

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE EX REL.

SUPREME COURT CASE NO. 06-2130

ANDRE YEAGER 432928

P.O. Box 788

MANSFIELD, OHIO 44901

Relator.

ORIGINAL ACTION IN MANDAMUS

PROHIBITION

ON COMPUTER-ALM

v -

LYNN SLABY, PRESIDING JUDGE

161 South High

Akron, Ohio 44308

BETH WHITMORE, JUDGE

161 South High

Akron, Ohio 44308

DONNA CARE, JUDGE

161 South High

Akron, Ohio 44308

Respondents.

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RELATORS MEMORANDUM IN OPPOSITION TO RESPONDENTS MOTION TO DISMISS

HEARING REQUESTED VIA PHONE

ANDRE YEAGER 432928

P.O. Box 788

MANSFIELD, OHIO 44901

Relator.

Richard Kasay

53 University Ave 6th Floor

Akron, Ohio 44308

Counsel for Respondents.

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STATE EX REL. ANDRE YEAGER

SUPREME COURT NO. 06-2130

432928 P.O. Box 788

MANSFIELD, OHIO 44901

ORIGINAL ACTION IN MANDAMUS

Relator

PROHIBITIONS

vs.

LYNN SLABY, PRESIDING JUDGE

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Respondents

RELATORS MEMORANDUM IN OPPOSITION TO RESPONDENTS MOTION TO DISMISS

HEARING REQUESTED VIA PHONE

Now comes Relator Andre Yeager, respectfully ask this Honorable Court to overrule to Respondents motion to dismiss.

Respectfully Submitted,

Andre Yeager 432928

P.O. Box 788

Mansfield, Ohio 44901

Relator

MEMORANDUM IN SUPPORT

Supreme Court Practice Rules X-(2) "All original actions shall proceed under the Ohio Rules of Civil Procedure unless clearly inapplicable". All Relators filings are by the rules. Therefore this Honorable Court must view the merits of this case on the submitted Original action, evidence and briefs.

Respondents have filed a 'general motion to dismiss' Civil R 8(B) Claims and defenses must be supported by some kind of factual basis; mere legal conclusions are not sufficient.

VIOLATION OF CIVIL RULE 8(C) which list all affirmative defenses that must be alleged and failure to clearly allege one constitutes waiver of that defense and a court must not thereafter dismiss a claim on the basis of that defense. Likewise, an allegation of an affirmative defense that contains no factual basis will not support a dismissal, supported by that defense.

RULE 8(D) provides that any issues alleged in a pleading are deemed to have been admitted by the opposing party if they are not denied in a mandatory responsive pleading.

It is imperative that all issues in a pleading be addressed specifically by the opposing party.

All 12(B) motions of civil rules defenses may be made by motion (1) Lack of jurisdiction over subject matter (2) Lack of jurisdiction over the person (3) improper venue (4) insufficiency of process (5) insufficiency of service of process (6) Failure to state a claim upon relief can be granted (7) Failure to join a party Under Rule 19 or 19.1,

Respondents Failed to raise or allege any grounds to be granted dismissal upon.

MEMORANDUM IN SUPPORT

Civil Rule 12(G) IF a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted.

The ~~state~~ Respondents entire argument verbatim is
"But the mandate in State v Yeager, supra from this Court was to consider Relator's assignments of error and to do so consistently with State v Martin, supra. The Respondents used their best judgment to apply Martin in Yeager II.

The mandate from this Court did not direct that any particular result be reached, either for or against relator.

Accordingly, the Ninth District Court of Appeals did not defy the mandate of this Court"

The Respondents argument is very deceptive to all citizens of this state and Martin if applied correctly to Relator the result is new trial but the Respondents claim to have "used their best judgment to apply Martin, supra. Had respondents followed Martin and not Ragle incorrect standard then the mandate would have been obeyed but the Respondents varied it and defied the mandate and its also a constitutional structural error that's not subject to harmless error.

MEMORANDUM IN SUPPORT

Respondents have waived legally all arguments upon all claims of the Original Action in Mandamus-Prohibition. relief may and must be granted under the mandate rule, law of the case doctrine, criminal rule 44(A) violated, ministerial duties, mandamus based on limited remand criminal rule 44(B) violation, mandamus based on Act the law especially enjoins a duty, mandamus based on act requiring construction of statute, mandamus based on due process and U.S. constitution violation, mandamus based on abuse of discretion, mandamus on due process and mandate rule, mandamus based on liberty interest and mandamus based on lack of jurisdiction. Twelve claims for relief under mandamus and relators have waived all by not objecting and mandamus legally can be used to enforce and relief must be granted because all claims are presently proven in original action and will be proven in brief and evidence submission to this Court.

Respondents motion to dismiss have no basis to be granted legally and ~~preemptory~~ alternative writ must issue and ~~the~~ Respondents motion to dismiss be denied and dismissed.

Relator has properly followed all rules and proven his case.

MEMORANDUM

I. INTRODUCTION: Despite Respondent's claims to the contrary, this case does not involve the authority of a reviewing court to control a lower court's discretion.

Rather, at issue is this Honorable Court's power to enforce compliance with its decisions. The Relator obviously has a very strong interest in the outcome of this complaint because the lower appellate courts usurpation of judicial authority has impaired the Relator's ability to trial and prove his innocence of all charges.

This Court's interest in the outcome is no less compelling, involving as it does its authority to enforce its mandate to a lower court, and the ability of a lower court to defy the mandate.

II. ADEQUACY OF REMEDY BY WAY OF APPEAL: Relator have asked this Honorable Court to enforce its mandate in State v Yeager decided sub nom. State v Martin 103 Ohio St. 3d 385, 2004 Ohio 5471 via mandamus and prohibition.

Respondents has filed a motion to dismiss Relator's complaint, arguing that neither mandamus nor prohibition serve to correct mere errors of law and Relator's appeals was denied review by this court. Respondent however has ignored and brazenly overlooked the well established principle that mandamus is available to enforce the mandate of a reviewing court, irrespective of the availability of appeal.

This HONORABLE COURT has said that "It is generally recognized that a writ of mandamus from a higher court is the proper remedy to require a lower court to perform a duty which it is incumbent on it to perform." State ex rel. Schneider v Brewer (1951) 155 Ohio St 203.

This Court has also said if an inferior court is without jurisdiction whatsoever to act, the availability or adequacy of a remedy of appeal to prevent the resulting injustice is immaterial to the exercise of supervisory jurisdiction by a superior court to prevent usurpation of jurisdiction by the inferior court. State ex rel Adams et al v Gusweiler (1972) 30 Ohio St 2d 326. A

reviewing court has the power to do all that is necessary to compel compliance on the part of the lower court and mandamus is an appropriate and expeditious remedy for that purpose.

67 O Jur 3d Mandamus, sec 108. The principle that an important function of the writ of mandamus is to force compliance with the mandate of a superior court is not peculiar to Ohio, but has historically been the law of the land.

See eg. Stern and Gressman, Supreme Court Practice, 7th ed. p. 494, (attached). It is equally clear that a lower court to which a case is remanded by a superior court is bound by the judgement and mandate of the latter and must obey and give effect to it. A lower court has no discretion absent extraordinary circumstances to disregard the mandate of a superior court in a prior appeal in the same case, State ex rel. Pottin v Matthews (1979) 59 Ohio St 2d 29. No court on remand has no authority to deviate from the mandate of the superior court, State ex rel TRW v Jaffe (1992) 78 Ohio App 3d 411

Time and again, these two principles - that a lower court may not deviate from the mandate of a reviewing court, and that mandamus (or prohibition, if appropriate) is properly invoked to enforce the superior court's mandates - have resulted in the issuance of writs directed to the lower court ordering compliance with the mandate. State ex rel Schneider v Brewer, supra, State ex rel Potain v Mathews, supra, State ex rel Adams v Gusweiler, supra, State ex rel TRW v Jaffe, supra. In this case the fact that the lower court's non-complying action was subject to review on appeal was and is irrelevant to the issuance of the writ. When the lower court defies the mandate, it is acting outside the scope of its jurisdiction. Mandamus exists to enforce the mandate of the reviewing superior court, and the party seeking enforcement is not required to win appeal in Ohio Supreme Court.

III. RESPONDENT HAS FAILED TO OBEY THE MANDATE OF THIS COURT:

Respondent has incorrectly suggested in his motion that the decision-order in State v Yeager II are consistent with this Court's mandate in State v Martin, supra. This is factually and clearly incorrect. The judgment entry of this Honorable Court in State v Martin remanded the ~~c~~ State v Yeager (State v Cline) proceedings consistent with State v Martin. The syllabus of this Court in State v Martin, which set out the law of the case, provides as follows: "The court of appeals held that Martin was inadequately advised about the risks of self-representation, reversed for new trial. There is no substantial compliance of waiver of counsel.

Accordingly, we reaffirm that in the case of a 'serious offense' as defined by Crim. R. 2(C) when a criminal defendant elects to proceed pro se, the trial court must demonstrate substantial compliance with Crim. R. 44(A) by making a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his right to counsel." Martin, supra. The state can't demonstrate substantial compliance June 14, 2002 transcript proves this conclusively and decision of Yeager 1 (attached) to be valid such waiver must be made with an apprehension of nature of charges, statutory offenses, range of punishment, possible defenses. Von Moltke 68 Sct 316. However the clear import of the court decision was to apply all factors of State v Martin which stated "The state contends that Martin waived his right to counsel by filing the motion" for respective counsel and co-counsel". However this was filed before any of the discussions concerning the self representation issue. Therefore, this pro se motion clearly cannot amount to a waiver of Martin's right to counsel. Martin, supra. Like Martin re: Andre Yeager motion for representation of self is being treated by the district court as waiver of counsel right and the court did not have to personally follow the warnings of self-representation on June 14, 2002, the motion is good enough for them, regardless that it is contrary to federal constitution this court's mandate and Ohio standard of waiver of counsel.

The record does not establish that Yeager was made aware of dangers of self-representation. Respondent seeks to avoid the fact the court never complied with Crim R. 44(A), Martin, mandate.

Respondent has stripped away all Relator's rights by ignoring this Court's mandate. Respondent has transformed a motion that was filed before June 14, 2002 hearing into a knowing waiver of counsel although Respondents admits in Yeager I that the court failed to adequately warn Yeager of dangers of self representation and did not comply at all with von Moltke (attached). The motion cannot be considered for a valid waiver of counsel in any court. This unauthorized standard of totality of circumstances the Respondents used (attached) provides an independent justification for finding that the Respondents acted outside of the scope of its jurisdiction. The consequences for the Respondents proceeding in this manner are immense. If the Respondents succeeds in obtaining a wrongful unconstitutional conviction, Relator will be incarcerated on charges the state admits there is no valid waiver of counsel on the record, until 2013.

IV RESPONDENTS ADMITS THAT THE DECISION MANDATE OF THIS COURT WAS TO CONSIDER RELATOR'S ASSIGNMENTS OF ERROR CONSISTENTLY WITH STATE v MARTIN, SUPRA:

"The Respondents used their best judgement to apply martin in Yeager II." (their statement) The Respondents are correct this honorable court did not direct that any particular result be reached, either for or against relator.

Had the respondents used (any judgment) best judgment then the court would not of applied and incorrect standard of review.

II RESPONDENTS APPLIED AN INCORRECT STANDARD OF WAIVER OF COUNSEL CONTRARY TO THIS COURTS MANDATE AND OHIO LAW:

Respondents was to only apply the facts, standard decided by this Court in State "Martin, supra not any other case. (Page 4 opinion) "The mandate violation" - "Indetermining the adequacy of the trial court's inquiry in the context of a defendants waiver of counsel, this Court reviews the totality of the circumstances. State "Ragle, 9th Dist No 22137, 2005-Ohio-590.

Above is clearly violation of this courts mandates that is not the standard to apply in Ohio and not in their district this Court sets the standard for all Ohio courts to follow not Respondents. "Further violations: (pg 5) "However, this Court has held that the trial court discussion of possible defenses and mitigating circumstances need not be fact specific. State "Trkilis 9th Dist. Nos. 04CA0096-M and 04CA0097-M. 2005-Ohio-4266.

In addition, a court may consider various other factors, including the defendants age, education, legal experience in determining that a waiver of counsel is made knowingly, voluntarily and intelligently. First Respondents are disregarding Crim. R. 44(C)

and State "Martin, supra, second no findings of fact for Relators age, education, legal experience. No court can just allege anything with no proof. These factors are not the standard in federal courts or in compliance with State "Martin, supra. Finding Relator prose motion "motion to proceed Prose Representation" a valid waiver of counsel is contrary to this courts mandate crim r. 44(c) does not establish a knowing waiver of counsel.

VII RESPONDENT HAS WAIVED AND CONCEDED LAW OF CASE DOCTRINE:

The Ohio Supreme Court has interpreted the law of the case doctrine to provide that the "decision of a review court in a case remains the law of that case of the legal questions involved for all subsequent proceedings in the case at reviewing levels"

Nolan v Nolan 11 Ohio St 3d 1, Yeager 1 is the law of case otherwise a substantial right has been violated. The state conceded Relator was never advised of dangers of self representation

Respondents Abuse of Power or Discretion: Judicial discretion never authorizes arbitrary, capricious action that tends to defeat the ends of substantial justice. "If the action of a court or judge in a matter calling for exercise of discretion amounts to an abuse of discretion and manifest a disregard of duty, and it appears that there is no other adequate remedy, and the exigency is such to justify the interposition of the extraordinary superintending power of the higher court, mandamus, will issue to compel the specific action which should have been taken. Re National Labor Relations Bd 58 S Ct 1001. Apply Martin, supra in First instance not Ragle at all. The writ will issue to prevent an abuse of the courts discretion or to correct arbitrary action not amounting to the exercise of discretion. Thus a lower court, judge may be compelled to act in a particular when when the facts are not in dispute and the court has come to a wrong conclusion of law therefrom, or disregarded duty expressly enjoined by the law under the undisputed facts. Virginia v Rives 100 U.S. 313
Yeager 1 facts are not in dispute (2) wrong conclusion of law is applying Ragle not Martin (3) duty was to follow Martin, not done.

Discretion was exercised on a ground and to the extent clearly untenable and clearly manifestly unreasonable in light of all crim. R. 44(A) *Faretta* ^v California, *Von Moltke*, *Martin* list is unless.

MANDATE HAS NOT BEEN CORRECTLY INTERPRETED BY RESPONDENTS:

"Where a mandate leaves nothing to the judgment or discretion of the court below, and that court mistakes or misconstrues the judgment or decree of reviewing court, and does not give full effect to the mandate, its action may be controlled by writ of mandamus. U.S. ^v U.S. Dist. Ct. 68 Sct 103

"The principles which govern the right to invoke the remedy by mandamus to correct an unlawful assumption of jurisdiction are the same as those which control the issue of the writ of prohibition for same purpose." *Re Oklahoma* 31 Sct 426

Mandamus is only remedy to determine whether Respondents acted within the scope of its authority, or in excess of its jurisdiction. The writ fully incorporated herein speaks for itself clearly and proves the Respondents are in violation.

Relator does not wish to reappeal - argue Respondents are not comprehending the mandate must be enforced and correct standard of *Martin* applied. Relator does not brazenly ask this court to reverse Yeager # without any further involvement of the Respondents, Relator asks this court to apply the relief and provision of *Coleman* ^v *Tyree* 827 Fed 667

This Court can apply *Martin* in first instance prevent injustice and grant relief if *Martin* followed a new trial will issue.

The syllabus of an opinion issued by Ohio Supreme Court states the law of the case, and all lower courts in the state are bound to adhere to the principles set forth therein. Smith v Klem (1983) 6 Ohio St. 3d 163; Rule 1(B), Supreme Court Rules for the Reporting of Opinions. A lower court is not free to ignore the Supreme Court's determination and substitute its judgement as to what the law should be.

Franklin County Law Enforcement Association v Fraternal Order Police, (1992) 80 Ohio App 3d 23. The Respondents had no authority to ignore the unambiguous holding in Martin or Yeager and incorrectly apply Ragle. Contrary to Respondents assertions they did not follow the mandate. RELATOR DOES NOT POSSESS ADEQUATE REMEDY AT LAW: All avenues of review are exhausted. Litigants before this Court deserve better protection by this Court of decisions rendered in their favor. Relator entitled to have mandate of this Court enforced and as Respondents imply and conceded Relator has stated numerous claims that relief can be granted upon, the Respondents has waived all other claims for relief. Because mandamus or prohibition are proper remedies in this matter, the writs must issue, legally. Respondents clearly violated the mandate of this court. Respondents motion to dismiss must be denied legally. Respectfully

Andre Yeager

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Relators Memorandum Contra Respondents motion to Dismiss was sent by first class mail, on the date of this filing, to opposing Counsel: Richard Kasey 53 University Ave 6th Floor. Akron, Ohio 44308 December 17, 2006

Andre Yeager

IN THE SUPREME COURT OF OHIO

STATE ex rel. ANDRE YEAGER
P.O. Box 788
Mansfield, Ohio 44901

CASE NO. 06-2130
ORIGINAL ACTION MANDAMUS-PROHIBITION

Relator,

vs.

PRESIDING JUDGE, LYNN SLABY
NINTH DISTRICT COURT OF APPEALS
161 SOUTH HIGH STREET
AKRON, OHIO 44308

Respondent,

JUDGE, BETH WHITMORE
NINTH DISTRICT COURT OF APPEALS
161 SOUTH HIGH STREET
AKRON, OHIO 44308

Respondent,

JUDGE, DONNA CARR
NINTH DISTRICT COURT OF APPEALS
161 SOUTH HIGH STREET
AKRON, OHIO 44308

Respondent.

AFFIDAVIT OF ANDRE YEAGER IN SUPPORT TO DISMISS RESPONDENTS

MOTION TO DISMISS

Affiant, Andre Yeager, being first duly cautioned and sworn, here

by states and deposes that:

STATE OF OHIO
COUNTY OF RICHLAND

)

SS: affidavit of ANDRE YEAGER

1. I am the Defendant Relator, that is the victim of an improper waiver of counsel.
2. The attached complaint in this matter was prepared by Yeager, pro se.
3. I have personal knowledge that the factual allegations contained in the complaint as recited therein are true.
4. I possess a good faith belief that based upon the facts as recited in the complaint that I am legally entitled to the issuance of Writ's of Mandamus and Prohibition as described.
5. Affiant has first hand knowledge of the facts of the matters contained herein and is competent to trstify as to such matters.
6. ANDRE YEAGER, did file a motion for self-representation.
7. On June 14, 2002, Judge James R. Williams did not warn Yeager of the dangers of self-representation nor defenses available nor any of the factors of Von Moltke, he made no inquiry to ascertain if waiver of counsel was intelligent, knowingly or voluntary.
8. I would not elected to proceed without counsel had I knew all the dangers of proceeding, pro se, on June 14, 2002.
9. Affiant told counsel, Nathan Ray, he was fired and do not file anything to Ohio Supreme Court on my behalf because I wanted all errors preserved for Federal review, which counsel was intentionally selling me out to the Ninth District.
10. Counsel Ray filed anyway against clients wishes clearly knowing the attorney client relationship was terminated before he filed in the Ohio Supreme Court 2005.

11. Affiant possess a good-faith belief that said decision of Respondent are (1) in contravention of the syllabus of this Court;
12. In contravention of the mandate of this Court, all of which would support a Writ of Mandamus herein to confine Respondent, to carrying out the mandate of this Court.
13. In contravention of Criminal Rule 44(A) and the trial court had no subject matter jurisdiction to proceed to a trial because it never properly or procedurally acquired jurisdiction under the Sixth Amendment for trial court lacked a valid waiver of counsel since June 14, 2002.
14. Affiant believes the Ninth District Court does what it desires despite starre decis and mandates of any Superior Court.
15. Affiant filed 26(B) raises various issues that appellant counsel failed to raise dead bang winners in order that the court correct this illegal sentence, which was denied.
16. Affiant believes dealing with Summit County, Ninth District Court of Appeals the law is actually ignored because these courts are aware no court will review there improper decisions.
17. Affiant believes the Ninth District Court of Appeals stating this Court merely quotes the dicta from Von Molkte and is not there holding is a clear disrespect to this Court.
18. The Ninth District Court is wrong legally, factually by hold "This Court, likewise, will not adopt a rule which requires a trial in order, to fully acquaint himself with the facts of a case prior to trial in order to under take pseudo-legal representation of a defendant by specifically advising him of possible viable defenses or mitigating circumstances existing in his case, Ragle. This is insane, unconstitution and obstruction of justice, a court must inquire long as necessary to make sure a defendant eyes are open to the ramifications of this enormous right being waived, defendants are not aware of

there defenses or any factors that will aid in winning a just result.

19. Affiant understands the state conceded June 14, 2002, transcript shows there is no valid constitutional waiver of counsel on the record but the Court wants to dwell upon the ~~probiem~~ for self-representation that was filed before June 14, 2002, hearing and legally inadequate to prove an intelligent, knowingly and voluntary waiver of counsel. This structural violation that cannot be presumed by any motion it has to be on the June 14, 2002, transcript not any other transcript because then Yeager, was without counsel that guaranteed by the Constitution Gideon v. Wainwright, Powell v. Alabama, until that next date in Court then without counsel until next date very on going violation.

20. Affiant believes the mentality reflected in the opinion of 2005 ignores the Ohio Suprem Court precedent regarding the standard of waiver of counsel and the standard in Ohio is not the "Totality-of-the-circumstances" as the court wishes it to be the standard and duty of the Court's is whwther the trial court explained to d3fendnat dangers of self-representation, nature of charges, allowable penalties, defenses available and all factors as a whole in Faretta v. California or Von Moltke or State v. Martin, none is the totality of circumstances standard. There is no mention of background, age, or education those factors are not in the law because its not important as the inquiry thats required by the court this right is too important to waive by proxy or what a court wants the law to be.

21. The Ninth District Court of Appeals clearly deviated from this Court precedent by stating Martin, supra, does not require the trial court to consider all factors of Von Moltke, the court is wrong and this Court must enforce your mandate.

22. Affiant wants this Court to understand when Relator, say reverse to new trial what I am saying is once Martin, is correctly applied and all factors of Von Moltke and June 14, 2002, hearing transcript viewed then the end result

will be new trial. The court cannot view the motion as waiver of counsel if Martin, supra, is followed because it was filed before June 14, 2002, hearing.

On June 14, 2002, hearing is where the violation was done and never corrected.

23. Affiant believes stare decisi prevents the court of Appeals from declining to follow this court law. "As the United States Supreme Court has observed, faced with controlling authority by a Superior Court and another line of decisions, a Court of Appeals has only one course to follow the authority of the court to which it is inferior leaving to [the Higher Court] the prerogative of overruling its own decisions" (citation omitted).

24. Affiant believes the court decision standard deviates from established precedent.

25. Affiant believes the Writ must be complete in its nature, beneficial and speedy, to correct this miscarriage of justice. Relator, is actually innocent of all crimes and a constitutional violation has resulted in an innocent citizen being imprisoned (Schlup v. Delo).

26. Affiant will go back to third trial and prove his innocence on all charges with counsel.

27. Affiant believes the Court of Appeals exceeded this courts mandate and for any Inferior Court to determine that a syllabus of Ohio Supreme Court opinion is obiter dictum is improper and under S.Ct. R.Rep.Op. 1(B) "the syllabus of Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the court for adjudication.

28.

28. Affiant possess a good faith belief that no remedy by way of Appeal is available all has been denied, no appeal is adequate to redress the Relators interests in immediate compliance with the mandate of this court and that writs such as this are filed herein are the proper and traditional remedy to require a court to comply with the mandate of a superior court and perform the ministerial duty imposed by the order of the superior court.

29. Respondents motion to dismiss has waived twelve grounds that relief can be granted upon and must be dismissed by law and motion to dismiss is not based on any grounds that a dismissal may be granted upon.

30. I have prepared the true factual claims in the complaint in this matter and attached factual undisputed evidence to support relief being granted on all claims.

31. I possess a good faith belief, based upon the law, the facts as recited in the complaint and set forth in this affidavit in support of such complaint, that I am legally entitled to the issuance writs of mandamus and prohibition as described which belief is supported by affidavit, all exhibits attached in complaint and motion of relation in contra to respondents motion to dismiss.

Andre Yeager

ANDRE YEAGER, prose

Sworn to and subscribed in my presence this 12th day of December, 2006



MARY MINER
Notary Public, State of Ohio
My Commission Expires
Oct. 23, 2007

Mary Miner
NOTARY PUBLIC

Although the several writs to some extent serve different functions, they overlap considerably,⁵ and the same general principles guide the Court in determining whether to allow each of them. They will therefore be considered together here.

(1) *Forcing lower courts to comply with appellate mandate.* One function of the writ of mandamus is to force a lower court to comply with the mandate of an appellate court. When the mandate or judgment in question is that of the Supreme Court, application for the writ must, of course, be made to that Court. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *United States v. United States District Court*, 334 U.S. 258, 263 (1948); *Will v. United States*, 389 U.S. 90, 95-96 (1967); cf. *United States v. Smith*, 331 U.S. 469 (1947).⁶ If the action of the lower court takes the form of an appealable order, the aggrieved parties may file the ordinary petition for certiorari. *In re Sanford Fork & Tool Co.*, *supra*; *Baltimore & Ohio Railroad Co. v. United States*, 279 U.S. 781, 785 (1929). If the mandate or judgment of the Supreme Court leaves a question open for the exercise of discretion by the lower court, the decision of the latter cannot be reversed by mandamus. *In re Sanford Fork & Tool Co.*, *supra*; *In re Potts*, 166 U.S. 263, 266 (1897); *Ex parte Union Steamboat Co.*, 178 U.S. 317, 319 (1900). Where the appellate court leaves certain questions open for consideration by the lower court, the latter must confine itself to those issues, and can be corrected by mandamus if it fails to do so. *In re Potts*, *supra*; *Gaines v. Rugg*, 148 U.S. 228 (1893); cf. *United States v. Smith*, 331 U.S. 469 (1947). See also *United States v. Haley*, 371 U.S. 18, 20 (1962). ~~435011~~

Indeed, the Court has indicated that mandamus is the only proper remedy available to a party who has prevailed in the Supreme Court where the lower court, in the words of *United States v. Fossatt*, 20 How. 445, 446 (1858), "does not proceed to execute the mandate, or disobeys and mistakes its meaning." Thus in *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425 (1978), the Court denied a petition for clarification of its prior judgment on the merits (433 U.S. 623 (1977)), which claimed that the district court judge was not properly executing the judgment. But the denial was "without prejudice to the filing of a motion for leave to file a petition for mandamus pursuant to Rule 31" (a predecessor of present Rule 20), the remedy deemed appropriate by the Court. In *Vendo*, the motion to clarify might have been treated as a petition for mandamus had it been served on the lower court judge, as the rule required. See Sec. 11.6, *infra*. Since it had not been, the motion was held to serve no useful purpose "since the judgment was a routine order directing that the decision of this Court be carried into effect" and clarification of that order presumably would not correct the improper action of the district court judge. The Court seems to have left open the possibility that a motion to clarify may be appropriate where it can be treated as a petition for mandamus. Obviously, the better practice is to file a petition for mandamus, claiming that the lower court

⁵Three petitions for exactly the same relief in cases argued together were entitled "Petition for Writs of Mandamus and Prohibition," "Petition for Writ of Mandamus or Certiorari," and "Petition for Certiorari." *Ex parte Collett*, 337 U.S. 55 (1949); *Kilpatrick v. Texas & Pacific Railway Co.*, 337 U.S. 75 (1949); *United States v. National City Lines*, 337 U.S. 78 (1949). The Court decided each case on the merits without noting the difference among the writs.

The 2004 opinion states that defendant never waived counsel nor a
not "It found error only in the rules prescribed ... and opinion 5.
was reversed only for the purpose of other errors rendered moot
purpose of taking an account according to the principles law
this court. " As to the decree of the circuit court in res-
title was not invalidated by the action of this court on ca,
circuit court had no right to set aside that new trial. The dec
beyond the control of 9th. they could do nothing to aff
except in obedience to the mandate of this court" chaires

What remained for the 9th to do was only the taking of the
manner indicated by this court (Martin). To say its mandate
whole case of 9th is to say that it has done that which it sa-
not to be done. Under the mandate it intended to only reverse
that all it done, it substantially affirmed that part of
valid waiver and virtually only modified the opinion.

Received new facts = order to vacate no power to reviewing again "it
to executing the mandate". principle applied also in Ex parte Story,
[state said nothing about lack of waiver can it support conviction]

" duty of the court below to have entered a judgment strictly in acc-
of this court, and not to add to it Eagle standard, and that the law
court that "made consistent with Martin". did not authorize
respect from the judgment of this court.

Sibbald v U.S., 12 Pet. 488 held " that a mandamus
the error, where there was no other adequate remedy, and
discretion to be exercised by the inferior court, no disc
appeal not fully adequate writ is proper.

(Unexplained departure from Martin) Don't send back if will afford the
disregard your mandate. They excuse are unfounded and invoked

Baltimore and Ohio R. Co v U.S., ~~49~~ 49 S Ct 492 he-

Court refuses to give effect to, or mis construes our manda-
controlled by this court, either upon new appeal or by writ o-
well understood that this court has power to do all the
effect to its judgment"

is disobeying or misinterpreting the Court's judgment or mandate. A request to clarify may be appropriate in other situations not involving disobedience when there is ambiguity on the face of the Court's order or opinion.

The Supreme Court can issue a writ of mandamus not only to a lower federal court but to a highest court of a state that has disobeyed or failed to give effect to a prior judgment or mandate of the Court. See *Deen v. Hickman*, 358 U.S. 57 (1958); *Bucolo v. Adkins*, 424 U.S. 641 (1976). But while the Court will entertain and likely grant a petition for mandamus where such judicial noncompliance is clear, the Court dislikes to issue the peremptory writ itself. In both the *Deen* and *Bucolo* cases, for example, after explaining the respective mandates and finding that the state courts had in fact failed to conform, the Court simply granted the motions for leave to file mandamus petitions but "[a]ssuming as we do that the [state court] will conform to the disposition we now make, we do not issue the writ of mandamus." See also *Connor v. Coleman*, 425 U.S. 675, 679 (1976) (motion for leave to file granted but consideration of petition for mandamus continued on assumption that federal district court "will promptly conform its proceedings to give effect to these views"). See also 440 U.S. 612 (1979), 441 U.S. 792 (1979).

(2) *Correcting jurisdictional error.* Each of the writs of mandamus, prohibition, and certiorari is used on proper occasions to correct jurisdictional error on the part of the lower court. See *Kerr v. U.S. District Court*, 426 U.S. 394 (1976). As stated in *Will v. United States*, 389 U.S. 90, 95 (1967):

"The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945) * * *"

This does not mean that the extraordinary writs serve as substitutes for the ordinary appellate procedures whenever it is claimed that the lower court has acted beyond its jurisdiction. *Bankers Life Co. v. Holland*, 346 U.S. 379, 382-83 (1953); *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). The writs are to be used only when, for some special reason, remedy by appeal does not provide an adequate remedy.⁷ Orders which are not appealable by reason of their interlocutory nature or otherwise may not ordinarily be reviewed through any of the extraordinary writs, even though the hardship of a prolonged trial "is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment." *United States Alkali Association v. United States*, 325 U.S. 196, 202 (1945); *Roche v. Evaporated Milk*

⁷ In *Maxwell v. Bishop*, 385 U.S. 650 (1967), for example, the Court granted a petition for a common-law writ of certiorari where the shortness of time available before a scheduled execution made the ordinary appeal procedures unavailable. The execution was set for a day or two after a circuit judge had denied a certificate of probable cause to appeal to the appellate court. The execution was stayed by a Supreme Court Justice to allow the petition to be filed. The Court then reversed the order denying the certificate of probable cause.

'0'
HOT 9650102

State took this action pursuant to a deliberately adopted policy, ruling the rules of criminal procedure no sup dependence of the crim.

76 Sct 917

(1) What education? (2)

Courts Key 379 Dist Ct should be error should be rectified without de. for accomplishing this is by mandamus. 17 Sct 520, (1) set aside it order affirming conviction

Common file delayed App: State v Trouten - 2006-0589 (Jefferson App # C
Get) State v Shelton 2006-0604 (Hamilton App # C-040658, 2006-182

"To proceed in accordance with law, justice and laws of U.S. in conformity to the
this honorable court. ^{Gaines v Rugg} Remanded the causes to 9th with a direction of
the mandate explicitly state, for further proceeding to be had therein in
opinion of this court. It did not disturb the findings (lack of
disposition of mootness to other errors. The mandate, opinion,
although they used word "reversed" amount to a reversal on
other errors and affirmance of prose new trial. Proper for the
construe its own mandate in connection with opinion, and must
and or acted beyond its province in construing the mandate
obeying the mandate of this court and proceeding in conformity with
not matters within the discretion of the circuit court; and, the
cases which hold that this court will not direct in what
of an inferior tribunal shall be exercised do not apply to the
The opinion of this court proceeded upon an approval by it of the
in respect to reversal new trial and disapproval of strict com
As to the action to be taken under the directions given by this
state v Yeager, state v Martin. ~~no~~ No right to empower
undertook to do by more filings to appeal date of briefs. in s
and exceptions, or set down for cause the hearing upon the issue
pleadings. to sustain prosecutor erroneous thinking on waiver, r
Martin, Volke and refuse to award new trial.

Respondent contends that this absolutely reversed the grant
and the dist ct had a right, therefore, to proceed in the case
standard of Ragle) in the language of the mandate not merely
the opinion and mandate of the court and that it be done

1 right, Mr. Yeager?

2 ~~DEFT. A. YEAGER: All right. I'd like~~
3 ~~counsel appointed for the charge.~~

4 THE COURT: You would like counsel
5 appointed for this charge?

6 DEFT. A. YEAGER: Yes. And I object to
7 the indictments being used at the next trial
8 but I ain't going to be nothing with you, but
9 let's make it on the record. I object. It
10 has nothing to do with the RICO whatsoever.
11 It would only prejudice the case.

12 THE COURT: ~~The Court is -- I~~
13 ~~guess the Court has a question. Now, you're~~
14 ~~saying you want counsel on this particular~~
15 ~~charge but what about the other charges?~~

16 DEFT. A. YEAGER: I'm going back to call
17 Mr. Adgate so he can call you, because he
18 said he'd take it.

19 THE COURT: ~~I will call Mr.~~
20 ~~Adgate. In other words, you're saying that~~
21 ~~Mr. Adgate would represent you, you would let~~
22 ~~him represent you?~~

23 DEFT. A. YEAGER: Yes.

24 THE COURT: ~~And you not be your~~
25 ~~own counsel. Is that what you're telling the~~

1 Court?

2 ~~DEFT. A. YEAGER: Yes.~~

3 THE COURT: The Court will inquire
4 of Mr. Adgate as to whether he's available
5 and whether he's willing to represent you as
6 an appointee of the court.

7 MR. PEACOCK: Your Honor, if Mr.
8 Adgate is not available, what does Mr. Yeager
9 want to do?

10 DEFT. A. YEAGER: The tall -- Madison or
11 Benson, the tallest one that we talked about.

12 MR. PEACOCK: ~~Walt Benson.~~

13 THE COURT: ~~Is that what you're~~
14 saying?

15 ~~DEFT. A. YEAGER: Yes.~~

16 MR. PEACOCK: ~~Do you want counsel~~
17 for everything?

18 ~~DEFT. A. YEAGER: Yes, if --~~

19 MR. PEACOCK: The State is concerned
20 if we're going to go down the road again.

21 THE COURT: I understand that.
22 The Court is not going to make any changes
23 until after I, you know, I talk to these
24 individuals and see what their -- as of now
25 that's a firm trial date and we're headed for

COURT OF APPEALS
DYNIA ZALESKI
STATE OF OHIO)ss:
COUNTY OF SUMMIT)
SEP 21 AM 7:50
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO SUMMIT COUNTY CLERK OF COURTS C.A. No. 21510
Appellee
v.
ANDRE YEAGER
Appellant
APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 01 12 3475(B)

DECISION AND JOURNAL ENTRY

Dated: September 21, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, PRESIDING JUDGE, ANNOUNCES THE DECISION OF THE COURT WITH RESPECT TO ASSIGNMENTS OF ERROR II-IX AND AN OPINION WITH RESPECT TO ASSIGNMENT OF ERROR I.

{¶1} This cause is before this Court pursuant to remand by the Supreme Court of Ohio. The Supreme Court has vacated this Court's judgment in *State v. Yeager*, 9th Dist. No. 21510, 2004-Ohio-2368, and has remanded the case to this Court for further consideration in light of *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471. This Court affirms.

consecutiively, yielding a total of five and one-half years imprisonment. Appellant appealed the trial court's decision to this Court and this Court affirmed the decision of the trial court. *State v. Yeager*, 9th Dist. Nos. 21091, 21112, 21120, 2003-Ohio-1808, appeal denied, 101 Ohio St.3d 1422, 2004-Ohio-123.

{¶4} While appellant's direct appeal of his first trial was pending, a second trial was held on the charge of intimidation of a victim or witness, in violation of R.C. 2921.04(B), as contained in counts thirty and thirty-one of supplements six and seven to the indictment; and the charge of engaging in a pattern of corrupt activity, in violation of R.C. 2923.32 (A)(1), as contained in count sixteen of supplement two to the indictment. On March 12, 2003, the jury returned a verdict of guilty on all counts. Appellant was sentenced accordingly.

{¶5} Appellant timely appealed his convictions of engaging in a pattern of corrupt activity and intimidation, setting forth nine assignments of error. The assignments of error have been rearranged to facilitate review.

II.

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN FAILING TO SECURE A VALID WAIVER OF THE DEFENDANT'S RIGHT TO COUNSEL AND FAILED TO PROPERLY ADVISE HIM OF HIS RIGHT TO COUNSEL, THEREBY DENYING HIM HIS RIGHT TO COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT AND HIS RIGHT TO DUE PROCESS OF LAW."

{¶6} In his first assignment of error, appellant contends that the trial court deprived him of his constitutional right to counsel by accepting his waiver without

ascertaining whether it was knowingly, intelligently, and voluntarily made. I disagree.

{¶7} “The Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so.” *State v. Gibson* (1976), 45 Ohio St.2d 366, paragraph one of the syllabus, citing *Faretta v. California* (1975), 422 U.S. 806, 45 L.Ed.2d 562. However, “[c]ourts are to indulge every reasonable presumption against the waiver of a fundamental constitutional right including the right to be represented by counsel.” (Citations omitted.) *State v. Dyer* (1996), 117 Ohio App.3d 92, 95. Accordingly, “a valid waiver affirmatively must appear in the record, and the State bears the burden of overcoming the presumption against a valid waiver.” *State v. Martin* (“*Martin I*”), 8th Dist. No. 80198, 2003-Ohio-1499, at ¶8, citing *Dyer*, 117 Ohio App.3d at 95. “In order to establish an effective waiver of right to counsel, the trial court must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right.” *Gibson*, 45 Ohio St.2d at paragraph two of the syllabus.

VIOLATION OF MARTIAL
 {¶8} In determining the adequacy of the trial court's inquiry in the context of a defendant's waiver of counsel, this Court reviews the totality of the circumstances. *State v. Rege*, 9th Dist. No. 22137, 2005-Ohio-590, at ¶12. In

assuring that a waiver of counsel is made knowingly, voluntarily, and intelligently, a trial court should advise the defendant of the dangers and disadvantages of self representation. See *Gibson*, 45 Ohio St.2d at 377. See, also, *Faretta*, 422 U.S. at 835; *State v. Weiss* (1993), 92 Ohio App.3d 681, 686. While no one factor is determinative, the trial court should advise the defendant of the nature of the charges and the range of allowable punishments, and, in addition, advise the defendant of the possible defenses to the charges and applicable mitigating circumstances. See *Gibson*, 45 Ohio St.2d at 377, citing *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 92 L.Ed. 309. ~~However, this Court has held that the trial court's discussion of possible defenses and mitigating circumstances need not be fact-specific.~~ *State v. Trikilis*, 9th Dist. Nos. 04CA0096-M & 04CA0097-M, 2005-Ohio-4266, at ¶13, citing *Ragle* at ¶12. “[A] broader discussion of defenses and mitigating circumstances as applicable to the pending charges is sufficient.” *Trikilis* at ¶13. ~~In addition, a court may consider various other factors, including the defendant's age, education, and legal experience in determining that a waiver of counsel is made knowingly, voluntarily, and intelligently.~~ *Id.*, citing *State v. Doane* (1990), 69 Ohio App.3d 638, 647.

{¶9} Additionally, Crim.R. 44(C) requires that the trial court obtain a signed, written waiver by the defendant in “serious offense cases.” A “serious offense” is defined as “any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months.” Crim.R. 2(C).

violation
again

While a signed waiver is the preferred practice, the absence of a waiver is harmless error if the trial court has substantially complied with Crim.R. 44(A). *State v. Martin* (“*Martin II*”), 103 Ohio St.3d 385, 2004-Ohio-5471, at ¶39.

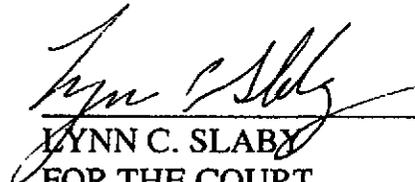
{¶10} In the present matter, appellant filed a pro se motion captioned “MOTION TO PROCEED PRO SE SELF-REPRESENTATION” with the trial court on June 3, 2002, invoking his right to self-representation. After reviewing appellant’s June 3, 2002 motion, I find that appellant’s motion sufficiently complied with Crim.R. 44(C) to constitute a valid written waiver. Consequently, I would overrule appellant’s first assignment of error.

SECOND ASSIGNMENT OF ERROR

“THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO GRANT APPELLANT’S MOTION FOR SEVERANCE OF COUNTS HEREIN FOR TRIAL PURPOSES, IN VIOLATION OF APPELLANT’S RIGHTS AS GUARANTEED TO HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.”

{¶11} In his second assignment of error, appellant argues that the trial court should have severed the engaging in corrupt activity count from the counts regarding the intimidation of a witness. This Court disagrees.

{¶12} Crim.R. 8(A) provides that joinder of offenses is proper if the offenses “are based on the same act or transaction.” However, “[i]f it appears that a defendant *** is prejudiced by a joinder of offenses *** in an indictment, *** the court shall order an election or separate trial of counts, *** or provide such other relief as justice requires.” Crim.R. 14. In order to prevail on a claim that the


LYNN C. SLABY
FOR THE COURT

WHITMORE, J.
CONCURS IN PART AND WRITES SEPARATELY SAYING:

{¶52} While I agree with this Court's finding that appellant properly waived his right to counsel, I do not agree with the finding that the letter appellant filed with the trial court on June 3, 2002, constituted a valid written waiver within the context of Crim.R. 44(C). While the preferred practice to follow when a defendant is waiving his or her right to counsel in a serious offense case such as the present matter would be to have a defendant execute a written waiver pursuant to Crim.R. 44, the failure to obtain a written waiver in this case was harmless error, if the trial court made a sufficient inquiry to determine whether appellant fully understood and intelligently relinquished his right to be represented by counsel. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, at ¶39.

{¶53} In the instant matter, I do not believe that Appellant's letter can be construed as a written waiver. Appellant authored the letter prior to any colloquy with the trial court. Accordingly, the letter cannot be said to be a valid waiver of Appellant's right to counsel. *Id.* at ¶41. Further, Appellant's in-court statements that he did not wish to proceed without a lawyer, but wished to proceed as the lead counsel with an attorney still representing him makes the letter ambiguous. Based

upon the facts presented, I would proceed forward to the analysis laid out supra at ¶¶7-9.

{¶54} In the present matter, appellant admitted that he understood that he had the right to counsel. He further admitted that he understood that he would be bound by the same rules of evidence as attorneys if he opted to represent himself, and that the trial court advised him of the charges against him and the possible penalties for those charges. The record further indicates that the trial court repeatedly warned appellant against self representation, and even appointed stand-by counsel, who was present and available during the entire proceeding, in the event appellant changed his mind. The record is replete with evidence that appellant understood trial procedure. During the trial, appellant made opening and closing statements, presented testimony on his own behalf, and cross-examined the State's witnesses.

*How
likely?*

{¶55} After reviewing the record, I would find that appellant validly waived his right to counsel. The trial court sufficiently explained the dangers of self-representation, the nature of the charges against appellant, and the allowable penalties for those charges. Appellant understood that the court had appointed stand-by counsel, available to assist him during the proceedings, yet he still opted to represent himself. Considering the totality of the circumstances, I would find that appellant voluntarily, knowingly, and intelligently waived his right to counsel.

CARR, J.

CONCURS IN PART AND DISSENTS IN PART, SAYING:

{¶[56]} I respectfully dissent. Although the Supreme Court of Ohio has held that the lack of a written waiver of counsel under Crim.R. 44(C) may be harmless error, it is only harmless error if the trial court made a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel. In the present case, the trial court failed to engage in the necessary colloquy to ensure that appellant's waiver of counsel was knowingly, intelligently, and voluntarily made. At no time during the many conversations between the court and appellant regarding his representation, did the trial court inquire as to appellant's understanding of the charges against him and the possible penalties he faced. Additionally, the trial court neglected to adequately inform appellant of the perils of self-representation. I would sustain appellant's first assignment of error and overrule appellant's ninth assignment of error with regard to the sufficiency argument. I would hold that appellant's remaining assignments of error are moot.

APPEARANCES:

NATHAN A. RAY, Attorney at Law, 137 South Main Street, Suite 201, Akron, OH 44308, for Appellant.

SHERRI BEVAN WALSH, Prosecutor, and PHILIP D. BOGDANOFF, Assistant Prosecuting Attorney, 53 University Ave., 6th Floor, Akron, OH 44308, for Appellee.

COPY

STATE OF OHIO
COUNTY OF SUMMIT
COURT OF APPEALS
DIANA ZALFONI
)ss:
2011-05-12 AM 8:01

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

301

STATE OF OHIO
SUMMIT COUNTY
CLERK OF COURTS

C. A. No. 21510

Appellee

v.

ANDRE M. YEAGER

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 01 12 3475(B)

DECISION AND JOURNAL ENTRY

Dated: May 12, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

{¶1} Appellant, Andre Yeager, appeals the decision of the Summit County Court of Common Pleas, which found him guilty of engaging in a pattern of corrupt activity and intimidation. This Court reverses and remands.

I.

{¶2} In January and February of 2002, appellant and several co-defendants were indicted on numerous counts of breaking and entering, in violation of R.C. 2911.13(A); receiving stolen property, in violation of R.C. 2913.51(A); and engaging in a pattern of corrupt activity, in violation of R.C.

2923.32(A). Appellant pled not guilty to the counts as charged in the indictment, and the matter was set for trial.

{¶3} After the prosecution rested its case, the trial court dismissed several counts of the indictment. On April 24, 2002, the jury found appellant guilty of breaking and entering, a felony in the fifth degree, as contained in counts five, nine, ten, and eleven of supplement two to the indictment. The jury also found appellant guilty of receiving stolen property, a felony of the fourth degree, as contained in count twenty-four of supplement five to the indictment. However, appellant was found not guilty of breaking and entering as contained in counts seven, eight, and twelve of supplement two to the indictment. The jury was deadlocked on the charges of breaking and entering and engaging in a pattern of corrupt activity, as contained in counts thirteen and sixteen, respectively, of supplement two to the indictment. The trial court then sentenced appellant to a definite term of twelve months imprisonment on each count of breaking and entering and a definite term of eighteen months imprisonment for one count of receiving stolen property. The trial court ordered the sentences to be served consecutively, yielding a total of five and one-half years imprisonment. Appellant appealed the trial court's decision to this Court and this Court affirmed the decision of the trial court. *State v. Yeager*, 9th Dist. Nos. 21091, 21112, 21120, 2003-Ohio-1808, appeal denied (2004), 101 Ohio St. 3d 1422, 2004-Ohio-123.

{¶4} While appellant's direct appeal of his first trial was pending, a second trial was held on the charge of intimidation of a victim or witness, in violation of R.C. 2921.04(B), as contained in counts thirty and thirty-one of supplements six and seven to the indictment; and the charge of engaging in a pattern of corrupt activity, in violation of R.C. 2923.32(A) (1), as contained in count sixteen of supplement two to the indictment. On March 12, 2003, the jury returned a verdict of guilty on all counts. Appellant was sentenced accordingly.

{¶5} Appellant timely appealed his convictions of engaging in a pattern of corrupt activity and intimidation, setting forth nine assignments of error. In order to facilitate review, the assignments of error have been re-arranged.

II.

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN FAILING TO SECURE A VALID WAIVER OF THE DEFENDANT'S RIGHT TO COUNSEL AND FAILED TO PROPERLY ADVISE HIM OF HIS RIGHT TO COUNSEL, THEREBY DENYING HIM HIS RIGHT TO COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT AND HIS RIGHT TO DUE PROCESS OF LAW."

{¶6} In his first assignment of error, appellant contends that the trial court deprived him of his constitutional right to counsel by accepting his waiver without ascertaining whether it was knowingly, intelligently, and voluntarily made. This Court agrees.

{¶7} "The Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an

independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so." *State v. Gibson* (1976), 45 Ohio St.2d 366, paragraph one of the syllabus, citing *Faretta v. California* (1975), 422 U.S. 806, 45 L.Ed.2d 562. ~~However, "[c]ourts are to indulge in every reasonable presumption against the waiver of a fundamental constitutional right, including the right to be represented by counsel." (Citations omitted.)~~ *State v. Dyer* (1996), 117 Ohio App.3d 92, 95. Accordingly, ~~"a valid waiver affirmatively must appear in the record, and the State bears the burden of overcoming the presumption against a valid waiver." *State v. Martin*, 8th Dist. No. 80198, 2003-Ohio-1499, citing *Dyer* at 95. "In order to establish an effective waiver of right to counsel, the trial court must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right." *Gibson*, 45 Ohio St.2d at paragraph two of the syllabus.~~

{¶8} In determining the sufficiency of the trial court's inquiry in the context of the defendant's waiver of counsel, the *Gibson* court applied the test set forth in *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 92 L.Ed. 309:

**** To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."

{¶9} Additionally, Crim.R. 44(C) requires that the trial court obtain a signed, written waiver by the defendant in “serious offense cases.” A “serious offense” is defined as “any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months.” Crim.R. 2(C). Upon review, this Court could not find a consensus among the appellate districts as to whether Crim.R. 44(C) must be strictly complied with or if substantial compliance with the criteria set forth in *Von Moltke* is sufficient. Some appellate courts have held that the failure to secure a written waiver of the right to counsel is subject to a “substantial compliance” standard, and that, so long as the criteria announced in *Von Moltke*, are substantially met, a conviction need not be overturned in the absence of a showing of prejudice.¹ Other appellate courts, however, have held that strict compliance with Crim.R. 44(C) is necessary and the absence of a signed waiver in a serious offense case constitutes reversible error.² This Court will follow the strict compliance approach.

{¶10} At a status conference on June 4, 2002, appellant advised the court on the record that he wished to represent himself. Appellant stated: “Yes. I waive my right to an attorney, intelligent, and I like to represent myself under the

¹ *State v. Longworth*, 3rd Dist. Nos. 1-01-08, 1-01-51, 2001-Ohio-2295, citing *State v. Fair* (Sept. 17, 1996), 10th Dist. Nos. 96-APA01-93, 96-APA01-94; *State v. Overholt* (1991), 77 Ohio App.3d 111, 115.

² *State v. Suber*, 154 Ohio App.3d 681, 2003-Ohio-5210; *State v. Martin*, 8th Dist. No. 80198, 2003-Ohio-1499.

Sixth Amendment.” On June 14, 2002, a hearing was held regarding appellant’s request to represent himself. The court granted appellant’s request to represent himself, but appointed attorney Nicholas Swyrydenko as standby counsel to assist appellant. On February 3, 2003, appellant was arraigned on two counts of intimidation. ~~After entering a plea of not guilty to both counts, appellant advised the court that he no longer wished to represent himself.~~ Appellant made it known to the court that he would only accept one of two attorneys as his counsel. The court advised appellant that it would make every effort to contact the attorneys and inquire as to whether they were willing to take his case.

{¶11} On March 4, 2003, the case proceeded to trial. Before the trial commenced, the court addressed appellant regarding his representation. The court advised appellant that neither of the two attorneys he requested were able to accept his case. The court then noted, as it had previously, that it did not believe that appellant’s decision to represent himself was a wise choice, but that the court would proceed with the case.³ Finally, the court explained Mr. Swyrydenko’s role in the trial and advised appellant that he would be given the same respect as any other attorney, but also held to the same standards with regard to proper courtroom decorum and adherence to the rules of evidence.

³ This Court notes that we have found that while “[t]he Constitution guarantees indigent defendants competent appointed counsel at trial and on direct appeal, it does not guarantee counsel of choice.” *State v. Edsall* (1996), 113 Ohio App.3d 337, quoting *State v. Bryant* (May 8, 1996), 9th Dist. No. 17618.

{¶12} In the present case, the trial court failed to engage in the necessary colloquy to ensure that appellant's waiver of counsel was knowingly, intelligently, and voluntarily made. At no time during the many conversations between the court and appellant regarding his representation, did the trial court inquire as to appellant's understanding of the charges against him and the possible penalties he faced. Additionally, the trial court neglected to adequately inform appellant of the perils of self-representation.

{¶13} After reviewing appellant's "Motion To Proceed Pro Se Self-Representation" which was filed with the trial court on June 3, 2002, this Court is

{¶14} reluctant to find that appellant's motion sufficiently complied with Crim.R. 44(C) to constitute a valid written waiver. In the motion, appellant merely stated that he wished to represent himself because he was not happy with his court-appointed counsel. Given that "[c]ourts are to indulge in every reasonable presumption against the waiver of a fundamental constitutional right including the right to be represented by counsel[.]" the motion fails to strictly comply with Crim.R. 44(C). *Dyer*, 117 Ohio App.3d at 95.

{¶15} Accordingly, appellant's first assignment of error is sustained.

{¶16} Although this Court's disposition of appellant's first assignment of error renders moot the remaining assignments of error, "to the extent that they raise arguments regarding the sufficiency of the evidence they must be addressed, since a reversal on sufficiency grounds would bar retrial on the counts affected."

by counsel, self-representation or hybrid representation, for '[t]he question is one of degree.' [*Bright v. State* (1986), 68 Md. App. 41] at 47, 509 A.2d [1227] at 1230. Neither the court, nor the defendant, nor counsel, nor the prosecutor would know until the record of the trial was examined who was actually responsible for the conduct of the defense and in control of deciding questions and resolving problems as they arose. As Wilner, J., said in his concurring opinion [in *Bright*]:

{¶ 35} "There is * * * no clear boundary line between hybrid representation and self-representation. Moreover, when, as in this case, a request for some degree of self-representation is made before trial, there is no way that the court ever can know on what side of the murky line the matter will fall. * * * [T]here are a number of factors to be considered, all of which are necessarily considered *ex post facto*.' [*Bright*, 68 Md.App.] at 57, 509 A.2d at 1235." *Parren v. State*, 309 Md. at 269-270, 523 A.2d 597.

{¶ 36} Thus, in a hybrid situation, it is difficult to ascertain even which parts of a trial have proceeded without counsel and where a waiver, if any, applies. In this case, the trial court, faced with the demands of this particular defendant, determined that Martin's requests would require him to proceed pro se with the assistance of standby counsel. However, under this ruling, Martin's representation resembled pro se status but also included some elements of hybrid representation in that the judge allowed counsel some active role.

Waiver

{¶ 37} However, even more critical to our analysis today is that the trial judge did not adequately warn Martin of the perils of self-representation before the judge required him to conduct much of his defense with counsel present in the

courtroom but not assisting. Martin himself delivered opening and closing statements, questioned the victim and all other witnesses, and filed a motion to dismiss. Because the court of appeals held that Martin was inadequately advised about the risks of self-representation and did not execute a written waiver, essentially proceeding pro se for the bulk of the trial, the court reversed the judgment of the trial court and remanded the cause for retrial. We agree.

[3] {¶ 38} In this case, there was no signed waiver of counsel. Crim.R. 44(C) provides: "Waiver of counsel shall be in open court and the advice and waiver shall be recorded * * *. In addition, in serious offense cases the waiver shall be in writing." While literal compliance with Crim.R. 44(C) is the preferred practice, the written waiver provision of Crim.R. 44 is not a constitutional requirement, and, therefore, we hold that trial courts need demonstrate only substantial compliance. See *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474 ("Literal compliance with Crim.R. 11 is certainly the preferred practice, but the fact that the trial judge did not do so does not require vacation of the defendant's guilty plea if the reviewing court determines that there was substantial compliance"); *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 5 O.O.3d 52, 364 N.E.2d 1163 ("although it can validly be argued that the trial court should adhere scrupulously to the provisions of Crim.R. 11(C)(2), * * * there must be some showing of prejudicial effect before a guilty plea may be vacated. * * * The trial court substantially complied with the requirements in Crim.R. 11, and the failure to personally advise appellant that in entering a plea of guilty to murder he would not be eligible for probation does not rise to the status of prejudicial error").

[4] {¶ 39} Accordingly, we reaffirm that in the case of a "serious offense" as defined by Crim.R. 2(C), when a criminal defendant elects to proceed pro se, the trial court must demonstrate substantial compliance with Crim.R. 44(A) by making a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel. *Gibson*, 45 Ohio St.2d 366, 74 O.O.2d 525, 345 N.E.2d 399, paragraph two of the syllabus. If substantial compliance is demonstrated, then the failure to file a written waiver is harmless error.

[5] {¶ 40} "To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Id.* at 377, 74 O.O.2d 525, 345 N.E.2d 399, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 68 S.Ct. 316, 92 L.Ed. 309.

[39]{¶ 41} The state contends that Martin waived his right to counsel by filing the motion "for respective counsel and co-counsel." However, this was filed before any of the discussions concerning the self-representation issue. Therefore, this pro se motion clearly cannot amount to a waiver of Martin's right to counsel, and we must consider whether Martin was adequately advised of the perils of self-representation.

[6] {¶ 42} Although Martin certainly made statements to the effect that he would like to actively participate in his defense, never did he unequivocally state that he wished to waive his right to counsel. In fact, when the trial court informed him that if he wanted to represent himself he could, Martin responded, "I want to be a part of that defense. I don't want to be

assigned." When the trial court asked Martin if it was his intention to act as his own lawyer, again Martin responded, "No, it is not, but that's my intention to participate as to doing all that I can to protect my rights as a citizen." Again, after the court informed Martin that he was placing his attorneys in an awkward position, the court asked, "So, it sounds like you want to be your own attorney, sir?" Martin replied for a third time, "That's not what I'm asking of the Court."

{¶ 43} The trial court cautioned Martin at times that it would be best if Martin were represented by counsel ("I would caution you against abandoning your lawyers but that's your choice"). But the court did not adequately explain the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses, mitigation, or other facts essential to a broad understanding of the whole matter, per *Von Moltke*, 332 U.S. at 724, 68 S.Ct. 316, 92 L.Ed. 309, and *Gibson*, 45 Ohio St.2d at 377, 74 O.O.2d 525, 345 N.E.2d 399.

{¶ 44} We therefore conclude that Martin was not "made aware of the dangers and disadvantages of self-representation" so that the record established that "he [knew] what he [was] doing and his choice [was] made with eyes open." *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525, 45 L.Ed.2d 562, quoting *Adams v. United States ex rel. McCann*, 317 U.S. at 279, 63 S.Ct. 236, 87 L.Ed. 268. If the court had properly complied with these requirements and had clearly advised Martin that he had no right to be "co-counsel" and that his only choices were to proceed pro se or with counsel, Martin may have made a different choice.

{¶ 45} The trial court failed to substantially comply with Crim.R. 44(A) by failing to make a sufficient inquiry to determine whether Martin fully understood and intel-

ligerly relinquished his right to counsel. *Gibson*, 45 Ohio St.2d 366, 74 O.O.2d 525, 345 N.E.2d 399, paragraph two of the syllabus. Thus, we hold that Martin did not knowingly and intelligently forgo the benefits of counsel as envisioned by *Gibson*, *Faretta*, and Crim.R. 44(A). Accordingly, we affirm the judgment of the court of appeals, remanding the cause for a new trial consistent with this opinion.

Judgment affirmed.

RESNICK, FRANCIS E. SWEENEY, SR., PFEIFER, O'CONNOR and O'DONNELL, JJ., concur.

MOYER, C.J., concurs in judgment only.

MOYER, C.J., concurring in judgment only.

{¶ 46} I concur in the judgment rendered by the majority but write separately for the reasons that follow. I agree with the majority that the trial court did not make a sufficient inquiry to determine whether Martin fully understood and intelligently relinquished his right to counsel as required by both the federal and Ohio Constitutions and Crim.R. 44(A). I do not agree with the majority's implication that it is possible for a trial court to substantially comply with Crim.R. 44¹ in "serious offense" cases where it fails to obtain a waiver of counsel in writing. Rather,

1. {¶ a} Crim.R. 44 states:

{¶ b} "(A) Counsel in serious offenses

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

{¶ d} " * * *

{¶ e} "(C) Waiver of counsel shall be in open court and the advice and waiver shall be

Crim.R. 52² and relevant case law provide the standards for determining whether trial court error requires reversal of a conviction. In my view, determination of whether Martin's conviction should be reversed and the cause remanded for a new trial due to noncompliance with Crim.R. 44(C) should be made pursuant to those standards rather than pursuant to a substantial-compliance analysis.

{¶ 47} The majority correctly observes that the written-waiver requirement of Crim.R. 44(C) is not a constitutional requirement. Citing our precedent in *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474, and *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 5 O.O.3d 52, 364 N.E.2d 1163, it concludes that "trial courts need demonstrate only substantial compliance" with Crim.R. 44. I acknowledge that paragraph two of the syllabus of the majority opinion is consistent with our precedent in *Nero* and *Stewart*. Nevertheless, I believe that those cases should be disaffirmed to the extent that they hold that compliance with a Criminal Rule occurred when in fact there was a clear lack of compliance with an express mandatory component of the rule.

I

Determination of the Existence of Error

{¶ 48} Crim.R. 44(C) is clear. It provides: "Waiver of counsel shall be in open

recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing."

2. {¶ a} Crim.R. 52 provides:

{¶ b} "(A) Harmless error

{¶ c} "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

{¶ d} "(B) Plain error

{¶ e} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing." (Emphasis added.) This court has consistently held that when a statute or rule uses the word "shall," the prescription is not advisory; rather, it is mandatory. See *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 36; *State v. Campbell* (2000), 90 Ohio St.3d 320, 324-325, 738 N.E.2d 1178; *State v. Golphin* (1998), 81 Ohio St.3d 543, 545-546, 692 N.E.2d 608. In adopting Crim.R. 44(C), this court chose the word "shall" three times. We should not deem as advisory in nature such a clear mandate.

{¶ 49} The purpose of Crim.R. 44 is to ensure that a defendant's Sixth Amendment rights are protected. Crim.R. 44(A) requires a waiver of the right to counsel to be knowing, intelligent, and voluntary. This language reflects the constitutional standard established in *Faretta v. California* (1975), 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562, that "in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits," quoting *Johnson v. Zerbst* (1938), 304 U.S. 458, 464-465, 58 S.Ct. 1019, 82 L.Ed. 1461. Crim.R. 44(C), however, adds a procedural layer of protection by requiring that a waiver be in writing. This is an additional safeguard not mandated by the Constitution. In my view, error occurs if compliance is lacking with either Crim.R. 44(A) or (C).

{¶ 50} The majority devotes most of its analysis to the consideration whether Martin made a knowing, intelligent, and voluntary waiver. That inquiry is relevant to the determination whether the trial court complied with Crim.R. 44(A). Only briefly does the majority mention the undisputed fact that Martin never executed a written waiver as required by Crim.R. 44(C). The majority thereby implies that substantial

compliance with Crim.R. 44(A) is equivalent to substantial compliance with Crim.R. 44 as a whole. In so doing, the majority implies that trial courts need not do what is expressly required by Crim.R. 44(C)—obtain a waiver in writing. Left unchallenged, this implication may potentially result in further erosion of the express requirements of the Rules of ¹³⁹⁶Criminal Procedure and ultimately lessen the probability that criminal defendants receive the full protection of constitutional and procedural law. The Rules of Criminal Procedure should not be reduced to mere malleable guidelines. Failure of a trial court to obtain a written waiver in a "serious offense" case is simply noncompliance with Crim.R. 44(C) and constitutes trial-court error.

II

Determination of Reversibility of Error

{¶ 51} As I have stated, the failure of a trial court to comply with a legal rule should be analyzed according to established error analysis embodied in Crim.R. 52 and relevant case law. As we recently explained in *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, Crim.R. 52 empowers appellate courts to correct trial-court error in two situations. First, if a defendant objected to an error at trial, the appellate court considers, pursuant to Crim.R. 52(A), whether the error was harmless. Under a harmless-error inquiry, the state has the burden of proving that the error did not affect the substantial rights of the defendant. Whether the defendant's substantial rights were affected depends on whether the error was prejudicial, i.e., whether the error affected the outcome of the trial. Prejudicial error mandates reversal of the trial court. If the state proves that the error was not prejudicial, the error is said to have been harmless, and the appellate court will not correct it. *Id.* at ¶ 15.

{¶ 52} When a defendant did not object to an error at trial, the appellate court uses Crim.R. 52(B) to determine whether there was plain error. *Id.* at ¶ 14. As we explained in *Perry*, under Crim.R. 52(B), the defendant has the burden of proof. *Id.* Correction of plain error involves three questions and, if appropriate, the exercise of discretion by the appellate court. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240. The defendant must first show that the trial court erred by failing to comply with a legal rule. *Id.* The defendant then must demonstrate that the error was plain, i.e., obvious. *Id.* Finally, the defendant must show that the error affected his substantial rights. *Id.* Even if the defendant establishes that plain error affected his substantial rights, the appellate court need not necessarily reverse the judgment of the trial court. In fact, courts are warned to “notice plain error ‘with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.’” *Id.*, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph three of the syllabus.

{¶ 53} There is also a third category of error, known as structural error. Certain constitutional defects disturb the basic framework within which a trial is conducted and “permeate [t]he entire conduct of the trial from beginning to end” so that the trial cannot “reliably serve its function as a vehicle for determination [of] guilt or innocence.”” *Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 17, quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 309 and 310, 111 S.Ct. 1246, 113 L.Ed.2d 302, quoting *Rose v. Clark* (1986), 478 U.S. 570, 577-578, 106 S.Ct. 3101, 92 L.Ed.2d 460. Structural error affects the substantial rights of a criminal defendant, even absent a specific showing that the outcome of the trial would have been different, and requires automatic reversal.

Because a defendant is relieved of his burden to show prejudice, the finding of structural error is rare and limited to exceptional cases. *Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 18, citing *Johnson v. United States* (1997), 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718. Among the types of error that have been held to be structural is a total denial of counsel to a criminal defendant. *Id.* at 469, 117 S.Ct. 1544, 137 L.Ed.2d 718, citing *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.

{¶ 54} The trial court did not make a sufficient inquiry to determine whether Martin fully understood and intelligently relinquished his right to counsel as required by both the federal and Ohio Constitutions and Crim.R. 44(A). I conclude that this error was structural error and that Martin’s conviction must therefore be reversed.

{¶ 55} The presence and limited involvement of standby counsel does not negate the fact that Martin was forced to conduct much of his own defense and was instructed by the trial court that he was to represent himself. This is not a case where counsel was absent, without a waiver, for only a very limited portion of the trial. The trial court’s noncompliance with Crim.R. 44(A) was an error that permeated the basic framework of Martin’s entire trial. Accordingly, the trial court’s noncompliance with Crim.R. 44(A) was structural error. *Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 17.

{¶ 56} The failure of the trial court to procure a written waiver of Martin’s right to counsel was an obvious deviation from Crim.R. 44(C). Because Martin did not object to noncompliance with Crim.R. 44(C) at trial, however, he forfeited all but plain error. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 49.

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In the instant case, because the failure of the trial court to comply with Crim.R. 44(A) was structural error, it is not necessary to determine whether the failure to obtain a written waiver of the right to counsel is plain error, and if so, reversible error.

III

Conclusion

{¶ 57} The trial court failed to obtain a knowing, intelligent, and voluntary waiver, thus materially affecting the integrity of Martin's trial. Although I am ¹⁹⁹⁸not able to concur in its opinion, I concur in the majority's judgment affirming the judgment of the court of appeals and remanding the cause for a new trial.



103 Ohio St.3d 398
2004-Ohio-5466

**CINCINNATI GAS & ELECTRIC
COMPANY, Appellant,**

v.

**PUBLIC UTILITIES COMMISSION
OF OHIO, Appellee.**

No. 2003-2034.

Supreme Court of Ohio.

Submitted May 25, 2004.

Decided Oct. 27, 2004.

Background: Electric distribution company filed application to modify its retail electric and certified supplier tariffs, which sought approval of new services for governmental aggregators and new requirements for certified suppliers in its service territory. The Public Utilities Commission issued order requiring company to provide governmental aggregator with customer information, and company appealed.

Holdings: The Supreme Court held that:

- (1) PUC's order was not a final, appealable order that produced prejudice or harm to company, and
- (2) company's compliance with PUC directives to provide governmental aggregator with customer information rendered issue of reasonableness and lawfulness of those directives moot.

Appeal dismissed.

Pfeifer, J., filed a dissenting opinion.

1. Public Utilities ⇌190

An interim order on appeal in a pending Public Utilities Commission (PUC) proceeding will not be considered by the Supreme Court. R.C. § 4903.13.

2. Public Utilities ⇌191, 192

Timeliness, as well as an effect on substantial rights, is necessary for a valid appeal in a pending Public Utilities Commission (PUC) proceeding.

3. Electricity ⇌11.3(7)

Order of Public Utilities Commission (PUC) requiring electric distribution company to comply with an administrative rule and to provide governmental aggregator with customer information, in connection with company's application to modify its retail electric and certified supplier tariffs, was not a final, appealable order that produced prejudice or harm to company. R.C. § 4903.13; OAC 4901:1-10-32(A).

4. Electricity ⇌11.3(7)

Electric distribution company's compliance with Public Utilities Commission's (PUC) directives, requiring company to comply with an administrative rule and provide governmental aggregator with customer information, rendered issue of reasonableness and lawfulness of those directives moot, in connection with proceed-

164 Ohio App.3d 228
2005-Ohio-5779

The STATE of Ohio, Appellee,

v.

CLINE, Appellant.

No. 2002-CA-5.

Court of Appeals of Ohio,
Second District, Champaign County.

Decided Oct. 28, 2005.

Background: Pro se defendant was convicted in the Court of Common Pleas, Champaign County, of multiple counts of unauthorized use of a computer, menacing by stalking, conspiracy to commit aggravated arson, criminal mischief, intimidation of a crime witness, and telecommunications harassment. Defendant appealed. The Court of Appeals reversed and remanded. State appealed. Granting review, the Supreme Court, 103 Ohio St.3d 471, 816 N.E.2d 1069, reversed and remanded.

Holding: Upon remand, the Court of Appeals, Fain, J., held that the trial court did not substantially comply with the requirements for waiver of counsel.

Judgment accordingly.

1. Criminal Law ⇨641.4(4)

Trial court did not substantially comply with the requirements for waiver of counsel, even it thoroughly explained to defendant why it might not be in his best interest to forgo assigned counsel and represent himself, where the court failed to explain to defendant the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses, mitigation, or other facts essential to a broad understanding of the case. Rules Crim.Proc., Rule 44(A, C).

2. Criminal Law ⇨641.4(2)

Even though a trial court may substitute substantial compliance for literal compliance with regard to waiver of counsel, it is still the obligation of the trial court, personally, to determine whether a defendant is electing to represent himself, and waive his right to counsel, with a sufficiently broad understanding of the possible consequences to render his decision a knowing, intelligent relinquishment of the right. Rules Crim.Proc., Rule 44(A, C).

Nick A. Selvaggio, Champaign County
Prosecuting Attorney, for appellee.

Virginia L. Crews, for appellant.

FAIN, Judge.

[¶1] This appeal of defendant-appellant, James M. Cline, from his conviction and sentence on multiple counts has been remanded to this court after our initial judgment, rendered on September 5, 2004, was reversed by the Ohio Supreme Court in *State v. Cline*, 103 Ohio St.3d 471, 2005-Ohio-5701, 816 N.E.2d 1069, reversed 2003-Ohio-4712. The opinion of the Ohio Supreme Court was based upon its reversal decision in *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 229, in which it held that it is not necessary to comply literally with the requirements of Crim.R. 44(C) that the right to counsel be waived in writing—that substantial compliance with the requirement of the rule is sufficient.

[¶2] We have applied the concept of substantial compliance set forth in *State v. Martin* to the facts in the record in this case, and we conclude that the trial court did not substantially comply with the requirements for waiver of counsel.

in Crim.R. 44(C). Accordingly, the judgment of the trial court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

I

{¶ 3} The facts, as set forth in our earlier opinion rendered on September 5, 2003, are as follows:

{¶ 4} "In the past Cline was convicted of harassing women who had declined to pursue relationships with him, and the trial court ordered probation. However, his probation was later revoked, and Cline was sent to prison. After his release, Cline embarked upon a series of actions that resulted in the charges contained in the two indictments involved in this case.

{¶ 5} "Between December, 1999, and the beginning of 2000, Cline met Robin Ra-book, Betty Jean Smith, and Sonja Risner in internet chat rooms. After several dates with each of the three women, they declined further contact with him. As a result, Cline began to harass the women by e-mail and by telephone, at all hours of the day and night. In an apparent attempt to take revenge against the three women, Cline used his knowledge of computers and the internet, along with the women's personal information, to create havoc in their personal lives. For example, Cline locked the women out of their internet accounts, and he scheduled dates with the women, unbeknownst to them. He used their names to send vulgar messages to others, and he sent vulgar messages about the women to others.

{¶ 6} "Cline also stalked Sonja. In September, 2000, Cline solicited the assistance of another woman whom he met on the internet to burn down the house where Sonja lived. That woman, Gina White, told Sonja of sabotage to her car, and a mechanic found a mothball in the gas tank. Cline also began an intensive program of

telephone harassment of Sonja. He called her repeatedly at home, and after she changed her number, he called her at work. He then began to call people all over Urbana trying to get Sonja's new phone number. Cline also ordered magazine subscriptions in her name, caused deliveries to be made to her home, advised realtors that she wanted to sell her home, and arranged to have her car towed. Cline gave Sonja's work number to many people, encouraging them to call her there. During a two-month period, Cline made over 3,000 phone calls.

{¶ 7} "While Cline was in jail in Indiana awaiting extradition to Ohio, he began writing Sonja's personal information and physical description in books in the jail, and encouraging prisoners to write to her, which several of them did. During this time, Cline continued to pursue plans to burn down her house." 2003-Ohio-4712 at ¶ 4-7.

{¶ 8} Cline was charged with multiple counts of unauthorized use of a computer, menacing by stalking, conspiracy to commit aggravated arson, criminal mischief, intimidation of a crime witness, and telecommunications harassment, having previously been convicted of telecommunications harassment. After the voir dire of the jury, Cline moved to represent himself. The trial judge told Cline that he didn't think that was a good idea, but ultimately permitted him to represent himself at the trial, although the attorney who had been assigned to represent him was required to remain available, during the trial, for consultation at Cline's initiative. Cline represented himself vigorously during the trial.

{¶ 9} At the end of the state's case, seven of the counts were dismissed at the state's motion. The jury acquitted Cline of two counts, but convicted him on a total of 76 counts. He was sentenced to a total

of 67 1/2 years, out of a possible maximum of 87 years. From his conviction and sentence, this appeal was taken.

{¶ 10} In our original decision, we concluded that because Cline's waiver of his right to counsel had not been in writing, as required by Crim.R. 44(C), his conviction and sentence, on all counts, had to be reversed, with the cause to be remanded. Cline had assigned a number of other errors. We treated all but two of these as moot, in view of our disposition of his [231] assignment of error involving the waiver of his right to counsel. One of the two assignments of error that we did address was a speedy-trial issue. We overruled that assignment of error. The other assignment of error asserted insufficient evidence. We sustained that assignment of error in part, concluding that there was insufficient evidence, as a matter of law, to convict Cline on one count of menacing by stalking and ordered him discharged as to that offense. We overruled the assignment of error in all other respects, concluding that there was sufficient evidence to support Cline's other convictions.

{¶ 11} The state perfected an appeal of our judgment to the Ohio Supreme Court, which reversed our judgment and remanded the cause to us. *State v. Cline*, 103 Ohio St.3d 471, 2004-Ohio-5701, 816 N.E.2d 1069. Cline's appeal is again before us pursuant to the mandate of the Ohio Supreme Court.

II

[1] {¶ 12} Cline's first assignment of error is as follows:

{¶ 13} "The trial court erred by allowing appellant to proceed pro se without executing a written waiver to the right to counsel."

{¶ 14} Crim.R. 44(C) provides:

{¶ 15} "Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing."

{¶ 16} A serious offense is defined as any felony and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months. Crim.R. 2(C). The state has never disputed the application of Crim.R. 44(C) in this case.

{¶ 17} In reversing our original judgment on appeal, the Ohio Supreme Court cited, without further comment, *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, a decision it had rendered just two weeks before its decision in this case. In *Martin*, the Supreme Court held that although Crim.R. 44(C) requires that the waiver of the right to counsel, in the case of a serious offense, be in writing, literal compliance with this requirement is not necessary—substantial compliance with the rule will suffice. *Id.*, at 392, 816 N.E.2d 227. The court held that "when a criminal defendant elects to proceed pro se, the trial court must demonstrate substantial compliance with Crim.R. 44(A) by making a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel." *Id.*

{¶ 18} In describing the warnings Martin had received, the court stated:

{¶ 19} "The trial court cautioned Martin at times that it would be best if Martin were represented by counsel ('I would caution you against abandoning your lawyers but that's your choice'). But the court did not adequately explain the nature of the charges, the statutory offenses included within them, the range [232] of allowable punishments, possible defenses, mitigation, or other facts essential to a broad understanding of the whole matter, per *Von*

Molke [v. Gillies (1948)], 332 U.S. [708] at 724, 68 S.Ct. 316, 92 L.Ed. 309, and [*State v. Gibson*, 45 Ohio St.2d [366] at 377, 74 O.O.2d 525, 345 N.E.2d 399." *Id.*, at 393, 816 N.E.2d 227.

{¶ 20} The Ohio Supreme Court concluded that because of these and other deficiencies, "[t]he trial court failed to substantially comply with Crim.R. 44(A) by failing to make a sufficient inquiry to determine whether Martin fully understood and intelligently relinquished his right to counsel." *Id.*

{¶ 21} In the case before us, as in *State v. Martin*, the trial judge commendably attempted to persuade Cline that he was making a mistake by seeking to represent himself. The colloquy between Cline and the trial judge is worth setting out herein, since the sufficiency of that colloquy under *Martin* is the issue. Assigned counsel had just informed the trial court that his client wanted to represent himself. The following colloquy ensued:

{¶ 22} "THE COURT: Excuse me, what we are discussing now is whether you want to represent yourself.

{¶ 23} "DEFENDANT CLINE: Yes, sir.

{¶ 24} "THE COURT: Do you understand that if I authorize you to represent yourself that you're held to the same standard as attorneys would be in the types of questions that you can ask and the things that you can do?

{¶ 25} "DEFENDANT CLINE: Yes, sir. Although I know that is confusing matters, since I'm not, per se, a lawyer, I have no, you know, legal background, no education other than a business law class in law. That is the only thing I had for education for law.

{¶ 26} "THE COURT: There are a number of people who believe they want to represent themselves, but the basic rule is

if they do they're held to the same standards.

{¶ 27} "DEFENDANT CLINE: I'm sure if I went outside your standards or guidelines, then you or someone in here would correct me on that. Right?

{¶ 28} "THE COURT: That is true.

{¶ 29} "DEFENDANT CLINE: Fine.

{¶ 30} "THE COURT: And you believe that that is the most effective way for your case to be presented is for you to be the attorney?

{¶ 31} "DEFENDANT CLINE: Well, as me and Mr. Feinstein have not gotten along, and there is a motion right here that—it was for Case Number 2001CR-87, State of Ohio versus Patrick Davidson, it was a motion that was filed by Richard Nau, all right, for a motion to disclose exculpatory evidence.

{¶ 32} "Now I wrote him and said, why can't we file this motion? And he says, we don't need to.

{¶ 33} "So then I turn around and I rewrote in my own handwriting and submitted it to you for a sustained or other ruling, which I believe it was sustained.

{¶ 34} "So that was part of my reason was why isn't he filing motions because in several of your journal entries he was saying—you were saying, rather, that the Defendant may file anything within the Criminal Rule guidelines. And I kept saying to myself, why isn't he doing said things?

{¶ 35} "And on the November 29 meeting you had asked him for his version of the time computation versus what the prosecution had submitted to you, and he didn't submit. He submitted my own calculations and he just said, I agree with him. And I felt that he should have come up with something a little more extravagant than that to present to yourself.

interests of the individual in any given situation whereas the lawyer might be able to present a different demeanor in presenting issues through witnesses and through evidence.

{¶ 69} "DEFENDANT CLINE: All right.

{¶ 70} "THE COURT: Were there other questions?

{¶ 71} "DEFENDANT CLINE: Not that I'm aware of.

{¶ 72} "THE COURT: Then it's time for the decision.

{¶ 73} "DEFENDANT CLINE: Well, if you're asking me do I want to represent myself, I would say yes.

{¶ 74} "THE COURT: All right. The legal phrase is pro se, it means for self."

{¶ 75} From this point forward, Cline represented himself at his trial, although his previously assigned counsel remained present to respond to Cline's inquiries.

{¶ 76} As we noted in our prior decision, the trial judge did a commendable job of explaining to Cline why it might not be in his best interest to forgo assigned counsel and represent himself. But missing from the colloquy were those explanations, deemed essential in *State v. Martin*, of "the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses, mitigation, or other facts essential to a broad understanding of the whole matter." Id., 103 Ohio St.3d at 393, 816 N.E.2d 227.

[2] {¶ 77} The state argues that Martin's previous offenses gave him a familiarity with criminal law and procedure, so that the trial court was not required to engage in the colloquy envisioned by *State v. Martin*. We are not persuaded. These were complex charges, with possibly complex defenses. And even though the trial court may substitute substantial compli-

ance with Crim.R. 44(A) for literal compliance, it is still the obligation of the trial court, personally, to determine whether a criminal defendant is electing to represent himself, and waive his right to counsel, with a sufficiently broad understanding of the possible consequences to render his decision a knowing, intelligent relinquishment of the right.

{¶ 78} Because we conclude that the trial court erred by accepting Cline's waiver of his right to counsel, and exercise of his right to represent himself, without substantial compliance with the requirements of Crim.R. 44, his first assignment of error is sustained.

III

{¶ 79} Cline's second, third, fourth, fifth, and sixth assignments of error are as follows:

{¶ 80} "The trial court erred by refusing to grant appellant a new trial where a juror was a convicted felon.

{¶ 81} "The trial court erred in sentencing appellant to consecutive terms of incarceration by failing to make required findings and statements required pursuant to O.R.C. 2929.14 and 2929.19.

{¶ 82} "The trial court erred and abused its discretion by sentencing appellant to a disproportionate sentence.

{¶ 83} "The trial court erred by imposing a sentence upon appellant in violation of the Eighth Amendment's prohibition on cruel and unusual punishment and Article I, § 9 of the Ohio Constitution.

{¶ 84} "The trial court erred because appellant's convictions were against the manifest weight of the evidence."

{¶ 85} These assignments of error correspond to the first, third, fourth, fifth, and eighth assignments of error set forth in Cline's original brief in this appeal, be-

fore the present remand from the Ohio Supreme Court. We treated all these assignments of error as moot in view of our disposition of his second assignment of error in that brief, which corresponds to his first assignment of error in this brief.

{¶ 86} The mandate of the Ohio Supreme Court is set forth in its opinion in this case, which, in its entirety, is as follows: "The judgment of the court of appeals is reversed and the cause is remanded to that court for proceedings consistent with *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, and for consideration of other assignments of error." *State v. Cline*, 103 Ohio St.3d 471, 2004-Ohio-5701, 816 N.E.2d 1069. We construe that mandate as requiring us to reconsider the other assignments of error as necessary to render a complete disposition of this appeal, since the Supreme Court's reversal of our initial disposition created the possibility that those other assignments of error might no longer be moot.

{¶ 87} Because we are sustaining Cline's first assignment of error, we still regard the other assignments of error he asserts in the brief that is presently before us as being moot. Accordingly, his second, third, fourth, fifth, and sixth assignments of error are all overruled as moot.

IV

{¶ 88} In Cline's original brief in this appeal, before the remand from the Ohio Supreme Court, he included the following two assignments of error (the sixth and seventh assignments of error in that brief):

{¶ 89} "The trial court erred by failing to dismiss the case because the state did not bring defendant to trial within the time limits set forth in Ohio Revised Code 2945.71 et seq.

{¶ 90} "Appellant's convictions were not supported by sufficient evidence."

{¶ 91} We did not treat these assignments of error as moot. The first of these two assignments of error we overruled on its merits. The second we sustained in part and overruled in part, holding that there was insufficient evidence to support Cline's conviction for menacing by stalking under Count 6 of the indictment (one of two menacing-by-stalking counts of which Cline was convicted), because neither he nor anyone acting in concert with him trespassed upon the victim's property, an essential element of that offense. We ordered Cline discharged as to that offense. With respect to all of Cline's other convictions, we found sufficient evidence in the record; therefore, this assignment of error was overruled to the extent that it applied to those other convictions.

{¶ 92} Cline has not reasserted these assignments of error from his original brief in this appeal, before this cause was remanded from the Ohio Supreme Court. Neither has the state, in its current brief, sought to revisit these assignments of error. In its mandate, the Ohio Supreme Court was not specific in its command "for consideration of other assignments of error." We take it that neither Cline nor the State regards this court as being under any obligation to revisit its disposition of these two assignments of error. Neither are we under the impression that we are so obligated.

{¶ 93} If we were obligated to revisit these assignments of error from Cline's original brief, before the remand of this cause from the Ohio Supreme Court, neither party has given us any basis to reconsider our prior disposition of these assignments of error.

{¶ 94} Our disposition of these assignments of error, set forth in Parts IV and V of our opinion rendered September 5, 2003, is incorporated in this opinion, as if fully rewritten herein.

94-15-71

Ohio Supreme Court (1995)

STATE EX REL. HECK v. KESSLER

Ohio 793

Cite as 647 N.E.2d 792 (Ohio 1995)

mus, and (2) reversal of Court of Appeals' decision finding that Ethnic Intimidation Act was unconstitutionally vague resolved vagueness issue and did not permit trial judge on remand to dismiss ethnic intimidation charges based on Court of Appeals' judgment.

Writs granted in part and dismissed in part.

1. Mandamus ⇨4(3)

Mandamus may not be employed as substitute for appeal from interlocutory order.

2. Criminal Law ⇨1023(3), 1072

State has right to appeal even interlocutory orders in criminal case by leave of Court of Appeals. R.C. § 2945.67.

3. Mandamus ⇨4(1)

Generally, availability of discretionary appeal is adequate remedy that will preclude writ of mandamus.

4. Mandamus ⇨4(1)

Prohibition ⇨3(2)

Extraordinary remedies like mandamus and prohibition may not be employed before trial on merits as substitute for appeal for purpose of reviewing mere errors or irregularities in proceedings of court having proper jurisdiction.

5. Mandamus ⇨4(1)

In cases where lower court refuses to follow superior court's mandate, appeal is inadequate remedy, in determining whether mandamus relief is available.

6. Mandamus ⇨4(4)

Availability of appeal for state from judge's decision dismissing ethnic intimidation charge against defendant and ordering defendant to stand trial on underlying aggravated menacing charge did not preclude the prosecutor's action for writ of mandamus to compel judge to comply with mandate on prior appeal, remanding case for new trial based on determination that Ethnic Intimidation Act was constitutional; to hold otherwise could lead to result of lower court perpetually refusing superior court's man-

date, necessitating repeated ineffective appeals. R.C. § 2927.12.

7. Mandamus ⇨28

Writ of mandamus will not issue to control judicial discretion, even if that discretion is abused.

8. Criminal Law ⇨1192

Absent extraordinary circumstances, such as intervening decision by Supreme Court, inferior court has no discretion to disregard mandate of superior court in prior appeal in same case.

9. Courts ⇨109 —

Syllabus of opinion issued by Supreme Court of Ohio states law of the case and, as such, all lower courts in state are bound to adhere to principals set forth therein.

10. Courts ⇨109 ¶1

It is generally improper for lower court to determine that syllabus of Ohio Supreme Court opinion is obiter dictum.

11. Extortion and Threats ⇨25.1

Supreme Court's determination that Ethnic Intimidation Act was constitutional was not limited to attacks based upon free speech. R.C. § 2927.12.

12. Criminal Law ⇨1192 —

Supreme Court's reversal of Court of Appeals' decision finding that Ethnic Intimidation Act was unconstitutionally vague resolved vagueness issue and did not permit trial judge on remand to dismiss ethnic intimidation charges based on Court of Appeals' judgment. R.C. § 2927.12.

13. Prohibition ⇨1

Relators seeking writ of prohibition must establish that: judge is about to exercise judicial or quasi-judicial powers; exercise of that power is unauthorized by law; and denying writ will result in injury for which no other adequate remedy exists in ordinary course of law.

14. Prohibition ⇨3(4)

Availability of appeal from order dismissing ethnic intimidation charges did not preclude extraordinary relief on petition for writ of prohibition, where trial judge's brief

responding to petition did not specifically respond to prohibition claim.

15. Criminal Law ◊1192

In addition to lacking discretion to depart from superior court's mandate, inferior court also lacks jurisdiction to do so.

In cases arising from separate incidents, James B. May, Jr. and Mark J. Staton were charged with ethnic intimidation, R.C. 2927.12, predicated on aggravated menacing. Respondent, Judge John W. Kessler of the Montgomery County Court of Common Pleas, granted May's and Staton's motions to dismiss the indictments on the basis that R.C. 2927.12 is unconstitutionally vague, in violation of Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution because (1) the "by reason of" phrase used in R.C. 2927.12 describes no statutorily cognizable mental state as required by R.C. 2901.21 for an element of the offense, and (2) the language of R.C. 2927.12 does not sufficiently specify the relationship of the race, etc. of the other "person or group of persons" to the actor or victim. The Court of Appeals for Montgomery County affirmed Judge Kessler's dismissal of the ethnic intimidation charges on the basis that R.C. 2927.12 is unconstitutionally vague. However, the court of appeals further held that Judge Kessler erred in dismissing the underlying aggravated menacing charges. The court of appeals certified its judgment as being in conflict with the judgment of the Court of Appeals for Delaware County in *State v. Wyant* (Dec. 6, 1990), Delaware App. No. 90-CA-2, unreported, 1990 WL 200270.

The *May* and *Staton* cases were consolidated with other ethnic intimidation cases in this court, and in *State v. Wyant* (1992), 64 Ohio St.3d 566, 597 N.E.2d 450 ("*Wyant I*"), at syllabus, R.C. 2927.12 was held to "create a 'thought crime,' in violation of Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution." We affirmed the judgment of the court of appeals dismissing May's and Staton's ethnic intimidation charges and remanding the causes to

Judge Kessler to proceed on the underlying aggravated menacing charges. In so holding, we did not reach constitutional challenges to R.C. 2927.12 based on vagueness, equal protection, due process, and overbreadth. *Wyant I*, *supra*, at 579-580, 597 N.E.2d at 459.

The cases in *Wyant I*, including *May* and *Staton*, were remanded to this court by the Supreme Court of the United States for the purpose of "further consideration in light of *Wisconsin v. Mitchell*, 508 U.S. — [113 S.Ct. 2194, 124 L.Ed.2d 436] (1993)." See (1993), 509 U.S. —, 113 S.Ct. 2954, 125 L.Ed.2d 656. In *State v. Wyant* (1994), 68 Ohio St.3d 162, 624 N.E.2d 722 ("*Wyant II*"), we vacated *Wyant I* and held in the syllabus that "R.C. 2927.12, the Ohio Ethnic Intimidation Act, is constitutional under the United States and Ohio Constitutions." In this court's mandate, as to *May* and *Staton*, it was ordered that "the judgment of the court of appeals is reversed and the cause is remanded for a new trial consistent with the opinion rendered herein."

Although *May* and *Staton* did not file a motion for rehearing, this court *sua sponte* denied rehearing. Other defendants in *Wyant II* filed motions for rehearing, which argued, in part, that this court had not decided other constitutional issues raised regarding R.C. 2927.12, including the vagueness claim. We overruled the motions.

On remand from this court, *May* and *Staton* filed motions to dismiss the ethnic intimidation charges. On June 30 and July 1, 1994, Judge Kessler dismissed those charges and further ordered that the cases be set for trial on the underlying aggravated menacing charges. The state appealed Judge Kessler's dismissal orders, and on September 6, 1994, Judge Kessler vacated the scheduled trial dates for *May* and *Staton* and stayed all proceedings pending resolution of the state's appeal.

On August 23, 1994, relators, Montgomery County Prosecuting Attorney Mathias H. Heck, Jr., and then-Ohio Attorney General Lee Fisher, filed a complaint in this court seeking (1) a writ of mandamus ordering Judge Kessler to vacate his June 30 and July

1, 1994 decision on the ethnic writ of prohibition from requiring *May* and *Staton* to pay charges. Or Judge Kessler ordered an alternative for Montgomery state to appeal later stayed pending the this court. (request for

The cause consideration submitted ev

Mathias H. Pros. Atty., Pros. Atty., Gen., and S Counsel, for

David H. and Susan C for responde

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Initially, re and that the cordingly, the for extraordinary as moot. Th to *May*, deferring criminal c sler.

[1, 2] As t damus, relator right to have ethnic intimid clear legal du and the absce remedy at l *Wilkinson* (19 N.E.2d 1128, employed as interlocutory *Cuyahoga Cty bate Div.* (19 N.E.2d 1005, 2731.05. The even interloc

Cite as 647 N.E.2d 792 (Ohio 1995)

1, 1994 decisions and set the matter for trial on the ethnic intimidation charges, and (2) a writ of prohibition preventing Judge Kessler from requiring the state to proceed against May and Staton on the aggravated menacing charges. On October 19, 1994, we overruled Judge Kessler's motion to dismiss and granted an alternative writ. The Court of Appeals for Montgomery County granted leave to the state to appeal Judge Kessler's decisions, but later stayed further appellate proceedings pending the outcome of relators' action in this court. On January 18, 1995, we denied a request for oral argument.

¹⁰⁰The cause is now before this court for a consideration of the parties' arguments and submitted evidence.

Mathias H. Heck, Jr., Montgomery County Pros. Atty., and Carley J. Ingram, Asst. Pros. Atty., Betty D. Montgomery, Atty. Gen., and Simon B. Karas, Deputy Chief Counsel, for relators.

David H. Bodiker, Ohio Public Defender, and Susan Gellman, Asst. Public Defender, for respondent.

PER CURIAM.

Initially, relators note that Staton has died and that the action is moot as to him. Accordingly, that portion of relators' complaint for extraordinary relief is properly dismissed as moot. The following discussion is limited to May, defendant in the remaining underlying criminal case pending before Judge Kessler.

[1, 2] As to their claim for a writ of mandamus, relators must establish a clear legal right to have Judge Kessler try May on the ethnic intimidation charge, a corresponding clear legal duty on the part of Judge Kessler, and the absence of a plain and adequate remedy at law. *State ex rel. Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 490, 633 N.E.2d 1128, 1129. Mandamus may not be employed as a substitute for appeal from an interlocutory order. *State ex rel. Horwitz v. Cuyahoga Cty. Court of Common Pleas, Probate Div.* (1992), 65 Ohio St.3d 323, 328, 603 N.E.2d 1005, 1009; see, generally, R.C. 2731.05. The state has the right to appeal even interlocutory orders in a criminal case

by leave of the court of appeals pursuant to R.C. 2945.67. *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 438-439, 639 N.E.2d 83, 96-97. The Court of Appeals for Montgomery County granted leave for the state to appeal in May's criminal case.

[3, 4] Generally, the availability of a discretionary appeal is an adequate remedy that will preclude a writ of mandamus. *State ex rel. Birdsall v. Stephenson* (1994), 68 Ohio St.3d 353, 356, 626 N.E.2d 946, 949. In other words, extraordinary remedies like mandamus and prohibition may not be employed before trial on the merits as a substitute for appeal for the purpose of reviewing mere errors or irregularities in the proceedings of a court having proper jurisdiction. *State ex rel. Levin v. Sheffield Lake* (1994), 70 Ohio St.3d 104, 109, 637 N.E.2d 319, 324.

Nevertheless, in Ohio, it is recognized that a writ of mandamus is an appropriate remedy to require a lower court to comply with an appellate court's mandate directed to that court. *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 13 O.O.3d 17, 391 N.E.2d 343; *State ex rel. Schneider v. Brewer* (1951), 155 Ohio St. 203, 44 O.O. 170, 98 N.E.2d 2. This view comports with the holdings of the Supreme Court of the United States, as well as other federal and state courts. ¹⁰¹*Vendo Co. v. Lektro-Vend Corp.* (1978), 434 U.S. 425, 427-428, 98 S.Ct. 702, 703-704, 54 L.Ed.2d 659, 662-663; *In re Sanford Fork & Tool Co.* (1895), 160 U.S. 247, 255, 16 S.Ct. 291, 293, 40 L.Ed. 414, 416; *Casey v. Planned Parenthood of Southeastern Pennsylvania* (C.A.3, 1994), 14 E.2d 848, 856-857; *Hartford Acc. & Indemn. Co. v. Gulf Ins. Co.* (C.A.7, 1988), 837 F.2d 767, 774; *Cleveland v. Fed. Power Comm.* (C.A.D.C. 1977), 561 F.2d 344; *Ex parte Ufford* (Ala. 1994), 642 So.2d 973; see, generally, 52 American Jurisprudence 2d (1970), Mandamus, Section 355.

The Supreme Court of the United States has held:

"When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court

The interpretation of S.Ct. is erroneous.

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." (Emphasis added.) *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 11 OBR 1, 462 N.E.2d 410, syllabus; *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1994), 70 Ohio St.3d 344, 345, 639 N.E.2d 25, 26. As noted previously, mandamus is an appropriate remedy in these circumstances.

[9-11] Judge Kessler further contends that his dismissal of the ethnic intimidation charges did not exceed this court's mandate in *Wyant II* because the dismissal was on grounds other than free speech rights of the First Amendment to the United States Constitution. He argues that this court never decided whether R.C. 2927.12 is unconstitutionally vague. It is axiomatic that the syllabus of an opinion issued by the Supreme Court of Ohio states the law of the case, and, as such, all lower courts in this state are bound to adhere to the principles set forth therein. *Smith v. Klem* (1983), 6 Ohio St.3d 16, 18, 6 OBR 13, 15-16, 450 N.E.2d 1171, 1173; *Grange Mut. Cas. Co. v. Smith* (1992), 80 Ohio App.3d 426, 431, 609 N.E.2d 585, 588. It is also generally improper for a lower court to determine that a syllabus of an Ohio Supreme Court opinion is *obiter dictum*. The *Wyant II* syllabus broadly states that R.C. 2927.12 is constitutional and is not limited to attacks based upon free speech.

[12] Further, under S.Ct.R.Rep.Op. 1(B), "[t]he syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication." (Emphasis added.) See, also, *Worrell v. Athens Cty. Court of Common Pleas* (1994), 69 Ohio St.3d 491, 495, 633 N.E.2d 1130, 1134. The vagueness issue was raised in *Wyant I* and *II*, as well as in some of the motions for rehearing.

On remand from this court, Judge Kessler again dismissed the ethnic intimidation charges against May based upon the prior court of appeals' decision because he found that he was "constrained to follow the unreversed decision of [the court of appeals in *Wyant I*]." Judge Kessler now concedes

that the court of appeals' decision was reversed by this court in *Wyant II*. Since the issue of the alleged unconstitutional vagueness of R.C. 2927.12 was unquestionably before the court in May's appeal in *Wyant II*, our reversal of the court of appeals' judgment, which was based upon this constitutional ground, manifestly decided the issue. If this was not intended, reversal would not have been warranted. Therefore, Judge Kessler's dismissal of the ethnic intimidation charge against May based on the prior court of appeals' judgment exceeded the scope of this court's mandate on remand. Accordingly, relators are entitled to a writ of mandamus to compel Judge Kessler to comply with the *Wyant II* mandate by proceeding to try May on the ethnic intimidation charge.

[13-15] As to relators' claim for a writ of prohibition, they must establish that (1) Judge Kessler is about to exercise judicial or quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Keenan, supra*, 69 Ohio St.3d at 178, 631 N.E.2d at 121. While addressing relators' mandamus claim, Judge Kessler's brief does not specifically respond to relators' prohibition claim. In these circumstances, the availability of an appeal does not preclude extraordinary relief. *State ex rel. Potain, State ex rel. Schneider, and Vendo Co., supra*. Further, absent the stay entered by Judge Kessler pending resolution of the state's discretionary appeal in May's criminal case, which stay was issued after the filing of this action by relators, Judge Kessler would proceed to try May on the underlying aggravated menacing charge. This action is legally unauthorized because in addition to lacking discretion to depart from a superior court's mandate, an inferior court also lacks jurisdiction to do so. *State ex rel. TRW, Inc. v. Jaffe* (1992), 78 Ohio App.3d 411, 604 N.E.2d 1376 (retrial of damages inconsistent with the Supreme Court's opinion would exceed the jurisdiction of the court). As we stated in *State ex rel. Potain, supra*, 59 Ohio St.2d at 32, 13 O.O.3d at 18-19, 391 N.E.2d at 345:

"The doctrine of law of the case is necessary, not only for consistency of result and the termination of litigation, but also to preserve the structure of the judiciary as set forth in the Constitution of Ohio. Article IV of the Ohio Constitution designates a system of 'superior' and 'inferior' courts, each possessing a distinct function. *The Constitution does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals.*" (Emphasis added.)

Consequently, relators are entitled to a writ prohibiting Judge Kessler from proceeding to try May on the lesser aggravated menacing charge alone. *State ex rel. TRW, supra.*

Accordingly, we grant the requested writs of mandamus and prohibition to relators as to May's criminal case and dismiss as moot that portion of the complaint relating to Staton's criminal case.

Writs granted in part and dismissed in part.

MOYER, C.J., and DOUGLAS, WRIGHT, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER and COOK, JJ., concur.



72 Ohio St.3d 104

104The STATE ex rel. OSBORNE,
Appellant,

v.

INDUSTRIAL COMMISSION OF
OHIO et al., Appellees.

No. 93-2366.

Supreme Court of Ohio.

Submitted Feb. 21, 1995.

Decided April 26, 1995.

Workers' compensation claimant filed motion for scheduled-loss compensation under section of workers' compensation statute

which establishes compensation schedule for "loss" of enumerated body parts. After the Industrial Commission denied motion and that denial was administratively affirmed, claimant filed complaint in mandamus in the Court of Appeals for Franklin County, which denied writ. Claimant appealed as of right. The Supreme Court held that ankylosis of the toes was not compensable.

Affirmed.

1. Workers' Compensation \Leftrightarrow 882'

For purposes of section of workers' compensation statute which establishes compensation schedule for claimants who sustain "loss" of enumerated body part, "loss" is not confined to amputation. R.C. § 4123.57(B).

See publication Words and Phrases for other judicial constructions and definitions.

2. Workers' Compensation \Leftrightarrow 882

For purposes of section of workers' compensation statute which establishes compensation schedule for claimants who sustain "loss" of enumerated body part, "total and permanent loss of use" also constitutes compensable "loss." R.C. § 4123.57(B).

3. Workers' Compensation \Leftrightarrow 892

Ankylosis (total stiffness of) toes was not compensable under section of workers' compensation statute which establishes compensation schedule for claimants who sustain "loss" of enumerated body parts. R.C. § 4123.57(B).

105Appellant-claimant, Joan Osborne, injured the toes of her right foot in May 1979, while in the course of and arising from her employment with appellee General Motors Corporation, BOC Group. Her workers' compensation claim was allowed. Eleven years later, she filed a motion with appellee Industrial Commission of Ohio for scheduled-loss compensation under R.C. 4123.57(B) (formerly R.C. 4123.57(C)) for her four toes. The commission denied the motion and that denial was administratively affirmed.

Claimant filed a complaint in mandamus in the Court of Appeals for Franklin County,

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▷

Court of Appeals of Ohio, Third District, Union
 County.
 In re MOTZ.
 April 20, 1955.

Original action in habeas corpus. The Court of Appeals, Middleton, J., held that where defendant in criminal proceeding pleaded 'not guilty', and record showed that such defendant made every effort to obtain counsel to represent her, and where, after failing to secure counsel until morning of trial, defendant did obtain counsel, which counsel was permitted by trial court to withdraw on day of defendant's trial, trial court lost jurisdiction to proceed with trial upon failure to advise defendant of her right to have the court appoint counsel to defend her.

Writ allowed.

West Headnotes

[1] Criminal Law 110 ⇨ 641.7(1)

110 Criminal Law
 110XX Trial
 110XX(B) Course and Conduct of Trial in
 General
 110k641 Counsel for Accused
 110k641.7 Affirmative Duties in
 Protection of Right
 110k641.7(1) k. In General; Advice,
 Preliminary Inquiry and Appointment by Court.
 Most Cited Cases
 (Formerly 110k641(3))

Where defendant in criminal proceeding pleaded "not guilty", and record showed that defendant made every effort to obtain counsel to represent her, and where, after failing to secure counsel until morning of the trial, defendant did obtain counsel, which counsel was permitted by trial court to withdraw on day of defendant's trial, trial court lost jurisdiction

to proceed with trial upon failure to advise defendant of her right to have court appoint counsel to defend her. R.C. § 2941.50; Const. art. 1, § 10.

[2] Criminal Law 110 ⇨ 641.1

110 Criminal Law
 110XX Trial
 110XX(B) Course and Conduct of Trial in
 General
 110k641 Counsel for Accused
 110k641.1 k. In General. Most Cited
 Cases

(Formerly 110k641(1))

The provisions of the Sixth Amendment of the Federal Constitution that accused shall enjoy the right to have the assistance of counsel for his defense apply only to the federal courts. U.S.C.A.Const. Amend. 6.

[3] Criminal Law 110 ⇨ 641.7(1)

110 Criminal Law
 110XX Trial
 110XX(B) Course and Conduct of Trial in
 General
 110k641 Counsel for Accused
 110k641.7 Affirmative Duties in
 Protection of Right
 110k641.7(1) k. In General; Advice,
 Preliminary Inquiry and Appointment by Court.
 Most Cited Cases
 (Formerly 110k641(3))

Failure to advise defendant in criminal proceeding of her right to have court appoint counsel to defend her was a denial of a fundamental constitutional right, and conviction and judgment in such case was void, and the subsequent imprisonment of defendant was illegal. R.C. § 2941.50; Const. art. 1, § 10.

[4] Habeas Corpus 197 ⇨ 482.1

197 Habeas Corpus
 197II Grounds for Relief; Illegality of Restraint

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197II(B) Particular Defects and Authority for
Detention in General

197k482 Counsel

197k482.1 k. In General. Most Cited
Cases

(Formerly 197k482, 197k25.1(5), 197k25(1))

Habeas Corpus 197 \Leftarrow 791

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)5 Determination and
Disposition; Relief

197k791 k. In General. Most Cited
Cases

(Formerly 197k111(1))

Where it was determined in habeas corpus proceeding that petitioner's confinement was unlawful because of denial of her right to be represented by counsel at time of her conviction in criminal prosecution, petitioner was entitled to be discharged from confinement under the unlawful commitment, but she was still in custody of the court. R.C. § 2941.50; Const. art. 1, § 10.

****431 Syllabus by the Court.**

***296 1.** Where a defendant in a criminal proceeding pleads 'not guilty,' and the record shows that such defendant made every effort to obtain counsel to represent him; and where, after failing to secure counsel until the morning of the trial, such defendant does obtain counsel, which counsel is permitted by the trial court to withdraw on the day of such defendant's trial; such trial court loses jurisdiction to proceed with trial upon failure to advise such defendant of his right to have the court appoint counsel to defend him.

2. The failure to advise a defendant in a criminal proceeding of his right to have the court appoint counsel to defend him is a denial of a fundamental constitutional right; a conviction and judgment in such case is void; and the subsequent imprisonment of such defendant is illegal.

James B. Albers, Columbus, for petitioner.

C. William O'Neill, Atty. Gen., and Roger B. Turrell, Columbus, for respondent.
MIDDLETON, Judge.

This is an action in habeas corpus instituted in this court.

The petitioner recites that she is confined in the Ohio Reformatory*297 for Women, at Marysville, Ohio; that her confinement is without legal authority; that at her trial she was without legal counsel to defend her, although she made every effort to obtain an attorney; that the court failed to appoint counsel to defend her; and that, as a consequence, she was forced to go to trial without counsel, in violation of her right to a proper defense accorded her by the Constitution and the laws of Ohio.

The petitioner recites further that, after being convicted by a jury, she was transferred**432 for examination to Lima State Hospital where she was kept for thirty days and then transferred to the women's reformatory where she was kept in strict confinement for seven weeks; that during that time her right to appeal had expired; that for a period of four months following her conviction she was unable to communicate with an attorney; and that, by reason of the foregoing, her rights at the trial were violated, her sentence was void, and her imprisonment is illegal.

The return filed by the superintendent of the reformatory sets out a copy of the indictment upon which the petitioner was tried. The indictment contains 17 separate counts, nine for giving checks with intent to defraud, seven for larceny by trick, and one for the conversion of trust property.

The evidence offered by the petitioner shows that she is about 45 years of age, and the mother of four children, two boys and two girls, aged 26, 18, eight and five years, respectively; that between the time of her indictment and trial, her daughter was confined to a hospital for a period of many months, her son had entered the U. S. Air Force, her husband was ill, and she was the support of the family.

The record shows petitioner contacted a number of

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'After a copy of an indictment has been served or opportunity had for receiving it, the accused shall be brought into court, and if he is without and unable to employ counsel, the court shall assign him counsel, not exceeding two, who shall have access to such accused at all reasonable hours. Such counsel shall not be a partner in the practice of law of the attorney having charge of the prosecution. A partner of the attorney having charge of the prosecution shall not be employed by or conduct the defense of a person so prosecuted.'

[1] There was no opportunity given petitioner to secure other counsel after the court permitted Mrs. Cory to withdraw from the case, nor did not court assign counsel to represent her. She was forced to trial without the benefit of counsel. To force her to trial on an indictment containing 17 counts, which trial consumed seven days, was clearly a denial of petitioner's constitutional and statutory rights. The requirement that defendant proceed to trial under the circumstances appearing in this record does not meet the test of a fair trial. Permitting counsel to withdraw, refusing to grant a continuance, and failing to assign other counsel to represent petitioner was, in its practical effect, a denial of her right to be defended by counsel.

[2] This question has been passed upon by the Supreme Court of the United States. While the court holds that the provisions *300 of the Sixth Amendment to the Constitution of the United States apply only to federal courts, the case of *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, which arose under the Sixth Amendment to the United States Constitution, is analogous, and applies with great force, to the facts in the case at bar which arises under Section 10, Article I of the Constitution of Ohio.

In the *Johnson* case, 304 U.S. on page 462, 58 S.Ct. at page 1022, the court said:

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.' This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. * * * The Sixth Amendment stands as a

constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and, learned counsel. **434 That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intricate, complex, and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to '* * * the humane policy of the modern criminal law * * *' which now provides that a defendant '* * * if he be poor, * * * may have counsel furnished him by the state * * *.'

'The '* * * right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.'

*301 At page 465, of 304 U.S., at page 1023 of 58 S.Ct., the court said:

~~'The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution. True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities-not involving the question of jurisdiction-occurring during the course of trial; and the writ of habeas~~

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corpus cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve not destroy constitutional safeguards of human life and liberty. The scope of inquiry in *habeas corpus* proceedings has been broadened not narrowed since the adoption of the Sixth Amendment.'

The question is presented: Did the action of the court in forcing the defendant to trial without counsel deprive her of a fundamental constitutional right, causing the court to lose jurisdiction; or was such action simply an irregularity in the proceedings, constituting error? Did such action oust the court of jurisdiction or constitute error the remedy for which is appeal?

'Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost in the course of the proceedings due to failure to complete the court as the Sixth Amendment requires by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court *302 no longer has jurisdiction to proceed.' *Johnson v. Zerbst*, supra, 304 U.S. at page 467, 58 S.Ct. at page 1024.

The petitioner has no adequate remedy at law. It is apparent from the record that after her conviction she was in strict confinement**435 during the time she might have prosecuted an appeal. The time for appeal is long since past. There could be no record upon which an appeal could be based.

In the case of *In re Burson*, 152 Ohio St. 375, 89 N.E.2d 651, 654, Judge Hart, in commenting on the duty of the court to assign counsel under Section 13439-2, General Code, stated:

'In the opinion of this court, the section of the statute just quoted, mandatory in terms, must be complied with unless compliance is waived by a defendant, which we hold may be done. Perhaps it was unfortunate that the trial court did not specifically advise the petitioner concerning his right to counsel, but under the circumstances with the record of the petitioner before it, the court might assume that he knew his rights in this respect and chose to plead guilty rather than to stand trial on a charge concerning which he knew he had no defense.'

In the *Burson* case, supra, the petitioner pleaded guilty and thereby raised 'a presumption of waiver of the right to counsel unless there are circumstances which rebut and nullify such presumption.'

'Whether the petitioner's plea of guilty and consequent waiver of the appointment of counsel was intentional and intelligently made must rest in the sound discretion of the trial judge before whom the plea was taken.'

In the case before us, the petitioner's plea was 'not guilty,' and the record shows that she made every effort to obtain counsel to represent her and when she did obtain counsel the court permitted her counsel to withdraw and ordered trial to proceed. Obviously, it cannot be claimed that the petitioner waived any right she had to the protection of the court in assigning counsel to defend her, whether requested by her or not.

On the entire record, it is the opinion of the court that the trial of the petitioner without counsel was contrary to the generally accepted idea of fairness and right.

We believe the law as pronounced in the *Burson* case is clearly distinguishable from the case now before this court, and *303 that it does not bar the petitioner from receiving the relief prayed for.

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~~We are of the opinion that under the factual situation appearing in the record, the trial court lost jurisdiction to proceed with trial upon its failure to advise petitioner of her right to have the court appoint counsel to defend her. Such failure was not simply error in procedure, reviewable only by appeal, but was a denial of a fundamental constitutional right.~~

~~[3] The trial court having lost jurisdiction, the sentence and judgment are void, and the imprisonment of the petitioner illegal. The writ is allowed.~~

[4] However, this order of discharge is not a grant of freedom for every purpose and against every claim. The petitioner, while entitled to be discharged from confinement under the unlawful commitment, is not entitled to absolute freedom. She is still in the custody of the court. In re Henry, 162 Ohio St. 62, 120 N.E.2d 588.

The indictment against her is still in full force and the Common Pleas Court of Franklin County still has jurisdiction of the person and subject matter.

It is, therefore, the order of the court that the petitioner be delivered to the custody of the Sheriff of Franklin County, to be returned to the trial court for further proceedings.

Judgment accordingly.

QUATMAN, P. J., and YOUNGER, J., concur.
Ohio App. 1955
In re Motz
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CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Clark
 County.

STATE of Ohio, Plaintiff-Appellee

v.

Victor L. YOUNGBLOOD, Defendant-Appellant.
 No. 05CA0087.

Decided July 28, 2006.

Criminal Appeal from Common Pleas Court.

Stephen Schumaker, Pros. Attorney; Daniel P.
 Driscoll, Asst. Pros. Attorney, Springfield, OH, for
 plaintiff-appellee.

Linda Joanne Cushman, Springfield, OH, for
 defendant.

GRADY, P.J.

*1 {¶ 1} Defendant, Victor Youngblood, appeals
 from his conviction and sentence for felonious
 assault and tampering with evidence.

{¶ 2} Defendant was indicted on one count of
 attempted murder, R.C. 2923.02(A) and 2903.02(A)
 , two counts of felonious assault, R.C.
 2903.11(A)(1) and (A)(2), one count of having
 weapons while under a disability, R.C.
 2923.13(A)(2), and one count of tampering with
 evidence, R.C. 2921.12(A)(1).

{¶ 3} At his arraignment on May 9, 2005,
 Defendant was represented by court-appointed
 counsel, but he requested that he be allowed to
 represent himself. On May 12, 2005, Defendant's
 appointed counsel withdrew and Defendant then
 represented himself at all subsequent court
 proceedings in accordance with his expressed
 desire, which he repeated at various court
 proceedings.

{¶ 4} On July 19, 2005, just before trial
 commenced, Defendant signed a written waiver of
 counsel which acknowledged his right to be
 represented by counsel and his desire to waive that
 right and represent himself. The waiver form did
 not contain any information regarding the nature of
 the charges against him, the statutory offenses they
 included, the range of allowable punishments,
 possible defenses to the charges or circumstances in
 mitigation thereof, or any warning about the risks of
 self-representation. Neither did the trial court
 discuss these matters with Defendant.

{¶ 5} Defendant was found guilty following a jury
 trial of felonious assault and an accompanying
 firearm specification, count two, as well as
 tampering with evidence, count five. Defendant was
 found not guilty of felonious assault as charged in
 count three. The having weapons while under
 disability charge was dismissed by the State at trial,
 and the jury was unable to reach a unanimous
 verdict on the attempted murder charge.

{¶ 6} The trial court sentenced Defendant to
 consecutive prison terms of eight years for
 felonious assault and five years for tampering with
 evidence, plus an additional and consecutive three
 years on the firearm specification, for a total
 aggregate sentence of sixteen years. Defendant
 timely appealed to this court from his conviction
 and sentence.

{¶ 7} The Clark County Prosecutor's Office did
 not file a brief in this appeal, and therefore is not
 actively defending the conviction obtained in the
 trial court. In accordance with App.R. 18(C), in
 determining this appeal we will accept Defendant's
 statement of facts and issues as correct, and will
 reverse the judgment if Defendant's brief reasonably
 appears to sustain such action.

FIRST ASSIGNMENT OF ERROR

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{¶ 8} "THE COURT ERRED AND DEPRIVED DEFENDANT/APPELLANT VICTOR YOUNGBLOOD OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS THE COURT FAILED TO ENSURE THAT MR. YOUNGBOOOD HAD MADE A VOLUNTARY, KNOWING, AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL, AND A KNOWING AND INTELLIGENT DECISION TO REPRESENT HIMSELF."

*2 {¶ 9} Defendant argues that the trial court did not make a sufficient inquiry to determine whether he fully understood and intelligently relinquished his right to counsel, and therefore his waiver of his right to counsel is invalid. We agree.

{¶ 10} The Sixth Amendment guarantees a defendant in a state criminal trial an independent constitutional right of self-representation, and that he may proceed to defend himself without counsel when he voluntarily, knowingly, and intelligently elects to do so. *State v. Gibson* (1976), 45 Ohio St.2d 366; *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562. In order to establish an effective waiver of the right to counsel, the trial court must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right. *Gibson*, at syllabus.

{¶ 11} In *Von Moltke v. Gillies* (1948), 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed.309, the United States Supreme Court discussed waiving the right to counsel and the serious and weighty responsibility upon the trial court to determine whether there is an intelligent and competent waiver by the accused. The Court stated:

{¶ 12} "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's

responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. * * * " *Id.*, at 723.

{¶ 13} Crim.R. 44 governs the procedure for waiver of counsel in serious offense cases and requires that the waiver be knowing, intelligent, and voluntary. The waiver shall be in open court, and the advice and waiver shall be recorded. Crim.R. 44(C). In serious offense cases, the waiver shall be in writing. *Id.*

~~{¶ 14} In *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio5471, the Ohio Supreme Court, in deciding what constitutes a sufficient waiver of the accused's right to counsel under the Sixth Amendment and Article I, Section 10 of the Ohio Constitution, reaffirmed its previous holding in *Gibson*, and held in the syllabus that when in serious offense cases a Defendant elects to proceed pro se, the trial court must demonstrate substantial compliance with Crim.R. 44 by making a sufficient inquiry to determine whether defendant fully understood and intelligently relinquished his or her right to counsel. Citing *Gibson*, which quotes from *Von Moltke*, the Supreme Court held.~~

*3 {¶ 15} "To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Id.* At ¶ 40.

{¶ 16} In this appeal we must determine whether the trial court made a sufficient inquiry to determine that defendant fully understood and intelligently relinquished his right to counsel and adequately warned Defendant of the perils of self-representation. *Martin, supra*. A careful review of this record reveals that at times during the arraignment and the subsequent pretrial

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conferences, the trial court cautioned Defendant that "the problem is if you're representing yourself, you're not going to have anyone to turn to," (T. 5/9/05, at 9) and "a lot of times it's to your benefit if you have an attorney representing you." *Id.* The court also told Defendant, "if you're ineffective at trial, that's your own fault," (T. 7/11/05, at 14), and "if you conduct a poor cross-examination on State's witnesses, that's your fault, not mine." (T. 7/11/05, at 14-15). Additionally, the court pointed out to Defendant that it was not the court's responsibility to give Defendant legal advice, and that Defendant could not learn how to be a lawyer in just a few days by spending some time in the law library. (T. 7/11/05, at 15). Just before trial commenced, when Defendant complained that his witnesses were not present and that he did not understand that he had to subpoena his witnesses rather than merely submit a witness list, the trial court responded: "and therein lies the problem with representing yourself." (Trial T. at 10). On the day of trial, Defendant was presented a written waiver form by the court and told: "You need to sign that form ... Right now. We have a jury waiting." (T. 17-18).

~~{¶ 17} At no time did the trial court explain or discuss with Defendant the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses to the charges, possible mitigating circumstances, or other facts essential to a broad understanding of the whole matter, as required by *Von Moltke, Gibson, and Martin*.~~

~~{¶ 18} Defendant was not given adequate warnings about the seriousness of the trial, the possible results it could have for his liberty and life, and the dangers and disadvantages of self-representation, so that the record establishes that he knew what he was doing and that his choice was made with eyes open. *Martin, supra*, at ¶ 44.~~

~~{¶ 19} The trial court failed to make a sufficient inquiry to determine whether Defendant fully understood and intelligently relinquished his right to counsel. The court's admonitions to Defendant concerning self-representation, unlike those in *Gibson, supra*, do not comply with *Von Moltke, supra*. And, Defendant's waiver was not put in~~

writing when it was accepted, but was executed by Defendant only after the prejudicial effects of his self-representation had occurred. Therefore, we find that Defendant did not knowingly and intelligently waive his right to counsel.

*4 {¶ 20} The first assignment of error is sustained. The judgment of the trial court will be reversed and the case remanded for a new trial consistent with this opinion.

SECOND ASSIGNMENT OF ERROR

{¶ 21} "THE COURT ABUSED ITS DISCRETION IN SENTENCING MR. YOUNGBLOOD TO MAXIMUM AND CONSECUTIVE SENTENCES AS MR. YOUNGBLOOD, APPEARING PRO SE, WAS DROWSY, CONFUSED, AND ON SLEEPING AND OTHER MEDICATIONS AT THE TIME OF SENTENCING AND WAS THEREFORE DEPRIVED OF HIS RIGHT OF ALLOCUTION."

THIRD ASSIGNMENT OF ERROR

{¶ 22} "THE COURT ABUSED ITS DISCRETION IN HANDING DOWN MAXIMUM AND CONSECUTIVE SENTENCES AS THE FINDINGS SUPPORTING THE SENTENCES ARE NOT SUPPORTED IN THE RECORD."

{¶ 23} These assignments of error, challenging the validity of Defendant's sentence, are rendered moot by our disposition of the first assignment of error. Accordingly, we decline to address them. App.R. 12(A)(1)(c).

BROGAN, J., and WOLFF, J., concur.

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State v. Youngblood

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CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Greene
 County.

STATE of Ohio, Plaintiff-Appellee

v.

John P. STUBBS, Defendant-Appellant.

No. 2005-CA-88.

Decided July 28, 2006.

Criminal Appeal from Common Pleas Court.

William F. Schenck, Prosecuting Attorney, by
 Suzanne M. Schmidt, Assistant Prosecuting
 Attorney, Xenia, OH, for plaintiff-appellee.

Alan D. Gabel, Dayton, OH, for
 defendant-appellant.

FAÏN, J.

*1 ¶ 1} Defendant-appellant John Stubbs appeals from his conviction and sentence for Carrying a Concealed Weapon, Having a Weapon Under a Disability, and Tampering with Evidence. Stubbs contends that the trial court erred by permitting him to waive his right to counsel and to represent himself at trial without first determining whether he was doing so voluntarily, knowingly and intelligently. He further contends that the evidence does not support his conviction for Tampering with Evidence. Stubbs also claims that the trial court erred by improperly instructing the jury and by permitting jurors to pose questions to the witnesses.

¶ 2} We conclude that the trial court failed to comply with the requirements of *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, when it failed to advise Stubbs of the possible consequences of declining counsel and electing to represent himself. We further conclude that there is sufficient evidence in the record to support a conviction for

Tampering with Evidence, and that the jury did not lose its way in deciding to convict on that charge. The claim that the trial court erred with regard to jury instructions and permitting jurors to propound questions are rendered moot.

¶ 3} The judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

¶ 4} On March 25, 2005, John Stubbs was arrested and charged with Carrying a Concealed Weapon, Having a Weapon Under a Disability, and Tampering with Evidence. At his arraignment, Stubbs stood silent and did not answer the trial court's inquiries. The trial court entered a not guilty plea and asked Stubbs whether he would retain counsel or seek appointed counsel. When Stubbs did not respond, the trial court informed him that he needed to fill out papers before counsel could be appointed.

¶ 5} On May 31, 2005, Stubbs filed a witnessed and notarized document in which he informed the court that he would be "acting in [his] own defense." He also filed, pro se, motions to dismiss and to suppress. A hearing was held on the motions, at which time the trial court again advised Stubbs to obtain counsel and informed him that he could seek to have counsel appointed. Stubbs declined and stated that he wanted to proceed without counsel.

¶ 6} The case proceeded to trial. At the start of trial, the court once more asked Stubbs if he wanted counsel, to which Stubbs made the following reply: "No, sir. I would not be acting as my own defense neither. No, I'm not going to defend myself nor am I going to take and hire counsel." The trial court then informed Stubbs that attorney Joseph Coates would be acting as standby counsel for Stubbs during the course of trial.

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{¶ 7} Following trial, the jury found Stubbs guilty as charged and the trial court sentenced him accordingly. From his conviction and sentence, Stubbs appeals.

II

{¶ 8} The First Assignment of Error states as follows:

*2 {¶ 9} "THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY ADVISE APPELLANT OF THE DANGERS OF SELF-REPRESENTATION AND FAILING TO MAKE A SUFFICIENT INQUIRY ON THE RECORD TO DEMONSTRATE THAT APPELLANT MADE AN INTELLIGENT, VOLUNTARY, AND KNOWING WAIVER OF HIS RIGHT TO ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION."

{¶ 10} Stubbs contends that the trial court failed to properly advise him with regard to his right to counsel, and therefore he did not knowingly, voluntarily and intelligently waive his right to counsel.

{¶ 11} Crim.R. 44(C) provides: "Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing."

{¶ 12} A serious offense is defined as any felony or misdemeanor "for which the penalty prescribed by law includes confinement for more than six months." Crim.R. 2(C).

{¶ 13} "[W]hen a criminal defendant elects to proceed pro se, the trial court must demonstrate substantial compliance with Crim.R. 44(A) by making a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel." *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶ 39

{¶ 14} A valid waiver "must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Id.* at ¶ 40, citations omitted.

{¶ 15} In this case, the trial court did ask, at every stage of the proceedings, whether Stubbs would obtain counsel or seek appointed counsel. The trial court also informed Stubbs that he would need to fill out forms in order to have counsel appointed. The trial court even, on two occasions, told Stubbs that his interests would be best served by having counsel. However, there is nothing in the record to indicate that the trial court made any effort to determine whether Stubbs understood the nature of the charges, the penalties or the possible defenses. In short, the trial court failed to make any of the determinations deemed essential by the Supreme Court in *Martin*, supra.

{¶ 16} The charges against Stubbs were serious, as evidenced by the fact that he was sentenced to a two-year prison term. Thus, the trial court had an obligation to determine whether Stubbs had a sufficient understanding of the possible consequences of declining counsel. We conclude that the trial court erred by failing to substantially comply with the requirements of Crim.R. 44. The First Assignment of Error is sustained.

III

{¶ 17} The Second Assignment of Error provides as follows:

{¶ 18} "APPELLANT'S CONVICTION FOR TAMPERING WITH EVIDENCE IS AGAINST THE MANIFEST WEIGHT AND/OR SUFFICIENCY OF THE EVIDENCE."

*3 {¶ 19} Stubbs contends that the conviction for Tampering with Evidence must be reversed because

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CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga
 County.

STATE of Ohio Plaintiff-Appellee

v.

Gary T. FORD Defendant-Appellant.

No. 86951.

Decided July 20, 2006.

Criminal appeal from Court of Common Pleas Case
 No. CR-464544, Reversed and remanded for new
 trial.

William D. Mason, Cuyahoga County Prosecutor,
 Christopher Wagner, Assistant, Prosecuting
 Attorney, T. Allen Regas, Assistant, Prosecuting
 Attorney, Cleveland, for Plaintiff-Appellee.

Joseph V. Pagano, Cleveland, for
 Defendant-Appellant.

JAMES J. SWEENEY, J.

*1 ¶ 1} In this appeal, defendant-appellant, Gary
 T. Ford ("defendant"), appeals from the judgment
 entered pursuant to a jury trial finding him guilty of
 tampering with evidence. For the following reasons,
 we reverse and remand for a new trial.

¶ 2} A review of the record reveals the following:
 On April 8, 2005, defendant was indicted on one
 count of tampering with evidence in violation of
 R.C. 2921.12. On May 19, 2005, the trial court
 appointed assigned counsel to defendant, after
 which he pled not guilty to the indictment.

¶ 3} The matter proceeded to a jury trial on June
 29, 2005. Upon conclusion of the direct
 examination of the State's first witness, defendant
 requested to represent himself pro se. The following
 is the colloquy between the court and defendant:

¶ 4} "THE COURT: * * * Mr. Gary Ford, it's my
 understanding you consulted with your lawyer. It's
 your intention to represent yourself. Is that correct?"

¶ 5} "DEFENDANT: Correct."

¶ 6} "THE COURT: That's your desire?"

¶ 7} "DEFENDANT: Yes, ma'am."

¶ 8} "THE COURT: That's a decision
 intelligently made; is that right?"

¶ 9} "DEFENDANT: Yes."

¶ 10} "THE COURT: You understand by doing
 so you're actually waiving your right to counsel?
 You understand that?"

¶ 11} "DEFENDANT: So I'm not-I couldn't have
 legal assistance, that's what you're saying?"

¶ 12} "THE COURT: No. If it is your request,
 the Court will have Mr. Gautner sit there with you
 to advise both legally and procedurally how to
 conduct the trial. So I'm not saying that. But it's my
 understanding that we need both a waiver from you
 in court, which is verbal, and we need to also have
 you and your lawyer write out a waiver indicating
 that you understand your right to counsel and that
 you want to waive your right to counsel.

¶ 13} "DEFENDANT: Okay. That's
 understandable. It's a couple things I don't
 understand. With certain things I will be discussing
 why do you always have the jury leave?"

¶ 14} "THE COURT: Because when we discuss
 legal issues we don't discuss them in front of the
 jury. The jury's only here to decide the facts of the
 case, not to decide the law. You try the law of the
 case to the Court. You try the facts of the case to the
 jury. So the jury is only here to gather the facts.

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{¶ 59} On July 1, 2005, the jury returned a verdict of guilty on the sole count of tampering with evidence. Defendant was sentenced to five years of incarceration, a fine of \$250, and three years of post-release control with mandatory drug testing and counseling. Defendant timely appeals his conviction and raises six assignments of error, which will be addressed out of order where appropriate.

*4 {¶ 60} "II. Appellant was denied his Sixth Amendment right to counsel because the record does not establish a valid waiver."

{¶ 61} In his second assignment of error, defendant argues that the trial court's inquiry into whether he waived his right to counsel was insufficient to establish that he knowingly, intelligently, and voluntarily waived his right to counsel.

{¶ 62} The Sixth Amendment to the United States Constitution provides that defendants shall have the right to have the assistance of counsel for their defense. While a defendant has a right to counsel, the defendant may also waive that right when the waiver is voluntary, knowing, and intelligent. *State v. Gibson* (1976), 45 Ohio St.2d 366, citing *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562.

{¶ 63} To establish an effective waiver of right to counsel, the trial court must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right. *Gibson*, supra at paragraph two of the syllabus. Although there is no prescribed colloquy in which the trial court and a pro se defendant must engage before a defendant may waive his right to counsel, the court must ensure that the defendant is voluntarily electing to proceed pro se and that the defendant is knowingly, intelligently, and voluntarily waiving the right to counsel. *State v. Martin*, Cuyahoga App. No. 80198, 2003-Ohio-1499. Specifically, the trial court must advise the defendant of the nature of the charges against him, the range of allowable punishment, the possible defenses, any mitigating circumstances, and the dangers of self-representation. See *Gibson*, supra at 377, citing

Von Moltke v. Gillies (1948), 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309.^{FN1}

FN1. We are aware of the recent decision of the 9th District which held that the factors in *Von Moltke* are merely dicta for the court to consider in deciding whether a defendant has waived his right to counsel. See *State v. Ragle*, Summit App. No. 22137, 2005-Ohio-590. However, we decline to follow this view and feel that the doctrine of stare decisis precludes us from declining to follow the law set forth by the Ohio Supreme Court.

{¶ 64} This Court has repeatedly addressed the importance of a defendant's decision to waive his right to counsel, stating:

* {¶ 65} "A court cannot abdicate its responsibility to sufficiently inform a criminal defendant as to that defendant's waiver of the right to counsel merely because that defendant manifests a desire, however eloquently stated, to represent himself. Nor can the court satisfy this responsibility by standby counsel. However laudable, such appointments do not absolve the trial court from its responsibility to insure that the defendant is aware of the range of allowable punishments, the possible defenses to the charges and circumstances that might serve in mitigation as well as any other facts that would demonstrate that the defendant understood the entire matter." See *State v. Thompson*, Cuyahoga App. No. 85483, 2005-Ohio-6126; *State v. Richards* (Sept. 20, 2001), Cuyahoga App. No. 78457. See, also, *State v. Ward*, Cuyahoga App. No. 81282, 2003-Ohio-3015; *State v. Martin*, Cuyahoga App. No. 80198, 2003-Ohio-1499; *State v. Jackson* (2001), 145 Ohio App.3d 223; *State v. Melton* (May 4, 2000), Cuyahoga App. No. 75792.

*5 {¶ 66} Applying the foregoing analysis to this case, we find that the trial court failed to engage in the necessary colloquy to ensure that defendant's waiver of counsel was knowingly, intelligently, and voluntarily made. The trial court merely read the written waiver that defendant had signed. While this written waiver contained the statutory charge and

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the range of allowable punishments, it did not contain any possible defenses or mitigating circumstances that might apply nor the perils of self-representation. Other than the cursory reading of the written waiver, there is nothing in the record showing any attempt by the trial court to further explain to the defendant his possible defenses or the dangers of proceeding to trial without counsel. For example, the trial court could have warned the defendant of the seriousness of his waiver of counsel, that the defendant would be held to the same rules and criminal procedure as an attorney, or cautioned defendant against waiving his right to counsel.^{FN2} However, the trial court's discussion with defendant did not include any warnings whatsoever of the disadvantages or dangers of self-representation before the trial court accepted defendant's waiver of counsel. Rather, the record shows that the trial court merely engaged in an extensive explanation that the defendant was entitled to "competent" counsel, not the counsel of his "desire."^{FN3}

FN2. See, for example, *State v. Doyle*, Pickaway App. No. 04CA23, 2005-Ohio-4072, in which the trial court warned the defendant that "it was a dangerous course of action to proceed to trial without a lawyer." The court also attempted to make clear to defendant that he did not understand the legal system to a degree where he could competently represent himself.

FN3. Tr. at 216.

{¶ 67} Under the facts and circumstances of this case, we find that defendant was prejudiced by the trial court's failure to ensure that he made a knowing and voluntary decision to represent himself. Accordingly, we sustain defendant's second assignment of error.

Judgment reversed and remanded for a new trial.

Our resolution of defendant's second assignment of error renders moot his remaining assignments of error,^{FN4} and, therefore, we need not address it.

App.R. 12(A)(1)(c).

FN4. See appendix.

It is ordered that appellant recover of appellee his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, Jr., P.J., and ANTHONY O. CALABRESE, Jr., J., concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).

APPENDIX

*6 "I. Appellant was denied a fair trial by the trial court's decision to allow the admission of irrelevant and prejudicial evidence about prior drug activity and the execution of a search warrant that were totally unrelated to appellant and the charges against him.

"III. Appellant's convictions were not supported by sufficient evidence and the trial court erred by denying his motions for acquittal.