

IN THE SUPREME COURT OF OHIO

ERNEST HOLLINGSWORTH

Petitioner,

-vs-

DEB TIMMERMAN-COOPER, Warden

Respondent.

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

REPLY BRIEF OF PETITIONER ERNEST HOLLINGSWORTH

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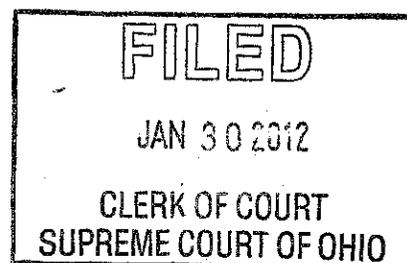


TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY ARGUMENT 1

 A. A postconviction or habeas action is a separate and subsequent action from the underlying criminal case 1

 B. The Mapes exception is narrow and inapplicable 3

 C. The Warden’s theory makes no sense and creates numerous problems 4

CONCLUSION 6

CERTIFICATE OF SERVICE..... 7

TABLE OF AUTHORITIES

<i>Duncan v. Henry</i> , 513 U.S. 364 (1995).....	6
<i>Elevators Mutual Ins. Co. v. J. Patrick O’Flaherty’s, Inc.</i> , 125 Ohio St.3d 362, 2010-Ohio-1043	3
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985).....	6
<i>Lefkowitz v. Newsome</i> , 420 U.S. 283, 43 L.Ed2d 196, 95 S.Ct. 886 (1975).....	4, 5
<i>State v. Mapes</i> , 19 Ohio St.3d 108, syllabus (1985).....	3, 4, 6
<i>State v. Perry</i> , 10 Ohio St.2d 175, syllabus (1967).....	1
<i>State v. Wilson</i> , 73 Ohio St.3d 40, Nt. 6 (1995).....	1

STATUTES

R.C. 2953.21(A)(2)	1
Crim.R. 11(B)(2).....	passim
Evid.R. 410(A)(2)	2, 4, 6
Crim.R. 12(I).....	2, 4
28 U.S.C § 2254(b)(1) (A)	6

REPLY ARGUMENT

The Warden's arguments in support of her claim that a no-contest plea is admissible to prove a waiver or forfeiture of the right to effective assistance in postconviction or federal habeas litigation are addressed below.

A. ***A postconviction or habeas action is a separate and subsequent action from the underlying criminal case***

First, the Warden argues that postconviction and habeas actions are collateral proceedings that are functionally the same as the underlying criminal case. Warden's brief, pp. 7-8. Because they are the same, the Warden argues that a postconviction or habeas case is not a "subsequent civil or criminal proceeding" to trigger the Crim.R. 11(B)(2) bar. *Id.* But this court's precedent forecloses that argument. In *State v. Wilson*, 73 Ohio St.3d 40, 45, Nt. 6 (1995), this court observed that "* * * a postconviction relief proceeding **is a separate civil proceeding** * * *." (Emphasis added) This separateness has allowed for the use of *res judicata* during postconviction litigation for claims that were, or should have been, raised by the defendant on direct appeal. *State v. Perry*, 10 Ohio St.2d 175, syllabus (1967). If the Warden's theory were correct, *res judicata* would be unavailable as a procedural bar for postconviction cases, since the postconviction and underlying criminal cases are the same. But that is not the law. *Id.* Moreover, under the Warden's theory, there would be no basis for a postconviction statute-of-limitations and no reason to file a separate notice-of-appeal after a postconviction judgment. Of course, Ohio law has long involved both. R.C. 2953.21(A)(2). The Warden is therefore incorrect in characterizing a

postconviction or habeas action as the same as the underlying criminal case to avoid the plain language from Crim.R. 11(B)(2) and Evid.R. 410(A)(2).

In framing this first argument, the Warden also asserts that Hollingsworth's use of Crim.R. 11(B)(2) and Evid.R. 410(A)(2) falls outside of their intended policies. The Warden describes these policies as encouraging plea-bargaining "* * * by removing the possibility of additional future liability—civil or criminal—for the same act." Warden's brief, pp. 8. According to the Warden, Hollingsworth should not benefit from the barring rules because his no-contest plea will not prevent an *additional liability* for the same act. *Id.*

But the Warden is only half right. Hollingsworth agrees that the rules are designed to encourage plea-bargaining. In this case, they did just that. Hollingsworth pled no-contest and avoided an unnecessary trial. The Warden errs, however, in limiting the evidentiary bar for no-contest pleas to circumstances where *future liability for the same act* is at stake. In an overwhelming number of cases, including this one, a defendant pleads no-contest to preserve a pretrial constitutional issue. Crim.R. 12(I). This is a widely accepted practice; yet the Warden excludes this practice from her policy definition. Warden's brief, pp. 8.

In actuality, the Warden's position that a no-contest plea can be used to prove waiver or forfeiture in collateral proceedings serves to thwart the policies behind Crim.R. 11(B)(2) and Evid.R. 410(A)(2). That is because a defendant, like Hollingsworth, will lack incentive to plead no-contest to avoid an unnecessary trial if he risks implicitly waiving or forfeiting constitutional rights, like effective

assistance, that relate to the very issue he seeks to preserve by pleading no-contest in the first place.

B. *The Mapes exception is narrow and inapplicable*

Second, the Warden argues that use of a no-contest plea to prove waiver in a collateral proceeding is admissible under the *Mapes* exception. Warden's brief, pp. 9-10. *Mapes* permitted a no-contest plea and conviction from a prior murder case to prove an aggravating factor in a subsequent capital case. *Mapes*, 19 Ohio St.3d 108, syllabus (1985). But this court has never applied the *Mapes* exception outside the capital murder context; and the district courts have never applied it beyond circumstances where an administrative regulation conditioned an EMT certification on the absence of a criminal conviction. See, *Elevators Mutual Ins. Co. v. J. Patrick O'Flaherty's, Inc.*, 125 Ohio St.3d 362, 2010-Ohio-1043, ¶ 18 (citing the district court cases).

Nevertheless, the Warden posits that our case fits within *Mapes* because the postconviction and habeas statutes make a no-contest plea relevant in a like way. Warden's brief, pp. 9-10. But the Warden misses the point. In *Mapes*, an Ohio statute *expressly referenced* a prior murder conviction to justify a capital-murder specification; in the district court cases, an administrative regulation *expressly referenced* a misdemeanor conviction involving moral turpitude to justify the revocation of an EMT certificate. In contrast, neither the postconviction nor the habeas statutes make *express reference* to a prior conviction as substantive evidence to prove anything. So the *Mapes* exception is inapplicable.

There is a danger in taking up the Warden's offer to expand *Mapes* here. Crim.R. 11(B)(2) and Evid.R. 410 are unambiguous. They bar the use of a no-contest plea and conviction in a subsequent proceeding. If *Mapes* were expanded, this court would be legislating by inserting additional but absent words into the rules; and the stability in the law that comes with judicial restraint and settled expectations will be dealt a serious blow.

C. ***The Warden's theory makes no sense and creates numerous problems***

The Warden gives the example of a *Batson* or insufficient evidence claim in postconviction litigation that follows a no-contest plea, and posits that Hollingsworth's theory would allow for their postconviction consideration even though the conviction was obtained by plea. Warden's brief, pp. 11. But the Warden is wrong. Crim.R. 12(I) limits claims that can be raised after a no-contest plea to those occurring in pretrial litigation. Both *Batson* and insufficient evidence claims arise during trial. So, contrary to the Warden's examples, the bar against use of no-contest pleas would only apply to pretrial claims contemplated by Crim.R.12(I).

This gives rise to another point. The instant issue is one of State criminal procedure. It is up to Ohio to determine its own laws regarding the waiver and forfeiture of rights, and not the federal court. This was established by the U.S. Supreme Court in *Lefkowitz v. Newsome*, 420 U.S. 283, 43 L.Ed2d 196, 95 S.Ct. 886 (1975). There, the State argued that defendant waived his right to present a 4th Amendment claim in federal habeas because he had pled guilty to his offenses in state court. The Supreme Court looked beyond the guilty plea, however, and

observed that New York law permitted an appeal of a 4th Amendment claim even after a guilty plea. This was dispositive. The Supreme Court held that federal habeas was permitted for a claim that was not waived or forfeited under state law. *Id.*

The upshot of *Lefkowitz* is that the Warden's citations to federal cases, like *Tollet*, *Brady*, and *Alford*, are confined to their respective facts and to local procedure, because it is Ohio law that will decide whether Hollingsworth's no-contest plea procedurally defaulted his federal claim. The Warden is absolutely incorrect—and this is the heart of this case—when she states, " * * * it is up to the district court to assess the impact of Hollingsworth's no-contest plea on his petition for federal habeas relief." Warden's brief, pp. 13. *Lefkowitz* rejected this many years ago, and the entire purpose of certifying this question from federal court was to determine the impact of Ohio procedural default on Hollingsworth's habeas claim.

To the Warden's point about Hollingsworth's 'nonsensical' theory, the opposite is true. In the habeas case, the Warden argued Hollingsworth waived his right to effective assistance by pleading no contest. A waiver is the intentional relinquishment of a known right. But the record contains no waiver at all. Warden's brief, pp. A-5 to A-19. So, from Hollingsworth's perspective, the Warden is seeking to undo settled waiver law. This is a sincere point, and hardly nonsensical.

Finally, the Warden takes inconsistent positions in her brief. On the one hand, she asserts that Hollingsworth's ineffective-assistance claim cannot survive his no-contest plea as a matter of *federal law*. Warden's brief, pp. 1. But on the

other hand, she disclaims the first argument, and asserts that her only argument is that Hollingsworth is confined to challenging the voluntariness of his plea but never presented that claim.¹ Warden's brief, pp. 15. If the Warden were proceeding on the second argument only, this court would not be involved. Instead, the habeas court would reject Hollingsworth's claim because he failed to present it in state court as required by the federal habeas statute, leaving it unexhausted. 28 U.S.C. § 2254(b)(1)(A). This court is involved, however, because there is a dispute between the parties regarding the Warden's first argument: (i) does Ohio law control procedural default in federal habeas?; and (ii) does Crim.R. 11(B)(2) and Evid.R. 410 prohibit the Warden's use of Hollingsworth's no-contest plea to prove procedural default?

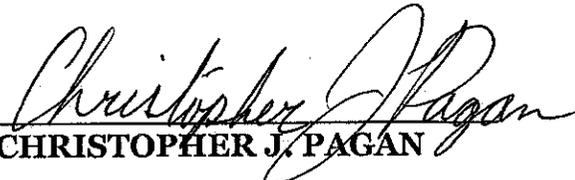
CONCLUSION

Federal habeas and state postconviction are subsequent civil proceedings, as contemplated by Crim.R. 11(B)(2) and Evid.R. 410. The *Mapes* exception is a narrow one that does not apply to this case. And, under *Lefowitz*, it is incumbent upon Ohio to define its own procedural rules, including whether waiver or forfeiture can be proved with use of a no-contest plea or conviction. As such, and for the reasons expressed in the Merit brief, Hollingsworth submits that this court must answer 'yes' to the certified question.

¹ Hollingsworth rejects this characterization. He fairly presented his ineffective-assistance claim to the state and federal habeas courts as contemplated by federal habeas law. *Duncan v. Henry*, 513 U.S. 364, 365 (1995). Because Hollingsworth pled no-contest, the ineffective-assistance claim required him to establish that he was prejudiced because he would not have pled absent his attorney's defective performance. *Hill v. Lockhart*, 474 U.S. 52 (1985). But this issue is not before this court. The only issue for this court is whether Ohio law permits the use of a no-contest plea to prove procedural default in the habeas case.

To the court, the instant Reply brief is

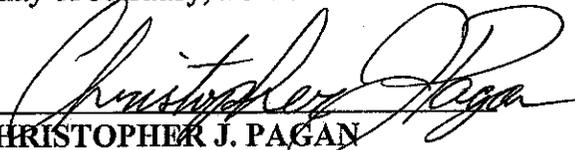
Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon Alexandra T. Schimmer, Ohio Attorney General's Office, 150 E. Gay Street, 16th Floor, Columbus, OH 43215, on this 30th day of January, 2012.


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