ORIGINAL

Case No. 2011-1501

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO
CASE NO. 2010CA00292

STATE OF OHIO,
Plaintiff-Appellee,
v.
DONALD BILLITER (aka BILLETER),
Defendant-Appellant

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MERIT BRIEF OF PLAINTIFF-APPELLEE, THE STATE OF OHIO

JOHN D. FERRERO, #0018590
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO

By: Ronald Mark Caldwell
Sup. Ct. Reg. No. 0030663
Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza, South - Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965

Counsel for Appellee

STEPHEN P. HARDWICK
Sup. Ct. Reg. No. 0062932
Office of the Ohio Public Defender
250 East Broad Street
Suite 1400
Columbus, Ohio 43215
(614) 466-5394

Counsel for Appellant

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STATEMENT OF THE CASE

In 1998, Donald Jack Billiter, III[1] pleaded guilty to one count each of aggravated burglary and domestic violence.[2] Upon his guilty plea and conviction, Billiter was sentenced to an aggregate prison term of three years – a three-year prison term for the aggravated burglary charge, and a concurrent one-year term for the domestic violence charge. The trial court in that case incorrectly noted in its judgment entry that Billiter would be subject to post-release control for a period up to three years.

> The Court has further notified the defendant that post release control is mandatory in this case up to a maximum of three (3) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control.
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> *State v. Billeter*, Stark County Court of Common Pleas Case No. 1998-CR-0651, Judgment Entry – Change of Plea and Sentence Imposed, at 3 (filed Dec. 9, 1998).

Billiter, however, did not appeal or otherwise challenge his criminal sentence, including the imposition of post-release control.

On May 20, 2001, Billiter was later released from prison after serving his three-prison term. He was also placed on post-release control, pursuant to the unchallenged sentencing entry of the trial

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[1]Billiter has used both "Billiter" and "Billeter" as his last name in numerous criminal and traffic prosecutions in Stark County.

[2]The aggravated burglary offense was a first degree felony, and the domestic violence offense was charged as a felony of the fifth degree. See R.C. 2911.11(B) (aggravated burglary) and R.C. 2919.25(D) (domestic violence).

court. Within the three-year period of post-release control, however, Billiter escaped from this "detention."[3] According to the indictment filed in the instant case that charged him with the offense of escape, Billiter committed this offense on March 18, 2004.

Billiter did not stand trial or otherwise challenge the validity of the escape indictment or its allegations. Instead, he pleaded guilty to this single charge of escape.[4] Billiter was initially sentenced to a community control sanction (probation) for a period of three years, and again did not appeal this conviction or sentence. While on his community control sanction, however, he violated the terms and conditions of his community control sanction, which resulted in the revocation of his probation by the trial court. Upon revoking his probation, the trial court sentenced Billiter to a prison term of six years. Billiter also did not appeal this revocation or the imposition of his criminal sentence, or the validity of his conviction.

Instead, in 2008, Billiter filed a *pro se* motion to suspend further execution of sentence based on *Hernandez* grounds.[5] The trial court, after the State filed a reply to Billiter's motion, overruled the motion based upon the reasons set forth in the State's reply. Those reasons were that Billiter's reliance on *Hernandez* was misplaced as that case dealt with a situation where the trial court did not impose any period of post-release control, as opposed to imposing the erroneous period of time as in this case. Second, the trial court in Billiter's case did impose a period of post-release control, but imposed an erroneous period that benefitted Billiter. The correct period for the first-degree felony

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[3]See R.C. 2921.01(E) (definition of "detention" to include being on post-release control).

[4]See R.C. 2921.34(A)(1) (the offense of escape). The offense was charged as a felony of the second degree. See R.C. 2921.34(C)(2)(a).

[5]*Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301.

(aggravated burglary) is a mandatory five-year period; the trial court in this case imposed a period of post-release control up to three years. This erroneous time period favored Billiter and did not prejudice him. And in either case – a three-year period or a five-year period – Billiter had committed the crime of escape within either time period.

Billiter appealed this ruling of the trial court to the Court of Appeals for Stark County (Fifth Appellate District). Billiter argued that the trial court should have vacated the escape conviction since he was not validly on post-release control. The court of appeals rejected Billiter's argument and affirmed the trial court, holding that he had been notified of his post-release control obligations in a manner that actually benefitted him (up to three years as opposed to a mandatory five years). In its decision, the appellate court relied in part on this Court's *Watkins* decision, wherein the supreme court found the notice of post-release control during the sentencing sufficient despite the fact that the sentencing entry contained some discretionary language and post-release control was mandatory.[6] Billiter did not seek reconsideration of the court of appeals's decision, or appeal the decision to the Ohio Supreme Court.

Instead, Billiter filed in 2010 a motion to withdraw his guilty plea on the ground that his conviction for the offense of escape was a nullity. Billiter essentially raised the same issue that he had raised in his motion to suspend further execution of sentence and the subsequent appeal – that his placement in post-release control was invalid since the imposition of post-release control was defective. According to Billiter, he had escaped from an invalid detention due to his post-release

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[6]*State v. Billiter*, Stark App. No. 2008-CA-00198, 2009-Ohio-2709, 2009 WL 1629721, ¶ 13. See *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio5082, 857 N.E.2d 78, ¶ 46 ("Here, while not specifying the postrelease control as mandatory, the trial courts did at least notify the petitioners at their sentencing hearings that they could be subject to postrelease control.").

control obligation being void. The trial court overruled the motion to withdraw guilty plea in part on res judicata grounds.

Billiter thereafter filed a direct appeal to the Court of Appeals for Stark County (Fifth Appellate District) to challenge the trial court's ruling on his motion to withdraw guilty plea. The court of appeals rejected Billiter's arguments, overruled his assignment of error, and affirmed the trial court's ruling on the motion to withdraw his guilty plea. The court reasoned, in part, that the issue was res judicata since Billiter had not filed a direct appeal from his escape conviction after pleading guilty, as well as based on that court's prior opinion affirming the trial court's subsequent denial of his motion to suspend further execution of sentence.[7]

The court of appeals subsequently sustained Billiter's motion that its opinion was in conflict with three cases from a single appellate court: *State v. Robinson*, Champaign App. No. 2010-CA-30, 2011-Ohio-1737, 2011 WL 1362308, *appeal denied*, 129 Ohio St.3d 1453, 2011-Ohio-4217, 951 N.E.2d 1048 (Second Appellate District); *State v. Pointer*, Montgomery App. No. 24210, 2011-Ohio-1419, 2011 WL 1103006 (Second Appellate District); and, *State v. Renner*, Montgomery App. No. 24019, 2011-Ohio-502, 2011 WL 345806, *appeal denied*, 129 Ohio St.3d 1411, 2011-Ohio-3244, 949 N.E.2d 1005 (Second Appellate District). This Court determined that a conflict did exist between the *Billiter* decision and these three decision of the Court of Appeals for the Second Appellate District.[8] This Court certified the following question:

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[7]*State v. Billiter*, Stark App. No. 2010-CA-00292, 2011-Ohio-2230, 2011 WL 1832617.

[8]*State v. Billiter*, 130 Ohio St.3d 1436, 2011-Ohio-5883, 957 N.E.2d 298.

> Where a criminal defendant enters a plea of guilty to escape, does res judicata bar the defendant from arguing his plea is void due to a post release control sentencing violation?

The Court, however, denied Billiter's motion for leave to appeal to this Court.[9]

[9]*State v. Billiter*, 130 Ohio St.3d 1440, 2011-Ohio-5883, 957 N.E.2d 301.

ARGUMENT

PROPOSITION OF LAW

WHERE A CRIMINAL DEFENDANT ENTERS A PLEA OF GUILTY TO ESCAPE, DOES RES JUDICATA BAR THE DEFENDANT FROM ARGUING HIS PLEA IS VOID DUE TO A POST RELEASE CONTROL SENTENCING VIOLATION?

The issue in this appeal is whether res judicata bars a criminal defendant from challenging an escape conviction, which he pled guilty to, on the basis that the escape from detention was based on a prior conviction in which the period of post-release control was incorrectly imposed but went unchallenged. Not only did Billiter not challenge the original imposition of post-release control, but he did not challenge this defective imposition during the escape prosecution. He only challenged it for the first time after his community control sanction, imposed upon his guilty plea to the escape charge, was revoked and a prison sentence imposed. The trial court overruled his motion that challenged his escape conviction, and this ruling was upheld by the court of appeals. Billiter did not seek reconsideration of the appellate court's ruling, even though this Court had rendered its *Bloomer* decision[10] in the interim, and did not appeal that decision to this Court. Instead, Billiter challenged it via a motion to withdraw his guilty plea, arguing that he was actually innocent of the escape charge based upon the post-release control argument. The trial court, following the unchallenged decision of the court of appeals that Billiter's original sentence for the aggravated burglary charge was not void, overruled the motion. The court of appeals upheld this ruling, relying in large part upon the doctrine of res judicata.

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[10]*State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254. *Bloomer* was decision on June 9, 2009, whereas the court of appeals's first decision upholding the trial court's motion to suspend further extension of sentence was filed the day before, June 8, 2009.

In arguing that his guilty plea created a manifest injustice, Billiter renews his arguments raised previously before the trial court and before the court of appeals that his conviction for escape is void since he was improperly placed on post-release control due to the improper imposition of that post-release control in a separate criminal case. He thus argues that he could not have committed the crime of escape because he should not have been placed on post-release control; hence, his conviction is invalid since he is innocence of the crime of escape. Therefore, according to Billiter, the trial court erred in not sustaining his motion to withdraw his guilty plea and vacate his conviction.

The flaw in Billiter's argument is a fundamental one – Billiter had raised the issue of his escape conviction was void because he was not properly placed on post-release control. The issue was raised directly in the trial court, which rejected Billiter's arguments, and was raised in the appeal from that ruling. The court of appeals also rejected these arguments and affirmed the trial court's ruling. Billiter was therefore validly convicted of the escape charge, as recognized by these court decisions. Billiter is therefore not "actually innocent" of the escape charge.

The court of appeals relied primarily upon this Court's *Fischer* decision. Billiter does not attempt to avoid the impact and scope of this decision, but instead argues that it actually favors him and supports his argument that res judicata does not bar him in this case from challenging his escape conviction via a motion to withdraw guilty plea. This reliance and argument is misplaced.

In *Fischer*, this Court did hold in its syllabus that, "A sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by

principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack."[11] Billiter, however, ignores the context of the Court's ruling. The defendant in *Fischer* had successfully challenge his sentence on appeal on post-release control grounds, and was resentenced. The defendant thereafter filed another appeal not just from the resentencing hearing, but also from the original trial case. The defendant argued that since his original sentence was void *in toto*, his initial direct appeal was a nullity, and he was therefore entitled to another direct appeal in which he could raise any and all issues relating to the original prosecution. This Court rejected this broad reading of its post-release control precedents, and held that the appeal is limited to the imposition of post-release control. Res judicata principles would not bar the defendant from raising issues pertaining to the reimposition of post-release control; res judicata, however, would act to bar the defendant from raising all other claims. Instead of emasculating the doctrine of res judicata in post-release control cases, this Court solidified its application in criminal cases in an attempt to stem the proliferation of challenges by criminal defendants to this convictions and sentences based upon a post-release control claim.

This case presents an excellent example of the proper application of this doctrine. Billiter was convicted of an offense in which the trial court imposed an incorrect period of post-release control, a period that actually benefitted Billiter (three years instead of the mandatory five). Billiter did not challenge the validity of his criminal sentence. After serving his underlying prison term, he commenced serving his post-release control, again without legal challenge. During the three-year period of post-release control, Billiter escaped from his detention. As a result, he was charged with

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[11]*State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph one of the syllabus.

one count of escape. Instead of challenging the validity of this charge, Billiter pleaded guilty to the charge. This plea amounted to a complete admission of his guilt to all of the elements of the charged offense.[12] Billiter was thereafter sentenced to a community control sanction. Again, he did not challenge the validity of this conviction and sentence, and did not challenge the validity of the prior sentence that placed him on post-release control. Only upon violating the terms and conditions of this community control sanction, which resulted in the sanction being revoked and a prison term imposed, did Billiter challenge the validity of his escape conviction and sentence on post-release control grounds. The trial court, based upon precedent extant at that time, overruled the motion to suspend further execution of sentence. And the court of appeals, based upon extant precedent, affirmed the trial court's ruling. Billiter did not seek a reconsideration of the court of appeals's decision or pursue an appeal to this Court.

Instead, through present counsel, Billiter attempted to raise the same issue via the procedural avenue of a motion to withdraw guilty plea. Billiter has not yet challenged the imposition of post-release control in the 1998 aggravated burglary sentence. He could have and should have attacked that sentence, and only then pursue a challenge to the escape conviction. Instead, he has repeatedly attempted to attack the validity of the 1998 aggravated burglary sentence collaterally through his belated challenges to his escape conviction and sentence. *Fischer* did not preclude the res judicata doctrine from applying to Billiter's type of case. Instead, *Fischer* was directed to subsequent appeals from a resentencing and what issues may defendants raise, and not raise, in such appeals. Billiter's case was not an appeal from a resentencing.

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[12]*See* Crim. R. 11(B)(1) ("The plea of guilty is a complete admission of the defendant's guilt.").

Billiter also argues that he should prevail even if res judicata applies in his case. He argues that there is an "injustice" exception to the rule that would apply to his case. In the court of appeals below, Billiter relied primarily upon this Court's *Dillon* case for such an exception and its application of his case. Such reliance is again misplaced.

The trial court in the instant case overruled Billiter's motion in part on res judicata grounds. Billiter does not object to the general application of res judicata to his case, but instead argues that doctrine does not bar claims that lead to "unjust results." This so-called "unjust results" doctrine is allegedly set out in the supreme court's *Dillon* decision.[13] Billiter's reliance upon *Dillon* for this exception is misplaced. The part of *Dillon* that Billiter relies upon in his brief is a simple restatement of the holding of the supreme court's earlier *Murnahan* case.[14] The supreme court had in *Murnahan* set forth the procedure by which criminal defendants could challenge the effectiveness of their appellate counsel in the absence of a prescribed procedure. The *Dillon* court set forth *Murnahan*'s holding:

> Pursuant to *Murnahan*, a defendant may apply for delayed reconsideration (now application for reopening, see App.R. 26[B]) in courts of appeals only where he has set forth a colorable claim of ineffective assistance of counsel, where the circumstances render a claim of res judicata unjust, and the time periods for reconsideration in courts of appeals and direct appeal to this court have expired. *Id.* at 66, 584 N.E.2d at 1209.
>
> *Dillon*, 74 Ohio St.3d at 171, 657 N.E.2d at 277.

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[13]*State v. Dillon*, 74 Ohio St.3d 166, 171, 1995-Ohio-169, 657 N.E.2d 273, 277.

[14]*State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992).

This special circumstance does not generally apply to the res judicata doctrine. *Murnahan* dealt with an issue for which no procedures covered – the challenge of the ineffectiveness of appellate counsel. After *Murnahan*, App. R. 26(B) was adopted, the supreme court has applied res judicata to applications for reopening direct appeal without any such "unjust results" exception.[15]

In the instant case, Billiter raised the very same issue raised in motion to withdraw his guilty plea in the earlier motion and appeal. The issue was rejected by the court of appeals, and Billiter did not seek to have the court of appeals reconsider its decision or seek to appeal its decision to the supreme court (either in light of the supreme court's *Bloomer* decision or on other grounds). Billiter did not present the trial court with any grounds for that court to ignore the preclusive res judicata effect that the court of appeals's earlier decision has on Billiter's post-release control issue. Accordingly, the trial court did not err in overruling his motion on res judicata grounds.

The procedural context of the instant case is crucial to understanding why res judicata applies. The post-release control issue was raised collaterally, in a separate criminal case, via a motion to withdraw guilty plea. In overruling Billiter's motion, the trial court relied upon the doctrine of res judicata. Billiter had raised the same issues in the context of a motion to suspend

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[15]See, e.g., *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 7; *State v. Williams*, 99 Ohio St.3d 179, 2003-Ohio-3079, 790 N.E.2d 299, ¶ 10, *cert. denied* (2003), 540 U.S. 1053; *State v. Carter*, 93 Ohio St.3d 581, 582, 2001-Ohio-1614, 757 N.E.2d 362, 363-364; *State v. Cheren*, 73 Ohio St.3d 137, 138, 652 N.E.2d 707, 708 (1995) (""Once ineffective assistance of counsel has been raised and adjudicated, res judicata bars its relitigation.").

The supreme court has recognized a narrow exception to the application of res judicata principles to App. R. 26(B) applications is when the same attorney who represented the defendant on direct appeal also represents the defendant in the App. R. 26(B) application. *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, ¶ 39 (recognizing that "an attorney 'cannot realistically be expected to argue his own incompetence'") (quoting *State v. Cole*, 2 Ohio St.3d 112, 114, n. 1, 443 N.E.2d 169, 171, n. 1 (1982)).

further execution of sentence, which the trial court overruled. The court of appeals affirmed the trial court's ruling, and Billiter did not seek to appeal or otherwise have the appellate court's decision reviewed. Instead, he raised the same issues in his motion to withdraw his guilty plea. Billiter argues that the trial court should have ignored the ruling of the court of appeals on the issue of the validity of the aggravated burglary sentence, especially its post-release control component.

The standard of review of the trial court's ruling is an abuse of discretion. Motions to withdraw a guilty plea are governed by Crim. R. 32.1, which provides in toto: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." And this Court has held that reviewing courts should determine whether the trial court has abused its discretion in ruling on these motions.[16] Absent an abuse of that discretion, the trial court's decision must be affirmed.[17] In order to find an abuse of discretion, the trial court must have acted unjustly or unfairly and the ruling must be "unreasonable, arbitrary or unconscionable."[18] Billiter argues that the trial court was "unreasonable, arbitrary or unconscionable" in failing to disregard the clear and unambiguous holding of the court of appeals relative to the validity of his escape conviction (and hence the validity of the post-release control imposed in the 1998 aggravated burglary case), and allowed Billiter to withdraw his plea and pursue

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[16]*State v. Smith*, 49 Ohio St.2d 261, 3 O.O.3d 402, 361 N.E.2d 1324 (1977) (citing *United States v. Mainer*, 383 F.2d 444 (3rd Cir 1967).

[17]*State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715, 719-720 (1992).

[18] *Xie*, 62 Ohio St.3d at 526-527, 584 N.E.2d at 718-720 (quoting *State v. Adams*, 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 173, 404 N.E.2d 144, 149 (1980)). *See, also*, *State v. Clark*, 71 Ohio St.3d 466, 470, 644 N.E.2d 331, 335 (1994).

legal remedies to challenge the validity of the escape charge. This holding would create chaos and uncertainty as a general principle of law, and would contradict the general proposition that lower courts are to follow the holdings of appellate courts relative to issues decided in that case.[19]

Thus, the proper question in this case is whether the trial court abused its discretion in overruling Billiter's Crim. R. 32.1 motion, not whether the trial court erred. And given the application of res judicata principles, as well as law of the case, the trial court did not abuse that discretion in following and applying the holding of the court of appeals in *Billiter*'s earlier appeal. The trial court would have in fact abused its discretion to ignore that earlier appellate ruling.

Billiter also takes issue with the preclusive effect that the doctrine of the law of the case has on his issue. He argues that "an intervening decision by the Supreme Court" is an exception to this doctrine,[20] and that the *Bloomer* case is such a decision. According to Billiter, this Court's *Bloomer*

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[19]*Cf. State, ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 9 O.O.3d 88, 378 N.E.2d 162 (1978) (holding that trial court lacks jurisdiction to entertain a Crim. R. 32.1 motion to withdraw guilty plea subsequent to an appeal from that guilty plea and affirmance by the court of appeals).

[20]This Court has set forth a summary of this doctrine, and the "intervening decision" exception:

> This case involves the doctrine of the law of the case. "The law of the case is a longstanding doctrine in Ohio jurisprudence." *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, ¶ 15. "The portion of the [law-of-the-case] doctrine generally applied in extraordinary-writ cases provides that '[a]bsent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.' " *State ex rel. Dannaher v. Crawford* (1997), 78 Ohio St.3d 391, 394, 678 N.E.2d 549, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 11 OBR 1, 462 N.E.2d 410, syllabus; *State ex rel. Non-Employees of Chateau Estates Resident Assn. v. Kessler*, 107 Ohio St.3d 197, 2005-Ohio-6182, 837 N.E.2d 778, ¶ 14. "The doctrine is necessary

decision effectively overruled its earlier *Watkins* decision, one of the decisions the court of appeals relied upon in deciding the post-release control issue in Billiter's earlier direct appeal. Billiter's argument, however, fails on the basic ground that *Bloomer* did not overrule *Watkins*, but merely restated existing precedent governing post-release control sentencing issues.

First, the court of appeals denied Billiter's post-release claim in his earlier direct appeal, finding that the criminal sentence was not void, and thus his conviction for escape was not invalid. In so ruling, the court of appeals relied upon the supreme court precedent that distinguished between cases in which post-release control had not been imposed and those cases in which it had been imposed incorrectly (and had actually benefitted the defendant).

> As is stated above, appellant argued that his sentence in the case should have been suspended based on *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301. In such case, an action for a writ of habeas corpus, the Ohio Supreme Court held that the Adult Parole Authority lacked authority to impose post-release control on an offender, whose prison sentence was completed, who had not been advised by the trial court of statutorily required post-release control. *Id.* at ¶ 28, 844 N.E.2d 301. However, in contrast to Hernandez, in the case sub judice, appellant, in his 1998 case, was advised of mandatory post-release control in the trial court's Judgment Entry. While, as appellant alleges, the trial court may have erred in advising appellant that the proper period of post-release control was three years rather than five years, the Ohio Supreme Court, in *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, held that the trial court did notify

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to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Hopkins*, at ¶ 15; *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404, 659 N.E.2d 781.

State, ex rel. Cordray, v. Marshall, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, ¶ 27.

> the appellant of post-release control even though the trial court misstated the post-release control term as five years when the actual term was three years. See *Watkins v. Collins*, 111 Ohio St.3d 425, 857 N.E.2d 78, 2006-Ohio-5082, at ¶ 50 (finding notice of post-release control during sentencing sufficient where post-release control was mandatory and entry contained some discretionary language).
>
> *State v. Billeter*, Stark App. No. 2008-CA-00198, 2009-Ohio-2709, 2009 WL 1629721, ¶ 13 (footnote omitted).[21]

This decision of the court of appeals was rendered on June 8, 2009; this Court's *Bloomer* decision was released on June 9, 2009. And as noted above, Billiter did not move the court of appeals to reconsider its decision in light of *Bloomer*, or appeal the appellate court's decision to the supreme court raising this argument that *Bloomer* had overruled *Watkins*. Instead, he filed his motion to withdraw his guilty plea.

Second, in *Bloomer*, the supreme court rejected a number of constitutional challenges to Ohio's resentencing statute – R.C. 2929.191 – with regard to correcting criminal sentences that had been rendered void by the deficient imposition of post-release control. Billiter seeks to take advantage of one portion of this Court's decision – a statement by the Court that was merely a

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[21]In the omitted footnote, the court of appeals referred to a decision of the Court of Appeals for Cuyahoga County that found harmless error in the imposition of the incorrect term of post-release control for a defendant.

> In *State v. Holloway*, Cuyahoga App. No. 86426, 86427, 2007-Ohio-2221, the appellant argued that he was denied due process of law when the trial court incorrectly stated that the length of the mandatory post-release control was three years rather than five years. The court held that the trial court's misstatement was harmless in light of *Watkins*, supra.
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> *Billeter*, Stark App. No. 2008-CA-00198, 2009-Ohio-2709, 2009 WL 1629721, at ¶ 13 n.2.

restatement of existing post-release control precedent, and did not modify or otherwise change that existing law, including *Watkins*.[22] In addition, the particular defendant under review in that part of the *Bloomer* decision had not been notified of any term of post-release control as part of his criminal sentence, the trial court having failed to state the length of the term (a situation that distinguishes the *Watkins* case and the instant case).

> Here, although mandatory postrelease control terms of five and three years applied, the trial court advised Barnes at the sentencing hearing, "[Y]ou will now be subject to Post Release Control pursuant to Ohio Revised Code 2967.28. If you violate the terms of your Post Release Control you could receive an additional prison term not to exceed fifty percent of your original prison term * * *." (Emphasis added.) However, the trial court failed to state the length of the postrelease control term. Additionally, in its nunc pro tunc entry, the court erroneously stated that Barnes " may be supervised under post release control R.C. 2967.28." (Emphasis added.) The trial court also stated that "if the Defendant violates the terms of the post-release control, the Defendant could receive an additional prison term not to exceed 50 percent of his original prison term," but again failed to state the length of the postrelease control term. Thus, the court failed to satisfy the most basic requirement of R.C. 2929.191 and our existing precedent-that it notify the offender of the mandatory nature of the term of postrelease control and the length of that mandatory term and incorporate that notification into its entry.
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> *Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, at ¶69.

Thus, *Bloomer* did not overrule *Watkins*. The passage that Billiter relied upon merely restated existing law governing post-release control issues. Furthermore, the particular defendant had not been notified of any length of time for his post-release control term, as opposed to an incorrect length of time (that actually benefitted him). As a result, *Bloomer* does not constitute "an

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[22]*Watkins*, in fact, is not even mentioned or cited in the Court's *Bloomer* decision.

intervening decision by the Supreme Court" that would qualify as an exception to the law of the case doctrine.

As a result, both of Billiter's challenges to the trial court's ruling on his motion to withdraw his guilty plea – that Billiter's case presents an exception to both the doctrine of res judicata and to the doctrine of law of the case – are without merit. Billiter's case could not present a better case for the application of these two important doctrines. He has failed to establish an exception to the preclusive effect of these doctrines that would apply to his case. As a result, the trial court did not err or abuse its discretion in overruling his motion to withdraw guilty plea.

Billiter also argues that the application of res judicata in this case produces an absurd result. The absurdity, however, would be created with the adoption of the exceptions he hopes to have this Court carve out for res judicata principles. In this case, Billiter believed reasonably that he was on post-release control after he served his prison sentence for aggravated robbery, under the understanding of the law governing post-release control. The term that was imposed – three years – actually benefitted him since the statute required a mandatory five-year period of post-release control. Nonetheless, before the three years was up, Billiter violated the terms of his post-release control by escaping from detention. Again, pursuant to the understanding of the law governing post-release control at that time, Billiter pleaded guilty to this charge, and was placed on probation (community control sanction). All of these proceedings would have reasonably occurred had Billiter challenged his original post-release control – the trial court would have corrected the error, and properly imposed the mandatory five-year period. Billiter, not unreasonably, would have wanted the lesser, incorrect term as opposed to the longer, correct term. In either case, it was not absurd for the court and the parties to believe that Billiter was properly on post-release control when he escaped

from detention, and that the escape prosecution and conviction (based upon Billiter's guilty plea) were proper, especially in light of the fact that Billiter never challenged them.

The absurd result is reached by adopting Billiter's res judicata exceptions. Despite appellate review of issues, Billiter would empower lower, trial courts with the discretion, if not the duty, to ignore or disobey appellate rulings in the very case. In addition, his proposed jurisprudence would result in uncertainty as the validity of convictions. His doctrine would allow collateral attacks and challenges to convictions and sentences in perpetuity. A defendant's conviction and sentence would never truly be final, despite how many appellate decisions on particular issues in each case. And Billiter's proposed "injustice" or "unjust results" standard is so vague and ambiguous that it does not provide courts with any guidance as to what appellate rulings are unjust or create a manifest injustice that trial courts would not only be free to ignore, but obligated to do so.

Finally, the cases that have been certified as being in conflict with Billiter's case are distinguishable based upon the procedural posture of each case. None of the three cases involved a prior legal challenge to the legality of the defendant's escape conviction based upon a post-release control argument. *Robinson* was a direct appeal from a Crim. R. 32.1 motion as the initial challenge to the escape conviction; *Pointer* was also a direct appeal from a Crim. R. 32.1 motion to withdraw a no contest plea as the defendant's first challenge to the legality of the escape conviction; and, *Renner* was a direct appeal from a Crim. R. 32.1 motion as the first challenge to legality of the escape conviction. None of these cases involved a prior ruling of the court of appeals that rejected the post-release control challenge. Thus, the trial courts in those cases were not saddled with an appellate decision that had rejected the post-release control challenge.

For these reasons, therefore, this Court should affirm the court of appeals.

CONCLUSION

The Supreme Court of Ohio should reject the proposition of law proposed by Billiter, defendant-appellant, and answer its certified question in the affirmative, i.e., res judicata does bar a defendant from challenging his guilty plea to the charge of escape, when that defendant had earlier challenge the validity of the predicate post-release control in an earlier motion with the trial court and in the subsequent direct appeal to the court of appeals, both of which rejected the challenge. The Supreme Court of Ohio should therefore affirmed the decision of the Court of Appeals for Stark County (Fifth Appellate District).

JOHN D. FERRERO, #0018590
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO

By: Ronald Mark Caldwell
Ronald Mark Caldwell
Ohio Sup. Ct. Reg. No. 0030663
Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza, South – Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965

Counsel for Plaintiff-Appellee

PROOF OF SERVICE

A copy of the foregoing MERIT BRIEF OF APPELLEE was sent by ordinary U.S. mail, postage prepaid, this 2nd day of April, 2012, to STEPHEN HARDWICK, counsel for defendant-appellant, at The Office of the Ohio Public Defender - 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

Ronald Mark Caldwell
Ohio Sup. Ct. Reg. No. 0030663
Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza, South – Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965

Counsel for Plaintiff-Appellee