the plea.**

Hollingsworth asserts that Crim. R. 11(B)(2) and Evid. R. 410(A)(2) shields a criminal defendant from one of the natural consequences of entering a plea: his waiver of any claims of error that occurred in the proceedings prior to the plea. Decades of United States Supreme Court precedent demonstrates that his argument is meritless. This Court's negative answer to the certified question will conclusively block this novel avenue to collateral relief.

1. **The United States Supreme Court has long held that criminal defendants, by pleading guilty or no contest, waive the right to raise allegations of constitutional error that occurred prior to the plea.**

A prisoner who has entered a guilty plea at trial and who later attempts to attack his sentence collaterally through a federal habeas corpus action is limited to raising only the issue of whether his plea was knowing and voluntary. *United States v. Broce* (1989), 488 U.S. 563, 572; *Tollett v. Henderson* (1973), 441 U.S. 258, 266-67; *Brady v. United States* (1970), 397 U.S. 742; *see also Baker v. United States* (6th Cir. 1986), 781 F.2d 85. A plea that is voluntarily and intelligently made satisfies the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and such a plea serves as a valid waiver of a defendant's constitutional rights, including claims of constitutional violations that preceded the guilty plea. *Brady, supra*; *Boykin v. Alabama* (1967), 395 U.S. 238. Significantly, a plea of "no contest" stands on equal footing with a "guilty" plea. *North Carolina v. Alford* (1970), 400 U.S. 25, 37 ("[T]hat his plea was denominated a plea of guilty rather than a plea of *nolo contendere* is of no constitutional significance...."); *United States v. Freed* (6th Cir. 1982), 688 F.2d 24, 25.

A plea of guilty or no contest may be challenged as involuntary on collateral review on the grounds that the defendant was not afforded effective assistance of counsel at his plea

hearing. *Hill v. Lockhart* (1985), 474 U.S. 52; *Baker v. United States* (6th Cir. 1986), 781 F.2d 85, 91. Courts apply *Strickland v. Washington* (1984), 466 U.S. 668, to evaluate claims of ineffective assistance of counsel arising from a guilty plea. *Hill*, 474 U.S. at 58-59. To succeed, a petitioner must demonstrate both (1) that his counsel's performance was actually constitutionally deficient; and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687, 694; *Hill*, 474 U.S. at 59. In other words, Hollingsworth must both plead and demonstrate that there is a reasonable probability that, but for counsel's constitutional errors, he would not have entered a no contest plea and would have insisted on going to trial. *Id.* Hollingsworth has never made such an argument in this litigation.

Instead, Hollingsworth argues that his counsel was ineffective at an earlier stage of the proceeding, *before* he made a decision to enter a no contest plea. But, as the Supreme Court has explained, that claim is now extinguished; once a defendant enters a plea, he cannot complain about the adequacy of counsel's performance at any earlier stage:

A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry. And just as it is not sufficient for the criminal defendant seeking to set aside such a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts, *McMann, supra*, it is likewise not sufficient that he show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.

Tollett, 411 U.S. at 267, citing *McMann v. Richardson* (1970), 397 U.S. 759, 771.

Once Hollingsworth pleaded no contest, he waived any claims of ineffective assistance occurring at the pretrial and suppression stages of his criminal proceeding. He is not permitted to raise those claims on direct or collateral review.

Crim. R. 11(B)(2) and Evid. R. 410(A)(2) do nothing to vitiate this well-established waiver rule. Such a result would be “absurd,” to use the federal court’s word. Doing so would directly conflict with Supreme Court precedent, and Hollingsworth has provided no case law to support his contrary argument.

This Court should accept the question to reaffirm this firmly established waiver principle.

B. *Elevators Mutual* does not bar the use of a defendant’s no contest plea in a subsequent post-conviction or habeas proceeding.

The federal court’s concern – prompting the certified question – is the result of this Court’s recent holding in *Elevators Mut. Ins. Co. v. J. Patrick O’Flaherty’s, Inc.*, 125 Ohio St. 3d 362, 365, 2010-Ohio-1043. But the facts of *Elevator Mutual* demonstrate that it could not be more inapplicable here. That case involved an insurance claim paid to an insured for a fire that destroyed a restaurant. After the insurance company made a preliminary payment on the claim, the insured, Richard Heyman, was indicted on charges of arson and insurance fraud. He pleaded no contest and was convicted.

In a subsequent civil suit, *Elevators Mutual* sued Heyman on a claim of no coverage and for recovery of the initial insurance payout. In support of its claim, *Elevators Mutual* entered the convictions as substantive evidence of the arson and insurance fraud. The trial court ruled that the evidence of the convictions was admissible and entered summary judgment on behalf of the insurance company. On appeal, the Court of Appeals ruled that pursuant to the plain language of Crim. R. 11(B)(2) and Evid. R. 410(A)(2), the no contest plea was not admissible against Heyman, and that there was no distinction between the plea and the conviction for purposes of determining admissibility. *Elevators Mut. Ins. Co. v. J. Patrick O’Flaherty’s, Inc.*, 180 Ohio App. 3d 315, 2008-Ohio-6946 (Ohio Ct. App., Sandusky County, 2008).

In affirming the Court of Appeals, this Court held that the facts of that case presented the very circumstances that Crim. R. 11(B)(2) and Evid. R. 410(A)(2) were meant to prevent – a victim of crime using a no contest plea against the defendant in seeking civil damages for the criminal acts that resulted in the plea.

The purpose behind the inadmissibility of no contest pleas in subsequent proceedings is to encourage plea bargaining as a means of resolving criminal cases by removing any civil consequences of the plea. *Mapes*, 19 Ohio St.3d at 111, 19 OBR 318, 484 N.E.2d 140; *Rose v. Uniroyal Goodrich Tire Co.* (C.A.10, 2000), 219 F.3d 1216, 1220. The rule also protects the traditional characteristic of the no contest plea, which is to avoid the admission of guilt. *Id.* The prohibition against admitting evidence of no contest pleas was intended generally to apply to a civil suit by the victim of the crime against the defendant for injuries resulting from the criminal acts underlying the plea. *Allstate Ins. Co. v Simansky* (1998), 45 Conn.Supp. 623, 628, 738 A.2d 231. The plain language of Evid.R. 410(A) prohibits admission of a no contest plea, and the prohibition must likewise apply to the resulting conviction. To find otherwise would thwart the underlying purpose of the rule and fail to preserve the essential nature of the no contest plea.

Elevators Mut. Ins. Co., 125 Ohio St. 3d at 365.

The policy reasons for these rules are manifest. A no contest plea, which permits a court to enter a conviction without an admission of guilt by the defendant, promotes efficiency and finality within the criminal process. Permitting a victim to use the plea and conviction as a sword against the defendant would be unfair because the defendant has pleaded no contest in order to resolve the charges, not to admit guilt. Furthermore, as this Court noted in *Elevators Mutual*, the civil plaintiff has many other avenues to prevail on its claim against the criminal defendant without use of the plea and conviction. Conversely, without those prophylactic rules, fewer criminal defendants would be willing to bring a quick resolution to their criminal proceedings through a no contest plea if they know that certain civil liability would attach as a result.

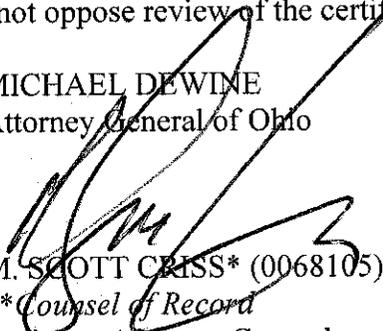
Those valuable policy concerns are absent in this case. The criminal defendant, Hollingsworth, is not attempting to avoid civil liability. Rather, he is attempting to escape the very consequences of his knowing and voluntary decision to plead no contest—namely, his criminal conviction. It is he, and not the State, who is attempting to undercut the essential nature of the no contest plea.

Because *Elevators Mutual* cannot and should not be expanded to prohibit the use of a no contest plea in post conviction and habeas proceedings, the Court should accept the question and answer it in the negative.

CONCLUSION

For the above reasons, the Warden does not oppose review of the certified question.

MICHAEL DEWINE
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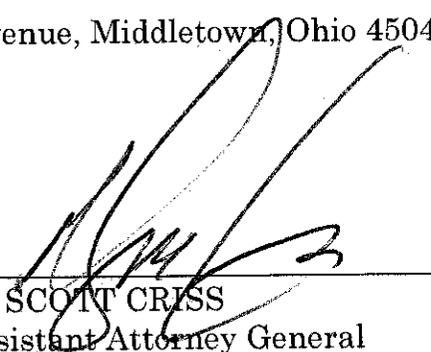


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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing *Preliminary Memorandum Of Respondent, Deb Timmerman-Cooper, Warden, In Response To The Certification Order* has been forwarded to counsel for Petitioner, Christopher J. Pagan, Repper, Pagan, Cook, Ltd., 1501 First Avenue, Middletown, Ohio 45044 via regular U. S. Mail this 18th day of July 2011.



M. SCOTT CRISS
Assistant Attorney General