

ORIGINAL

IN THE SUPREME COURT OF OHIO
2009

STATE OF OHIO,

Case No. 08-1012

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

DAVID B. CLINKSCALE,

Court of Appeals
Case No. 06AP-1109

Defendant-Appellant

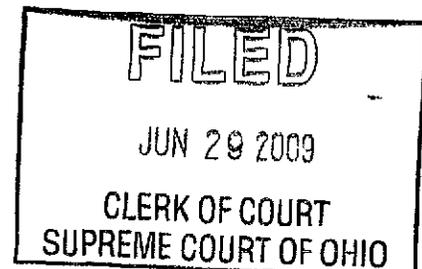
**PLAINTIFF-APPELLEE STATE OF OHIO'S MOTION FOR
RECONSIDERATION, MOTION FOR SUPPLEMENTAL BRIEFING, AND
MOTION FOR ORAL REARGUMENT**

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**PLAINTIFF-APPELLEE STATE OF OHIO'S MOTION FOR
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Pursuant to S.Ct.Prac.R. XI(2), and for the reasons stated in the following memorandum in support, plaintiff-appellee State of Ohio respectfully requests that this Court reconsider the 4-3 decision issued on June 17, 2009. Upon such reconsideration, the State further respectfully requests that this Court order supplemental briefing on the Crim.R. 22 issue and order an oral reargument.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

In a 4-3 opinion, the four-justice majority reversed defendant Clinkscale's convictions on two grounds: (1) the trial court had violated Crim.R. 22 and due process by not recording the proceedings surrounding the dismissal of a deliberating juror; and (2) the trial court had violated former Crim.R. 24(G)(2) by substituting an alternate for the dismissed juror during deliberations.

The State now seeks reconsideration because of legal errors in the majority opinion and because the majority deprived the State of a fundamentally-fair appellate review. While this motion is lengthy, it is not a mere reargument of the State's positions. Rather, it is lengthy because this is the State's first opportunity to address a

claim of Crim.R. 22 error.

A. One-Sided Appellate Review & Lack of Notice and Opportunity to Be Heard

The majority reached out to address a claim of error under Crim.R. 22 and/or “due process” because of the trial court’s failure to record proceedings related to the dismissal of a juror, even though defendant had *never even cited Crim.R. 22* and had *never claimed* that a violation of that rule warranted reversal or rose to the level of a “due process” violation. Indeed, the proposition of law pertinent to the dismissal of the juror presupposed an adequate appellate record and presupposed that defendant could prevail on the merits based on his trial counsel’s unilateral assertions three weeks after the dismissal. The conclusion reached by the majority here – that the appellate record was inadequate and “speculative” regarding the events surrounding the dismissal – is diametrically at odds with the defense proposition of law and the arguments made thereunder.

In opposing defendant’s speculative proposition of law, *the State* contended that the record was inadequate and that the proposition of law pertaining to juror dismissal must be rejected. The majority here *agreed* with the State, but the majority then *sua sponte* claimed that the trial court’s failure to make a record was itself a basis for reversal. No such claim of error had ever been raised.

Sua sponte consideration of a claim of Crim.R. 22 error also went beyond this Court’s narrow grant of review. The majority acknowledged that the Court “accepted jurisdiction over only two of the propositions of law * * *.” Opinion, at ¶ 10. Neither of those propositions involved a claim of Crim.R. 22/“due process” error pertinent to

a failure to make a record regarding the dismissal. Going beyond a narrow grant of review is a ground for reconsideration. See Case No. 2007-0268, *State v. Smith* (after initial decision addressed issue not earlier granted review, Court granted review on issue and allowing supplemental briefing); see, also, *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787 (opinion after the supplemental briefing).

By going beyond the narrow grant of review, and by addressing a claim of error never raised in the Court of Appeals or here, the majority deprived the State of fair appellate review. This Court's own precedents require that the parties be given the opportunity to address issues that are raised sua sponte by an appellate court. The State asked for such an opportunity in footnote six of its merit brief:

If this Court contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

The State was blindsided by the majority's consideration of a claim of Crim.R. 22 error. Such consideration is made all the more inappropriate by the fact that the majority committed several errors. See Parts (B)(1) to (B)(4), below. For example, the majority's resolution of the issue contradicts this Court's cases requiring that the appellant use all reasonable efforts, including App.R. 9 procedures, to reconstruct the record, even on "critical" issues. See Part (B)(3), below. The majority also applied the wrong appellate remedy in awarding an outright reversal instead of ordering a limited remand to settle the record pursuant to App.R. 9. See Part (B)(4), below.

While reaching out to address sua sponte a claim of Crim.R. 22 error, the majority ironically then proceeded to *not* address arguments the State had been raising all along regarding defendant's claim of error under former Crim.R. 24(G)(2) regarding the substitution of the alternate. The majority did not address the State's argument for plain-error review, an argument the State has been raising ever since the defense first raised this claim of error in the Court of Appeals. See Part (C), below.

In addition, the majority did not address the State's claim that former Crim.R. 24(G)(2) is unconstitutional as in conflict with substantive provisions in R.C. 2945.29 and R.C. 2313.37(D), both of which *commanded* the substitution of the alternate. The former rule was unconstitutional in barring mid-deliberation substitution, and the majority here did not rule on the issue of constitutionality. Again, the State had been raising this issue all along. See Part (D), below.

The end result is that the majority's ruling creates two levels of unfairness to the State. On one level, the majority reached out to address sua sponte the claim of Crim.R. 22 error without giving the State notice and an opportunity to be heard. Then, on another level, the majority failed to address legal arguments the State had been raising all along vis-à-vis the substitution of the alternate. By giving defendant review of a claim he did not even raise, while failing to give the State a review of the issues it had been raising all along, the majority has deprived the State of a fundamentally-fair appellate review.

Such unfairness justifies reconsideration. The test generally used in ruling on a motion for reconsideration is "whether the motion calls to the attention of the court

an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.” *Columbus v. Hodge* (1988), 37 Ohio App.3d 68, 68. The State respectfully submits that the majority committed an obvious error depriving the State of fair notice of the claim of Crim.R. 22 error. The State also respectfully submits that the majority failed to address key issues regarding plain-error review vis-à-vis former Crim.R. 24(G)(2) and regarding R.C. 2945.29, R.C. 2313.37(D), and the unconstitutionality of former Crim.R. 24(G)(2).

B. Mistakes in the Majority’s Crim.R. 22 Analysis

There is a practical reason for giving the parties notice and an opportunity to be heard on sua sponte claims of error. Without the reasoned advocacy of the parties, the appellate court is more likely to make mistakes. Several mistakes occurred here.

1.

If given notice and the opportunity to be heard, the State would have pointed out that, under this Court’s precedents, the claim of Crim.R. 22 error was waived/forfeited through lack of objection. The defense never claimed Crim.R. 22 error in the trial court regarding the lack of recording of the dismissal of the juror. Time after time, this Court has concluded that unobjected-to error under Crim.R. 22 is waived/forfeited. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶¶ 182, 183 (“Leonard failed to object or ask that these conferences be recorded and has waived this issue.”; “reversal will not occur as a result of unrecorded proceedings when the defendant failed to object and fails to demonstrate material prejudice.”); *State v.*

Palmer (1997), 80 Ohio St.3d 543, 555 (“defense counsel made no request on the record that they be recorded, thereby waiving the error involved.”); *State v. Grant* (1993), 67 Ohio St.3d 465, 481 (“defense counsel never requested that they be recorded, thereby waiving any error”); *State v. Brewer* (1990), 48 Ohio St.3d 50, 60-61 (“appellant failed to object or move for recording at trial. More significantly, appellant’s present counsel failed to invoke the procedures of App. R. 9(C) or 9(E) to reconstruct what was said or to establish its importance. In the absence of an attempt to reconstruct the substance of the remarks and demonstrate prejudice, the error may be considered waived.”).

Even when there was a contemporaneous objection to the lack of recording in the trial court, this Court has required that the defendant-appellant exhaust App.R. 9 procedures or else waive the issue. *State v. Keenan* (1998), 81 Ohio St.3d 133, 139 (“Keenan did not attempt to use App.R. 9 to reconstruct the content of the unrecorded sidebars and show prejudice. Hence, ‘the error may be considered waived.’”).

The claim of Crim.R. 22 error also was never raised in the Court of Appeals, which meant that the issue was waived/forfeited there too and cannot succeed unless defendant shows plain error. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶¶ 60, 77, 87, 99, 115, 128, 148, 213, 215 (repeatedly citing *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph two of the syllabus, and citing Crim.R. 52(B) in ¶ 60).

The majority should have concluded that the claim of Crim.R. 22 error was waived and that the claim was only reviewable under a plain-error standard.

2.

The majority wrongly contended that, in the sentencing hearing three weeks after the fact, “defense counsel took sufficient measures, required by *Palmer*, to give notice that a deficiency in the record existed and to appropriately remedy the deficiency.” Opinion, at ¶ 16. Whatever else one may think about counsel’s comments three weeks after the fact, such comments do not represent a timely objection to any lack of recordation three weeks earlier. The time to object to any lack of recordation would have been before the verdicts when the parties learned of the failure to record, not three weeks later after the defense had lost.

While the trial court could have endeavored to fill out the record three weeks later, the problem is that the defense *never asked the court to do so*. Counsel only asked to put his own purported recollections on the record: “I simply wanted to put on the record what happened Monday morning * * *.” (T. 1522) “So, essentially, that’s what I wanted to say.” (T. 1524) Counsel said “I just wanted to fill out the record, because none of that was put on.” (T. 1527) Counsel “just wanted” to place his unilateral version on the record. The defense never asked the *trial court* to conclusively settle the record.

3.

Another aspect of the problem is that, even when there is a timely objection to the failure to make a record, this Court has always required that the appellant (including capital defendants) exhaust App.R. 9 procedures in an effort to reconstruct what occurred or to establish its importance. The majority acknowledged this aspect

of *State v. Palmer* (1997), 80 Ohio St.3d 543, but then contended that *Palmer* is distinguishable because “Palmer addresses the failure to record relatively unimportant portions of the trial.” Opinion, at ¶ 14. This is a misstatement not only of the significance of *Palmer* but also of the significance of other cases in which this Court has recognized that exhaustion of App.R. 9 procedures is required.

If the State been given notice and an opportunity to be heard, the State could have pointed out that issues just as important as the dismissal of a deliberating juror had been involved in other cases in which this Court invoked the exhaustion requirement. In *Palmer* itself, one of the unrecorded conferences involved the dismissal of a prospective juror in that capital case. *Palmer*, 80 Ohio St.3d at 555. The majority here states that “the composition of the jury in a capital case implicates important constitutional rights * * *.” Opinion, at ¶15.

In fact, the exhaustion requirement goes back as far as *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, which recognized nearly three decades ago that when a transcript of four days of testimony was missing, all reasonable efforts to reconstruct the record must be exhausted. As stated in *Knapp*:

The plaintiffs in this action did not meet their burden to supply a transcript of the trial proceedings. Admittedly, it was through no fault of their own that plaintiffs were unable to supply a verbatim trial transcript. However, other options were available, specifically App. R. 9(C) and (D). App. R. 9(C) permits an appellant to submit a narrative transcript of the proceedings when a verbatim transcript is unavailable, subject to objections from the appellee and approval from the trial court. App. R. 9(D) authorizes parties to submit an agreed statement of the case in lieu of the record. There is nothing in the record indicating that plaintiffs even attempted to avail themselves of

these alternatives. Accordingly, as to those assignments of error dependent for their resolution upon a trial transcript, the judgment of the lower court would ordinarily be affirmed in a case such as this.

One fact, however, precludes such a result in this cause -- plaintiffs were never out of order during the entire pendency of the appeal. At all times plaintiffs acted with the permission of the court in waiting for the court reporter to regain her health so that she could transcribe her notes. * * *

This does not mean, however, that plaintiffs are entitled to a new trial. Rather, the cause should be remanded to the trial court, where, pursuant to Civ. R. 63(B), a judge shall be appointed to complete the unfulfilled duties of the removed trial judge in this cause. Several options are then available to the appointed judge. We suggest that an inquiry be made as to the current health status of the court reporter. Indeed, it would not be surprising to find that she is now quite able to transcribe her notes. If not, plaintiffs should be given the opportunity to provide the court with an App. R. 9(C) narrative transcript. The parties might even reach an agreed statement of the case pursuant to App. R. 9(D). But, the appointed judge should consider granting plaintiffs a new trial, in accordance with Civ. R. 63(B), *only after all reasonable solutions to this problem are exhausted.*

Knapp, 61 Ohio St.2d at 199-200 (emphasis added).

This principle was reinforced in the 1990's in *State v. Jones* (1994), 71 Ohio St.3d 293, in which the entire transcript of the trial testimony was unavailable because the court reporter's notes had been destroyed. This Court emphasized again that the appellant must endeavor to use all reasonable efforts to reconstruct the record.

The correct procedure the court of appeals could have followed in this case is found in App.R. 9. Where there is no record, App.R. 9(C) permits the trial court to hold an evidentiary hearing in order to settle and approve the appellate record. Where there are gaps in

or disputes about the record, App.R. 9(E) provides a procedure for correction or modification. Under that provision, a court of appeals may direct the trial court to settle the record.

App.R. 9 does not explicitly provide the appellate court with the authority to grant a new trial. However, per *Knapp v. Edwards Laboratories, supra*, an appellant is entitled to a new trial where, after an evidentiary hearing, a record cannot be settled and it is determined that the appellant is not at fault. * * *

In *Knapp, supra*, the issue was whether the plaintiffs were entitled to a new trial because the court reporter was unable to transcribe portions of trial testimony necessary to properly present the assigned errors on appeal. *This court held that, absent fault on the part of the appealing party, a new trial should be granted if, after all reasonable solutions are exhausted, an appellate record could not be compiled.*

* * *

We are troubled by the fact that neither the trial court nor the court of appeals complied with App.R. 9. Furthermore, the court of appeals should have dealt with the record before it by way of an opinion instead of a simple journal entry. Due to the approach taken by both the court of appeals and the trial court, additional time has passed, making it even more difficult to compile and settle a 9(C) statement.

Jones, 71 Ohio St.3d at 297-99 (emphasis added).

Other cases requiring exhaustion of App.R. 9 procedures have involved unrecorded conferences on issues involving constitutional issues and unrecorded conferences in cases in which the death penalty actually had been imposed.

- *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 213 (death case; conversations between court and jury; “Frazier has not attempted to reconstruct what the trial court discussed with the jury in an effort to show prejudice. See App.R. 9(B) and (E)”))

- *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 163 (death case; “defense counsel made no attempt to recreate the contents of the charts pursuant to App.R. 9(C)”)
- *State v. Williams*, 99 Ohio St. 3d 439, 2003-Ohio-4164, ¶¶ 96-99 (death case; claimed ex parte meeting by judge with jurors; defendant had “not established that he was prejudiced by any conversations that the trial judge may have had with the jury. In fact, he has not even attempted to reconstruct what occurred in an effort to show prejudice.”)
- *State v. Iacona* (2001), 93 Ohio St.3d 83, 106-107 (defendant claimed due process violation because trial court threatened defense with negative evidentiary ruling if defense pursued natural-death defense; record held inadequate because no App.R. 9(C) statement was made)
- *State v. Nields* (2001), 93 Ohio St. 3d 6, 27 (death case; claimed denial of fair trial in violation of witness sequestration order; claim rejected because “defendant made no attempt to supplement the record under App.R. 9(C)”)
- *State v. Williams* (1995), 73 Ohio St.3d 153, 161 (death case; actual polling of jury after guilt-phase verdict not transcribed; defendant “did not make a timely motion to supplement the record, nor did appellant attempt to reconstruct the record.”)

If given the opportunity to brief the claim of Crim.R. 22 error, the State also would have pointed out that this Court had already held that “the nature of the underlying case is immaterial * * *” to the issue of whether App.R. 9 procedures must be exhausted. *In re B.E.*, 102 Ohio St.3d 388, 2004-Ohio-3361, ¶ 14. In the *B.E.* case, an order of permanent custody had been reversed by the appellate court because a transcript of “critical testimony” was missing. This Court *rejected* the appellate court’s conclusion that automatic reversal was called for, and this Court emphasized that App.R. 9 procedures must first be exhausted even in cases of missing “critical testimony” and even in cases as serious as those involving constitutionally-protected parental rights. As stated in *B.E.*:

{¶ 14} Although we agree with the result reached by

the court of appeals, we decline to hold that an App.R. 9(C) statement may never be used where a juvenile court fails to comply with Juv.R. 37(A). The procedures outlined in App.R. 9 *are designed precisely for this type of situation, where a transcript is unavailable*. Therefore, we reject the court of appeals' assertion that App.R. 9 is insufficient in a case where parental rights are at stake and critical testimony is missing. In fact, *the nature of the underlying case is immaterial*, as we have allowed criminal defendants to use App.R. 9(C) to supplement the record even in aggravated murder cases, in which the court was also obligated to record the proceedings, under Crim.R. 22. See, e.g., *State v. Brewer* (1990), 48 Ohio St.3d 50, 60-61, 549 N.E.2d 491.

{¶ 15} We find that our decisions interpreting the interplay between Crim.R. 22 and App.R. 9 are relevant to resolution of this appeal. Similar to the recording requirement in Juv.R. 37(A), Crim.R. 22 requires a criminal court to record proceedings in all "serious offense cases." In these cases, despite the recording requirement, *we held that the appellant waived any error by failing to invoke the procedures of App.R. 9(C) or 9(E) and making no attempt to reconstruct the missing portions of the record*. E.g., *id.*; *State v. Keenan* (1998), 81 Ohio St.3d 133, 139, 1998 Ohio 459, 689 N.E.2d 929. Thus, we recognized that although it is the court's responsibility in the first place to record the proceedings, the appellant, if possible, should attempt to use one of the procedures outlined in App.R. 9 to supplement the record for appeal purposes. (Emphasis added)

This Court in *B.E.* ultimately concluded that reversal was called for, but only because the parent's attorney *had* attempted to use App.R. 9 to reconstruct the record and was unsuccessful because no one could recall what had occurred and the missing testimony could not be recreated.

The decision in *B.E.* shows that the majority erred here. *B.E.* shows that

nature of the underlying case is *immaterial* to the exhaustion requirement. *B.E.* also shows that it is immaterial that the unrecorded conference addresses an important or “critical” issue. In *B.E.*, “critical testimony” was missing, and yet this Court still required an exhaustion of App.R. 9 procedures. See, also, *Knapp*, *supra* (four days of testimony missing); *Jones*, *supra* (all testimony missing). The absence of “critical testimony” in *B.E.* would be just as “critical” to appellate review of constitutionally-protected parental rights as would be the unobjected-to dismissal of a deliberating juror in a nominally “capital” case in which the death penalty was not available. Indeed, even in cases in which the death penalty had actually been imposed, the defendant was still required to exhaust App.R. 9 procedures. See *B.E.*, at ¶¶ 14 & 15 (citing *Brewer* and *Keenan*). The State cannot help but think that this Court would have benefited from the supplemental briefing that this Court should have ordered.

Defendant never tried to exhaust App.R. 9 procedures, as he never moved the trial court to conduct such proceedings. At the sentencing hearing three weeks after the juror’s dismissal, defendant could not have invoked App.R. 9 procedures, since no appeal was pending yet. See App.R. 1(A). Presumably, a motion to fill out the record could have sufficed to comply with the exhaustion requirement discussed in *B.E.* and other cases. The problem, though, is that the defense never requested that the trial court provide a conclusive settlement of the record *ala* App.R. 9. Again, defense counsel had only wished to state his unilateral recollection, without any request whatsoever that the trial court actually settle or correct the record. The defense waived/forfeited any error in this regard.

If the State had been given notice and the opportunity to be heard, the State also would have pointed out that an error three weeks after the guilty verdicts in failing to sua sponte settle the record would not require a vacating of the verdicts themselves. If the error is in failing to settle the record, the appellate remedy for such error would be only partial reversal so that the trial court could do what it should have done, i.e., settle the record. After the trial court would settle the record on remand, another appeal could proceed from there, at which time the defendant could receive a full merits determination of the legality of the dismissal of the juror.

It is axiomatic that the remedy for trial court error is to return the case to the status quo ante the error. “Upon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred.” *State ex rel. Stevenson v. Murray* (1982), 69 Ohio St.2d 112, 113. “This rule has been applied to criminal cases.” *State ex rel. Douglas v. Burlew*, 106 Ohio St.3d 180, 2005-Ohio-4382, ¶ 11. At most, the trial court’s error in failing to hold a settle-the-record hearing would return the case to the point at which the error occurred, i.e., at the point when counsel purportedly “took sufficient measures” at the outset of the October 2nd sentencing hearing to raise the issue. The error at the sentencing hearing in failing to settle the record would not justify the reversal of the guilty verdicts.

This Court’s case law shows that the proper remedy for a lower court’s failure to use all reasonable efforts to settle the record is to remand for a record-settling hearing. In *Knapp* and *Jones*, this Court remanded for App.R. 9 procedures or an

evidentiary hearing to settle/correct the record. *Knapp*, 61 Ohio St.2d at 200; *Jones*, 71 Ohio St.3d at 299. This makes logical sense. If the error was in the failure of the trial court to settle the record, an remand for a record-settling hearing would fully vindicate the purported error.

The majority's conclusion that the Crim.R. 22 error requires the outright reversal of the convictions constitutes obvious error. A reversal and limited remand for App.R. 9 procedures would have been sufficient, since such procedures "are designed precisely for this type of situation." *B.E.*, at ¶ 14. The majority's mistake on remedy again demonstrates that supplemental briefing would have been beneficial.

It bears emphasis that, unlike in *B.E.*, it does not appear that App.R. 9 procedures would be unable to settle the record. There is no shortage of available recollections, as the defense counsel and the prosecutor gave their conflicting accounts. The error found by the majority is "the trial court's failure to make either party's rendition official * * *." Opinion, at ¶ 17. The remedy for such an error would be a settle-the-record hearing and settle-the-record order, not outright reversal.

It also bears emphasis that the majority did not find error in the dismissal of the juror. Indeed, the majority agreed with the State that issues related to excusal of the juror could not be determined on the basis of the current speculative record. Opinion, at ¶ 18. The only error found in this regard is the failure to make a record of the dismissal, and a remand for record-settling hearing would fix this error.¹

¹ The State disagrees with the majority's assertion that the record is speculative because "we are unable to discern whether the juror was, as argued, a lone dissenting juror who wished to be dismissed for this reason." Opinion, at ¶ 18. This Court has already recognized that a deliberating juror should not be asked about how he or she

C. Mistake in Failing to Apply Plain-Error Review to Former Crim.R. 24(G)(2)

The substitution-of-alternate issue does not suffer from a lack of recordation under Crim.R. 22, since the court expressly made the substitution on the record. But the record also confirms that there was never any objection to the substitution, under former Crim.R. 24(G)(2) or otherwise. Indeed, the rule was not even cited in the appeal process until supplemental authority was filed by the defense shortly before oral argument in the appellate court.

Ever since, the State has argued that a plain-error standard of review applied and that, under such review, the convictions should not be reversed. The State incorporates by reference its merit briefing on plain-error review and why no reversal for plain error should occur. See State's Merit Brief, at pp. 18-22, 28-36. Reversal is unwarranted for several reasons, including the tactical decisionmaking that the defense very likely engaged in, including the defense inability to show a manifest miscarriage of justice, and including the need to discourage gamesmanship.

Reconsideration is warranted because the majority failed to address the plain-error standard of review. The majority emphasized that the trial court's substitution of the alternate was in "clear violation" of the no-substitution provision. Opinion, at ¶ 21. The majority further stated that "[a] trial judge may not act in direct contravention

is voting in that deliberation. "As a general rule, no one -- including the judge presiding at a trial -- has a "right to know" how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror." *State v. Robb* (2000), 88 Ohio St.3d 59, 81, quoting *United States v. Thomas* (C.A. 2, 1997), 116 F.3d 606, 618. As the United States Supreme Court stated less than two weeks ago, "Courts properly avoid such explorations into the jury's sovereign space, * * * and for good reason. The jury's deliberations are secret and not subject to outside examination." *Yeager v. United States* (2009), 557 U.S. ____.

of the Rules of Criminal Procedure.” Id. at ¶ 22. On this basis, the majority concluded that “reversible error” had occurred. Id. at ¶ 22.

But this is not plain-error review, and the majority gave no explanation as to why the error would be exempt from plain-error review. Finding that the error is “plain” or “obvious” is only one of the three prongs before reversal is allowed for plain error. See State’s Merit Brief, at p. 21, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21. There is also the requirement that the defendant show clear outcome-determination and that the defendant show that enforcing the waiver/forfeiture would result in a manifest miscarriage of justice. Id. at pp. 19, 21, quoting *State v. Long* (1978), 53 Ohio St.2d 91, and quoting *Barnes*. And, beyond the three prongs, an appellate court would have had discretion to disregard the error and refuse to reverse. Id. at p. 21, quoting *Barnes*. The majority engaged in none of this analysis.

It is difficult to fathom how the majority could disregard the operable standard of appellate review under Crim.R. 52(B). “In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings.” *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, ¶ 19.

It is also plain that this Court cannot properly find a manifest miscarriage of justice. Effective in July 2008, this Court adopted a rule that specifically allows this kind of mid-deliberation substitution with instructions to begin deliberations anew. Crim.R. 24(G)(1). While the current rule did not govern the trial under review, the current rule nevertheless is highly relevant to this Court’s review here and now. Since the current rule allows exactly this kind of substitution, it could not be a manifest

miscarriage of justice to allow the conviction to stand. Indeed, in the new trial that the majority ordered, the very same substitution would be allowed under the current rule.

Defendant will likely contend that the majority was treating the old no-substitution provision as a jurisdictional provision that automatically requires reversal. But an automatic-reversal interpretation does not show that this Court was treating the matter as “jurisdictional.” Such an interpretation might only show that the majority believed the error to be “structural error.” But even that interpretation would reveal legal error warranting reconsideration. Only errors of constitutional dimension can be given this kind of “structural error” treatment, and this is simply not an error of constitutional dimension. See State’s Merit Brief, at pp. 32-33. Moreover, “structural error” does not obviate plain-error review, as “structural error” analysis and “plain error” analysis are two different things. *Id.* at p. 33.

A “jurisdictional” interpretation would be legally flawed as well. This Court has already determined that improper substitution of an alternate in a civil case did not require reversal because it was not plain error amounting to a manifest miscarriage of justice. *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121. Such a holding shows that an improper-substitution error is not “jurisdictional.”

Nor could a rule of this Court create a “jurisdictional” limit on substitution. Since this Court can only prescribe rules of “practice and procedure” for the courts, see Article IV, Section 5(B), Ohio Constitution, it follows that this Court cannot prescribe rules governing “substantive” matters, and “jurisdictional” matters are substantive, not procedural. *State ex rel. Sapp v. Franklin County Court of Appeals,*

118 Ohio St.3d 368, 2008-Ohio-2637, ¶ 30 (subject matter jurisdiction “is substantive law rather than procedural”); *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶ 18 (jurisdictional statute is “substantive law of this state”). A rule of promulgated by this Court cannot be “jurisdictional.”²

By disregarding plain-error review, the majority failed to address an issue it should have considered, and it committed an obvious error, and therefore reconsideration is warranted.

D. Mistake in Failing to Address Unconstitutionality of Former Crim.R. 24(G)(2)

Not only was there no plain error; there was no error to begin with. As the State has argued ever since this issue was first raised, the substitution of the alternate complied with R.C. 2945.29 and R.C. 2313.37(D), both of which commanded the substitution. In its briefing at pages 36-39, which the State incorporates by reference here, the State contended that the statutes controlled on this substantive matter governing whether the trial could continue. Inexplicably, the majority failed to address the constitutionality of the no-substitution rule provision.

By disregarding the State’s argument, the majority committed an obvious error and failed to address an important issue, and therefore reconsideration is warranted.

E. Mistake in Contending that Mistrial was Required

The majority committed an obvious error when it contended, based on a

² One rule commonly referred to as “jurisdictional” is the time limit for direct appeal. App.R. 4(A). But that rule is backed up by statutory law, which makes the failure to timely appeal jurisdictional. R.C. 2505.04. As the State has contended, statutory law supports the trial court’s mid-deliberation substitution, and so there can be no “jurisdictional” argument in this respect.

statement in *State v. Hutton* (1990), 53 Ohio St.3d 36, 47, that a mistrial would be required if a deliberating juror were dismissed for illness. This untruth should be reconsidered.

The State gave an extended argument pointing out how a mistrial could have potentially been avoided. See State's Merit Brief, at pp. 29-30. By all indications, the defense wished the trial to proceed, and the defense could have agreed to a trial by eleven jurors. This Court's precedents allow a trial by eleven. See *Id.* at pp. 11-12, 30, citing *State ex rel. Warner v. Baer* (1921), 103 Ohio St. 585, paragraph two of the syllabus. So the majority's claim here that a mistrial is always required is demonstrably false. The majority notably did not address the *Warner* precedent.

And even if the defense had objected to the substitution, the majority failed to take into account the trial court's ability to reconsider the excusal. The court might have been able to reinstate the just-recently-excused juror, see State's Merit Brief, at p. 29, and that possibility should preclude this Court from being able to find outcome-determinative plain error.

F. Conclusion

In light of the foregoing, the State respectfully requests reconsideration of the June 17th decision. Upon such reconsideration, this Court should order supplemental briefing on the Crim.R. 22 issue and should order an oral reargument.

Respectfully submitted,



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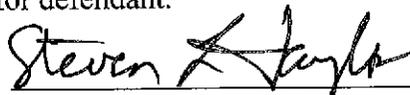
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 29th day of June, 2009, to William S. Lazarow, 400 South Fifth Street, Suite 301, Columbus, Ohio 43215, counsel for defendant.



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