

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

**CASE NO. 07-2434**

Plaintiff-Appellee,

**ON APPEAL FROM THE  
MONTGOMERY COUNTY COURT  
OF APPEALS, SECOND  
APPELLATE DISTRICT**

vs.

**JOHN WESLEY SLAGLE**

**COURT OF APPEALS  
CASE NO: 22364**

Defendant-Appellant.

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**MEMORANDUM IN RESPONSE**

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**MATHIAS H. HECK, JR.**

PROSECUTING ATTORNEY

By **CARLEY J. INGRAM (COUNSEL OF RECORD)**

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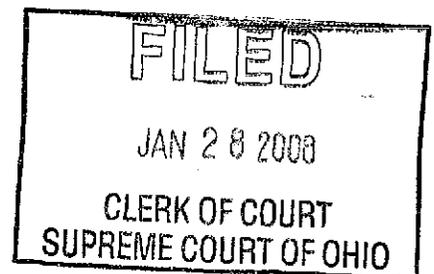
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**COUNSEL FOR APPELLANT, JOHN W. SLAGLE**



**Why This Is Not A Case Of Public or Great General Interest and Does Not Involve A Substantial Constitutional Question**

Appellant Slagle argues that the 1998 amendments to R.C. 2505.02 require the Court to re-examine its decision that a judgment denying a motion to dismiss on double jeopardy grounds is not a final appealable order. *State v. Crago* (1990), 53 Ohio St.3d 243, 559 N.E.2d 1353. Appellant's theory is that the denial of a motion to dismiss on double jeopardy grounds qualifies as a final order under R.C. 2505.02(B)(4), which brings an order granting or denying a provisional remedy under the definition of final order when certain conditions exist. But even if the denial of a motion to dismiss on double jeopardy grounds were found to be a provisional remedy, one of the conditions that allow immediate appellate review of a decision denying a provisional remedy under R.C. 2505.02(B)(4) is the inability of the appealing party to obtain meaningful or effective relief without the interlocutory appeal.

This Court has explicitly rejected the argument that Appellant has asked it to embrace by holding that a criminal defendant who has lost a motion to dismiss on double jeopardy grounds has an adequate remedy at law by way of direct appeal at the end of the proceedings in the trial court. *Wenzel v. Enright*, 68 Ohio St.3d 63, 66, 1993-Ohio-53, 623 N.E.2d 69; *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 338, 1997-Ohio-267, 686 N.E.2d 267. Appellant offers no compelling reason for this Court to reverse its earlier rulings on the issue.

The State does not concede that a motion to dismiss an indictment on grounds of double jeopardy meets any of the requirements under R.C. 2505.02(B)(4). But the simplest and most direct reason to reject Appellant's bid for review is his unquestionable inability to show irreparable harm that cannot be cured without an interlocutory appeal, which is what is required by R.C. 2505.02(B)(4).

### Statement of the Case

At a bench trial before Judge Jack Davis in Common Pleas Court in Montgomery County in September 2006, the State of Ohio introduced evidence that John Slagle, an attorney in a local law firm, stole half a million dollars from his employers. This was the fourth trial date; the first three had been vacated for the benefit of the defense. The indictment, which charged Slagle with two counts of aggravated theft, was filed two years before the trial was held, and the delays between indictment and trial were all attributable to the defense. Six weeks after the evidence concluded and two weeks after the deadline set by the court, Slagle filed his written closing argument. The State responded two weeks later. Twelve weeks after that, Judge Davis died, without having rendered a verdict.

Judge John Kessler, assisting with Judge Davis' caseload, granted the State's motion for a mistrial. When the State was unwilling to re-try the case by submitting the already-admitted testimony and evidence to another judge for a verdict, Slagle filed a motion to dismiss the indictment on the grounds that "a full-blown retrial" would violate his right to be free from double jeopardy. The trial court overruled the motion. Slagle appealed and the Court of Appeals granted the State's motion to dismiss. It is this decision that Slagle now seeks to appeal.

### Argument

In 1980, this Court held that the overruling of a motion to dismiss on double jeopardy grounds was a final order as that term was defined in R.C. 2505.02. *State v. Thomas* (1980), 61 Ohio St.2d 254, 400 N.E.2d 897. Part of the basis for deciding in that case that a motion to dismiss on double jeopardy grounds qualified as a "special proceeding" under R.C. 2505.02, was the Court's view that an erroneous decision on such a motion could not be effectively reviewed after judgment on the second trial. But in *State v. Crago* (1990), 53 Ohio St.3d 243, 559 N.E.2d

1353, the Court overruled explicitly *State v. Thomas*, and held that the overruling of a motion to dismiss on double jeopardy grounds is not a final appealable order under R.C. 2505.02: “The denial of a motion to dismiss a charge on the basis of double jeopardy does not meet, for purposes of being a final order, any one of the three prongs of R.C. 2505.02. Therefore, the denial of a motion to dismiss on grounds of double jeopardy is not a final order which may immediately be reviewed on appeal.” *Id.*, at 244.

After the decision in *State v. Crago*, *supra*, this Court has twice made it clear that extraordinary writs were not available to test the denial of a motion to dismiss on double jeopardy grounds before trial: “...there exists an adequate remedy in the ordinary course of the law to challenge an adverse ruling on the issue, to wit: an appeal to the court of appeals at the conclusion of the trial court proceedings.” *Wenzel v. Enright*, 68 Ohio St.3d 63, 66, 1993-Ohio-53, 623 N.E.2d 69. And in *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 338, 1997-Ohio-267, 686 N.E.2d 267, this Court said this: “Therefore, based on *Wenzel*, White has adequate legal remedies to raise his double jeopardy contentions by a pre-trial motion to dismiss, and if it is denied and he is subsequently convicted, by direct appeal.”

Although Appellant urges the Court to review the decision in *State v. Crago* in light of amendments made to R.C. 2505.02 in 1998, the language of the statute as amended prohibits him from taking an interlocutory appeal. Pertinent to this case is R.C. 2505.02(B)(4):

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

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(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

A “provisional remedy” is a proceeding ancillary to an action. R.C. 2505.02(A)(3).

The Court need not consider whether a decision overruling a motion to dismiss on double jeopardy grounds is a provisional remedy because even if it were, the appealing party would still have a meaningful and effective remedy by way of direct appeal at the end of the proceedings in the trial court. *Wenzel v. Enright*, supra, *State ex rel Junkin v. White*, supra.

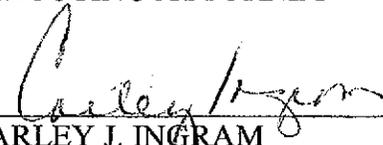
The three other courts that have considered the question that Appellant presents have all concluded that the 1998 amendments to R.C. 2505.02 did not transform the denial of a motion to dismiss on double jeopardy grounds into a final appealable order. *Mentor v. Babul* (July 16, 1999), Lake App. No. 98-L-244, 1999 WL 820583, appeal dismissed and leave to appeal denied, 87 Ohio St.3d 1441, 719 N.E.2d 5; *State v. Hubbard*, (1999), 135 Ohio App. 3d 518, 734 N.E.2d 834; *State v. Prokos* (May 31, 2000), Athens App. No. 00CA 02. Appellant offers no compelling reason to decide otherwise.

### Conclusion

The appeal should be dismissed and leave to appeal denied.

Respectfully submitted,

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PROSECUTING ATTORNEY

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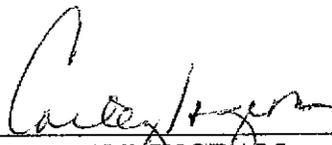
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ATTORNEY FOR STATE OF OHIO,  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Response was sent by first class mail on January 25, 2008 to: Richard Hempfling, Flanagan, Lieberman, Hoffman & Swaim, 318 W. 4<sup>th</sup> Street, Dayton, OH 45402.



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