IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	08-2251
Appellee	:	
-vs-	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals
DANTAE CHAMBLISS	:	
Appellant	:	CA: 91272

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT DANTAE CHAMBLISS

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EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL CONSTITUITONAL QUESTIONS AND IS A MATTER OF GREAT GENERAL AND GREAT PUBLIC INTEREST[1]

The issues presented in this case address the ability of a court of appeals to prevent the commission of a structural trial error before a trial has begun. May an appellate court, via an interlocutory appeal, stop the trial court from persisting in an erroneous disqualification of counsel that dooms the validity of the upcoming trial, or must the appellate court remain a bystander who simply waits until after the damage is done to reverse the conviction?

In this case, the Eighth District Court of Appeals was addressing a pretrial appeal from the trial court's revocation of the defendant's bond and from the trial court's sua sponte disqualification of the defendant's attorney. The court of appeals reversed the bond revocation but believed itself powerless to disturb the disqualification of counsel, because this Court, in *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, held that the pretrial disqualification of counsel in a criminal case is not a final appealable order under an earlier version of R.C. 2505.02, and also held that a defendant whose counsel was disqualified had an adequate remedy via a post-conviction appeal.

The Eighth District, in its unanimous opinion below, stated that it was "particularly conflicted" by its decision in this case. Opinion below at n. 7. The Eighth District noted that the Court's 1994 decision in *Keenan* preceded the United States Supreme Court's recent holding in *United States v. Gonzalez-Lopez* (2006), 548 U.S. 140. When *Keenan* was decided, the denial of counsel was *presumptively* prejudicial. In *Gonzalez-Lopez,* the United States Supreme Court held that "the erroneous deprivation of the right to counsel of choice 'with consequences that are

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[1] The Opinion Below, *State v. Chambliss*, Cuyahoga App. No. 91272, 2008-Ohio-3800, involved three defendants, Dantae Chamblis, James Bennett, and Travis Sanders. Each defendant has noted an appeal to this Court. The memoranda in support of jurisdiction submitted by the respective defendant-appellants are substantively identical.

necessarily unquantifiable and indeterminate, unquestionably qualifies as *structural error*.'" *Gonzalez-Lopez*, quoting *Sullivan v. Louisiana* (1993), 508 U.S. 275 (emphasis added). As the Eighth District noted, structural error "permeates the entire conduct of a trial so that the trial cannot reliably serve its function as a means for determining guilt or innocence." Opinion below, at par. 14. Accord, *Arizona v. Fulminante* (1991), 499 U.S. 279, 309; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297 at par. 17. A structural error is more than merely a presumptively prejudicial error where the State still has the opportunity to avoid reversal by demonstrating that the defendant suffered no actual prejudice. To the contrary, when a structural error is committed, the court of appeals does not even engage in an error analysis before *automatically* reversing the conviction. *Gonzalez-Lopez*, at 148.

The Eighth District went on to "acknowledge that [it is] significantly troubled" by the fact that, in this case, the State's only response has been to argue that the disqualification of counsel is not a final appealable order – the State has never tried to defend the propriety of the trial court's sua sponte disqualification of Mr. Chambliss' counsel of choice.

> By asserting that this is not a "final appealable order," the State is left in a position where, should they obtain a conviction at trial, said conviction would be subject to automatic reversal. Likewise, appellants [i.e. Mr. Chambliss and his co-defendant, whose counsel was also disqualified] could not possibly sustain a loss – they either "win" the case, or it is reversed. We can conceive of no greater waste of court time and resources; not to mention the cost to appellants of having to pay two sets of retained attorneys for perhaps two trials. And, in light of the "structural" nature of the error, quare whether anything that transpired in a first trial could be used by the State against appellants in a second trial, including the testimony of appellants, should they elect to testify.
>
> ***
>
> Reluctantly, we find that, pursuant to *Kennan*, supra, the error alleged by the order directing the unilateral removal of appellants' retained counsel is not a final and appealable order, and accordingly, appeal upon that issue is dismissed.

Opinion below, at pars. 15, 18.

In light of *Keenan,* the court of appeals understandably believes itself powerless to stop the trial court on its path to structural error. The ability to revisit *Keenan* in light of the United States Supreme Court's intervening precedent in *Gonzalez-Lopez* is solely the province of this Court. This is precisely why this Court should accept this case.

In accepting this case, this Court will do far more than simply prevent the structural error that is about to happen in this case. The circumstance of counsel being disqualified by a trial judge is one that has occurred in the past and will recur. See, e.g., *State v. Saadey* (June 30, 2000), Columbiana App. No. 99 CO 49, 2000 WL 1114519, unreported (7th Dist.).*State v. Williams* Lucas App Nos. L-03-1070 and L-03-1071, 2003-Ohio-2533 (6th Dist.), 2003-Ohio-2533. Both *Saadey* and *Williams* addressed the availability of a pretrial appeal to determine whether a criminal defendant's counsel had been improperly disqualified from representing the defendant. As did the Eighth District in this case, both the Sixth and Seventh Districts concluded, prior to *Gonzalez-Lopez*, that an interlocutory appeal would not lie.[2] This Court's decision in this case would thus affect the precedental value of decisions of the Sixth, Seventh and Eighth Districts. This is a matter of statewide importance.

In a slightly different context, this Court is currently considering *State v. Chojnacki. Chojnacki*, which is in the briefing process, addresses whether the denial of counsel for purposes of challenging a classification under the Adam Walsh Act, Ohio's new sexual offender registration law enacted via S.B. 10, is a final appealable order. *Chojnacki* thus confronts the denial of counsel in a cause of action that may or may not be criminal in nature.[3] The Court's analysis of the issue presented in *Chojnacki* may be dispositive of the issues presented herein and

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[2] In reaching their respective holdings in this regard, the Seventh District in *Saadey* relied on *Keenan,* while the Sixth District in *Williams* followed *Saadey's* analysis.

[3] Cf. *State v. Ferguson*, Slip Opinion 2008-4824 (holding that Ohio's Megan's Law, the precursor to the Adam Walsh Act, is regulatory and not punitive).

will, at the very least, shed light on those issues. Accordingly, this case could be accepted and held for *Chojnacki.* If *Chojnacki* is not dispositive of the issues presented, then briefing in this case could be ordered or the case could be remanded to the Eighth District for further consideration in light of *Chojnacki.*

Regardless of whether this case is accepted for briefing from the outset or held for *Chojnacki,* the issues presented are worthy of review. Trial judges need to know when, and under what circumstances, defense counsel can be removed from a case. But must trial judges wait until it is too late, i.e., until after the trial has been infected by structural error, to find that they made a mistake in disqualifying counsel? Should prosecutors be forced to try a case under the cloud that securing a conviction will only guarantee them a re-trial after the process has run its course? Should crime victims be forced to undergo the inevitability of two trials, when one would have sufficed? Should defendants be required to run the gauntlet of trial twice, with its attendant doubling of costs and the potential that the tactical choices of counsel-by-default in the first trial may limit the tactical options of counsel-of-choice in the second? Finally, should criminal defendants faced with Mr. Chambliss' conundrum be required to seek extraordinary writs prior to trial, either directly to this Court or to courts of appeals (in which case there is an appeal of right to this Court) and thereby clog courts of appeals and this Court with equitable actions because there is no remedy at law?

The answers to each of these questions is "no." As set forth in Argument, infra, Chapter 2505 of the Revised Code should be interpreted in light of *Gonzalez-Lopez* to permit pre-trial appeals of the denial of counsel. Such an interpretation is mandated by the separate statutory requirement that statutes and rules governing procedure are to be interpreted so as to arrive at fairness and the speedy and efficient administration of justice.

By re-examining whether the denial of counsel of choice in a criminal case is a "final appealable order" in light of the structural-error consequences that *Gonzalez-Lopez* has now imposed as well as by the post-*Keenan* changes to R.C. 2505.02, this Court will engage in the process by which the common law evolves – re-examining precedent (i.e. *Keenan)* in light of a change in the law brought about by a statutory amendment (the creation of R.C. 2505.02(B)(4)) and an intervening decision of a higher court (i.e., the United States Supreme Court in *Gonzalez-Lopez*). Principles of stare decisis compelled the Eighth District, pursuant to *Keenan,* to "reluctantly" hold that there was no final appealable order, and then to squarely identify the problem in dicta. Mr. Chambliss now respectfully asks this Court, which has the authority to revisit *Keenan* in light of *Gonzalez-Lopez*, to take the next step and solve this problem before it is exacerbated.

For these reasons, this Court's limited resources will be well spent on this case.

STATEMENT OF THE CASE AND FACTS

Trial Proceedings

The trial court proceedings are summarized in the first five paragraphs of the Opinion Below, 2008-Ohio-5285 (footnotes omitted):

> **{¶ 1}** Defendants-appellants, Dantae Chambliss, James Bennett, and Travis Sanders, appeal the trial court's judgments removing their respective counsel, remanding them to the county jail, and ordering them to retain new counsel.
>
> **{¶ 2}** Appellants were indicted on several drug-related offenses, and each retained his own attorney. The charges carried mandatory prison time. All three appellants posted the bonds that were set for them, and were released pending trial. Appellants filed various pretrial motions, including motions to compel production of the search warrant affidavit and to unseal it, motions to suppress, and motions to disclose the identity of a confidential and reliable informant. These motions have never been ruled on.
>
> **{¶ 3}** The record reflects that the State did not want to reveal the identity

of the informant in this case and, therefore, was hesitant to permit the search warrant affidavit to be unsealed. As a result of these concerns, the State and appellants reached a compromise whereby appellants would plead guilty to amended counts of the indictment which did not carry mandatory prison time, the identity of the informant would not be revealed, and the search warrant would not be unsealed. As part of the plea agreement, the State agreed to recommend a community control sanction at sentencing for Sanders and two year sentences for Chambliss and Bennett.

{¶ 4} The trial judge assigned to the case was unavailable on the day of the plea, and the plea was taken by another judge. The plea journal entry on behalf of Sanders states that "[t]he state recommends community control sanctions and should the sentencing court choose to impose a prison term, the state has no objection to withdrawal of the pleas." The plea journal entries on behalf of Chambliss and Bennett state that the "[r]ecommended sentence by the state is 2 years[;] no objection by the state to withdraw the plea should the court choose to impose a harsher sentence." On the date set for sentencing, the trial court refused to accept the agreement between the State and the defense, and the docket reflects that appellants then orally moved to withdraw their pleas. These oral requests were granted on March 27, 2008 and the court set the matter for trial on April 8, 2008 at 9:00 am.

{¶ 5} On April 8, the day set for trial, in addressing some preliminary issues, Bennett's attorney indicated that the search warrant affidavit had not yet been ordered unsealed and, as a result, if required to proceed to trial without the necessary information to which he was entitled, he would be ineffective as counsel within the meaning of the Sixth Amendment. In response, the court ordered removed all three of appellants' attorneys, ordered appellants to retain new counsel within ten days, verbally ordered the appellants' bonds revoked, by judgment entry ordered the appellants remanded to the county jail, and refused former counsels' requests to be heard on the record on behalf of their clients. On April 10, 2008, counsel for appellants filed a notice of appeal, and a motion to stay execution of the court's judgments pending appeal.

Proceedings Before the Court of Appeals

The Eighth District held that the trial court erred in remanding the defendants to jail after the trial court rejected the plea agreement. With respect to whether the trial court erred in removing counsel, the Eighth District, relying on *Keenan*, held that it did not have jurisdiction to consider this issue prior to the completion of the trial, because it was not a final appealable order.

This timely appeal follows.[4]

ARGUMENT

Proposition of Law I:

In a criminal case, the denial of counsel of choice prior to trial is a final appealable order which a court of appeals has jurisdiction to review and affirm, modify or reverse.

The trial judge's disqualification of Mr. Chambliss' counsel is a final appealable order under Chapter 2505 of the Revised Code. R.C. 2505.02(B) sets forth the types of orders that are final appealable orders, i.e. orders that can be reviewed on direct appeal to a court of appeals. Subsection (B)(4), which was not in existence when *Keenan* was decided, pertains to the type of circumstance presented herein, where a trial court has denied a criminal defendant the right to be represented by counsel of choice.[5]

> (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:

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[4] The Eighth District originally announced its decision on July 31, 2008, 2008-Ohio-3800, but did not journalize it. Instead, on October 9, 2008, the Eighth District reconsidered its reasoning and issued a new opinion that was journalized that same date.

[5] In *Keenan,* this Court focused on subsection (B)(2) in determining that the denial of counsel of choice was not a final appealable order because it was not made in a "special proceeding." This aspect of *Keenan* is not being challenged.

However, *Keenan* also concluded that Keenan possessed an adequate remedy at law to appeal the disqualification of his choice of counsel. This latter aspect of *Keenan* is at issue in this case because, if Mr. Chambliss has an adequate remedy at law he cannot take an interlocutory appeal pursuant to subsection (B)(4) either. See infra.

> (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.

In *In re A.J.S.*, Slip Opinion 2008-5307, this Court recently examined subsection B(4):

> Thus, R.C. 2505.02(B)(4) sets forth a three-pronged test for determining whether a decision granting or denying a provisional remedy is a final order. *State v. Muncie* (2001), 91 Ohio St.3d 440, 446, 746 N.E.2d 1092.
>
> The first prong of this test asks whether the proceeding is a provisional remedy.
>
> ***
>
> The second and third prongs of the test for a final and appealable order examine whether the order determines the action and prevents a judgment in favor of the appealing party with respect to the provisional remedy and whether the appealing party would have a meaningful or effective remedy following a final judgment in the case.

Id., at pars. 18-19, 24.

In re A.J.S. applied these three criteria and concluded that, in a mandatory juvenile bindover proceeding, a juvenile court order denying the State's motion for a bindover was final and appealable. Applying these same criteria in the instant case should also cause this Court to hold that the trial court's order denying Mr. Chambliss his counsel of choice is final and appealable.

The First Criterion: The Choice of Counsel is a Provisional Remedy

The first requirement of subsection (B)(4) is that the trial court's proceeding must have addressed a provisional remedy. Accord, *In re A.J.S.* at par. 19. A provisional remedy is a "proceeding ancillary to an action." R.C. 2505.02(A)(3).

> "While R.C. 2505.02 does not define "ancillary," this court has held that "'[a]n ancillary proceeding is one that is attendant upon or aids another proceeding.' " *Muncie*, 91 Ohio St.3d at 449, 746 N.E.2d 1092, quoting *Bishop v. Dresser Industries* (1999), 134 Ohio App.3d 321, 324, 730 N.E.2d 1079.

In re A.J.S., at par. 20.

Applying these definitions of "provisional remedy" and "ancillary," it is apparent that the disqualification of counsel of choice is a provisional remedy because the choice of counsel is attendant upon, and aids the trial process in, the underlying criminal case. See, *State v. Saadey* (June 30, 2000), Columbiana App. No. 99 CO 49, 2000 WL 1114519, unreported ("a ruling on a motion to disqualify counsel in a criminal case is ancillary to the main action and thus qualifies as a provisional remedy under R.C. 2505.02(A)(3)").

The Second Criterion: The Trial Court's Disqualification of Counsel of Choice Has Determined the Provisional Remedy

The second requirement of R.C. 2505.02(B)(4) is that the ruling below determine the provisional remedy and prevents judgment for the appellant with respect to the provisional remedy. Here, there can be no question that the provisional remedy, i.e., whether Mr. Chambliss will be represented by the counsel of his choice, has been determined finally and against Mr. Chambliss. Under the trial court's ruling, Mr. Chambliss must go to trial represented by an attorney other than his attorney of choice or else he must represent himself. See, *Saadey* ("it is clear when a court rules on a motion for disqualification, the resulting order determines the action with respect to the motion and prevents judgments in favor of the appellant with respect to the motion.").

The Third Criterion: Mr. Chambliss Does Not Have a Meaningful or Effective Remedy via a Post-Trial Appeal.

The final criterion that must be met concerns whether Mr. Chambliss has a post-trial appellate remedy that can adequately redress the injury he will suffer from a wrongful

disqualification of his counsel of choice. This Court should re-examine its holding in *Keenan,* which concluded that a criminal defendant has an adequate remedy via a post-trial appeal. There are at least four reasons why a post-trial appeal is an inadequate substitute for an immediate appeal of the disqualification of counsel of one's choice:

1. Prevailing in a post-trial appeal requires the defendant to run the gauntlet of trial twice

2. Prevailing in a post-trial appeal requires the defendant to defend after a presumptively prejudicial passage of time

3. Prevailing in a post-trial appeal does not guarantee that counsel of choice will be able to make the tactical decisions in a second trial that would have been available at the first trial

4. Prevailing in a post-trial n appeal will not shield the defendant from the likelihood that the defendant will endure restraints of liberty during the appellate process

These concerns are addressed seriatim.

1. Forcing the Defendant to Run the Gauntlet of Trial Twice.

Even though the United States Supreme Court, in *Gonzalez-Lopez,* has guaranteed that Mr. Chambliss will automatically receive a new trial if his counsel was wrongly disqualified, Mr. Chambliss still suffers the constitutional indignity of having to be tried twice. The Double Jeopardy Clause of the United States Constitution generally protects the criminal defendant from having to undergo a second trial. See, e.g., *Abney v. United States* (1977), 431 U.S. 651.

> Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction.

Id., at 661.

While a retrial after a conviction is one of the "certain exceptions" that is not barred by the Double Jeopardy Clause, the fact remains that Mr. Chambliss will still be required to endure

the "personal strain, public embarrassment, and expense of a criminal trial more than once" if his appeal of his counsel's disqualification is not allowed prior to trial. In that these constitutionally-condemned adverse consequences could be avoided by an immediate appeal, the option of having to wait for a post-trial appeal is neither a "meaningful" or "effective" remedy.

This is not to suggest that every issue in every criminal case must be subject to an interlocutory appeal. But, in that an erroneous disqualification is a structural error which has been consummated as soon as counsel is disqualified, an immediate appeal in order to avoid an *automatic* re-trial is practical and will fully protect the defendant from running the gauntlet of trial twice. Because of this, the post-trial appeal of this issue is a far less efficacious remedy than the immediate appeal. This, alone, satisfies the third criterion of R.C. 2505.;02(B)(4).

2. Success in a Post-Trial Appeal Means Re-Trying a Stale Case

As a practical matter, a post-trial appeal necessarily causes a re-trial to occur more than one year after the original trial. With the passage of time also comes prejudice to the defendant. The United States Supreme Court has recognized that a delay of more than one year from the defendant's having been charged until the defendant's having been tried crosses the presumptively prejudicial threshold under the Sixth Amendment's speedy trial provision. *Doggett v. United States* (1992), 505 U.S. 647 652 n.1. Here, if Mr. Chambliss is erroneously forced to go to trial with different counsel, it will take far more than one year since his originally being charged before he is able to prevail in a post-trial appeal and be re-tried.

On the other hand, resolution of the disqualification issue via an interlocutory appeal can be handled expeditiously because the record is limited and there is only one issue on appeal. Unlike a post-trial appeal, which must also address any other errors committed at trial, an interlocutory appeal of the disqualification of counsel can be placed on an accelerated calendar and decided in very short order. Indeed, in this case, Mr. Chambliss's counsel was disqualified

on April 9, 2008 and the Eighth District originally announced its decision on July 31, 2008 – less than four months later.

Once again, because of the time lag attendant to trying a case with counsel-by-default, followed by a post-trial appeal, the normal appellate process does not provide a meaningful nor and effective remedy for Mr. Chambliss.

3. The Defendant's Options in a Re-Trial May Be Hampered by the Tactical Decisions of Counsel-By-Default

In *Gonzalez-Lopez,* the Supreme Court recognized that different attorneys will make different tactical choices in defending a case. Id., at 150. These differences in trial tactics are a principal reason that the wrongful denial of counsel of choice cannot be subject to an analysis for prejudice.

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.

Id. at 150.

These same tactical differences between attorneys may cases the attorney-of-choice to have to pursue a different strategy at the re-trial than would have been employed initially, solely because the tactical decisions of counsel-by-default made during the first trial have now limited what is available at the second trial. Witness examinations may have to be modified in light of prior testimony at the previous trial. The defendant's decision to testify or not to testify may be affected by the testimony of a defense witness at the first trial that counsel-of-choice never would have called. At the very least, the State has been given a preview of one possible defense strategy in the first trial and can now take steps to hone its presentation.

Because the re-trial will not be the same as the first trial, for reasons that *Gonzalez-Lopez* acknowledged are unquantifiable, it follows that a post-trial appeal does not provide an equally meaningful and effective remedy as would a pre-trial appeal of a wrongful disqualification of counsel.

4. The Defendant May Be Subjected to Additional Liberty Restrictions And Public Scorn When Taking a Post-Trial Appeal

Defendants taking **interlocutory** appeals prior to trial will usually continue to be subject to their pretrial conditions of release. On the other hand, defendants taking post-trial appeals oftentimes find themselves subjected to more restraints on their liberty than they confronted prior to trial. Oftentimes a convicted defendant is required to begin serving a period of incarceration immediately upon sentencing – particularly in cases where a conviction carries mandatory imprisonment. Even those defendants who are able to secure an appellate bond will oftentimes find themselves subjected to conditions of bond beyond those imposed prior to trial, such as more closely monitored release, home confinement, etc. Moreover, these additional conditions are combined with the public humiliation of having been convicted, which can limit employment opportunities ad generally subject the defendant to public scorn.

Once again, the post-trial appeal is not as meaningful or effective as an interlocutory appeal because the defendant labors under these more onerous conditions of release and under the cloud of a conviction during the pendency of the post-trial appeal.

Interpreting R.C. 2505.02(B)(4) As Allowing Interlocutory Appeals of the Disqualification of Counsel Effects the Fair, Effective and Speedy Administration of Justice.

Statutes governing procedure in criminal cases should be interpreted so as to effect fairness as well as the speedy and sure administration of justice. R.C. 2901.04. These

considerations all weigh in favor of interpreting R.C. 2505.02(B)(4) so as to permit interlocutory appeals of the disqualification of counsel of choice.

The adverse effects on criminal defendants who are forced to wait until after trial to appeal the disqualification of counsel have already been discussed. But others within the criminal justice system also suffer if defendants cannot immediately appeal the disqualification of their counsel of choice.

Where defendants are denied counsel-of-choice, they are less likely to have the confidence in counsel-by-default to agree to plead guilty when such a plea is warranted. This is particularly so in light of *Gonzalez-Lopez,* which guarantees the defendant a new trial if counsel-of-choice was wrongfully disqualified. Defendants who are outraged at having lost their counsel of choice are likely to go to trial in order to vindicate this interest. Accordingly, needless trials will occur. Moreover, cases that could only be resolved via trial will now result in two trials when counsel-of-choice has been wrongfully disqualified and reversal is automatic.

While, as the Opinion Below recognized, the criminal defendant may have nothing to lose in going to trial when counsel has been wrongfully disqualified, others will suffer adverse effects. Victims will be required to go through the rigors of trial twice. Other witnesses will be inconvenienced. In some cases, prosecutors may be required to extend overly-indulgent plea offers to defendants in order to avoid these consequences.

Obviously, re-trials also affect the efficiency of trial courts, as well as appellate courts (who may now see two rounds of appeals, one after each trial). The same inefficiencies that arise in civil cases where counsel has been wrongfully restricted from participating in a case are also present in criminal cases. Yet, denial of pro hac vice status in a civil case is a final appealable order. E.g., *Guccione v. Hustler Magazine, Inc.* (1985), 17 Ohio St.3d 88.

As the Opinion Below concluded:

> We apprehend no reason why the selection and retention of an attorney in a civil case is to be more protected (by immediate access to the appellate process) than the choice and retention of counsel in a criminal case. Especially in a situation such as we have here, where should there be a conviction, reversal would be "automatic."

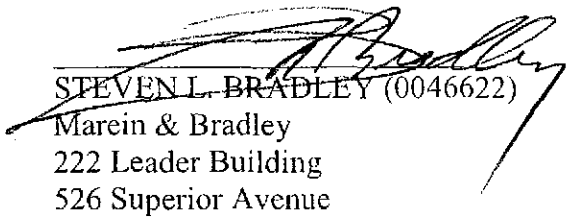
Id., at par. 17, quoting *State v. Payne, Payne* 114 Ohio St.3d 502,505, 2007-Ohio-4642.

For these reasons, the decision of the Eighth District should be reversed.

CONCLUSION

Wherefore, this Court should accept this case and decide the important issues presented herein.

Respectfully submitted,



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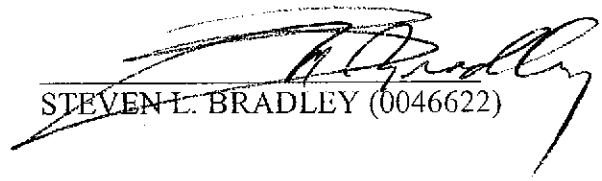
CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was served via U.S. Regular Mail to William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 17 day of November, 2008.



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OCT 9 - 2008

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91272

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DANTAE CHAMBLISS, ET AL.

DEFENDANTS-APPELLANTS

CA08091272
53981160

JUDGMENT:
REVERSED IN PART; DISMISSED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500664

BEFORE: McMonagle, J., Gallagher, P.J., and Boyle, J.

RELEASED: October 9, 2008

JOURNALIZED: October 9, 2008

00667 P0618

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ON RECONSIDERATION[1]

CHRISTINE T. McMONAGLE, J.:

Defendants-appellants, Dantae Chambliss, James Bennett, and Travis Sanders, appeal the trial court's judgments removing their respective counsel, remanding them to the county jail, and ordering them to retain new counsel.

Appellants were indicted on several drug-related offenses, and each retained his own attorney. The charges carried mandatory prison time. All three appellants posted the bonds that were set for them, and were released pending trial. Appellants filed various pretrial motions, including motions to compel production of the search warrant affidavit and to unseal it, motions to suppress, and motions to disclose the identity of a confidential and reliable informant. These motions have never been ruled on.

The record reflects that the State did not want to reveal the identity of the informant in this case and, therefore, was hesitant to permit the search warrant affidavit to be unsealed. As a result of these concerns, the State and appellants reached a compromise whereby appellants would plead guilty to amended counts of the indictment which did not carry mandatory prison time, the identity of the

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[1]The original announcement of decision, *State v. Chambliss*, 2008-Ohio-3800, released July 31, 2008, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(E); see also, S.Ct.Prac.R. II, Section 2(A)(1).

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informant would not be revealed, and the search warrant would not be unsealed. As part of the plea agreement, the State agreed to recommend a community control sanction at sentencing for Sanders and two-year sentences for Chambliss and Bennett.

The trial judge assigned to the case was unavailable on the day of the plea, and the plea was taken by another judge. The plea journal entry on behalf of Sanders states that "[t]he state recommends community control sanctions and should the sentencing court choose to impose a prison term, the state has no objection to withdrawal of the pleas." The plea journal entries on behalf of Chambliss and Bennett state that the "[r]ecommended sentence by the state is 2 years[;] no objection by the state to withdraw the plea should the court choose to impose a harsher sentence." On the date set for sentencing, the trial court refused to accept the agreement between the State and the defense, and the docket reflects that appellants then orally moved to withdraw their pleas. These oral requests were granted on March 27, 2008 and the court set the matter for trial on April 8, 2008 at 9:00 am.[2]

On April 8, the day set for trial, in addressing some preliminary issues, Bennett's attorney indicated that the search warrant affidavit had not yet been

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[2]One appellant, Sanders, later filed a notice of objection to the order vacating the plea agreement and motion to enforce the plea agreement.

ordered unsealed and, as a result, if required to proceed to trial without the necessary information to which he was entitled, he would be ineffective as counsel within the meaning of the Sixth Amendment. In response, the court ordered removed all three of appellants' attorneys, ordered appellants to retain new counsel within ten days, verbally ordered the appellants' bonds revoked, by judgment entry ordered the appellants remanded to the county jail, and refused former counsels' requests to be heard on the record on behalf of their clients.[3] On April 10, 2008, counsel for appellants filed a notice of appeal, and a motion to stay execution of the court's judgments pending appeal.

On April 11, 2008, we granted a stay, vacated the trial court's order remanding appellants, and ordered that appellants be released forthwith on their previously posted bonds. We did not reinstate any revoked bonds, as revocation of the bonds did not appear in the court's entry of judgment. *State v. Chambliss*, Cuyahoga App. No. 91272, Motion No. 407777.

In their sole assignment of error, appellants challenge the trial court's judgments removing their counsel and remanding them to jail.

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[3]Upon the record, the judge said he was revoking appellants' bonds; the judgment entries, however, do not specifically revoke the bond, rather they simply remand appellants.

As to the issue of the remand of appellants to jail and the verbal (but not journalized) order revoking their bond, the State does not contest the merits of appellants' claim.[4] The law is clear and unequivocal that Section 9, Article I of the Ohio Constitution guarantees appellants bail, and this guarantee is put into effect by Crim.R. 46. In order to deny bail, the court is required to follow the dictates of R.C. 2937.222.[5] At oral argument, the State contended that this court had already vacated the order of remand in its entry granting a stay, and since the order revoking the bonds was never journalized, there is nothing left to be resolved.

We disagree; our order vacating the remand of appellants to jail was solely in fulfillment of a "request for stay" filed by appellants; it did not resolve whether the remand was error. We first acknowledge that "remanding the defendants to jail" and "revoking their bonds" have no difference in meaning in the context of this case; whether appellants had valid bonds is of no moment; the trial court ordered all of them to jail. While new bonds did not have to be written upon our order of release of appellants, the bonds were effectively

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[4]The State only argues that since the only journalized order is for remand, and since the defendants have been released, this issue is not "ripe" for adjudication.

[5]The record before us is silent as to whether the charges against appellants are of the nature where bail can be denied under the statute; we proceed to analyze the case as though they are.

"revoked," "set aside," or "ignored"–regardless of how termed, the outcome for appellants resulted in them being incarcerated.

In this particular case, appellants were first deprived of counsel. Then, with no notice, no opportunity to be heard, and no legally sufficient cause articulated upon the record, the trial court jailed all three appellants. While the trial court stated that he did this because the pleas were vacated and appellants again faced mandatory time,[6] this statement to the Supreme Court ignores the fact that all three appellants involved here had been free on substantial surety bonds *before* pleas were ever taken,[7] and there is no evidence whatsoever that they had come to pose any greater danger to the community than they did when the bonds were first set, nor is there any evidence in the record that they ever failed to appear as scheduled or breached any conditions of their bonds. In sum, there is no evidence in the record of any sort that could support a modification, let alone cancellation, of these three bonds since appellants met the conditions of their bonds in accordance with Crim.R. 46. Other than the removal of counsel, the record reflects no change of circumstances whatsoever from conditions when the original bond was set.

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[6]Court's affidavit in *In re Disqualification of Judge John Sutula*, Supreme Court Case No. 08-AP-033.

[7]On September 27, Chambers posted $100,000, and Bennett and Sanders each posted $10,000.

In *Utley v. Kohn* (1997), 120 Ohio App.3d 52, 696 N.E.2d 652, the court held that "[w]here the trial court setting the original bail has considered all the required factors in determining the amount of bail, and there is no showing of any changed circumstances of the accused or his surroundings, the bond as set must continue as a matter of right." Id. at 55, citing Crim.R. 46(J) and *May v. Berkemer* (Mar. 29, 1977), Franklin App. No. 77A-183.

The issue of a final appealable order regarding the remand of appellants is resolved by R.C. 2937.222(D)(1), which explicitly provides that "[a]n order of the court of common pleas denying bail pursuant to this section is a final, appealable order[,]" "the court of appeals shall give the appeal priority on its calendar[,]" and "[d]ecide the matter expeditiously." This court has given the bail issue priority in granting a stay, vacating the remand order, and expediting a briefing schedule and hearing.

We address next the unilateral removal of retained counsel by the court without request of either party, without notice and without opportunity to be heard, rendering the appellants under indictment, remanded to jail without bond, and wholly without counsel.

In *United States v. Gonzalez-Lopez* (2006), 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409, the United States Supreme Court held that a court's deprivation of a criminal defendant's choice of counsel entitles him to a reversal

of his conviction. The court further held that appellate review of the court's decision to remove counsel is not subject to a harmless-error analysis, and stated "that the erroneous deprivation of the right to counsel of choice 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.'" Id. at 150, quoting *Sullivan v. Louisiana* (1993), 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182. Structural errors are constitutional errors that defy analysis by "harmless error" standards because they affect the framework in which the trial proceeds, rather than just being error in the trial process itself. *Gonzalez-Lopez* at 148. Structural error permeates the entire conduct of a trial so that the trial cannot reliably serve its function as a means for determining guilt or innocence. *Arizona v. Fulminante* (1991), 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302. A structural error mandates a finding of "per se prejudice." *State v. Colon*, 118 Ohio St.3d 26, 30, 2008-Ohio-1624, 885 N.E.2d 917, and results in "automatic reversal." *State v. Payne*, 114 Ohio St.3d 502, 505, 2007-Ohio-4642, 873 N.E. 2d 306. The State does not contest the merits of this claim; it contends only that the order removing retained counsel is not a final appealable order.

We must acknowledge that we are significantly troubled by this argument. By asserting that this is not a "final appealable order," the State is left in a position where, should they obtain a conviction at trial, said conviction

would be subject to automatic reversal. Likewise, appellants could not possibly sustain a loss–they either "win" the case, or it is reversed. We can conceive of no greater waste of court time and resources; not to mention the cost to appellants of having to pay two sets of retained attorneys for perhaps two trials. And, in light of the "structural" nature of the error, quaere whether anything that transpired in a first trial could be used by the State against appellants in a second trial, including the testimony of appellants, should they elect to testify.

In *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 631 N.E.2d 119, the Ohio Supreme Court, relying on *Polikoff v. Adam* (1993), 67 Ohio St.3d 100, 616 N.E.2d 213, syllabus, held that a pretrial order granting a disqualification motion in a criminal case is not a final appealable order. *Keenan* at 178. In *Polikoff*, the Supreme Court held that orders that are entered in actions that are recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02. We note, however, that both *Keenan* and *Polikoff* were decided before *Gonzalez-Lopez* articulated the proposition that denial of counsel of choice is structural error entitling an aggrieved defendant to an automatic reversal of his conviction. We locate no other criminal case where disqualification of an attorney constituted a final appealable order.

We do note, however, a number of cases where denial of pro hac vice status in a civil case is a final appealable order See, for e.g., *Westfall v. Cross* (2001), 144 Ohio App.3d 211, 759 N.E.2d 881; *Guccione v. Hustler Magazine, Inc.* (1985), 17 Ohio St.3d 88, 477 N.E.2d 630. Likewise, this court, after *Polikoff*, in a legal malpractice case, found an order disqualifying chosen counsel was a final appealable order in *Ross v. Ross* (1994), 94 Ohio App.3d 123, 640 N.E.2d 265. We apprehend no reason why the selection and retention of an attorney in a civil case is to be more protected (by immediate access to the appellate process) than the choice and retention of counsel in a criminal case. Especially in a situation such as we have here, where should there be a conviction, reversal would be "automatic." *Payne* at 505.

Accordingly, we find error in the court's remand of appellants, and we vacate that order. Reluctantly, we find that, pursuant to *Keenan*, supra, the error alleged by the order directing the unilateral removal of appellants' retained counsel is not a final and appealable order, and accordingly, appeal upon that issue is dismissed.[8]

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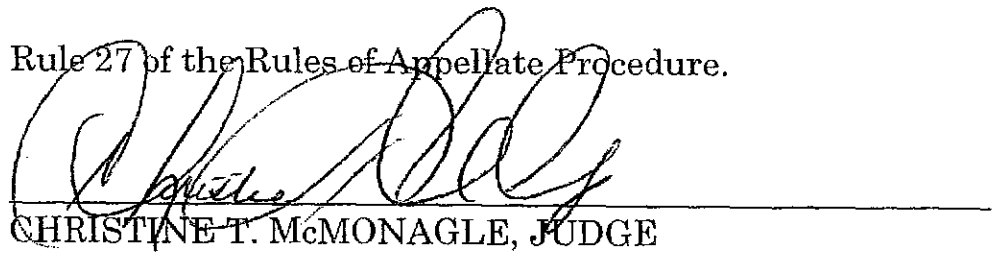
[8]We are particularly conflicted by this ruling because the right to an attorney of one's choice is a Sixth Amendment constitutional right in criminal cases, and does not find the same constitutional significance in a civil matter.

It is ordered that appellants and appellee equally split the 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 common pleas court 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.



CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR

FILED AND JOURNALIZED
PER APP. R. 22(E)

OCT 9 - 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED