IN THE SUPREME COURT OF OHIO

STATE OF OHIO	On Appeal from the Delaware County
Appellee	Court of Appeals
V.	FIFTH APPELLATE DISTRICT
FRANK K.C. HERTEL, SR.	Court of Appeals Case No. 18CAA070049
Appellant	

19-0047

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT FRANK K.C. HERTEL, SR.

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EXPLANATION OF WHY THIS CASE INVOLVING A FELONY INVOLVES SEVERAL SUBSTANTIAL CONSTITUTIONAL Questions.

This cause presents two critical issues for the future of plea bargaining, prison overcrowding, and States' exposure to lawsuits claiming excessive incarceration. In Felony Prosecutions: (1) Do the State, Appointed Counsel, and Courts have a duty to offer the most lenient Statutory Sentence contemplated by the legislature from time of crime to sentencing; (2) Do Ohio Courts have a duty, when confronted by void sentences, to reclassify out of state prisoners' State Habeas Petitions into motions for resentencing?

The instant case presents a time of crime of 1993 and sentencing of 2014. Trial court allowed defendant to withdraw plea of guilty in 2013 where court found current Ohio Statutes, "new law", prejudicial to defendant. Trial court then accepted a new plea under the "old law", sentencing defendant in March of 2014 to an indefinite 1994 Statutory sentence of "19 to 95 years", which defendant now appeals as void claiming the Rule of Lenity dictates a sentence of 3 years mandated by Ohios' July 1996 definite Sentencing scheme, rendering Courts' sentence void. To that end out of State prisoner defendant filed State Habeas, then motion to reclassify Habeas to resentencing based on this courts holding in Boswell (2009) which held that Courts must recognize void sentences, accepting jurisdiction by sua sponte reclassifying PCR Petitions to motions/resentencing of in state prisoners, but failing to address out of state Habeas specifically. Then trial court denied Jurisdiction of Habeas as well as motion to reclassify. Court of Appeals denied Habeas, ignoring void sentence claims and motion/reclassify in its ruling, failing to address Boswell. It seems in the States' best interest to reduce prison overcrowding and exposure to civil suit by having this court mandate procedures to find most lenient sentences during plea bargaining, and to extend Boswell to cover out of state prisoners' State habeas.

STATEMENT OF THE CASE

Case 00CRI110361 (Henceforth Case00) initiated upon indictment on 11/17/2000. Arraignment and return on arrest warrant took place in March of 2013, when Mr Hertel was transferred from Arizona to Ohio pursuant the Interstate Agreement on Detainers (IAD). Mr Hertel pled guilty on 11/5/2013 to the Statutes in effect at that time ("new Law"). Trial court determined on 12/13/2013 that "new Law" is prejudicial to Mr Hertel and allowed plea to be withdrawn. On 1/17/2014 simultaneous indictment was brought in Case 14CRI010021 (Henceforth Case 14) containing, pursuant States' motion to Consolidate of 2/26/2014 "identical charges" to Case 00. Mr Hertel moved to dismiss both indictments on IAD, statutory, and Constitutional Speedy trial grounds on 2/21/2014. State of Ohio did not oppose motion in Case 00, and no judgment entry adjudicating motion was made by court. On 3/3/2014 Counsel persuaded Mr Hertel to accept States' plea agreement under "Old Law", i.e. Statutes in effect from 1993-1996, reserving all appellate rights. On 3/5/2014 Mr Hertel was sentenced to 19-to-95 years incarceration pursuant Ohio Statutes in effect in 1994. On 3/18/2014 Case 14 was dismissed without prejudice in violation of the IAD mandate of "with" prejudice. On 4/2/2014 Appellate counsel filed NOA in Case 00 only, specifing Sentencing, Speedy trial and IAC as issues to be appealed. On 7/14/2014 Counsel filed Anders Brief, which Mr Hertel Supplemented Pro Se, neither Brief arguing void sentence. Ohio Court of Appeals (COA) denied relief pursuant Anders, not finding any meritorious issues, in Case 14CAA040019 on 3/26/2015, also denying Mr Hertel leave for delayed appeal in the 14 Case on 10/17/2014, in COAs' case 14CAA090060. Since that time Mr Hertel has attempted to Litigate both Ohio Cases through all Ohio courts without ever being heard on the merits of the IAD, Speedy Trial, and void sentence/conviction issues, denial always coming through procedural Bars. This is Mr Hertels latest attempt, based on State Habeas Corpus and Motion for Resentencing denied by Trial and Appellate court in Case 18CAA070049.

STATEMENT OF THE FACTS

Unless otherwise specified "EXHIBIT" refers to the EXHIBITS INCLuded in HERTELS PCR Petition Filed February 21, 2017 in Case 00. Docket No. (D No) refers to the Docket Numbers on the electronically accessible Docket of Case 00, which is available also as EXHIBIT "AG".

HERTEL was tried and convicted by an Arizona Jury of one count of continuing sexual conduct with his same Ohio victim; the single Arizona count occurring in July of 1996, the five ohio counts in 1993-1995 according to indictment [EXHIBIT "E".] The State of Ohio submitted HERTELS Arizona Sentencing Transcript of October 22, 2012 in the Record of Case 00 on July 29, 2013 attached to its Memorandum Contra Defendants Motion Dismiss [D No 77] At sentencing IT was established that no aggravators were found by HERTELS Arizona Jury, and that The State of Arizona found no aggravators on the record, [Id. Transcript sentencing pg. 6 Lines 1-12] a record which included the "continous abuse" as evidenced by the Ohio allegations [Id pg 9 Lines 1-9] and which the Court considered to give a presomptive, 20 year sentence. [Id. pg 28 lnJ7] Mr HERTEL was transferred to Ohio by the Jurisdiction given by the State of Arizona under the Interstate Agreement on Detainers whose speedy trial requirement was quantified at arraignment to mandate trial by June 12, 2013 [D No 17] The Transcript of Proceedings of May 24, 2014 - read into the record on appeal, Case 14CAA040019 on 12/02/2014 Docket No 66-69 - shows that Mr HERTEL, when questioned by the court, was NOT asked to waive IAD speedy trial time and in fact did not do so. Continuances pursuant the IAD - see ORC § 2963.30 [EXHIBIT "AF"] are

mandated under Article III(a) to be in open court, with defendant or Counsel present [Id under Art. III(a)] but all continuances granted in both Ohio cases were by Judgment entry only, forgoing the open court mandate, [D No 33 5/31/13; D No 32; D No 83 8/20/13; D No 110 12/19/13 - see also Docket Case 14 EXHIBIT "AG" Docket No 16 02/03/14] mandating dismissal of the indictments with prejudice upon violation pursuant Form II of the signed Agreement on Detainers [EXHIBIT "A" under Form II; D No 119 2/21/2014 Motion to dismiss - Form II attached] which was argued, claiming Speedy trial violations in both Ohio Cases, in pretrial motion to Dismiss [EXHIBIT "A"; D No 119] of 2/21/2014 which was not countered by the State of Ohio and which was not adjudicated per Judgment entry by the court [see Lack of such entries From D No 119 to D No 125] Making HERTELS' change of plea of 3/03/2014 [D No 125] involuntary, where proper dismissal with prejudice at this point would have obviously precluded HERTELS' guilty plea.

Case 14 was improperly dismissed without prejudice on 3/18/2014 at a in chambers hearing in violation of Ohio R. Crim. P 48(a) s' open court requirement, made more egregious by the fact that neither HERTEL nor Counsel attended [see Counsels signature "By authority of Prosecutor O'BRIEN in Docket Case 14 No 34], where Case 14 should have been dismissed with prejudice under IAD Art III(d) anti-shuttling provision [EXHIBIT "AF" under III(d)] Plainly, proper, with prejudice dismissal of Case 14 on 3/18/14 would have called for vacation of the identical charges in Case 00, as they are the lesser included charges, voiding conviction and sentence in Case 00. Sentence in Case 00 was under the "old Law" in effect pre July 1996, an indeterminate consecutive minimum sentence of 19 to 95 years, which is void pursuant O.R.C § 2929.41(E)(2) [EXHIBIT "F" pg 223] as a minimum

sentence of no more than 15 years is mandated for Mr HERTEL there. The courts' sentence of 3/5/14 [EXHIBIT "E"; D No 130] is filled with Procedural Due Process violations, where counts One through four are indeed "old Law" indeterminate sentences [Id. pg 2] of the pre July 1996 O.R.C., but every other Statute quoted [RC. §2929.19; §2929.11; §2929.13(D)(1); §2929.12; §2929.14(E); §2929.18(A)(4) - see Id. pg 1-4] is a then "new Law" 2013 O.R.C., again voiding the sentence as argued below, as pursuant the "old Laws" index [EXHIBIT "F"] pg 223:

a) §2929.18, §2929.14(E), §2929.19 and §2929.13(D)(1) do not exist!

b) §2929.11 is titled "penalties for felony [Id pg 211], §2929.12 is titled "Discretion of Court in determining minimum term of imprisonment for felony Listing SEVEN Mitigating factors, [Id pg 213 under (C)(1)-(7)] and three aggravaters The Court, however called §2929.11 "principles and purposes of sentencing" [EXHIBIT "E" pg 1; D No 130 pg 1] and §2929.12 "seriousness and recidivism factors" Listing only FOUR mitigators but eight aggravaters [EXHIBIT "I" pg 219-220] prejudicing Mr HERTEL where the court never even considered THREE mitigaters which apply to Him as argued below, sentenced him to a fine under non-existant §2929.18 and classified Mr HERTEL as a TIER III sex offender [EXHIBIT "E" pg 4; D No 130 pg 4] under the Sex Offender Registration act, which was found to be punitive, in violation of the ex post Facto Clause pursuant the Holding in Does #1-5 v. Snyder 834 F. 3d 696 (2016) at 706 and according to the dissent in State v. Ferguson No. 2007-1427 "R.C. Chapter 2950 Has Evolved from Remedial to Punitive" under ¶¶ 44-¶62. Trial counsel was ineffective for not preserving the sentencing issues. Appellate counsel was ineffective for not arguing the above, filing an Anders Brief on an incomplete record exclusive of Case 14 on July 14, 2014.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Courts are mandated to recognize void convictions and/or Sentences, vacating same for remand.

The recent U.S. Supreme Court decision in Montgomery V. Louisiana, 136 S.Ct. 718, 193 L. Ed. 2d 599 (2016) dealt with Louisiana State prisoner Montgomery invoking the Substantive rule announced in Miller V. Alabama (2012) in State Court and bringing "a collateral attack on his... sentence by filing a motion to correct an illegal sentence." 136 S.Ct. 726, which for procedural reasons the state courts refused to address and give relief on. Id at 727. The Supreme Court held that "States may not disregard a controlling constitutional command in their own courts. See Martin V. Hunter's Lessee, 1 Wheat. 304, 340-341, 344, 4 S.Ct. 97 (1816); see also Yates V. Aiken, 484 U.S. 211, 218, 108 S.Ct. 534, 98 L. Ed. 2d 546 (1988)(when a State has not "placed any Limit on the issues that it will entertain in collateral proceedings... it has a duty to grant the relief that federal Law requires")" Id at 727-728. Then defining that "Substantive rules include "rules forbidding criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." Penry V. Lynaugh, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed. 2d 256(1989)" 136 S.Ct. at 728. The Supreme court then defined the original sphere of collateral attack as one that deprives courts of Jurisdiction "or because the sentence was one the court could not lawfully impose... A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. See [Ex parte] Siebold 100 U.S. at 376. It follows, as a general principle that a court has no authority to leave in place a conviction or sentence that violates a substantive rule..." 136 S.Ct. at 731 Per

Both Federal R.Civ.P. 60(b)(4) and OHIO R.Civ.P. 60(B)(5) any Federal or Ohio

court may relieve a party of a void judgment "within a reasonable time" 18 U.S.C § 2106 allows any Federal Appellate Court to vacate any judgment brought before it for review in the interests of justice. Ohio R.Crim.P. 32.1 allows conviction to be set aside at any time to "correct manifest injustice" and permit withdrawal of guilty plea.

The U.S. Supreme Court in Rutledge v. U.S. 517 U.S. 292 (1996) unanimously held that "In Tinder v. United States, 345 U.S. 565, 570 (1953), the defendant had been ... improperly sentenced ... Exercising our "power to do justice as the case requires" pursuant to 28. U.S.C. § 2106, we ordered the District Court to correct the sentence without vacating the underlying conviction." 517 U.S. at 305. The interests of Justice, when any Ohio courts were presented with a void conviction or sentence, by the Ohio Supreme court in State v Boswell 121 Ohio St. 3d 575, 2009-Ohio 1577, were quantified by its holding: "Despite the lack of a motion for resentencing, we must still vacate the sentence and remand for a resentencing hearing in the trial court. Because the original sentence is actually considered a nullity, a court cannot ignore the sentence and instead must vacate it and order resentencing." (Emphasis added) 121 Ohio St. 3d at ¶ 12. The Boswell court vacated "Boswell's void sentence and order[ed] resentencing if his motion to withdraw his guilty plea is ultimately denied." Id at ¶ 13.

In the Instant Case Mr Hertel argued that his conviction and/or sentence is void for the following reasons:

1. Trial court lost jurisdiction pursuant the IAD long before Mr Hertels' change of plea of 3/3/2014, making plea neither Knowing nor intelligent, thus voiding plea and conviction. (See Brief Appellant Case 18CA A 070049 Sept. 12, 2018 pgs 8-9)

2. Sentence is void where trial Court violated Procedural and substantive Due Process, and the Constitutions' ex post facto clause, where the court sentenced Mr Hertel to fines under R.C. 2929.18(A)(4) a statute that did not exist under the "old Law" in effect at the time of crime. (Id pg 9-10 under a)

3. Trial court violated Constitutional Procedural and Substantive Due process where No statute authorizes length of Mr Hertels sentence, rendering it void per the substantive rule that courts may not "prescribe] greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366 (1983); Brown v. Ohio, 432 U.S. 161, 165 (1977) as quoted in Rutledge v U.S. 517 U.S. 292 (1996) (Id. Brief pg 10 under b))

4. Trial court violated Constitutional Procedural and Substantive Due process where it mistakenly used the current, 2014 Sentencing factors' instead of the more lenient, appropriate 1994 factors mandated by the plea agreement voiding plea and sentence per Hunter, Brown and Rutledge where 1994 Legislative intent assumed concurrent sentencing, not the consecutive sentences Mr Hertel received. (Id pg 11 under c))

5. Trial court violated the substantive rule announced in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington 542 U.S. 296 (2004) as applied to Ohio in State v Foster, 109 Ohio St. 3d 1, 2006-OHIO-856 where R.C. 2929.41(A) eff 1994 specifies concurrent sentencing and trial court ordered consecutive sentences in violation of Mr Hertels 6th Amendment Jury trial rights pursuant Apprendi Blakely and Foster where no Jury found any factors justifying Mr Hertels' Super-aggravated Sentence. (Id pg 11-13 under d))

6. Trial Courts retroactive application of the current Amendments to the Sex Offender Registration Act, (SORA) in addition to his sentence of imprisonment,

is a violation of the Constitutions' ex post facto clause pursuant the holding in Does #1-5 v. Snyder 834 F. 3d 696 (2016) in which the Sixth Circuit held that "... SORA imposes punishment. And ... punishment may never be retroactively imposed or increased. Indeed, the fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto Clause." 834 F. 3d at 705-706.

Furthermore, where trial court sentenced Mr Hertel to imprisonment AND SORA's' punitive Registration Requirements under R.C. 2950, Constitutional Double Jeopardy was violated. The Double Jeopardy Clause of the Fifth Amendment provides, among others, protection against multiple punishments for the same offense. See Ohio v Johnson, 467 U.S. 493, 498 (1984) The protection against cumulative punishments confines courts' sentencing discretion to the legislative limits. (Id at 499). Where Does #1-5 clearly defined SORA as punishment, and where Mr Hertel was not liable to ANY sort of punitive sex offender registration at the 1993-1995 time of crime both Ex Post Facto and Double Jeopardy were violated by trial courts' sentence, rendering it void. (see Brief pg 13-15 under e))

7. Trial courts sentence is excessive, violating the rule of Lenity defined by the U.S. Supreme Court in Callanan v. U.S. 364 U.S. 587, 81 S.Ct. 321, 5 L.Ed. 2d 312 (1961) which "serves as an aid for resolving an ambiguity... The rule comes into operation at the end of the process of construing what Congress has expressed..." The court then explained that a court must, before sentencing, ascertain if counts merge for sentencing, and what the appropriate unit of prosecution is. In the instant case Mr Hertels' initial change of plea was rejected by trial court as the current, 2014 Ohio

Sentencing Statutes were found by the trial Court to be prejudicially excessive to Mr Hertel, the court allowing Mr Hertel to withdraw his plea on December 13, 2013 pursuant the rule of lenity.
Likewise the 19 to 95 year sentence of imprisonment arrived at by the trial court on 3/5/2014 is clearly excessive, and violates the rule of lenity where merger applied to all but two of the charges and where in any case the 1994 version of the Ohio Sentencing statutes is, Mr Hertel argues, excessive compared to the Post 1996 (July) version of some which would produce a three year prison sentence.
Clearly "19 to 95" years are excessive compared to "3". The court, using the rule of lenity, should likewise have rejected the March 3, 2014 plea as being prejudicial to Mr Hertel – or – allowed that "old Law" also encompasses the lenient 1996 Ohio Sentencing statutes introduced in July of that year and sentenced him to the appropriate three years per the clear legislative intent back in July of 1996.
No doubt it is difficult to determine, in the time period from the 1993 time of Crime to the present, just exactly which sentence allowed by the legislature during that twenty+ year time period is not prejudicially excessive to Mr Hertel, but since on March 4, 2014 trial court completely failed to do so, the sentence is void pursuant Callanan Mr Hertel asks for an evidentiary hearing to determine which version of the Ohio Sentencing Statutes 1993–2014 produce the most lenient sentence. (see Brief pgs 15-18 under f))

Per the above Mr Hertel asks this court to find his conviction and/or sentence void, and that trial and Appellate Courts' failure to recognize and correct this through

Mr Hertels motion to reclassify/resentence of May 29, 2018 in Case OO and/or through his Appeal filed in Case 18CAA070049 on September 12, 2018 violates the Substantive rule announced in Montgomery Rutledge and Boswell holding that courts may not ignore a void sentence and must, in spite of procedural irregularities rule on the merits of the void sentence claim, which neither Ohio trial or Appellate courts did.

Proposition of Law No. 2: Trial and Appellate Counsels' failure to preserve/Appeal void conviction/sentence issues constitute IAC.

The Sixth Amendment guarantees the right to effective assistance of counsel. To obtain reversal of a conviction, defendant must prove that (1) counsel's performance "fell below an objective standard of reasonableness" see Strickland v. Washington, 466 U.S. 668, 687-88 (1984) and (2) counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome in the proceeding. 466 U.S. at 687, 691-92

Here trial counsels performance at sentencing, where counsel did not object to excessive 19 to 95 year sentence, and did not research the 1993-2014 Ohio Sentencing Guidelines for most lenient sentence constitutes IAC. See Glover v. U.S., 531 U.S. 198, 203-04 (2001) (counsels alleged error at sentencing, resulting in 6- to 21-month sentence increase, could be sufficiently prejudicial to constitute ineffective assistance); U.S. v. Soto, 132 F.3d 56, 57-60 (D.C. Cir. 1997) (counsel's failure to request downward adjustment of sentence using correct section of Guidelines was ineffective assistance because reasonable probability that, absent error, defendant's sentence would have been reduced) Likewise, Counsels failure to challenge prosecutions breach of plea using "new

Law" sentencing enhancers, where both Counsel AND the prosecution did not produce new sentencing memorandi for the March 4, 2014 Sentencing, but rather used their original december 2013 sentencing memorandi which were based on the current, prejudicial, "new Law" Sentencing Guidelines constitutes IAC where counsels failure to produce "old Law" memorandum allowed trial court, rather than a jury, to make findings to enhance Mr Hertels sentence beyond what the legislature intended - see void arguments above. Prosecutions' use of "new Law" constitutes breach of plea which mandated "old Law". See U.S. v Granados, 168 F.3d 343, 346 (8th Cir. 1999)(counsels' failure to challenge prosecution's breach of plea agreement at sentencing was ineffective assistance because error increased defendant's sentence by 40-50 additional months)

Appellate Counsels' performance constitutes IAC where:

A. Counsel did not file Ohio R. Crim. P. 34 motion for Arrest of Judgment as ordered to by Mr Hertel on 3/20/2014 in Case 14, nor did counsel file NOA in Case 14 where dismissal of Case 14 was mandated to be with prejudice pursuant the IAD. Trial courts Judgment dismissing Case 14 without prejudice violated IAD contract, mandating dismissal with prejudice of both Case 14 and Case 00 pursuant Form II of said Contract, and would obviously have voided Mr Hertels sentence and Conviction in Case 00. See. Baldayque v. U.S. 338 F.3d 145, 152 (2nd Cir, 2003)(counsels failure to file post-conviction motion to vacate despite defendants' direction was ineffective assistance because it "violated a basic duty of an attorney"); Roe, Warden v. Flores-Ortega, 528 U.S. 470 (2000) at 484 held "when counsels' constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal."

B. Counsel did not simultaneously appeal both Case 00 and Case 14, which did not allow Counsel to file a merit brief even though pursuant Parr v. U.S. 351 U.S. 513 (1956) Case 14 was but an interlocutory step in the prosecution of Case 00 mandating both cases to be appealed simultaneously, if as is the case here, Motion to dismiss both Cases was filed 2/21/2014, and only simultaneous appeal would allow that Motion's issues to be successfully appealed voiding sentence and conviction in Case 00. See Smith v. Robbins, 528 U.S. 259, 288-89 (2000) (Counsels failure to file merit brief ineffective)

C. Counsel filed Anders Brief, but neglected to mention "sentencing" as an issue in Brief even though tagged as possible issue in NOA of Case 00 filed 4/2/2014. Furthermore Counsel failed to provide necessary transcripts Mr Hertel requested to file his Pro Se Brief, violating Anders.

Mr Hertel would argue further that in the instant Case the Strickland analysis can be dispensed with, for trial and Appellate counsel. Here ~~Counsel~~ Counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing" rendering the adversarial process itself unreliable. U.S. v. Cronic 466 U.S. 648, 659 (1984); See e.g. Miller v Martin 481 F.3d 468, 473 (7th Cir. 2007) (Counsels' choice not to present any mitigating factors or objections at sentencing hearing for no apparent reason warranted prejudice presumption.) Likewise Cronic 466 U.S. at 659 n. 25 held "The court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." Here trial counsel was absent from the critical dismissal hearing in Case 14 on 3/18/2014 which resulted in the IAD violating dismissal without prejudice. Appellate counsel was absent from Case 14, not having been appointed for that Case, presuming IAC per Cronic.

See Brief pgs 18-22 for full IAC Argument

Proposition of Law No. 3: The States' violation of the plea agreement and IAD contracts make Mr Hertels' plea neither Knowing nor intelligent; motion for resentencing of May 29, 2018 included motion for withdrawal of plea.

"plea bargains are essentially contracts". See Puckett v. U.S. 129 S.Ct. 1423, 1430 (2009). Likewise, the "(IAD) is a compact... a federal Law subject to federal construction." New York V. Hill 528 U.S. 110 (2000) at 111. Under the Law of Contracts the party claiming a breach must prove the breach by a preponderance of the evidence. See U.S. v. Lukse, 286 F.3d 906, 913 (6th Cir. 2002). Due Process requires any ambiguity to be construed against the government. see U.S. v. McIntosh, 484 F.3d 832, 836 (6th Cir. 2007) and in accordance with the defendant's reasonable understanding of the agreement. "(Id)

A. The State of Ohio breached both the IAD and the plea bargain contracts where it did not move for dismissal with prejudice of Case 14 on 3/18/2014, where Mr Hertels understanding of the agreement mandated this - See Affidavits EXH. "A"-"D" which show unequivocally that on 3/20/2014 Mr Hertel Moved his Counsel to appeal Case 14 for states' noncompliance/Breach. Furthermore, the State breached the plea bargain by arguing under the more stringent, prejudical "new Law" at sentencing rather than the agreed upon "old Law" - see above; Transcripts COP and Sentencing March 2014.

B. Mr Hertels' plea was neither voluntary, nor Knowing and Intelligent. The Constitution requires that a defendants' plea be made Knowingly and intelligently. See Bradshaw V. Stumpf, 545 U.S. 175, 183 (2005); Bousley V. U.S., 523 U.S. 614, 618 (1998) (plea intelligent where defendant receives "real notice of the true nature of the charge against him".); U.S. V. Hairston, 522 F.3d 336, 341-42 (4th Cir. 2008) (plea not Knowing because defendant not informed of maximum sentence.). Here Mr Hertels' plea is neither Knowing nor intelligent where the "true nature of the charge" on 3/3/2014 was mandated to be dismissal

with prejudice pursuant the IAD, or alternatively merger of all charges into a concurrent, 3 year sentence under the "old Law" and Apprendi, not the alleged "19 to 95" sentence trial court proffered as a maximum at change of plea. If trial court had correctly ruled to dismiss pursuant Counsels 2/21/2014 motion, Mr Hertel would not have plead guilty. If Counsel, State, and trial court had correctly determined Mr Hertels Maximum sentence to be three years, Mr Hertel would not have pled guilty to the excessive "19 to 95" sentence which NO statute in the time period 1993-2014 allowed.

Conclusion

Both the Delaware County Common Pleas Court (Judgment entry pg 2 order 4) and Court of Appeals (opinion pg 5 ¶ 22) are factually incorrect in claiming Sentencing issues were raised on previous appeal where void sentence was claimed for the first time on appeal in case 18CAA070049. It was both Courts' duty to NOT ignore Mr Hertels' void sentence/convictions claims pursuant the U.S. Supreme Court in Montgomery and this courts ruling in Boswell as argued above. Mr Hertel asks this court to accept Jurisdiction, so it may clarify/expand Boswell to mandate Ohio Courts to reclassify out of state habeas Petitions as motions for resentencing to rule on void convictions/sentences, and so this court may rule on the proper procedures for Ohio Courts to determine sentences that are not unconstitutionally prejudical/excessive in Cases like Mr Hertels' where time of Crime and Sentencing were separated by a 20 year gap, bringing into question exactly what the most Lenient Legislative intent was during that time period, during which the Legislature mandated Courts to obviously Not impose excessive sentences inordinate to its intent. The effect of this courts taking Jurisdiction and Ruling would relieve prison overcrowding/lawsuit exposure by mandating lower courts to apply the most Lenient Statutes.

Certificate of Service

I certify that a copy of the foregoing was sent by ordinary U.S. Mail on 9th January 2019, to:

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IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

THE STATE OF OHIO,
Plaintiff/Respondent,

Vs.

FRANK K C HERTEL SR,
Defendant/Petitioner,

Case No. 00 CR I 11 0361

EVERETT H. KRUEGER, JUDGE

2018 JUN 14 PM 1:48
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DELAWARE COUNTY, OHIO
COMMON PLEAS COURT
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JUDGMENT ENTRY DENYING PETITIONER'S MOTION TO RECLASSIFY PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS AS A MOTION FOR RESENTENCE

The petitioner/defendant filed a Petition for Habeas Corpus on April 3, 2018. The Respondent/State of Ohio filed a Motion to Dismiss the Petition on April 17, 2018. The Petitioner/defendant responded on May 29, 2018. The court granted the Motion to Dismiss on June 14, 2018. Because the court has denied the petition, the motion to reclassify is now moot. Further, the motion to reclassify a civil filing into a criminal case filing as a motion to re-sentence is inappropriate and improper.

MOTION DENIED.

Dated: June 14, 2018

EVERETT H. KRUEGER, JUDGE

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

THE STATE OF OHIO,
Plaintiff/Respondent,

Vs.

FRANK K C HERTEL SR,
Defendant/Petitioner

Case No. 00 CR I 11 0361

EVERETT H. KRUEGER, JUDGE

JUDGMENT ENTRY GRANTING THE RESPONDENT'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

The petitioner filed for a writ of habeas corpus on April 3, 2018 pursuant R.C. 2725.01 *et seq*. The Respondent, State of Ohio, filed a Motion to Dismiss the Petition on April 17, 2018. The petitioner responded on May 29, 2018.

The court incorporates by reference the Statement of the Case and procedural history set out in the respondent's motion. Further, the petitioner is incarcerated in Arizona not in Ohio and not in Delaware County, Ohio.

DECISION

1. This court does not have jurisdiction over this matter. This court is not the proper court in which to bring this petition. R.C. 2725.03 states that "if a person restrained of his liberty is an inmate of a state benevolent or correctional institution... no court or judge other than the courts or judges of the county in which the institution is located has jurisdiction to issue or determine a writ of habeas corpus...." The petitioner is housed in Arizona not Delaware County, Ohio.

2. In addition, the petitioner is only seeking this relief on the Ohio conviction. The petitioner was also convicted in Arizona. The Ohio Supreme Court has held that "*where one is in custody under sentences for multiple convictions for different crimes, any one of which, if valid, would warrant his present detention, errors relating to only one or less than all such convictions must be raised by appeal and not by habeas corpus. So long as a person is lawfully in custody for any reason, habeas corpus is not available to test the validity of other convictions.*" *McConnaughy v. Doe* 174 Ohio St. 533(1963) citing *Page v Green*, Supt. 174 Ohio St. 178 N.E. 2d 592. The petitioner is in lawful custody in Arizona and therefore cannot challenge his commitment in Ohio.

3. The application for a writ of habeas corpus "shall specify the officer, or name of the person by whom the prisoner is so confined or restrained". R.C. 2725.04(B). The petitioner is housed in Arizona on a 20 year sentence. The petition was brought against the wrong respondent. Further, his commitment documents were not attached as required by R.C. 2725.04(D). The Fifth District has ruled that it is a fatal defect which cannot be cured. *State ex rel. Baker* 2016-Ohio 7769

4. The petition raises issues regarding sentencing errors, speedy trial and ineffective assistance of counsel. The petitioner had ample opportunities to appeal and raise those issues and in fact, did raise those issues on appeal. Habeas corpus is not a remedy to review errors. *Walker v. Maxwell* 1 Ohio St. 2d 136(1965).

Because this court lacks the authority to rule on the petition, the motion to dismiss is granted and the petition is dismissed.

Dated: June 14, 2018

EVERETT H. KRUEGER, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by ☒ Regular Mail, ☒ Mailbox at the Delaware County Courthouse, ☐ Facsimile transmission

cc: ASSISTANT PROSECUTING ATTORNEY

FRANK K. C. HERTEL, SR. #276681, ASPC KINGMAN/HUACHUCA, P. O. BOX 3939, KINGMAN, ARIZONA 86402

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff - Appellee -vs- FRANK K.C. HERTEL Defendant - Appellant	:	JUDGES: Hon. John W. Wise, P.J. Hon. W. Scott Gwin, J. Hon. Craig R. Baldwin, J. Case No. 18 CAA 07 0049 OPINION
CHARACTER OF PROCEEDING:		Appeal from the Delaware County Court of Common Pleas, Case No. 00 CR I 11 0361
JUDGMENT:		Affirmed
DATE OF JUDGMENT:		

APPEARANCES:

For Plaintiff-Appellee

CAROL HAMILTON O'BRIEN
Prosecuting Attorney
Delaware County, Ohio

By: KYLE E. ROHRER
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For Defendant-Appellant

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#276681
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PO Box 3939
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Baldwin, J.

{¶1} Defendant-appellant Frank K.C. Hertel appeals from the June 14, 2018 Judgment Entries of the Delaware County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} On November 17, 2000, the Delaware County Grand Jury indicted appellant on three counts of rape in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree, and two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4), felonies of the third degree. At his arraignment on March 18, 2013, appellant entered a plea of not guilty to the charges.

{¶3} Thereafter, on March 3, 2014, appellant withdrew his former not guilty plea and entered a plea of guilty to the charges contained in the indictment. Appellant, as memorialized in a Judgment Entry filed on March 5, 2014, was sentenced to five to twenty-five years on each rape count and two to ten years on each gross sexual imposition count. All sentences were ordered to be served consecutively to one another, but concurrently to a sentence that appellant had received for sexual conduct with a minor in an Arizona case.

{¶4} Appellant appealed his conviction and sentence via an *Anders* case. Pursuant to an Opinion filed on March 26, 2015 in *State v. Hertel*, 5th Dist. Delaware No. 14 CAA 04 0019, 2015 -Ohio- 1168, this Court affirmed the judgment of the trial court.

{¶5} On April 3, 2018, appellant, who was imprisoned in Arizona, filed a Petition for Writ of Habeas Corpus pursuant to R.C. 2725.01 et seq. in the Delaware County case. Appellee filed a Motion to Dismiss the same on April 17, 2018, arguing that the trial court lacked jurisdiction to entertain the petition and the appellant had not complied with the requirements of R.C. 2725.04(D). Appellant, on May 29, 2018, filed a response to the

Motion to Dismiss and also a Motion to Reclassify his Petition for Writ of Habeas Corpus as a Motion for Resentencing. Appellee filed a contra memoranda on June 12, 2018.

{¶6} Pursuant to a Judgment Entry filed on June 14, 2018, the trial court granted the Motion to Dismiss, finding, in part, that it did not have jurisdiction over the matter. In a separate Judgment Entry filed on the same day, the trial court denied appellant's Motion to Reclassify, holding that it was moot because the trial court had granted the Motion to Dismiss and also that the "motion to reclassify a civil filing into a criminal case filing as a motion to re-sentence is inappropriate and improper."

{¶7} Appellant now appeals from the trial court's June 14, 2018 Judgment Entries, raising the following assignments of error on appeal:

{¶8} "I. WHERE NO OHIO COURT HAS JURISDICTION TO HEAR HERTELS' WRIT OF HABEAS CORPUS, HERTELS' CONSTITUTIONAL RIGHTS TO MEANINGFUL ACCESS TO THE COURTS ARE VIOLATED BY TRIAL COURTS SUSPENSION/DENIAL/DELAY OF JUSTICE."

{¶9} "II. COURTS' DENIAL OF STATE HABEAS ON THE BASIS OF HERTELS' OUT OF STATE INCARCERATION VIOLATES HERTELS' RIGHTS OF PROCEDURAL DUE PROCESS AND EQUAL PROTECTION."

{¶10} "III. MR. HERTEL IS RESTRAINED OF HIS LIBERTY BY VIRTUE OF A JUDGMENT TRIAL COURT HAD NO JURISDICTION TO RENDER, MAKING IT VOID."

{¶11} "IV. BOTH TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE."

{¶12} "V. THE INTERESTS OF JUSTICE MANDATE THAT HERTELS' VOID SENTENCES BE VACATED AND HERTEL RESENTENCED."

{¶13} "VI. THERE ARE NO PROCEDURAL DEFECTS ON HERTELS' HABEAS PETITION."

I

{¶14} Appellant, in his first assignment of error, challenges the trial court's' finding that it did not have jurisdiction over his Petition for Writ of Habeas Corpus.

{¶15} One of the basic requirements for a proper habeas corpus proceeding is that, regardless of where the prisoner was convicted, the case can only proceed in the county where he is actually incarcerated. See R.C. 2725.03. The courts of this state have concluded that this particular requirement is jurisdictional in nature; in other words, a court does not have the authority to order the release of a prisoner unless the prison lies within its territorial jurisdiction. See, *Bridges v. McMackin*, 44 Ohio St.3d 135, 541 N.E.2d 1035 (1989); *McAllister v. Ohio Adult Parole Auth.,* 7th Dist. Harrison No. 06 HA 583, 2006-Ohio-3697. See *Mott v. Sheriff of Hamilton Cty.*, 48 Ohio App.3d 84, 85, 548 N.E.2d 301 (1988) in which the court heled that the Hamilton County Court of Common Pleas had no jurisdiction over petitioner's "corpus" because he was held by the Kentucky authorities.

{¶16} Because appellant is incarcerated in an Arizona prison, the Delaware County Court of Common Pleas had no jurisdiction over his petition. Moreover, to the extent that appellant argues that R.C. 2725.03 is unconstitutional, we note that the Ohio Supreme Court, in *Bridges v. McMackin,* 44 Ohio St.3d 135, 541 N.E.2d 1035 (1989), held that the statute is constitutional.

{¶17} Appellant's first assignment of error is, therefore, overruled.

II

{¶18} Appellant, in his second assignment of error, argues that the trial court's denial of his petition violated his rights of procedural due process and equal protection.

{¶19} However, as noted by appellee, the trial court did not substantively deny appellant's petition, but rather granted the Motion to Dismiss because it lacked jurisdiction

to act upon it and also because of procedural defects. There could, therefore, be no violation of appellant's constitutional rights.

{¶20} Appellant's second assignment of error is, therefore, overruled.

III

{¶21} Appellant, in his third assignment of error, argues that his speedy trial rights were violated by the trial court and also challenges his sentence.

{¶22} However, appellant raised issues relating to the speedy trial issue and sentencing issues in his prior appeal to this Court. The doctrine of res judicata prevents parties from relitigating claims and issues when there is mutuality of the parties and when a final decision has been rendered on the merits. *Grava v. Parkman Twp.,* 73 Ohio St.3d 379, 653 N.E.2d 226, 1995-Ohio-331. Because appellant raised such issues in his prior appeal to this Court, he is barred by the doctrine of res judicata from raising them again now.

{¶23} Moreover, neither a claimed violation of the right to a speedy trial nor a mere sentencing error is cognizable in habeas corpus. *Russell v. Mitchell,* 84 Ohio St.3d 328, 329, 1999-Ohio-489, 703 N.E.2d 1249, 1249-1250; *Heddleston v. Mack*, 84 Ohio St.3d 213, 1998-Ohio-320, 702 N.E.2d 1198.

{¶24} Appellant's third assignment of error is, therefore, overruled.

IV

{¶25} Appellant, in his fourth assignment of error, argues that both his trial counsel and appellate counsel were ineffective.

{¶26} Appellant raised the issue of ineffective assistance of trial counsel in is prior appeal and is barred by the doctrine of res judicata from raising such issue again. Moreover, the Supreme Court has explained neither "[c]laims involving the ineffective

assistance of counsel [nor] the alleged denial of the right to counsel are ... cognizable in habeas corpus," *Bozsik v. Hudson,* 110 Ohio St.3d 245, 2006–Ohio–4356, 852 N.E.2d 1200, ¶ 7.

{¶27} Appellant's fourth assignment of error is, therefore, overruled.

V

{¶28} Appellant, in his fifth assignment of error, argues that the "interests of justice" mandate that his sentences be vacated and he be resentenced.

{¶29} Habeas corpus is not a proper remedy for reviewing errors of sentencing by a court of competent jurisdiction. *Walker v. Maxwell*, 1 Ohio St.2d 136, 205 N.E.2d 394 (1965). Appeal or postconviction relief would be the proper remedy. *Blackburn v. Jago,* 39 Ohio St.3d 139, 529 N.E.2d 929 (1988).

{¶30} Appellant's fifth assignment of error is, therefore, overruled.

VI

{¶31} In his sixth assignment of error, appellant maintains that the trial court erred in finding that his petition was procedurally defective.

{¶32} The trial court, in addition to finding that it had no jurisdiction to rule on appellant's petition, found that the same contained fatal defects. Appellant failed to attach his commitment documents as required by R.C. 2725.04(D). The Supreme Court has held failure to comply with this requirement is a fatal defect which cannot be cured, "[C]commitment papers are necessary for a complete understanding of the petition. Without them, the petition is fatally defective. When a petition is presented to a court that does not comply with R.C. 2745.04(D), there is no showing of how the commitment was procured and there is nothing before the court on which to make a determined judgment except, of course, the bare allegations of petitioner's application." *Bloss v. Rogers,* 65

Ohio St.3d 145,146, 602 N.E.2d 602 (1992). In addition, the petition improperly names the State of Ohio as the respondent. R.C. 2725.04(B) requires that an application for a writ of habeas corpus specify "[t]he officer, or name of the person by whom the prisoner is * * * confined or restrained[.]"

{¶33} Furthermore, appellant only sought habeas relief in the Delaware county case, but was serving a sentence for an Arizona conviction for a different sexual assault. The Ohio Supreme Court has held as follows: "[W]here one is in custody under sentences for multiple convictions for different crimes, any one of which, if valid, would warrant his present detention, errors relating to only one or less than all such convictions must be raised by appeal and not by habeas corpus. So long as a person is lawfully in custody for any reason, habeas corpus is not available to test the validity of other convictions. *Page v. Green, Supt.,* 174 Ohio St. 178 N.E.2d 592." *McConnaughy v. Doe,* 174 Ohio St. 533, 534, 190 N.E.2d 576, 577 (1963). Since appellant is serving a lawful sentence in Arizona, he may not attack the conviction in this case by means of habeas corpus.

{¶34} Based on the foregoing, appellant's sixth assignment of error is, therefore, overruled.

{¶35} Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Baldwin, J.

Wise, John, P.J. and

Gwin, J. concur.

HON. CRAIG R. BALDWIN

HON. JOHN W. WISE

HON. W. SCOTT GWIN

CRB/dr