



**LORAIN COUNTY COURT OF COMMON PLEAS**  
**LORAIN COUNTY, OHIO**  
**JOURNAL ENTRY**  
**Hon. D. Chris Cook**  
**Presiding Judge**

Date Feb. 26, 2026

Case No. 24CR111573

STATE OF OHIO  
Plaintiff

Paul Griffin  
Plaintiff's Attorney

VS

DERRICK R. JACKSON, JR.  
Defendant

Pro Se  
Defendant's Attorney

This matter is before the Court as upon the conclusion of the Defendant's sentencing hearing, the Defendant sought the appointment of counsel for the purpose of filing an appeal.

For the reasons explained below, and because the Defendant does not have a direct appeal as of right, his oral motion for the appointment of appellate counsel is not well-taken and hereby DENIED.

IT IS SO ORDERED.

  
\_\_\_\_\_  
Judge D. Chris Cook

cc: Griffin, Asst. Pros. Atty.  
Defendant, *Pro Se*



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**I. INTRODUCTION**

On December 12, 2025, the Defendant plead guilty to an amended indictment consisting of five charges, and on December 16, 2025, was sentenced to an agreed sentence of 10-years in prison with judicial consideration after five years and a report to jail date of February 24, 2026.

During the plea colloquy between the Court and the Defendant, the Court advised the Defendant that his appellate rights were limited and that any appeal he wished to file must be filed within 30-days of the date of his sentencing,<sup>1</sup> which would have been January 15, 2026.

THE COURT: All right. Let's move on then. Let's talk about your appellate rights. Because you're pleading guilty and there will be not trial, and because I'm not going to impose a maximum sentence, you have very limited appellate rights, and any appeal you wish to file must be filed within 30 days of the date of your Sentencing. Do you understand that?

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<sup>1</sup> See: App.R. 4(A)(1).



THE DEFENDANT: Yes.<sup>2</sup>

Immediately after his sentence was pronounced, the Defendant inquired about his right to appeal, and, after a lengthy, and admittedly somewhat convoluted discussion with the Court, requested the appointment of appellate counsel in order to file an appeal. The Defendant did not state a reason for wanting to file an appeal nor did he at any time seek leave to withdraw his guilty plea. The State objected to the appointment of appellate counsel. The pertinent part of that colloquy follows,

THE DEFENDANT: So if I was to tell you right now I wanted to appeal, does that count?

THE COURT: Sure.

THE DEFENDANT: I want to appeal.

THE COURT: Well, you can appeal - - you can appeal anytime you want between now and the next 30 days. But are you asking me to appoint a lawyer?

THE DEFENDANT: Yeah, because I can't afford a lawyer right now.

THE COURT: Okay. If you want a lawyer – if you want me to consider appointing an attorney to file an appeal for you, what is the appellate issue or what issues do you wish to raise on appeal such that I would consider appointing an attorney for you?

THE DEFENDANT: Well, I'm sure the – the list that I actually can appeal is shorter than the list that I want to appeal. **So what can I appeal?**

THE COURT: Well, I can't tell you what you can or can't appeal, because I would be giving you legal advice on that effect.

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<sup>2</sup> Tr. Pages 26-27, Lines 22-25, 1-3.



THE DEFENDANT: Okay. So if I do my legal research, am I able to email Ms. Pena, maybe set something up to come back to court?

THE COURT: You could absolutely at any time ask me to file – appoint an appellate lawyer for you, and I would consider appointing an appellate lawyer for you anyway. But you don't have a right to an appellate lawyer, because you've agreed to this sentence. But I would consider it for you . . .<sup>3</sup>

## II. PROCEDURAL HISTORY

8/22/2024 The Defendant is indicted for seven felony counts including Trafficking and Possession of Fentanyl (F1's), Trafficking and Possession of Cocaine (F1 & F2), Having Weapons While Under Disability (F3), Possession of Drugs (F5), and Possession of Criminal Tools (F5).

All seven counts contain specifications, to wit: Firearm Specifications, MDO Specification, and two forfeiture specifications for cash and a firearm.

12/12/25 The Defendant pleads guilty to an amended indictment. The F1 and F2 charges are reduced to F3's and the Firearm Specifications and MDO Specification are all dismissed.

The parties jointly recommend a 10-year prison sentence with judicial release consideration after five years and a report to prison date on February 24, 2026. The Court agrees to accept this sentencing recommendation.<sup>4</sup>

12/16/25 The Defendant is in open court, with counsel, for sentencing. The Court imposes the jointly recommended sentence as agreed.

At the conclusion of the sentencing hearing, the Defendant inquires about his appellate rights and seeks the appointment of counsel in order to file a direct appeal. The Defendant does not articulate a reason for requesting the appointment of counsel nor does he move or seek leave to withdraw

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<sup>3</sup> Tr. Pages 16-17, Lines 15-25, 1-18, emphasis added.

<sup>4</sup> This too is important, as will also be discussed *infra*.



his appeal. The State objects to the appointment of appellate counsel. To date, no appeal, motion for leave to file a delayed appeal, or motion to withdraw plea, has been filed. In addition, the Defendant has not contacted the Court to clarify or reiterate his request for the appointment of appellate counsel.

2/24/2026 The Defendant reports to Lorain County Jail as Ordered to begin serving his prison sentence.

### III. ANALYSIS

#### THE REQUEST FOR COURT-APPOINTED COUNSEL

At issue in this decision is the Defendant's post-conviction, post-guilty plea request for the appointment of appellate counsel to file an appeal. The Defendant has the right to file a direct appeal or the right to seek leave to file a delayed appeal.<sup>5</sup> The Defendant, however, does not necessarily have a direct appeal "as of right." And if he does not have an appeal as "of right," he does not have the attendant right to the appointment of appellate counsel.

The issue of appointing counsel at the state's expense to offenders convicted of serious offenses (felonies) after pleading guilty is an area of great confusion. This is primarily for four reasons: 1) the Ohio Supreme Court has never directly addressed the issue; 2) the interplay between Ohio's statutes, Criminal Rules, Appellate Rules, and state and federal law addressing the subject are complex; 3) it matters if counsel is sought in order to pursue a direct appeal, a delayed appeal, or some other, post-conviction remedy; and, 4) with great respect, the Ninth District Court of Appeals has issued two decisions over the last few years that address this issue, neither of which provides much edification.<sup>6</sup>

#### THE EFFECT OF A VALID GUILTY PLEA

We start with the obvious, a guilty plea waives most non-jurisdictional errors, including constitutional errors,

A valid guilty plea by a counseled defendant, however, generally waives the right to appeal all prior non-jurisdictional defects, including the denial of a motion to suppress. \* \* \* *State v. Beasley*, 2018-Ohio-16, ¶ 15.

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<sup>5</sup> See: App.R. 5(A)(1)(a).

<sup>6</sup> See: *State v. Diamond*, 2023-Ohio-40, (9<sup>th</sup> Dist.), and *State v. Hensley*, 2023-Ohio-2910, (9<sup>th</sup> Dist.).



And, the Ohio Supreme Court stated in *State v. Fitzpatrick*, 2004-Ohio-3167, the following on the issue,

"[A] guilty plea \* \* \* renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." *Menna v. New York* (1975), 423 U.S. 61, 62, fn. 2. Therefore, a defendant who, like Fitzpatrick, voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson* (1973), 411 U.S. 258, 267. See, also, *Ross v. Auglaize Cty. Common Pleas Court* (1972), 30 Ohio St.2d 323, (valid guilty plea by counseled defendant waives all non-jurisdictional defects in prior stages of proceedings); *State v. Spates* (1992), 64 Ohio St.3d 269, 271–273.

*Fitzpatrick* at ¶ 78.

Sandwiched between *Beasley* and *Fitzpatrick*, in *State v. Obermiller*, 2016-Ohio-1594, at ¶ 55, the Supreme Court noted,

A guilty plea is a complete admission of guilt under Crim.R. 11(B)(1), and a "defendant who \* \* \* voluntarily, knowingly, and intelligently enters a plea of guilty with the assistance of counsel 'may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.' " \* \* \*

So, we know the effect that a guilty plea has on most errors, but what about the right to counsel to pursue non-error correction remedies when a defendant has an "appeal of right?"

Federal case law, the Ohio Rules of Criminal Procedure, and the Ohio Revised Code, offer guidance.

#### FEDERAL LAW

In *Lopez v. Wilson*, 426 F.3d 339, 352-353, (6<sup>th</sup> Cir. 2005), emphasis added, the Sixth Circuit Court of Appeals noted,



In sum, the relevant state law, the distinctions between direct review and collateral review, and the structure and function of the AEDPA support the conclusion that a Rule 26(B) application to reopen is a collateral matter rather than part of direct review. As such, there is no federal constitutional right to assistance of counsel at that stage. *Finley*, 481 U.S. at 555, 107 S.Ct. 1990 (“We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today. **Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.**”) (citation omitted). The recent decision of *Halbert v. Michigan*, 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005), **does not change our conclusion.**<sup>7</sup>

#### THE OHIO RULES OF CRIMINAL PROCEDURE

Crim. R.44, “Assignment of Counsel,” is instructive.

It reads, in pertinent part, as follows,

##### (A) Counsel in serious offenses

Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent the defendant at every stage of the proceedings **from their initial appearance before a court through appeal as of right**, unless the defendant, after being fully advised of their right to assigned counsel, knowingly, intelligently, and voluntarily waives their right to counsel.

(Emphasis added.)

Now to be sure, there is some confusion in this area as the first question we must ask is what is an appeal “as of right?”

For reasons that are unclear, as this issue has come up before (as will be discussed below), there is no real direction to trial courts on when a criminal defendant who has plead guilty *has a right* to the appointment of counsel at the State’s expense in order to file a direct (or perhaps, delayed) appeal – that is to say, has an “appeal of right.” This is a critically important point as it is only when a defendant who has plead guilty has an appeal of right that the defendant has the attendant right to the appointment of counsel.

Or is it?

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<sup>7</sup> Note a theme that will be carefully scrutinized – the concept of an appeal “of right.” Also, interestingly, the *Halbert* decision will play a role in the analysis to come.



What about Crim.R. 32, "Sentence"? It reads, in pertinent part,

(B) Notification to defendant of right to appeal

(1) After imposing sentence in a serious offense **that has gone to trial**, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, **where applicable**, to appeal or to seek leave to appeal the sentence imposed.

(3) **If a right to appeal or a right to seek leave to appeal applies** under division (B)(1) or (B)(2) of this rule, the court also shall advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) **That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;**

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf. Upon defendant's request, the court shall forthwith appoint counsel for appeal.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

(Emphasis added.)

These two criminal rules, when read *in pari materia* with R.C. 2953.08, are very important because they guide us as to when court appointed counsel must be appointed after a conviction for a serious matter.

So, what do they tell us: 1) counsel must be appointed for a criminal defendant after sentencing where the defendant "went to trial;"<sup>8</sup> 2) counsel must be appointed for a criminal defendant who has an "appeal as of right;"<sup>9</sup> and, 3) counsel must be appointed for a defendant "where applicable."<sup>10</sup>

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<sup>8</sup> Crim.R. 32(B)(1).



The first situation is easy. After a conviction resulting from a trial, appellate counsel must be appointed. The second situation is more difficult because we still have not determined when a defendant has an appeal as of right. And the third situation is the catchall, that is, when a criminal defendant convicted for a serious matter went to trial or has an appeal of right, the appointment of counsel is applicable, when requested.

Now, without getting too far ahead of ourselves, the opposite of these conclusions must also be true. That is, if a criminal defendant convicted for a serious matter was not convicted after trial or does not have an appeal as of right, then that defendant does not have the right to the appointment of counsel for the purpose of filing an appeal. Put another way, in these two situations, where a defendant is convicted for a serious matter after a guilty plea or does not have an appeal as of right, the appointment of appellate counsel is discretionary, not madatory.

While we are at it, this Court would be remiss not to acknowledge that there is guidance where a defendant pleads no-contest,<sup>11</sup> where the request is for the appointment of counsel in the trial court for some post-trial matter, or where a defendant seeks the appointment of counsel to pursue a post-conviction matter.<sup>12</sup>

So back to the question at hand, does a defendant who pleads guilty and is convicted of a serious offense have a *right* to the appointment of appellate counsel at the state's expense in order to pursue a direct appeal? Yes, but only if the defendant has an appeal as of right.

And how do we know this? Because the Ohio Revised Code speaks directly to this issue.

#### THE OHIO REVISED CODE

The Ohio Revised Code sheds light on this issue and gives us the answer - almost.

#### R.C. 2953.08 – **Appeal as Matter of Right**; Grounds

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads

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<sup>9</sup> Crim.R. 44(A).

<sup>10</sup> Crim.R. 32(B)(2).

<sup>11</sup> Counsel must be appointed. See: Crim.R. 12(I); *State v. Beasley*, 18-Ohio-16; *State v. Diamond*, 2023-Ohio-40 (9<sup>th</sup> Dist.).

<sup>12</sup> Appointment of counsel is discretionary *State v. Crowder*, Ohio St. 3d 151, 152, (1991). See also: *State v. Craig*, 2010-Ohio-1169, ¶ 9 (9<sup>th</sup> Dist.); *State v. Scudder*, 137 Ohio App.3d 470, 472-473 (10<sup>th</sup> Dist., 1998).



guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

- (1) Max sentence;
- (2) Prison term for 4<sup>th</sup> or 5<sup>th</sup> degree felony;
- (3) Person plead guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense and was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to R. C. 2971.03(A)(3);
- (4) Sentence is contrary to law;
- (5) Court imposes full 10-years on RVO Spec.

\* \* \*

(C)(1) Consecutive sentences imposed pursuant to R.C. 2929.14(C)(3) that exceed the maximum definite prison term allowed by division (A) of that section for the most serious offense.

(C)(2) A defendant may seek leave to appeal an additional sentence imposed pursuant to R.C. 2929.14(B)(2)(a) or (b) if the additional sentence is for a definite prison term that is longer than five years.<sup>13</sup>

**(D)(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.**

(Emphasis added.)

We know that a defendant convicted after trial has an appeal of right and thus, the right to the appointment of appellate counsel. Same for a defendant who pleads no-contest. But we now see that even a defendant who pleads guilty *may* have an appeal of right and if so, the right to the appointment of counsel *if* the defendant can meet one of the factors listed in R.C. 2953.08, unless the sentence imposed was authorized by law,

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<sup>13</sup> This is for imposition of the RVO Spec. See: R.C. 2941.149.



jointly recommended by the parties, and imposed by a sentencing judge. R.C. 2953.08(D)(1).<sup>14</sup>

BUT WHAT ABOUT TWO NINTH DISTRICT COURT OF APPEALS DECISIONS THAT ADDRESS THIS ISSUE: *STATE v. RONALD DIAMOND*<sup>15</sup> AND *STATE v. JUSTIN HENSLEY*<sup>16</sup>

On May 14, 2020, Justin Hensley ("Hensley") plead guilty to a number of serious felonies, including aggravated robbery and aggravated burglary, among others. On July 10, 2020, he was sentenced. The Court advised Hensley that he would receive a three to four-and-one-half year mandatory prison term.

Hensley requested a report to jail date of August 14, 2020, which this Court granted, but only after a lengthy colloquy warning Hensley that the sentence was not final and that if he did not report to jail as ordered or committed any new offenses, the initial sentence would be off the table and could get much worse.

On August 17, 2020, three days after he was to report to jail, Hensley was arrested and charged with a slew of new, serious felonies, including aggravated burglary, weapons, and drug charges. On August 27, 2020, this Court imposed a sentence of eight to twelve years in prison.

At this hearing, after being sentenced and while within the time in which to file a direct appeal, Hensley requested that the Court appoint appellate counsel. This Court informed Hensley that as a result of his plea of guilty, and the fact that he was not sentenced to a maximum sentence, he was not entitled to appellate counsel as a matter of right. The Court informed Hensley that he could write a letter to the Court explaining why he wanted counsel and indicated that it would take his request under advisement. Hensley did not timely appeal the August, 2020, sentencing entry, nor did he timely write the Court.

Nearly two years later, on May 15, 2022, Hensley wrote this Court a letter seeking post-conviction relief and requested the appointment of appellate counsel. On May 23, 2022, just eight days later, despite having no obligation to do so, the Court appointed Hensley appellate counsel.<sup>17</sup> In the same order, the Court denied the untimely petition for post-conviction relief.

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<sup>14</sup> See also: *State v. Nutter*, 2024-Ohio-2434, ¶ 7 (9<sup>th</sup> Dist.). "Generally speaking, a defendant cannot challenge a jointly-recommended sentence."

<sup>15</sup> 2023-Ohio-40, (9<sup>th</sup> Dist.).

<sup>16</sup> 2023-Ohio-2910, (9<sup>th</sup> Dist.).

<sup>17</sup> Parenthetically, this Court appointed Hensley counsel because he asserted an ineffective assistance of counsel claim and alleged that his plea was not knowingly, voluntarily, or intelligently made.



Hensley timely appealed that order. While the Ninth District ultimately affirmed this Court's sentence,<sup>18</sup> it held that Hensley should have been appointed counsel two years earlier, when he initially requested it.

SO, WHY DOES *HENSLEY* REQUIRE FURTHER CLARIFICATION, AND WHY IS IT NOT CONTROLLING HERE

In reaching the wholly inapposite conclusion that Hensley was entitled to the appointment of appellate counsel after pleading guilty simply because he requested such within his direct appeal time, the Ninth District devotes a total of three paragraphs to the analysis, relying on two federal cases,<sup>19</sup> and, amazingly, does not once mention R.C. 2953.08.

The Ninth District in *Hensley* concludes, *ipse dixit*,

. . . On a direct appeal as of right, a criminal defendant has the right to appellate counsel even though that conviction was obtained following a guilty plea. Hensley should have been granted appellate counsel when he requested it at the hearing.<sup>20</sup>

The first sentence of this holding is absolutely a correct statement of law. As painfully explained above, *if*, and I repeat, *if*, a criminal defendant has a direct appeal *as of right*, that is, can satisfy one or more of the R.C. 2953.08 elements or raises a jurisdictional issue, he has the right to the appointment of appellate counsel, even though he plead guilty.

But that does not answer the question.

The unanswered question remains - *why did* Hensley have an "appeal of right" or put another way, why was the right to an appeal in his case applicable? Quite simply, he had neither an appeal of right nor was the right to appeal applicable, and thus, he had no right to the appointment of appellate counsel.

Importantly, Hensley did not have an appeal of right because he could not satisfy any of the requirements of R.C. 2953.08. Now one may *infer* from the *Hensley* decision that because he was in fact sentenced to more time than he plead to, R.C. 2953.08(D)(1) was inapplicable.

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<sup>18</sup> The Ninth District did conclude that this Court committed reversible error in treating Hensley's letter as a petition for post-conviction relief.

<sup>19</sup> *Hensley*, at ¶¶ 35-37.

<sup>20</sup> *Id.* at ¶ 37.



Perhaps.

But even conceding that Hensley was not given the recommended sentence he agreed to and R.C. 2953.08(D)(1) was not in play, he still had to satisfy at least one prong of that statute in order to have a direct appeal as "of right."

Regardless, nothing in the *Hensley* decision answers this question, including the two cited federal cases.

So, let us discuss them, and why they are inapplicable.

*GARZA v. IDAHO*<sup>21</sup>

This case does not hold that every criminal defendant convicted after a guilty plea is entitled to the appointment of appellate counsel.

Far from it.

In *Garza*, the defendant already had counsel and requested his counsel to file a notice of appeal, despite the fact that as part of *Garza*'s plea deal, he executed plea waivers. His counsel decided, based upon the plea waivers, that *Garza* had no right to appeal, and as a result, did not file an appeal for him.

The United States Supreme Court held that it was ineffective assistance of counsel for an attorney to fail to file an appeal once requested by his client. Quoting *Garza*, the Ninth District notes,

. . . appeal waiver does not serve as an absolute bar to all appellate claims; defendant retains the right to challenge whether the waiver itself is valid and enforceable on the grounds that it was unknowing or involuntary.<sup>22</sup>

*Hensley*, at ¶ 35.

This holding is correct, but of no accord. The *Garza* court addressed an ineffective assistance situation where an attorney failed to file a notice of appeal after his client requested he do so. The case is completely silent as to the right *to the appointment of counsel* at the outset or the requirement that counsel pursue the appeal after performing the ministerial act of filing the notice.

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<sup>21</sup> 586 U.S. ---, 139 S.Ct. 738 744 (2019).

<sup>22</sup> *Garza* at Pg. 744, 746.



Moreover, *Garza* does not address the trial court's duty relative to the appointment of appellate counsel, but instead, only addresses a lawyer's obligation, once engaged, to file a notice of appeal if requested by the client.

*HALBERT v. MICHIGAN*<sup>23</sup>

This case is even less helpful for two, very important reasons: 1) Halbert plead no-contest; and, 2) it analyzes Michigan, not Ohio law.

In *Halbert*, the United States Supreme Court held that Michigan may not deny appointed counsel to defendants who apply for leave to appeal to the Michigan Court of Appeals<sup>24</sup> following plea-based convictions. Michigan law provides that defendants who were convicted on a guilty or *nolo contendere* plea do not have an appeal of right to the Michigan Court of Appeals but must apply for leave to appeal.

The United States Supreme Court ruled that the Michigan Court of Appeals' review of an application for leave to appeal ranks as a first-tier appellate proceeding requiring appointed counsel for indigent defendants under *Douglas v. California*, 372 U.S. 353, (1963).

The Supreme Court reasoned that two aspects of the Michigan Court of Appeals' process following plea-based convictions compelled this conclusion.

First, the Michigan Court of Appeals must look to the merits of an appellant's claims in ruling on the application for leave to appeal. Second, indigent defendants pursuing review in the intermediate appellate court are frequently ill-equipped to represent themselves. *Id.* Furthermore, the Michigan Court of Appeals "sits as an error-correction instance." *Id.*

But Ohio law, and the appellate rights afforded to Ohio criminal defendants, are different.

Unlike the Michigan system, every Ohio criminal defendant has a right to appeal without first seeking leave. OHIO CONST. art. IV, § 3. Therefore, the appointment of appellate counsel in Michigan is necessary in order to ensure that all defendants have access to the appellate process, and the best way to ensure that is if they have an attorney.

Moreover, in Ohio, in addition to the right of direct appeal without the need to seek leave, every defendant convicted *after trial* or after a plea of no-contest, or who can

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<sup>23</sup> 545 U.S. 605 (2005).

<sup>24</sup> The equivalent of Ohio's twelve intermediate courts of review.



meet one, or more, of the R.C. 2953.08 criteria, also has the concomitant right to the appointment of appellate counsel (unless R.C. 2953.08(D)(1) mandates otherwise.)

Thus, *Halbert* is inapplicable because he did not plead guilty like Hensley did and, more importantly, unlike in Michigan, all criminal defendants in Ohio have a right to appeal, and those convicted after trial or no-contest pleas, or who can satisfy R.C. 2950.08, also have the right to the appointment of appellate counsel.

Following this logic, Ohio defendants convicted after a guilty plea *who cannot* satisfy R.C. 2953.08 or do not raise a jurisdictional defect do not have an appeal of right and are not entitled to the appointment of appellate counsel. See *Pennsylvania v. Finley*, 481 U.S. 551, (1987). See also: *Lopez v. Wilson*, cited above. Note again what *Lopez* says about *Halbert*, the case relied upon by the Ninth District in *Hensley*:

The recent decision of *Halbert v. Michigan*, 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005), **does not change our conclusion.**

*Lopez*, at Pg. 352, emphasis added.

Notice also, importantly, that the United States Supreme Court, in both *Finley* and *Lopez*, reiterate that the right to the appointment of appellate counsel only extends to first appeals *of right*. The converse of this axiom is, of course, that if a criminal defendant does not have an appeal of right, there is no right to the appointment of appellate counsel.

All of these federal cases are consistent with Ohio Supreme Court precedent, Ohio's Rules of Criminal Procedure, and traditionally understood policy regarding the effect of pleading guilty. That is, a criminal defendant who has a direct appeal "as of right" is entitled to the appointment of appellate counsel. A defendant who does not have an appeal "of right," does not.

#### SO WHERE DOES THE CONFUSION IN *HENSLEY* COME FROM

It is this Court's reasoned analysis that the confusion promulgated by the *Hensley* decision is a result of that court conflating the facts and law germane to the *Hensley* case with the facts and law in the *Diamond* case.<sup>25</sup>

In *Diamond*, the defendant, Ronald Diamond ("Diamond"), killed his wife. He plead no-contest before this Court and was sentenced to life in prison. Sometime after the time had passed for filing a direct appeal, Diamond sought the appointment of counsel in

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<sup>25</sup> 2023-Ohio-40 (9<sup>th</sup> Dist.).



order to file a direct appeal. This Court determined, incorrectly, that because Diamond had plead no-contest, he did not have the right to the appointment of appellate counsel.

Nevertheless, the Ninth District sustained this Court's decision to not appoint counsel because no appeal was pending and Diamond had not sought leave to file a delayed appeal.

. . . the trial court nonetheless correctly denied Mr. Diamond's motion to appoint appellate counsel. Indeed, at that juncture, Mr. Diamond's time for direct appeal had expired and Mr. Diamond had not yet filed a motion, pursuant to App.R. 5(A), for delayed appeal.

*Id.* at ¶ 12.

So where does the confusion arise? In paragraph 34 of the *Hensley* decision.

In the instant case, Hensley expressed his desire for appellate counsel on the record at the sentencing hearing, and thus, the time for a direct appeal had not expired. **Therefore, under *Diamond*, Hensley should have been granted appellate counsel at the hearing.**

*Id.* at ¶ 34, emphasis added.

Again, this Court cannot help but ask, why? Why should appellate counsel have been granted at the hearing? Hensley plead guilty and did not have an appeal as of right. Diamond, having plead no-contest, did have an appeal as of right. Naturally, the dissidence presented between these fact patterns is compelling – that is, the difference between a plea of guilty and a plea of no-contest, for purposes of the appointment of appellate counsel, is significant. Yet, on this issue, the *Hensley* court observed,

Although the defendant in *Diamond* entered a no-contest plea rather than a guilty plea, **it is a distinction without merit on this issue.**

*Id.* at ¶ 33, emphasis added.

With great respect to the Ninth District, how is it that the difference between a no-contest plea and a guilty plea, when scrutinizing the propriety of granting, or denying, the appointment of appellate counsel, be a "distinction without merit." Again, with respect, the issue turns almost entirely on the distinction. That is, after a plea of no-contest, a defendant does have an appeal as of right, and thus the appointment of appellate counsel, but, after a plea of guilty, a defendant *may* have an appeal as of right, and the attendant right to the appointment of appellate counsel.



Regardless, the conclusory statement that “. . . under *Diamond*, Hensley should have been granted appellate counsel . . .” provides no guidance, no direction, and no rationale for trial courts to follow as it has no supporting analysis or explanation as to why Hensley, under these facts and circumstances, should have been granted appellate counsel.

THE DEFENDANT AT BAR DOES NOT HAVE A RIGHT TO THE APPOINTMENT OF APPELLATE COUNSEL IN ORDER TO PURSUE A DIRECT APPEAL BECAUSE HE CANNOT SATISFY R.C. 2953.08, AND THUS, HE DOES NOT HAVE A DIRECT APPEAL “AS OF RIGHT”

In the case at bar, the Defendant, Derrick Jackson, plead guilty, thus waiving most, if not all constitutional and non-jurisdictional defects. And, because he plead guilty, as opposed to being convicted after trial, he must satisfy one, or more, of the requirements of R.C. 2953.08 in order to have an appeal as of right.

But, even if he can make a preliminary showing to satisfy one of the elements of that statute, he plead to a jointly recommended sentence that was imposed by the sentencing judge. As such, his sentence is not subject to review, meaning, he does not have a direct appeal “of right,” at least for purposes of appealing his sentence.<sup>26</sup>

WHAT IF THE DEFENDANT WISHES TO RAISE A JURISDICTIONAL CHALLENGE, AN INEFFECTIVE ASSISTANCE OF COUNSEL CHALLENGE, A PROSECUTORIAL MISCONDUCT ALLEGATION, OR CHALLENGE THE VALIDITY OF THE PLEA AGREEMENT ITSELF RELATIVE TO THE KNOWING AND VOLUNTARY NATURE OF THE AGREEMENT<sup>27</sup>

In the *Hensley* decision, the Ninth District went to some pains to criticize this Court for requiring Hensley to articulate a reason as to why he wanted the appointment of appellate counsel after pleading guilty. On this issue, the Ninth District stated,

Based on the foregoing, the applicable law squarely rejects the trial court's requirement that Hensley submit a letter identifying the grounds for appeal.

*Id.* at ¶ 37.

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<sup>26</sup> R.C. 2953.08(D)(1).

<sup>27</sup> See, for example, Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline (now, the Board of Professional Conduct), Advisory Opinion, 2001-6. “It is unethical under the Ohio Code of Professional Responsibility for a prosecutor to negotiate and a criminal defense attorney to advise a defendant to enter a plea agreement that waives the defendant's appellate or postconviction claims of ineffective assistance of trial counsel or prosecutorial misconduct.”



Again, I ask why? Why should Hensley have been granted appellate counsel when he asked for it without; A) satisfying R.C. 2953.08, or, B) articulating some other reason for the appointment of counsel such as a jurisdictional challenge, an ineffective assistance challenge, or some other challenge noted above?

And, more importantly, why should a trial court be prohibited from requiring a defendant to articulate the reason he wants the appointment of appellate counsel if he is not entitled to it? After all, if a trial court has the discretion to appoint counsel in situations where a defendant does not have an appeal as of right, how else can the court exercise its discretion to determine if the appointment of counsel is apposite?

Under the facts and circumstances in *Hensley*, this Court was well within its right to inquire of Hensley as to why he wanted the appointment of appellate counsel when he did not have an appeal as of right.

Same thing here.

The Defendant herein plead guilty to a jointly recommended sentence imposed by the sentencing judge and cannot satisfy any of the elements of R.C. 2953.08. Thus, he does not have an appeal as of right.

Nevertheless, he *may* have the right to the appointment of appellate counsel if he can articulate some other, legitimate basis for the appointment of counsel by way of some of the examples noted above. Either way, the only way for this Court to determine the propriety of the request for counsel is to inquire, to ask, to have a dialogue, to order a hearing, or to direct the defendant file a motion or write a letter. In other words, to require the Defendant to state or articulate why the appointment of appellate counsel is sought where it is not, in fact, mandated.

ONE FINAL OBSERVATION – THIS COURT HAS GREAT RESPECT FOR THE NINTH DISTRICT COURT OF APPEALS AND MEANS NO DISRESPECT IN ANALYZING AND QUESTIONING THE HOLDING IN THE *HENSLEY* DECISION

This Court is well-aware of its mandate to follow precedent from a superior court and has no intention of defying any order of the Ninth District Court of Appeals. That said, this Court has a genuine, legitimate concern about its' interpretation of the *Hensley* decision, how and whether it is actually applicable herein, and how the Ninth District reached the conclusion that Justin Hensley had the right to the appointment of appellate counsel when he could not satisfy any of the elements of R.C. 2953.08 (a statute that was not even mentioned in the decision).



Ironically, at the sentencing hearing when he first sought the appointment of appellate counsel, Hensley gave no reason for the request. Two years later, when he wrote this Court requesting the appointment of counsel, he did articulate his reasons, ineffective assistance of counsel and the voluntariness of his plea. These stated reasons at least opened the door to the appointment of counsel, which this Court then granted.

In any event, if this Court, and perhaps other trial courts, cannot glean the logic of a superior court's decision, it is fair to question how to apply it going forward. Moreover, the Code of Judicial Conduct provides that while a judge must, "interpret and apply the law without regard to whether the judge approves or disapproves of the law in question," it also provides that when interpreting the law, ". . . judges sometimes make good-faith errors of fact or law. Error of this kind do not violate this rule." Jud.Cond.R. 2.2, Comments [2] & [3].

To be clear, this Court has no opinion one way or the other, that is, it will not approve or disapprove of how a superior court may eventually resolve this issue. If this Court is wrong to deny the Defendant appellate counsel and is ultimately required to appoint appellate counsel under these, or similar situations in the future, so be it. Put another way, it is not "disagreement" with the *Hensley* decision that prompts this discussion, but the need for clarification.

Finally, the Ohio Rules of Professional Conduct also provide an attorney with a "safe harbor" to assert or controvert an issue in a proceeding in order to, "extend, modify, or reverse," existing law. Prof.Cond.R. 3.1. And, Comment [1] to the rule notes, ". . . the law is not always clear and never static . . . account must be taken of the law's ambiguities and potential for change."

Regardless, despite the holding in *Hensley*, this Court is unable to definitively determine if appellate counsel should be appointed for this Defendant simply because he asked for it, given all of the facts, circumstances, and applicable statutes and caselaw in play. And, as this Court may not be following the mandate required by *Hensley*, it is incumbent upon this Court to analyze and explain its rationale and seek further edification from a superior court on the issue presented.

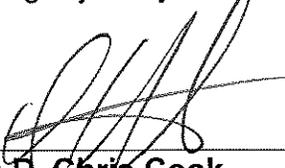
#### **IV. CONCLUSION**

For the reasons explained above, at least at this time, the Defendant's motion for the appointment of appellate counsel is DENIED because he cannot satisfy R.C. 2953.08, he plead to an agreed sentence, and, thus, he does not have a direct (or delayed) appeal as of right.



Moreover, the Defendant has not articulated any reason to this Court, either by way of motion, letter, or oral request, as to why he seeks the appointment of appellate counsel. Were he to do so, as long as he is not challenging his sentence, this Court would certainly consider the appointment of appellate counsel, particularly if the Defendant seeks to challenge this Court's jurisdiction, assert prosecutorial misconduct, or raise some other issue not foreclosed by *Beasley* and its progeny or by statute.

IT IS SO ORDERED. No Record.

  
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Judge D. Chris Cook