

In the
Supreme Court of Ohio

ORIGINAL

ERNEST HOLLINGSWORTH,	:	Case No. 2011-1095
	:	
Petitioner,	:	On Review of the Certified Question
	:	from the United States District Court,
v.	:	Southern District of Ohio
	:	Western Division
DEB TIMMERMAN-COOPER, Warden,	:	
	:	U.S. District Court
Respondent.	:	Case No. 1:08-CV-00745

**MERIT BRIEF OF RESPONDENT
DEB TIMMERMAN-COOPER, WARDEN**

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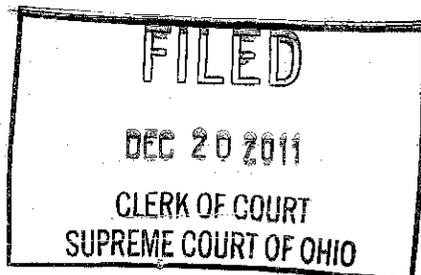


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INTRODUCTION

In 2004, law enforcement agents stopped a car and a van rented by Ernest Hollingsworth. A drug-sniffing canine detected narcotics in both vehicles, and a search uncovered approximately 700 pounds of marijuana and rental agreements confirming Hollingsworth's connection to the vehicles. After an unsuccessful motion to suppress the evidence, Hollingsworth pled no contest and was convicted of drug trafficking and possession. His direct appeal and state post-conviction petition failed, so Hollingsworth sought federal habeas relief, claiming that his trial counsel rendered ineffective assistance in connection with the suppression motion.

The matter was referred to a federal magistrate judge for review and a recommendation. The magistrate applied long-settled U.S. Supreme Court precedent: A prisoner who has pled guilty or no contest, and who later attempts to attack his conviction collaterally based on ineffective assistance of counsel, is limited to raising only the issue of whether his plea was knowing and voluntary. *Tollett v. Henderson* (1973), 411 U.S. 258, 267. Because Hollingsworth has not alleged that his plea was unknowing or involuntary, the magistrate concluded, his ineffective-assistance-of-counsel claim should be rejected.

In an effort to evade these requirements, Hollingsworth argued that Ohio Crim. R. 11(B)(2) and Ohio Evid. R. 410(A)(2) preclude his plea from being used, invoked, or relied upon in the federal habeas proceeding. Crim. R. 11(B)(2) provides that a "plea of no contest . . . shall not be used against the defendant in any subsequent civil or criminal proceeding." Evid. R. 410(A)(2) provides that "evidence of" a no-contest plea "is not admissible in any civil or criminal proceeding against the defendant who made the plea."

The district court has now certified the question whether Crim. R. 11(B)(2) and Evid. R. 410(A)(2) bar consideration of a defendant's no-contest plea in a collateral attack on the very

conviction that results from the plea. The Court should answer “no.” Indeed, ruling otherwise courts absurdity, as even the federal district judge noted in certifying the question to this Court. District Court Opinion and Order, Pet’r App. at 7.¹

First, by their own terms, Crim. R. 11(B)(2) and Evid. R. 410(A)(2) are inapplicable in state and federal post-conviction proceedings because these are *collateral* proceedings relative to the underlying judgment, not the “subsequent” or distinct “civil or criminal proceedings” contemplated by those rules. The purpose behind these rules reinforces that conclusion. The rationale for excluding no-contest pleas from other legal proceedings is to encourage plea bargaining as a means of resolving criminal cases by removing the possibility of additional future liability for the same act. *Elevators Mutual Ins. Co. v. J. Patrick O’Flaherty’s, Inc.* (2010), 125 Ohio St. 3d 362, 2010-Ohio-1043, at ¶ 14. But state and federal post-conviction proceedings carry no threat of civil liability, nor any risk of enhanced criminal liability. Accordingly, there is absolutely no basis for reading Crim. R. 11(B)(2) or Evid. R. 410(A)(2) as applying to post-conviction collateral attacks on an underlying criminal judgment.

Second, this Court has recognized that these rules do not apply where a statute has “made relevant” the plea and conviction. *State v. Mapes* (1985), 19 Ohio St. 3d 108, 111. Without question—indeed, by definition—the state post-conviction and federal habeas statutes “make relevant” a defendant’s underlying conviction and no-contest plea.

In sum, the Court should answer “no” to the certified question and hold that Crim. R. 11(B)(2) and Evid. R. 410(A)(2) do not apply to state post-conviction or federal habeas proceedings.

¹ “Pet’r App.” refers to the Appendix to Petitioner Ernest Hollingsworth’s merit brief.

STATEMENT OF THE CASE AND FACTS

A. Hollingsworth was convicted after pleading no contest to charges of trafficking and possessing approximately 700 pounds of marijuana.

In 2004, law enforcement agents stopped two vehicles rented by Hollingsworth—a car and a van—for traffic violations. An officer approached the car Hollingsworth was driving and smelled marijuana. After a drug-sniffing canine detected narcotics in both vehicles, agents conducted a search of the van and found approximately 700 pounds of marijuana. When they searched the car, they found rental agreements linking Hollingsworth to the van.

Hollingsworth was indicted in Hamilton County on charges of drug trafficking and possession. He initially pled not guilty and moved to suppress the evidence and statements obtained during the traffic stop and the search. The trial court denied the suppression motion after a hearing, concluding that the traffic stop was lawful because the agents' observations and drug-dog alerts triggered probable cause for the search.

Hollingsworth then proceeded to trial. But after two days of testimony, he withdrew his not-guilty plea, admitted to the facts in the indictment, and pled no contest. When asked during the plea colloquy whether he was entering the no-contest plea “freely, voluntarily, knowingly and intelligently,” Hollingsworth responded, “Yes.” Change of Plea Hr'g, Resp. App. at 13.² And when asked if he was satisfied with his counsel's representation and advice, he declared, “Very much so.” *Id.*

On entering his plea, Hollingsworth expressly waived his rights to a jury trial, to call and confront witnesses, and to be convicted only on proof of his guilt beyond a reasonable doubt. *Id.* at 11-12. Although he reserved the right to appeal the trial court's denial of the suppression motion, Hollingsworth waived all other defenses to the charges. *Id.* at 10-11.

² “Resp. App.” refers to the Appendix to this brief.

Hollingsworth was then convicted by the Hamilton County Court of Common Pleas, and sentenced to the mandatory minimum term of eight years in prison. He appealed the trial court's denial of his suppression motion to the First District Court of Appeals, which rejected his claim and affirmed the trial court's ruling, concluding that the officers had probable cause to search Hollingsworth's car. See *State v. Hollingsworth* (Oct. 12, 2005), 1st Dist. No. C-050109. Hollingsworth did not appeal to this Court.

Hollingsworth also sought state post-conviction relief, arguing that his trial counsel rendered ineffective assistance in the suppression hearing. The trial court denied relief, concluding that Hollingsworth's claims lacked merit. The First District affirmed on procedural grounds, ruling that Hollingsworth's petition was untimely.

Hollingsworth then appealed to this Court, which declined review. *State v. Hollingsworth* (2008), 118 Ohio St. 3d 1204.

B. Hollingsworth then sought federal habeas relief, raising the same ineffective-assistance claims that were denied by the state courts.

Hollingsworth filed a federal petition for habeas corpus, again claiming ineffective assistance of counsel relating to the suppression motion. Among other things, his federal petition claims that trial counsel was ineffective in failing to argue "that the drug-dog was not properly trained or tested." Habeas Petition, Resp. App. at 2. The Warden argued that Hollingsworth's ineffective-assistance claim failed because Hollingsworth did not challenge the knowing or voluntary nature of his no-contest plea.

Applying well-settled U.S. Supreme Court precedent, the federal magistrate judge agreed with the Warden: Hollingsworth was not claiming that defective advice from counsel rendered his plea unknowing or involuntary, and therefore his habeas petition must be dismissed. In response, Hollingsworth posited that his no-contest plea and resulting conviction could not be

used against him in habeas proceedings, invoking Crim. R. 11(B)(2) and this Court's decision in *Elevators Mutual Ins. Co. v. J. Patrick O'Flaherty's, Inc.* (2010), 125 Ohio St. 3d 362, 2010-Ohio-1043.

The magistrate judge concluded that Hollingsworth's reading of the rules and *Elevators Mutual* would be "absurd." Magistrate Judge's Report and Recommendations [hereinafter, R&R], Nov. 23, 2010, Pet'r App. at 3. "It is unimaginable," the magistrate said, "that the Ohio Supreme Court would read its rules as prohibiting introducing the no contest plea and resultant conviction in a case involving a collateral attack on the very criminal judgment resulting from the plea." R&R, Nov. 16, 2010, Resp. App. at 32.

The district judge agreed with that assessment, concurring that it would be "absurd" to forbid the use of a no-contest plea in habeas proceedings. District Court Opinion and Order, Pet'r App. at 7. But out of an abundance of caution, and because there is no controlling state precedent, the district court certified the following question to this Court, and the Court has agreed to answer it:

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 petition for post-conviction relief under Ohio Revised Code § 2953.21, or a federal habeas corpus action under 28 U.S.C § 2254?

Id. at 8.

ARGUMENT

Respondent's Proposition of Law No. 1:

The use of a defendant's no-contest plea is permissible in the defendant's state post-conviction and federal habeas proceedings; Crim. R. 11(B)(2) and Evid. R. 410(A)(2) are inapplicable.

Crim. R. 11(B)(2) provides that a “plea of no contest . . . shall not be used against the defendant in any subsequent civil or criminal proceeding” and Evid. R. 410(A)(2) says that “evidence of” a no-contest plea “is not admissible in any civil or criminal proceeding against the defendant who made the plea.” For two reasons, these rules do nothing to bar consideration of a no-contest plea in state post-conviction and federal habeas proceedings.

First, state post-conviction and federal habeas are *collateral* proceedings to the underlying plea and judgment of conviction. They are not the “subsequent” or distinct proceedings contemplated by Crim. R. 11(B)(2) or Evid. R. 410(A)(2), and therefore those rules do not apply.

Second, this Court has long held that Crim. R. 11(B)(2) and Evid. R. 410(A)(2) do not impede the admission of a prior conviction and no-contest plea where the conviction and plea are “made relevant by statute.” *State v. Mapes* (1985), 19 Ohio St. 3d 108, 111. Without question—indeed, *by definition*—the state post-conviction and federal habeas statutes “make relevant” a defendant’s underlying conviction and no-contest plea. To hold otherwise is to court absurdity, as both the federal district judge and magistrate observed in referring this question to the Court. District Court Opinion and Order, Pet’r App. at 7; R&R, Nov. 23, 2010, Pet’r App. at 3.

Because Crim. R. 11(B)(2) and Evid. R. 410(A)(2) have no bearing on state post-conviction or federal habeas proceedings, the Court should answer “no” to the certified question.

A. State post-conviction and federal habeas are not proceedings included in Crim. R. 11(B)(2) and Evid. R. 410(A)(2) and therefore those rules do not apply there.

By their own terms, Crim. R. 11(B)(2) and Evid. R. 410(A)(2) are inapplicable in state post-conviction and federal habeas because these are *collateral* proceedings relative to the underlying judgment, not the “subsequent” or distinct “civil or criminal proceedings” contemplated by those rules. Although different from the direct appeal, collateral proceedings, such as state post-conviction and federal habeas, have long been recognized as “a continuation of the criminal action itself.” *State v. Lloyd* (4th Dist. 1966), 8 Ohio App. 2d 155, 156. A state post-conviction petition to vacate a judgment under R.C. 2953.21 is filed through the original criminal action, assigned the same case number as the criminal action, and placed before the same trial judge. And far from following “subsequent” to the underlying proceeding, most state post-conviction petitions are filed *before* the conviction becomes final—that is, before the direct appeals process has concluded. *See* R.C. 2953.21(A)(2). Indeed, Hollingsworth filed his post-conviction petition through his original action, under the same case number, and before his direct appeal had concluded. *See* Docket in Case No. B 0402530-A, *State v. Hollingsworth*, Hamilton County Court of Common Pleas. It is irrelevant whether a state or federal post-conviction proceeding might technically be called a civil or criminal action. That simply is not the label by which these proceedings are generally known. *See Nken v. Holder* (2009), 129 S. Ct. 1749, 1759 (“The sun may be a star, but ‘starry sky’ does not refer to a bright summer day.”). Rather, state post-conviction and federal habeas suits are collateral attacks on the underlying judgment. Accordingly, they are not the “subsequent” or distinct proceedings contemplated by Crim. R. 11(B)(2) or Evid. R. 410(A)(2).

Such a reading is compelled here because, as discussed below, the results otherwise are absurd and could not have been intended by the rule drafters. *See United States v. Ron Pair*

Enterprises, Inc. (1989), 489 U.S. 235, 242 (“The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.”) (internal quotation marks omitted); *Medcorp, Inc. v. Ohio Dep't of Job & Family Servs.* (2009), 121 Ohio St. 3d 622, 2009-Ohio-2058, at ¶ 13 (“We must avoid constructions that create absurdities.”).

The purpose behind these rules reinforces the conclusion that they do not apply to a defendant’s state and federal post-conviction proceedings. The rationale for excluding no-contest pleas from other legal proceedings “is to encourage plea bargaining as a means of resolving criminal cases” by removing the possibility of additional future liability—civil or criminal—for the same act. *Elevators Mutual*, 2010-Ohio-1043, at ¶ 14. But no such thing is threatened by state or federal post-conviction actions. There is no risk of civil liability in post-conviction proceedings. Nor is there any risk of enhanced criminal liability—the worst outcome for a defendant in post-conviction proceedings is the status quo. Accordingly, there is no basis for reading Crim. R. 11(B)(2) or Evid. R. 410(A)(2) as including post-conviction collateral attacks on an underlying criminal judgment.

Given these considerations, it is no surprise that although the Federal Rules of Evidence make no-contest pleas inadmissible in “any civil or criminal proceedings,” Fed. R. Evid. 410(A)(2), as do many other States’ procedural rules, those rules *never* appear to have been interpreted to bar use of a no-contest plea in a collateral attack on the underlying judgment. And there is no reason for this Court to be the first to issue such an illogical pronouncement. Crim. R. 11(B)(2) and Evid. R. 410(A)(2) plainly do not apply to a defendant’s state post-conviction and federal habeas proceedings.

B. The state post-conviction and federal habeas statutes “make relevant” a defendant’s no-contest plea of conviction; Crim. R. 11(B)(2) and Evid. R. 410(A)(2) therefore do not apply.

Crim. R. 11 and Evid. R. 410(A)(2) are inapplicable for a second reason. These rules do not apply where a statute has “made relevant” the conviction entered upon a plea of no contest. *Mapes*, 19 Ohio St. 3d at 111. Nor would the rules apply, it follows logically, where a statute makes the plea itself relevant. The *Mapes* case concerned a murder-specification statute. The law provided that a capital sentence could be imposed for aggravated murder if the defendant *previously* had been convicted of murder. Invoking Crim. R. 11(B)(2) and Evid. R. 410(A)(2), *Mapes* claimed that his prior murder conviction, entered upon a plea of no contest, was inadmissible. The Court rejected that argument. It held that because the statute at issue “made relevant” the earlier conviction entered upon a plea of no contest, Crim. R. 11(B)(2) and Evid. R. 410(A)(2) did not apply.

The same principle applies here in spades: The state post-conviction and federal habeas statutes of course make relevant the underlying conviction and no-contest plea. Accordingly, Crim. R. 11(B)(2) and Evid. R. 410(A)(2) are inapplicable.

The criminal judgment is the direct object of both the state post-conviction statute and the federal habeas statute. This is clear from the statutes’ plain language. See R.C. 2953.21(A)(1)(a) (authorizing remedy “to vacate or set aside the judgment or sentence” because of state or federal constitutional violations); 28 U.S.C. § 2254(a) (authorizing writ of habeas corpus for unconstitutional custody “pursuant to the judgment of a State court”). The judgment is not merely made relevant by these statutes, it is made pivotal. Without the underlying judgment of conviction, there would be no basis or need for these *post-conviction* remedies.

In turn, Ohio law makes the plea part of the judgment. Pursuant to Crim. R. 32(C), the judgment of conviction is “*the plea, the verdict or findings, and the sentence*” fixed in a signed

journal entry. See Crim. R. 32(C) (emphasis added). In other words, because the criminal judgment is “made relevant” to post-conviction proceedings by the state and federal post-conviction statutes, and because the criminal judgment embodies the plea, the plea inescapably is made relevant too. Accordingly, under the principle announced in *Mapes*, Ohio Crim. R. 11(B)(2) and Evid. R. 410(A)(2) do not apply to state or federal post-conviction proceedings.

Elevators Mutual is not to the contrary, and Hollingsworth’s reliance on that case is misplaced. In *Elevators Mutual*, a policy-holder’s plea would have been relevant only by dint of his insurance policy, and the Court ruled that “the justification underlying the *Mapes* exception does not extend to *contract* situations.” 2010-Ohio-1043, at ¶ 18 (emphasis added). Accordingly, in that case, Ohio Crim. R. 11(B)(2) and Evid. R. 410(A)(2) barred the use of the policy holder’s prior plea.

Elevators Mutual leaves wholly intact the *Mapes* exception for relevance dictated by *statute*, which this Court should have no trouble finding is the exact case here. The state post-conviction and federal habeas statutes make relevant the underlying judgment of conviction and no-contest plea, and therefore Crim. R. 11(B)(2) and Evid. R. 410(A)(2) are inapplicable to these proceedings.

C. Turning a blind eye to a defendant’s plea in post-conviction proceedings makes no sense and creates numerous problems.

This Court has never extended Crim. R. 11(B)(2) and Evid. R. 410(A)(2) to post-conviction proceedings, nor has any court elsewhere ever extended analogous state or federal rules to the post-conviction context. And for good reason. Requiring courts to ignore a defendant’s underlying plea in post-conviction proceedings is senseless, both in terms of the legal issues involved and the practical consequences to the criminal justice system. Indeed, the federal district court deemed Hollingsworth’s theory “absurd” in certifying this issue to the Court.

And the district court was right. The havoc and headscratching oddities that follow from Hollingsworth's theory are many. What if a defendant who has pled no-contest tries to invalidate his conviction based on a *Batson* claim of unconstitutional jury selection? This would be a patently spurious argument, since a *jury-selection* claim does nothing to undermine a conviction obtained through a *plea*. But under Hollingsworth's theory, Crim. R. 11(B)(2) and Evid. R. 410(A)(2) would bar any utterance—by the State or a post-conviction court—of the critical fact that the defendant pled no contest and therefore has no viable *Batson* claim. Or what if a defendant convicted through a no-contest plea later raises, in post-conviction proceedings, a constitutional challenge implicating the sufficiency of the evidence supporting his conviction? Again, under Hollingsworth's theory, Crim. R. 11(B)(2) and Evid. R. 410(A)(2) would preclude the State or the court from looking to the most obvious—and in many cases, the only—source for evaluating that claim: the defendant's plea and the admissions made in the plea colloquy. And if the plea is truly inadmissible in *any* proceeding, then the plea could never even be a basis for a conviction because Evid. R. 410(A)(2) would make the plea inadmissible in the *primary criminal action itself*.

In short, accepting Hollingsworth's theory is little more than inviting post-conviction proceedings to become farce. Moreover, requiring courts to ignore a defendant's underlying no-contest plea in post-conviction proceedings would quickly undercut the key purpose behind Crim. R. 11(B)(2) and Evid. R. 410(A)(2)—to encourage plea bargaining. See *Elevators Mutual*, 2010-Ohio-1043, at ¶ 14. If a no-contest plea or conviction is irrelevant and inadmissible in post-conviction proceedings, then prosecutors will not offer such plea deals to defendants.

There is no basis for inviting those irrational outcomes. As discussed above, the purposes of Crim. R. 11(B)(2) and Evid. R. 410(A)(2) are not disserved by admitting the no-contest plea in state and federal post-conviction proceedings.

Respondent's Proposition of Law No. 2:

The effect of a no-contest plea on constitutional claims in post-conviction proceedings is beyond the scope of the certified question. But in any event, a no-contest plea forecloses an ineffective-assistance-of-counsel claim unless a defendant has alleged and proven that deficient advice by counsel rendered the plea unknowing or involuntary.

As discussed above, Crim. R. 11(B)(2) and Evid. R. 410(A)(2) do not apply to collateral attacks on the underlying criminal judgment. The Court can and should stop there. Hollingsworth, however, asks this Court to go further: He seeks wide-ranging pronouncements on the role played by a no-contest plea on constitutional claims raised in state and federal post-conviction proceedings. Those requests should be rejected.

A. The effect of a no-contest plea on constitutional claims in post-conviction proceedings is beyond the scope of the certified question.

First, the specific *role* played by a no-contest plea in state or federal post-conviction proceedings is beyond the scope of the certified question, which asks only if Crim. R. 11(B)(2) and Evid. R. 410(A)(2) “prohibit the use of such a plea” in those collateral proceedings. Certification Order, Pet’r App. at 1. Moreover, the effect of a plea will vary based on the constitutional claim presented. There is no one-size-fits-all pronouncement that could be issued here, and no way (or reason) for the Court to enumerate what a no-contest plea means for every conceivable constitutional claim.

Second, it is up to the federal district court to determine what role the no-contest plea plays in Hollingsworth’s federal habeas case. Although federal courts often look to state law when interpreting the contractual meaning of a petitioner’s plea, the federal court “must independently

assess the effect of [the plea] on federal constitutional rights.” *Ricketts v. Adamson* (1987), 483 U.S. 1, 7 n.3.

In short, the Court should hold that Crim. R. 11(B)(2) and Evid. R. 410(A)(2) do not bar consideration of a defendant’s conviction or no-contest plea in state or federal post-conviction proceedings. But it is up to the district court to assess the impact of Hollingsworth’s no-contest plea on his petition for federal habeas relief.

B. To prevail on an ineffective-assistance claim, a criminal defendant who has pled no-contest must allege and show that constitutionally deficient advice rendered his plea unknowing or involuntary.

Even if Hollingsworth’s federal constitutional claim for ineffective assistance of counsel were before this Court on the merits—and plainly it is not—that claim fails. Both the U.S. Supreme Court and this Court have made clear that a no-contest plea forecloses an ineffective-assistance-of counsel claim unless a defendant has alleged and proven that deficient advice by counsel rendered the plea unknowing or involuntary. Hollingsworth has never challenged his plea as unknowing or involuntary—meaning, he has never claimed that the allegedly antecedent constitutional violation regarding his suppression motion affected the voluntary and intelligent nature of his plea. Accordingly, his ineffective-assistance-of-counsel claim fails.

The U.S. Supreme Court has repeatedly addressed ineffective-assistance claims raised in collateral attacks to plea-based convictions. Three key principles control. First, a prisoner who has pled guilty or no contest, and who later attempts to attack his conviction collaterally based on ineffective assistance of counsel, is limited to raising only the issue of whether his plea was knowing and voluntary. *Tollett v. Henderson* (1973), 411 U.S. 258, 266-67; *Brady v. United States* (1970), 397 U.S. 742; see also *North Carolina v. Alford* (1970), 400 U.S. 25, 35 (a no-contest plea stands on equal footing with a guilty plea). This Court, too, has repeatedly recognized this principle. See *State v. Bird* (1998), 81 Ohio St. 3d 582, 585 (requiring defendant

asserting ineffective assistance of counsel in post-conviction proceeding to challenge his no-contest plea).

Second, a defendant who pleads guilty or no contest upon the advice of counsel may not rely upon antecedent constitutional violations to challenge the voluntariness and intelligence of his plea; rather, he “may only attack the voluntary and intelligent character of the . . . plea by showing that the advice he received from counsel was not within [the range of competence demanded of attorneys in criminal cases].” *Tollett*, 411 U.S. at 267. In other words, the focus of the inquiry on collateral review “is the nature of [counsel’s] advice and the voluntariness of the plea.” *Id.* at 266. “[C]laims of prior constitutional deprivation may play a part in evaluating the advice rendered by counsel, [but] they are not themselves independent grounds for federal collateral relief.” *Id.* at 267. All of this is because the conviction rests on the plea itself. See *McMann v. Richardson* (1970), 397 U.S. 759, 773 (conviction rests upon “counseled admission in open court”); *Hollingsworth No Contest Plea*, Resp. App. at 6 (“admi[tt]ing . . . the truth of the facts alleged in the indictment”).

And last, as always with ineffective-assistance claims, the prisoner must show that counsel’s constitutionally deficient advice resulted in prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59. To establish prejudice for plea-based convictions, a prisoner must plead and show “a reasonable probability that, but for counsel’s errors,” he would not have pleaded guilty or no contest “and would have insisted on going to trial.” *Hill*, 474 U.S. at 59; see also *Bird*, 81 Ohio St. 3d at 585; *State v. Xie* (1992), 62 Ohio St. 3d 521, 524.

Here, *Hollingsworth* has never asserted that his no-contest plea was unknowing or involuntary and he has never alleged that his counsel was deficient in advising him to plead no

contest. In his habeas petition, he claims only that his trial counsel provided ineffective assistance in seeking suppression of certain evidence before his no-contest plea.

To be clear, the Warden does not contend that Hollingsworth “waived” his ineffective-assistance claim, only that this claim fails because he has never alleged, let alone proven, that his no-contest plea was involuntary or unknowing. And absent such a claim, there is no force to the allegation that he suffered an antecedent ineffective-assistance injury during his suppression hearing. See *McMann*, 397 U.S. at 770 (plea entered by defendant is not rendered involuntary or unintelligent merely because “counsel may have misjudged the admissibility of the defendant’s confession”).

The cases Hollingsworth cites in opposition are no different: they require a defendant asserting ineffective assistance to challenge the plea itself. See *Padilla v. Kentucky* (2010), 130 S. Ct. 1473, 1483-84 (remanding to the district court to determine if ineffective assistance at plea stage caused prejudice); *United States v. Allen* (C.A.6, 2002), 53 F. App’x 367, 376-77 (same); *State v. Dalton* (10th Dist.), 153 Ohio App. 3d 286, 2003-Ohio-3813, at ¶ 30 (requiring defendant to show that he would not have pled but for counsel’s errors). The final case he cites is irrelevant to this proceeding. *State v. Blackert* (9th Dist.), 2006-Ohio-6670, at ¶ 7 (merely permitting defendant to proceed with postconviction petition).

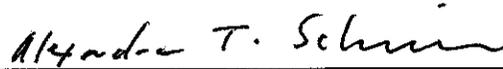
In short, Hollingsworth has never asserted at any stage of proceedings, either in state court or federal court, that his counsel was ineffective in advising him to plead no contest and that his plea was not knowing or voluntary. Accordingly, he cannot meet the federal habeas requirements for ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, this Court should answer “no” to the certified question and hold that Crim R. 11(B)(2) and Evid. R. 410(A)(2) do nothing to bar consideration of a defendant’s no-contest plea in his state post-conviction or federal habeas proceedings.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio



ALEXANDRA T. SCHIMMER* (0075732)
Solicitor General

**Counsel of Record*

DAVID M. LIEBERMAN (0086005)
Deputy Solicitor

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alexandra.schimmer@ohioattorneygeneral.gov

Counsel for Respondent

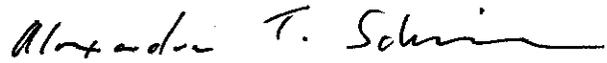
Deb Timmerman-Cooper, Warden

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Respondent Deb Timmerman-Cooper, Warden, was served by U.S. mail this 20th day of December, 2011, upon the following counsel:

Christopher J. Pagan
Repper, Pagan, Cook, Ltd.
1501 First Avenue
Middletown, Ohio 45044

Counsel for Petitioner
Ernest Hollingsworth



ALEXANDRA T. SCHIMMER
Solicitor General

APPENDIX

FILED
JAMES BONINI
CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

COURT
SOUTHERN DISTRICT OF OHIO
WEST DIV CINCINNATI

Ernest Hollingsworth]
Inmate No. A488073]
London Correctional]
Institution]
P.O. Box 69]
London, OH 43140]

Petitioner,]

-vs-]

Deb Timmerman-Cooper,]
Warden, London]
Correctional Institution]
(LoCI),]

Respondent.]

CIVIL ACTION NO. **1:08 CV 745 17**

SPIEGEL & L.
J. HOGAN

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Ernest Hollingsworth, through his counsel Christopher J. Pagan, avers as follows:

PARTIES

Petitioner

1. Petitioner Ernest Hollingsworth is confined at the London Correctional Institution in London, Ohio. He is serving an 8-year sentence imposed by the Hamilton County Common Pleas Court, Cincinnati, Ohio; see *State v. Hollingsworth*, Case No. B0402530-A.

Respondent

2. Respondent is the warden of the London Correctional Institution.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the instant petition under 28 U.S.C §§ 2254 and 1331. Hollingsworth is in custody under a judgment of an Ohio state court; and

he seeks relief because his imprisonment and sentence contravene his rights under the United States Constitution.

4. This Court has venue because Hollingsworth's conviction was obtained in Hamilton County Common Pleas Court, Hamilton, Ohio. See 28 U.S.C. § 2241(d).

PROCEDURAL HISTORY

5. Hollingsworth was prosecuted on an Indictment filed in the Hamilton County Common Pleas Court. He was charged with possession and trafficking of marihuana. He was convicted of both counts. He was sentenced to 8-years imprisonment.
6. Hollingsworth directly appealed his conviction and sentence to the Ohio First District Court of Appeals, Case No. C-050109. The court affirmed Hollingsworth's conviction and sentence.
7. Hollingsworth next litigated a post-conviction petition in the Hamilton County Common Pleas court, Case No. B0402530-A. The court ruled on the merits of Hollingsworth's claims for ineffective assistance and denied relief.
8. Hollingsworth appealed to the Ohio First District Court of Appeals, Case No. C-0600896. The court, *sua sponte*, decided that Hollingsworth's claims were barred by the statute-of-limitations.
9. Hollingsworth sought review in the Ohio Supreme Court, Case No. 2007-1752. The court accepted the case, ordered briefing, and conducted oral argument. However, on 30 April 2008, the court dismissed the case as improvidently accepted.
10. This petition for a writ of habeas corpus follows. Hollingsworth has not filed a previous petition for a writ of habeas corpus.

GROUND FOR RELIEF

11. Hollingsworth was denied his constitutional right to the effective assistance of trial counsel.
12. More specifically, Hollingsworth's trial counsel: a. failed to contest the warrantless seizure of the only physical evidence that linked Hollingsworth to the marihuana; b. failed to contest the warrantless seizure of Hollingsworth's person as the product of racial discrimination; c. failed to contest the warrantless search of Hollingsworth's car on the basis that the drug-dog was not properly trained or tested, and lacked a real-world record of reliability; and d. failed to present Hollingsworth's testimony regarding the circumstances of his seizure and his withholding of consent to search his papers and effects or to detain him.

EXHAUSTION

13. To the extent made possible, all of the grounds for relief raised in this petition were presented to the Ohio courts for their consideration and resolution.

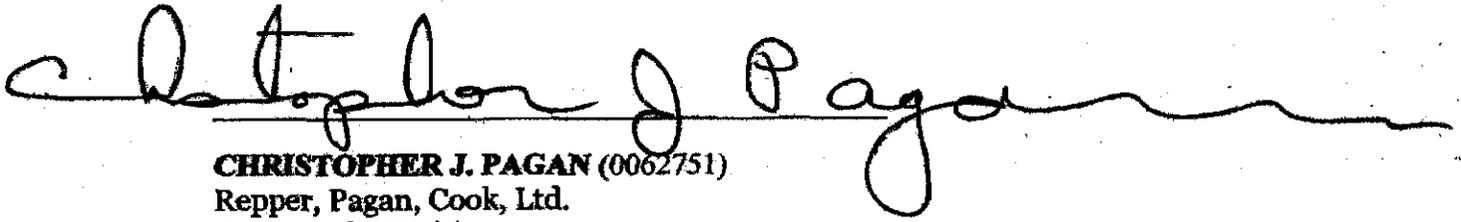
RELIEF REQUESTED

WHEREFORE, Ernest Hollingsworth prays that this Court:

14. Issue a writ of habeas corpus to have petitioner brought before this Court, and to have him discharged from his unconstitutional confinement;
15. Serve a copy of this petition on respondent (Warden Deb Timmerman-Cooper, London Correctional Institution, P.O. Box 69, London, OH 43140) and her counsel (Ohio Attorney General Nancy H. Rogers, Rhodes Office Tower, 30 East Broad Street, 17th Floor, Columbus, OH 43215-3428) by certified mail, in accord with Habeas Corpus Rule 4;
16. Require respondent to bring forward the entire record of the state court proceedings, and to specify any proceeding in the case that has been reported but not transcribed;
17. Require respondent to file an answer admitting or denying each and every factual allegation herein;
18. Allow petitioner to conduct discovery and to expand the record relating to the issues raised herein;
19. Conduct a hearing at which proof may be offered concerning the within allegations that respondent does not admit;
20. Allow petitioner sufficient time to brief the issues of law raised by the petition; and
21. Grant such other and further relief as may be appropriate.

To the Court, the instant petition is

Respectfully submitted,



CHRISTOPHER J. PAGAN (0062751)
Repper, Pagan, Cook, Ltd.
Attorney for Petitioner
1501 First Avenue
Middletown, OH 45044
ph/513-424-1823
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1208 Sycamore Street
Olde Sycamore Square
Cincinnati, OH 45210
Attorney for Petitioner
ph/513-241-5670
fx/513-241-5680

per EMAIL authorization

ENTER

NO CONTEST PLEA

JUDGE RICHARD *Nielhaus*

DATE:

JAN 28 2005

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO

Plaintiff

vs.

ERNEST HOLLINGSWORTH

Defendant

ENTERED &
SCANNED
JAN 28 2005
IMAGE 313

No. B-0402530(A)
(Judge Nielhaus)

ENTRY WITHDRAWING PLEA OF
NOT GUILTY AND ENTERING
PLEA OF NO CONTEST

*Accept plea of
no contest of guilty
of [unclear]*

I, ERNEST HOLLINGSWORTH, the defendant in the above cause,
hereby freely and voluntarily withdraw my former plea of not guilty and enter a plea of NO
CONTEST to the offense(s) of:

COUNT NUMBER	NAME OF OFFENSE/ R.C. SECTION	DEGREE	POTENTIAL SENT. RANGE (YRS. MOS)	MANDATORY PRISON TERM	MAXIMUM FINE
<u>I</u>	<u>POSSESSION OF MARIJUANA</u>	<u>(2)</u>	<u>2-8 yrs</u>	<u>8 yr. mand.</u>	<u>\$15,000.00</u>
<u>II</u>	<u>TRAFFICKING IN MARIJUANA</u>	<u>(2)</u>	<u>2-8 yrs</u>	<u>8 yr. mand.</u>	<u>\$15,000.00</u>
	<u>2925.11(A) F2</u>				
	<u>2925.103(A)(1) F2</u>				
					\$
					\$

I understand the nature of the charge(s) to which I plead no contest. I understand the maximum penalty as set out above, and any mandatory prison term during which I am NOT eligible for judicial release. The maximum fine possible is \$36,000.00, of which \$15,000.00 is mandatory. Restitution, other financial costs and driver's license suspension are possible in my case. If I am currently on felony probation or parole, this plea may result in revocation proceedings and any new sentence could be imposed consecutively.

I know any prison term stated will be the term served without good time credit.

I know that after prison release, I may have (5 years for F-1 or sex offense) or up to 3 years of post-release control. The parole board could return me to prison for up to nine months for each violation of those conditions, for a total of 50% of my stated term. If I commit a new felony while on post-release control, I may be punished both for the violation of post-release control and the new offense. At sentencing for the new felony, I may then receive a prison term for the violation of post-release control of up to the remaining period of post-release control or one year, which ever is greater. A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony.

If I am granted community control at any point in my sentence and if I violate any of the conditions imposed, I may be given a longer period under court control, greater restrictions, or a prison term from the basic range. Community control may last five years.

EXHIBIT
8

I understand the nature of these charges and the possible defenses I might have. I am satisfied with my attorney's advise, counsel, and competence. I am not under the influence of drugs or alcohol at this time. I have not been forced or threatened in any way to cause me to sign and offer this plea.

I understand by pleading no contest I give up my constitutional rights to a jury trial, to confront witnesses against me, to have subpoenaed witnesses in my favor, and to require the state to prove my guilt beyond a reasonable doubt at a trial at which I cannot be compelled to testify against myself.

I understand the plea of no contest is an admission of the truth of the facts alleged in the indictment but not an admission of my guilt to the charge(s) against me. I know the judge may either sentence me today or refer my case for a presentence report. I understand my right to appeal a maximum sentence, my other limited appellate rights and that any appeal must be filed within 30 days of my sentence.

I am EH am not _____ (initial) a citizen of the United States of America. I understand that if I am not a citizen of the United States, a conviction of the offense(s) to which I am pleading no contest may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

*I understand that the trial judge may, in addition to or independent of all other penalties provided by law or by ordinance, suspend or revoke my driver's license or commercial driver's license or permit or nonresident operating privilege for a period of not less that 6 months or more than 5 years.

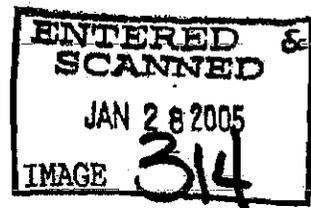
I have read this form and I knowingly, voluntarily, and intelligently enter this no contest plea.

[Signature]
Signature of Defendant

I have explained to the defendant prior to his/her signing this plea, the charge(s) in the indictment or information, the penalties therefor and his/her constitutional rights in this case. I represent that, in my opinion, the defendant is competent to enter this plea and now does so knowingly, intelligently and voluntarily.

[Signature]
Attorney for Defendant

[Signature]
Assistant Prosecuting Attorney
Dismiss Counts (if applicable) _____



*Where applicable.
(Rev. 7/02)

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 01/28/2005
code: GJEI
judge: 33

Entered 1-28-05
Date:
Image: 436


Judge: RICHARD A NIEHAUS

NO: B 0402530-A

STATE OF OHIO
VS.
ERNEST HOLLINGSWORTH

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

Defendant was present in open Court with Counsel HAL R ARENSTEIN on the 28th day of January 2005 for sentence.

The court informed the defendant that, as the defendant well knew, the defendant on a plea of no contest had been found guilty of the offense(s) of:

count 1: POSSESSION OF MARIHUANA, 2925-11A/ORCN,F2

count 2: TRAFFICKING-SHIP,TRNSPORT,DIST, 2925-03A2/ORCN,F2

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:

count 1: CONFINEMENT: 8 Yrs, Credit 324 Days DEPARTMENT OF CORRECTIONS

count 2: CONFINEMENT: 8 Yrs, Credit 324 Days DEPARTMENT OF CORRECTIONS

THE SENTENCES IN COUNTS #1 AND #2 ARE TO BE SERVED CONCURRENTLY WITH EACH OTHER.

THE DEFENDANT IS GIVEN A SIX (6) MONTH DRIVING SUSPENSION.

COURT COSTS AND THE DRUG FINE OF \$15,000.00 IS REMITTED DUE TO INDIGENCY.

AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT IS SUBJECT TO THE POST RELEASE CONTROL SUPERVISION OF R.C. 2967.28 .

HAL ARENSTEIN IS APPOINTED AS APPELLATE COUNSEL

EXHIBIT

Page 1
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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

THE STATE OF OHIO,)
Plaintiff,)
VS.)CASE NUMBER B-0402530-A
ERNEST HOLLINGSWORTH,)APPEAL NUMBER C-060896
Defendant.)VOLUME IV OF IV

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

Melynda J. Machol, Esq.
Gus A. Leon, Esq.
On behalf of the State.

Hal R. Arenstein, Esq.
On behalf of Ernest Hollingsworth.

BE IT REMEMBERED that upon the plea and
sentence of this cause, in the Common Pleas
Division, before the Honorable RICHARD A. NIEHAUS,
one of the said judges of the said court, on
January 28, 2005, the following proceedings were
had, to wit:

1 MORNING SESSION, January 28, 2005

2 THE COURT: We are ready to proceed
3 and enter -- what is the plea bargain? No
4 plea bargain? Plead no contest as charged
5 on Counts 1 and 2?

6 MR. ARENSTEIN: That's correct,
7 Judge. He's just signing the affidavit.

8 THE COURT: And that carries a
9 mandatory term of at least eight.

10 MS. MACHOL: Yes, Your Honor.

11 THE COURT: And are we going to
12 impose sentence today or what?

13 MR. ARENSTEIN: We would ask that you
14 do that today, Judge. We are not asking
15 for a presentence investigation.

16 THE COURT: There is also a \$15,000
17 fine on each count, of which 15,000 is
18 mandatory overall. But he filed an
19 affidavit of indigency, so we will remit
20 the fine.

21 MR. ARENSTEIN: Thank you, Judge.

22 THE COURT: Count 1 is possession of
23 marijuana. Are you aware of that, sir?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Carries a two to

1 eight-year sentence, with eight years
2 mandatory because it's over 20,000 --

3 THE DEFENDANT: Yes, sir.

4 THE COURT: -- grams. We already
5 talked about the fine. Also carries a
6 six-month to five-year driving suspension,
7 six months of which I must impose. Are
8 you aware of that, sir?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: A plea of guilty -- no
11 contest means you'll admit the facts as
12 the prosecutor reads them. And if they
13 constitute a violation of law, I can find
14 you guilty. Do you understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: And a plea of no contest
17 waives any other defenses you would have
18 had to this charge. Are you going to
19 assert -- is he going to assert an appeal?

20 MR. ARENSTEIN: Yes.

21 THE COURT: Okay. On the --

22 MR. ARENSTEIN: Motion to suppress.

23 THE COURT: -- motion to suppress --
24 on your waiver of any other defenses you
25 would have had, other than the allegation

1 that the search was illegal.

2 Do you understand that everything
3 that happened at the trial will be as if
4 the trial never took place? Okay.

5 THE DEFENDANT: All right.

6 THE COURT: But you have filed a
7 motion to suppress, and you may appeal
8 that if that's what you want to do. Do
9 you understand that, sir?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: So preserves that right.
12 Do you understand in order to plea no
13 contest, you have to waive your right to a
14 jury trial? We have already started a
15 jury trial, but you're willing to just --

16 THE DEFENDANT: Yes, sir.

17 THE COURT: -- discontinue the trial
18 and waive your right to jury trial? And
19 you signed this form that says you
20 knowingly, intelligently and voluntarily
21 waive your right to a jury, after talking
22 to your attorney about it?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: It will be accepted. If
25 we would have had a trial, you already

1 realize your attorney would have been able
2 to ask questions of any witnesses -- he's
3 already done this in the last couple of
4 days. Do you understand at trial you
5 could have subpoenaed in any witnesses,
6 items or documents you felt were necessary
7 for your defense, and if they could have
8 been found, we would have brought them in?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you understand at
11 trial you would have had a right, under
12 the Ohio and US Constitutions, not to
13 testify against yourself? You could have
14 chosen not to testify and no one could
15 have made you. Do you understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: At trial, the burden of
18 proof would have been upon the state to
19 prove your guilt beyond a reasonable
20 doubt, but, you know, that's what we have
21 been talking about. We have been engaged
22 in a trial for the last couple of days at
23 trial. Did anybody threaten or coerce you
24 into pleading guilty?

25 THE DEFENDANT: No, sir.

1 THE COURT: okay.

2 THE DEFENDANT: No, sir.

3 THE COURT: Do you freely,
4 voluntarily, knowingly and intelligently
5 enter this plea of no contest?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Have you discussed this
8 plea with your attorney?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Are you satisfied with
11 his representation and advice?

12 THE DEFENDANT: Very much so.

13 THE COURT: After your discussions
14 with your attorney, do you believe it's in
15 your best interest to plead no contest,
16 preserve your motion to suppress appeal
17 and be sentenced today?

18 THE DEFENDANT: Yes, sir.

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

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Okay. Facts?

23 MS. MACHOL: Judge, this occurred on
24 March 11, 2004, in this county and state.
25 At that time the defendant knowingly

1 obtained, possessed or used a schedule I
2 control substance, to wit: Marijuana, in
3 an amount that equaled or exceeded 20,000
4 grams.

5 Count 2 occurred on the same date,
6 this county and state. At that time the
7 defendant knowingly prepared for shipment,
8 shipped, transported, delivered, prepared
9 for distribution or distributed marijuana,
10 a schedule I controlled substance, when
11 the defendant knew or had reasonable cause
12 to believe that that was intended for sale
13 or resale by himself or another. And the
14 amount in question equaled or exceeded
15 20,000 grams, in violation of section
16 2925.03(A)(2).

17 Judge, you heard the facts in
18 opening.

19 MR. ARENSTEIN: We would waive
20 further reading, Judge, on the facts.

21 THE COURT: All right. We'll accept
22 these facts and make a finding of guilty.

23 Do you want to say anything by way of
24 mitigation of sentence?

25 MR. ARENSTEIN: No, Judge. There is

1 really nothing to say. It's a mandatory
2 sentence, and the Court has to do what the
3 Court has to do.

4 THE COURT: Sir, you have a right to
5 make a statement in mitigation of
6 sentence. Do you want to say anything
7 before the Court imposes sentence?

8 MR. ARENSTEIN: Don't say nothing.

9 THE DEFENDANT: No, sir. Thank you.

10 THE COURT: All right. We have to
11 make sentencing findings. I find that the
12 700 pounds was an offense of organized
13 criminal activity. Do you have any --
14 does he have a prior record?

15 MS. MACHOL: Yes, he does, Judge.

16 THE COURT: What is it?

17 MR. LEON: It's prior trafficking
18 convictions in the past, Judge.

19 MS. MACHOL: We believe the prior
20 trafficking is in Arizona and Wisconsin.

21 THE COURT: Prior delinquency
22 convictions in Arizona?

23 SERGEANT MORGAN: Arizona.

24 THE COURT: You're not on probation
25 or parole, are you, sir?

1 THE DEFENDANT: No, sir.

2 THE COURT: Were you on --

3 THE DEFENDANT: No, sir.

4 THE COURT: -- parole in Arizona?

5 THE DEFENDANT: Yes, I have been in
6 the past.

7 THE COURT: So it was unsuccessful
8 rehabilitation of probation. Do you want
9 to make a statement on sentence?

10 MS. LEON: Are you talking to me?

11 THE COURT: Well, he already made
12 his, so there is one.

13 MS. MACHOL: That's okay.

14 MR. LEON: Judge, you heard the
15 facts. You're aware of all the
16 circumstances and evidence here, and I
17 don't believe there is any question about
18 what occurred, and we will leave it to the
19 Court's discretion, the matter of
20 sentencing.

21 THE COURT: We don't have the code
22 section on here.

23 MR. ARENSTEIN: I'm sorry, Judge.

24 MR. LEON: We have an indictment.

25 THE COURT: I got it right here.

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It's 2925.11(A) on Count 1.

MR. ARENSTEIN: Yes.

THE COURT: And then it's 29 --

MS. MACHOL: 2925.03(A)(2).

THE COURT: It will be the sentence of this court of eight years on each, concurrent to each other, impose the \$15,000 fine and remit, pursuant to his affidavit. Six-month driving suspension. Commit. You will be placed upon post-release control by the Parole Board for a period of up to three years because this is a felony of the second degree. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: During that period of time, they could require you to undergo any program they felt would be necessary to rehabilitate you. They could require you to go to a halfway house, they could require you to undergo some kind of substance abuse, if that's what they find. And if you failed to abide by the terms, they could violate you and send you back for up to nine months, or otherwise

1 increase the sanctions against you. If
2 you committed a new felony while on
3 post-release control, the Parole Board or
4 the Court or the prosecutor could move to
5 have you returned to prison for the
6 remainder of your post-release control
7 time, which could be up to three years if
8 you violated early on, but in no event
9 would it be less than one. And by
10 statute, any sentence for the new felony
11 would have to be consecutive to that time.
12 Are you aware of post-release control,
13 sir?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Commit. Thanks. How
16 many days?

17 MR. ARENSTEIN: He's been locked up
18 since the day of, Judge.

19 MS. MACHOL: March 11th.

20 MR. BEYA: This would be maybe 324
21 because we sentenced Mr. Lopez.

22 THE COURT: 324 days. We get 10
23 extra.

24 (Proceedings concluded.)

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CERTIFICATE

I, SHERI D. RENKEN, RPR, the undersigned,
an Official Court Reporter for the Hamilton County
Court of Common Pleas, do hereby certify that at
the time and place stated herein, I recorded in
stenotype and thereafter I transcribed the within
11 pages, and that the foregoing Transcript of
Proceedings is a true, complete, and accurate
transcript of my said stenotype notes.

IN WITNESS WHEREOF, I hereunto set my hand
this 27th day of November, 2006.

SHERI D. RENKEN, RPR
Official Court Reporter
Court of Common Pleas
Hamilton County, Ohio

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

ERNEST HOLLINGSWORTH,

Petitioner,

Case No. 1:08-cv-745

-vs-

District Judge S. Arthur Spiegel
Magistrate Judge Michael R. Merz

DEB TIMMERMAN-COOPER, Warden,

Respondent.

REPORT AND RECOMMENDATIONS

This is a habeas corpus action brought under 28 U.S.C. § 2254. Petitioner is serving an eight-year sentence in Respondent's custody upon his conviction for possessing and trafficking in marijuana. He asserts that he received ineffective assistance of trial counsel in that his trial attorney:

- a. failed to contest the warrantless seizure of the only physical evidence that linked Hollingsworth to the marijuana;
- b. failed to contest the warrantless seizure of Hollingsworth's person as the product of racial discrimination;
- c. failed to contest the warrantless search of Hollingsworth's car on the basis that the drug-dog WBS not properly trained or tested, and lacked a real-world record of reliability; and
- d. failed to present Hollingsworth's testimony regarding the circumstances of his seizure and his withholding of consent to search his papers and effects or to detain him.

(Petition, Doc. No. 1, ¶ 12, PageID 2.)

Respondent moved to dismiss the Petition on the grounds that the ineffective assistance of

trial counsel claim was barred by Petitioner's failure to raise that claim in a timely petition for post-conviction relief under Ohio Revised Code § 2953.21 (Motion to Dismiss, Doc. No. 9). Magistrate Judge Hogan recommended the Motion be denied on the grounds that the procedural rule relied on by the First District Court of Appeals in dismissing the post-conviction petition was not firmly established and regularly followed (Report, Doc. No. 16). Judge Spiegel adopted that Report over Respondent's Objections (Doc. No. 24).

In the subsequent Return of Writ (Doc. No. 28), Respondent asserts that "[b]ecause Hollingsworth pleaded "no contest" to the charges against him, thereby admitting the factual basis for the charges, he has waived his ability to assert any error, constitutional or otherwise, that occurred in the criminal proceedings before the "no contest" plea." *Id.* at PageID 569. Respondent also reasserts the procedural bar and argues that the decision on the merits of the post-conviction petition by the trial judge is not contrary to, nor an objectively unreasonable application of, clearly established federal law.

In the Traverse, Petitioner asserts his no contest plea does not waive any of the claims made here, relies on the Court's prior decision on procedural default, and asserts the trial court's findings on the merits are not entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA") (Traverse, Doc. No. 37).

ANALYSIS

Law of the Case

Respondent seeks reconsideration of the Court's prior procedural default ruling. While the law of the case doctrine is merely prudential at the trial court level, Respondent has presented no good cause for reconsideration. *See Arizona v. California*, 460 U.S. 605, 618 (1983), citing 1B Moore's Federal Practice ¶0.404 (1982); *Patterson v. Haskins*, 470 F.3d 643, 660-61 (6th Cir. 2006); *United States v. City of Detroit*, 401 F.3d 448, 452 (6th Cir. 2005). In particular, Respondent cites no case law showing that the interpretation of Ohio Revised Code § 2953.21 relied on by the First District Court of Appeals has been routinely followed by Ohio courts.

The law of the case also disposes of Petitioner's request for an evidentiary hearing in his Traverse (PageID 616-618). Noting that the request did not satisfy the post-AEDPA standards for such a hearing, the Magistrate Judge denied it without prejudice to renewal on certain conditions (Order, Doc. No. 39, PageID 622). Petitioner neither appealed from that Order nor filed a new motion for evidentiary hearing within the time allowed by the Order. Thus he is barred from presenting evidence at a hearing in this Court.

Waiver/Forfeiture of the Claims

As noted above, Respondent asserts that Petitioner, by pleading no contest, Petitioner has "waived any error, constitutional or otherwise, that occurred prior to his plea." (Return of Writ,

Doc. No. 28, PageID 575.)

A guilty plea renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt. *Menna v. New York*, 423 U.S. 61 (1975). A guilty plea constitutes a break in the chain of events leading up to it. *Tollett v. Henderson*, 411 U.S. 258 (1973). Federal habeas corpus review of claims raised by a petitioner who has entered a guilty plea is limited to “the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity.” *Tollett*, 411 U.S. at 266. A guilty plea bars a defendant from raising in federal habeas corpus such claims as the defendant’s right to trial and the right to test the state’s case against him. *McMann v. Richardson*, 397 U.S. 759 (1970); *McCarthy*, 394 U.S. at 466. The same result applies with a no contest plea. *North Carolina v. Alford*, 400 U.S. 25 (1970).

Petitioner argues, however, that this analysis has been rejected by the Sixth Circuit, citing *Dando v. Yukins*, 461 F. 3d 791 (6th Cir. 2006). In that case petitioner Debra Dando, on advice of counsel, pled no contest to a series of armed robberies. She had sought a court-appointed expert on Battered Woman’s Syndrome to assist in the decision of whether she should move to withdraw her plea. Judge Martin wrote for the majority:

The certificate of appealability from this Court defined Dando's claim as presenting two questions: (1) whether the sentencing court abused its discretion in denying Dando's motion for an expert witness, and (2) whether trial counsel was ineffective for failing to pursue a duress defense. Although the certificate of appealability framed the issues involved here as separate questions, they are inherently intertwined with one another. Dando did not seek the help of an expert before entering her no contest plea in state court. Rather, in a collateral state proceeding, she requested an expert to assist her in determining whether or not she should seek to withdraw her plea. The only relevant federal constitutional hook that would require allowing Dando to withdraw her plea is a claim that her counsel was ineffective in advising her to plead no contest under *Hill v. Lockhart*. 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (stating that

when "a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases."). Thus, her request for a mental health expert to help her decide whether or not to withdraw her plea and her claim of ineffective assistance of counsel are one in the same. As presented in her federal habeas claim now before this Court, the issue can be articulated as follows: was it an unreasonable application of federal law to reject Dando's claim of ineffective assistance of counsel based on her trial counsel's failure to consult an expert and otherwise investigate the validity of a duress defense based on Battered Woman's Syndrome?

461 F.3d at 796.

In a footnote quoted by Petitioner (PageID 614), Judge Martin wrote on the precise issue before this Court:

Additionally, the state argues that Dando waived her right to seek an expert and assert a defense by pleading guilty. This argument is not availing. Although a defendant might generally waive her right to put on a defense and seek an expert by pleading no contest, **where the plea is challenged** through an ineffective assistance of counsel claim, the availability of a defense and of an expert becomes relevant under *Hill* for determining whether or not the defendant suffered prejudice. See *Magana v. Hofbauer*, 263 F.3d 542, 551 (6th Cir. 2001). The application here of the waiver approach suggested by the state would instead render *Hill* a nullity.

Id. at 798, n. 1 (emphasis added). Petitioner, paraphrasing *Dando*, argues his claims are "'effectively inseparable' from a *Hill* claim... ." (Traverse, Doc. No. 37, PageID 614). That is simply not so. At issue in *Hill v. Lockhart*, 474 U.S. 52, 57 (1985), was whether a plea of guilty would be rendered involuntary if it was based on advice of counsel which constituted ineffective assistance; the Supreme Court held that the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), announced two terms earlier, were indeed applicable to negotiated plea cases.

But there is no *Hill v. Lockhart* claim made in this case. Neither in the state courts nor in the

Petition here has Mr. Hollingsworth claimed his decision to plead no contest was based on constitutionally ineffective assistance of counsel. He has never sought to withdraw that plea. His papers in this habeas case, prepared by two experienced criminal defense attorneys, do not purport to demonstrate that the decision to plead no contest was based on advice which was constitutionally ineffective. Indeed, the whole strategy of the defense seems to have been to rely on the motion to suppress and preserve it for appeal, a strategy Petitioner does not now question and reinforces by asserting the motion to suppress should have been better. In the absence of any effort to withdraw or set aside the plea, *Dando*, which involved a *Hill v. Lockhart* claim, is inapposite.

Petitioner also argues that under Ohio law his no contest plea cannot be used against him in this habeas corpus proceeding because habeas is a civil proceeding. Petitioner relies on the recently-decided *Elevators Mutual Insurance Co. v. J. Patrick O'Flaherty's, Inc.*, 125 Ohio St. 3d 362, 928 N.E. 2d 685 (2010). In that insurance fraud case, the Ohio Supreme Court confirmed the long-standing principle of Ohio law, embodied in Ohio R. Crim. P. 11(B)(2) and Ohio R. Evid. 410(A) that a no contest plea in a criminal matter "shall not be used against the defendant in any subsequent civil or criminal proceeding."

Justice Lanzinger's opinion in *Elevators Mutual* recites the rationale of the Ohio no contest plea – obtaining criminal case finality:

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* (Conn. Super. 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.

Id. at 365. That rationale was served by excluding the no contest plea and subsequent conviction in the *Elevators Mutual* case. But there is no indication the Ohio Supreme Court intended that interpretation to apply in collateral attacks on the very criminal judgment which results from a no contest plea. To do so would utterly eviscerate the utility of the no contest plea to bring finality to criminal proceedings. If Petitioner's interpretation were adopted, a person convicted on a no contest plea could file a post-conviction petition claiming, e.g., that there was no evidence admitted to prove him guilty. When the State responded with a transcript of his plea and the statement of facts on which the conviction was then based, he could respond, if Petitioner's interpretation were adopted, that the statement of facts was only presented as a consequence of his plea and thus the State's relying on the statement of facts in post-conviction uses his plea against him in a civil proceeding.¹ In sum, however broad the language in *Elevators Mutual*, applying it to collateral attacks on criminal convictions engendered by no contest pleas leads to absurd results and Petitioner points to no case law in which any Ohio court has made that application.

Because Petitioner pled no contest and has not challenged the voluntary, knowing, and intelligent character of that plea, he has waived or forfeited² any antecedent claims of

¹Proceedings under Ohio Revised Code § 2953.21 are characterized as "civil" by the Ohio courts. See *State v. Apanovitch*, 107 Ohio App. 3d 82667 N.E. 2d 1041 (Ohio App. 8th Dist. 1995).

²It is more accurate to characterize what happened here as a forfeiture of claims, rather than a waiver. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the

unconstitutionality.

Because the Court concludes that Petitioner has forfeited his claims of ineffective assistance of trial counsel by pleading no contest, it does not reach the merits.

Conclusion

The Petition herein should be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied leave to appeal *in forma pauperis* and any requested certificate of appealability.

October 12, 2010.

s/ **Michael R. Merz**
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to seventeen days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(B), (C), or (D) and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it

timely assertion of a right, waiver is the intentional relinquishment of a known right.” *United States v. Olano*, 507 U.S. 725, 733 (1993), see also *Freytag v. C.I.R.*, 501 U.S. 868, 895 (1991)(acknowledging that the Supreme Court has so often used the words interchangeably that it may be too late to introduce precision.)

as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. See *United States v. Walters*, 638 F. 2d 947 (6th Cir., 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

**IN THE UNITED STATES DISTRICT COURT
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ERNEST HOLLINGSWORTH,

Petitioner,

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DEB TIMMERMAN-COOPER, Warden,

Respondent.

Case No. 1:08-cv-745

District Judge S. Arthur Spiegel
Magistrate Judge Michael R. Merz

SUPPLEMENTAL REPORT AND RECOMMENDATIONS

This habeas corpus case is before the Court on Petitioner's Objection (Doc. No. 42) to the Magistrate Judge's Report and Recommendations (Doc. No. 40) recommending that the Petition be dismissed with prejudice. The Warden's time to respond to the Objection has expired and no response has been filed. The General Order of Reference for the Dayton location of court permits a magistrate judge to reconsider decisions or reports and recommendations when objections are filed.

Petitioner asserts he received ineffective assistance of trial counsel in the litigation of his motion to suppress (Petition, Doc. No. 1, ¶ 12, PageID 2.) Having lost on that motion, he pled no contest and thereby preserved his suppression issues for state court appeal. He was, however, unsuccessful on that appeal and continues to serve an eight-year sentence for trafficking in marijuana.

1. Forfeiture by No Contest Plea

Respondent argued that, by pleading no contest, Petitioner had waived any error in the proceedings before the plea (Return of Writ, Doc. No. 28, PageID 569). The Report accepted that argument, citing *Menna v. New York*, 423 U.S. 61 (1975); *Tollett v. Henderson*, 411 U.S. 258 (1973); and *McMann v. Richardson*, 397 U.S. 759 (1970) (Report, Doc. No. 40, PageID 626).

In his Objection, Petitioner argues his ineffective assistance of trial counsel claim was not waived by his no contest plea. He relies on *United States v. Freed*, 688 F.2d 24 (1982), asserting the Sixth Circuit decided an ineffective assistance of counsel claim in that case on the merits. Freed, an attorney, was denied appointed counsel in the district court and appealed, in part, based on that denial. The Sixth Circuit affirmed, holding in pertinent part:

Freed does not contend that his plea was not made voluntarily and intelligently. He does not argue that the advice he received from counsel was "not within the range of competence demanded of attorneys in criminal cases." *Tollett v. Henderson*, 411 U.S. 258, 266, 36 L. Ed. 2d 235, 93 S. Ct. 1602 (1973), quoting *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970). Appellant simply has not raised a claim which can be considered in an attack on a conviction resulting from a nolo contendere or guilty plea. See *Menna v. New York*, 423 U.S. 61, 62 n.2, 46 L. Ed. 2d 195, 96 S. Ct. 241 (1975).

688 F.2d at 26. That is exactly the situation here: Petitioner is not claiming his plea of no contest was not made voluntarily or intelligently because of defective advice from his counsel. That claim would be cognizable despite the plea because it would be seeking to undermine the plea. But as the Report notes, "there is no *Hill v. Lockhart* claim made in this case." (Report, Doc. No. 40, PageID 627.)

Petitioner also argues that the Magistrate Judge's view, if correct, "would undercut the

Supreme Court's holding in *Kimmelman v. Morrison*, 477 U.S. 365 (1986) ... that ineffective-assistance claims for failing to investigate and litigate 4th Amendment issues are cognizable in habeas." (Objection, Doc. No. 42, PageID 638.) But *Kimmelman* is not a guilty or no contest plea case – it went to trial. Hence the question of waiver of pre-plea rights on which the Report turns did not occur in *Kimmelman*.

This portion of the Objection concludes "a holding like the instant one would force state defendants to try cases to preserve their federal remedies, resulting in unnecessary trials and waste of finite judicial resources." (Doc. No. 42, PageID 638.) But that is exactly the correct result. Ever since *Wainwright v. Sykes*, 433 U.S. 72 (1977), replaced the deliberate bypass rule of *Fay v. Noia*, 372 U.S. 391 (1963), the Supreme Court has emphasized that a state court trial is not to be treated as a "trial run" for the eventual real test of federal rights in habeas corpus. The whole body of law developed around the exhaustion and procedural default doctrines has been for the purpose of having federal rights in criminal cases litigated in the first instance in the state courts.

2. Use of a No Contest Plea in a Civil Proceeding

Petitioner also asserted that his no contest plea could not be used against him in this proceeding because of the Ohio rule that a no contest plea cannot be used against a defendant in a subsequent civil proceeding, citing *Elevators Mutual Insurance Co. v. J. Patrick O'Flaherty's, Inc.*, 125 Ohio St. 3d 362, 928 N.E. 2d 685 (2010). The Report rejects this argument, holding

[T]here is no indication the Ohio Supreme Court intended that interpretation to apply in collateral attacks on the very criminal judgment which results from a no contest plea. To do so would utterly eviscerate the utility of the no contest plea to bring finality to criminal proceedings. If Petitioner's interpretation were adopted, a person convicted on a no contest plea could file a post-conviction

petition claiming, e.g., that there was no evidence admitted to prove him guilty. When the State responded with a transcript of his plea and the statement of facts on which the conviction was then based, he could respond, if Petitioner's interpretation were adopted, that the statement of facts was only presented as a consequence of his plea and thus the State's relying on the statement of facts in post-conviction uses his plea against him in a civil proceeding.

(Report, Doc. No. 40, PageID 629.)

The Objection chides the Magistrate Judge for preferring the policy behind the rule to its plain text. "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). Adopting an interpretation of Ohio R. Crim. P. 11 and Ohio R. Evid. 410 which would prohibit the introduction of a no contest plea in a subsequent "civil" collateral attack on the criminal judgment itself would run directly counter to the purpose of the no contest plea – repeated by the Ohio Supreme Court in *Elevators Mutual* – to promote finality in criminal cases. It is true that habeas corpus cases are classified as "civil" for some purposes. But that is also true of Ohio post-conviction proceedings under Ohio Revised Code § 2953.21. It is unimaginable that the Ohio Supreme Court would read its rules as prohibiting introducing the no contest plea and resultant conviction in a case involving a collateral attack on the very criminal judgment resulting from the plea.

Conclusion

For the foregoing reasons, it is again respectfully recommended that the Petition herein be dismissed with prejudice.

November 16, 2010.

s/ **Michael R. Merz**
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to seventeen days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(B), (C), or (D) and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. See *United States v. Walters*, 638 F. 2d 947 (6th Cir., 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).