

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2008-2415
	:	
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Butler County
	:	Court of Appeals,
JAMES C. MCCAUSLAND	:	Twelfth Appellate District
	:	
Defendant-Appellant.	:	Court of Appeals Case
	:	No. CA2007-10-254
	:	

MERIT BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF AMICUS INTEREST	2
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT	3
<u>Amicus Curiae Attorney General's Proposition of Law:</u>	
<i>A defendant waives the right to closing argument when he or she has the opportunity to request a closing argument but fails to do so, and then fails to object to the lack of summation.</i>	
CONCLUSION.....	8
CERTIFICATE OF SERVICE	unnumbered

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Columbus v. Woodrick</i> (10th App. 1976), 48 Ohio App. 2d 274.....	6
<i>Hampton v. Detella</i> (7th Cir. 2000), No. 98-3897, 2000 U.S. App. LEXIS 16020.....	6
<i>Herring v. New York</i> (1975), 422 U.S. 853	<i>passim</i>
<i>Hunter v. Moore</i> (11th Cir. 2002), 304 F.3d 1066	6
<i>Illinois v. Gates</i> (1983), 462 U.S. 213	7
<i>Jackson v. Jackson</i> (8th Dist. Dec. 16, 1993), Nos. 64284, 64873, 1993 Ohio App. LEXIS 5992.....	4
<i>Johnson v. Zerbst</i> , 304 U.S. 458	5
<i>Kearney v. United States</i> (D.C. Ct. App. 1998), 708 A.2d 262.....	7
<i>State v. Baron</i> (7th Dist.), No. 05-MA-156, 2007-Ohio-4323	4
<i>State v. Baumgardt</i> (5th Dist.), No. 02CA7, 2002-Ohio-4662	4
<i>State v. Brown</i> (12th Dist. Dec. 30, 1980), No. CA-1210, 1211, 1983 Ohio App. LEXIS 13952	4
<i>State v. Erickson</i> (11th Dist. Apr. 29, 1988), No. 12-137, 1988 Ohio App. LEXIS 1576.....	4
<i>State v. Garrard</i> (10th Dist.), 170 Ohio App. 3d 487, 2007-Ohio-1244.....	4
<i>State v. Hoffner</i> , 102 Ohio St. 3d 358, 2004-Ohio-3430	7
<i>State v. Newton</i> (11th Dist. June 27, 1997), No. 96-L-058, 1997 Ohio App. LEXIS 2802	4

<i>State v. Patton</i> (6th Dist. Dec. 30, 1983), No. WD-83-51, 1983 Ohio App. LEXIS 14863	4
<i>State v. Yoder</i> (9th Dist. Feb. 5, 1986), No. 2099, 1986 Ohio App. LEXIS 5627	4
<i>United State v. Martinez</i> (5th Cir. 1992), 974 F.2d 589	6, 7
<i>United States ex rel. Spears v. Johnson</i> (3d Cir. 1972), 463 F.2d 1024	5
<i>United States v. Anderson</i> (7th Cir. 1975), 514 F.2d 583	5
<i>United States v. Spears</i> (7th Cir. 1982), 671 F.2d 994	6
Constitutional Provisions, Statutes, and Rules	
R.C. 109.02	2

INTRODUCTION

In *Herring v. New York* (1975), 422 U.S. 853, the United States Supreme Court held that a criminal defendant has the right to present a closing argument at a bench trial. Just as clearly, however, the Supreme Court ruled that this right may be waived. *Id.* at 860. But *Herring* did say what factors indicate waiver, and so for years, Ohio courts have been split on how and when to infer that a defendant has waived the right to closing argument. Ohio courts have been especially divided over the specific question presented by this case: When does a defendant's failure to request closing argument amount to waiver of the right?

Ohio's appellate districts are divided into two camps of thought on that question. The first camp holds that a summation can *never* be waived by the mere failure to request closing argument, while the second camp holds that the right is *always* waived where it was never requested or affirmatively denied. In this case, the Twelfth District adopted the latter view. But neither of the polar views is fully satisfactory, for neither is entirely faithful to the mandates of *Herring*, on the one hand, or the practical realities of trial and waiver, on the other.

The Attorney General respectfully suggests that this Court resolve the divide by adopting a pragmatic, middle-ground view that has been embraced by courts outside of Ohio. This approach considers all of the surrounding circumstances to determine whether the failure to request closing argument constitutes a waiver. Under this approach, a defendant waives the right to summation when he or she has the opportunity to request closing argument before judgment but makes no such request, and later fails to bring the issue to the trial court's attention,.

Applying that standard here, this Court should find that McCausland suffered no constitutional injury. The record indicates that he had the opportunity to request closing argument before judgment, but made no such request, and that he had the opportunity to object

after the verdict, but failed to do so. Moreover, McCausland has failed to show—indeed, he has not even *alleged*—plain error or any prejudice arising from the lack of a closing argument.

This Court should therefore affirm the judgment of the Twelfth District, which found no constitutional violation.

STATEMENT OF AMICUS INTEREST

Ohio Attorney General Richard Cordray acts as Ohio’s chief law officer. R.C. 109.02. Accordingly, he has a strong interest in ensuring that Ohio’s criminal laws are properly applied. Ohio’s appellate districts are currently split as to how and when to infer a criminal defendant’s waiver of the right to closing argument. The Attorney General respectfully urges the Court to resolve this split by adopting a pragmatic view that is both faithful to the constitutional rights recognized by the U.S. Supreme Court in *Herring*, but also accommodating of the practical realities of trial and waiver.

STATEMENT OF THE CASE AND FACTS

For brevity, the Ohio Attorney General adopts the Twelfth District’s statement of the case and the statement of the case and facts presented in the brief of Appellee, the State of Ohio. We emphasize here only the following:

- McCausland’s trial for speeding and OVI violations was a bench trial. It was a straightforward case lasting less than one afternoon. Each side called one witness.
- After the parties rested their cases, a “pause” was noted on the record. After that, the judge began to announce his findings of fact and conclusions of law. He started by recounting the State Trooper’s testimony, and then pronounced McCausland guilty of the speeding offense. The judge then requested—and defense counsel provided—the relevant code sections for the drunk-driving charges. The judge then recounted at length the evidence supporting the OVI charges before finding McCausland guilty on those offenses.
- Before pronouncing the sentence and adjourning court, the judge had at least two more conversations on the record with McCausland’s counsel.

- McCausland’s counsel never requested a closing argument and never objected to the lack of a closing argument.
- McCausland has not demonstrated—in fact, he has never even alleged—that he was prejudiced by the lack of closing argument or that the outcome of the trial clearly would have been different had his counsel presented such an argument.

ARGUMENT

Amicus Curiae Attorney General’s Proposition of Law:

A defendant waives the right to closing argument when he or she has the opportunity to request a closing argument but fails to do so, and then fails to object to the lack of summation.

In *Herring v. New York* (1975), 422 U.S. 853, 858, the U.S. Supreme Court recognized that the opportunity to present closing argument is a basic element of the adversary criminal process. Accordingly, the Court held that it is *per se* reversible error for a trial judge—even in a bench trial—to deny a defendant the opportunity to make a closing argument. *Id.* at 865. Just as clearly, however, the Supreme Court recognized that the right to a closing argument can be waived:

The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor . . . *unless he has waived his right to such argument, or unless the argument is not within the issues in the case.* . . .

Id. at 860 (quotation and citation omitted) (emphasis added).

The *Herring* Court did not say what factors indicate waiver, and so Ohio courts have long been split on whether and when waiver can be inferred. The courts have been particularly divided over when a defendant’s failure to request a closing argument amounts to a waiver of the right. Indeed, that is the question that this case squarely presents.

In one camp of legal thought are the courts of appeals—the Fifth, Sixth, Seventh, and Tenth Districts—holding that “relinquishment of the right to closing argument must be express, intentional, and voluntary,” and that therefore, the mere failure to request closing argument does

not waive the right. *State v. Garrard* (10th Dist.), 170 Ohio App. 3d 487, 2007-Ohio-1244, ¶ 51; *State v. Baron* (7th Dist.), No. 05-MA-156, 2007-Ohio-4323, ¶ 34 (citation omitted). See also *State v. Baumgardt* (5th Dist.), No. 02CA7, 2002-Ohio-4662; *State v. Patton* (6th Dist. Dec. 30, 1983), No. WD-83-51, 1983 Ohio App. LEXIS 14863. Other districts—for instance, the Eighth, Ninth, Eleventh, and Twelfth—take a different view. Reading *Herring* narrowly, those courts hold that *Herring* only applies where a court outright denies a defense counsel’s request for closing argument, and that absent such an affirmative denial (and therefore, absent an affirmative request for closing argument), there can never be constitutional error. See *State v. Brown* (12th Dist. Dec. 30, 1980), No. CA-1210, 1211, 1983 Ohio App. LEXIS 13952; *State v. Yoder* (9th Dist. Feb. 5, 1986), No. 2099, 1986 Ohio App. LEXIS 5627; *State v. Erickson* (11th Dist. Apr. 29, 1988), No. 12-137, 1988 Ohio App. LEXIS 1576; *State v. Newton* (11th Dist. June 27, 1997), No. 96-L-058, 1997 Ohio App. LEXIS 2802; *Jackson v. Jackson* (8th Dist. Dec. 16, 1993), Nos. 64284, 64873, 1993 Ohio App. LEXIS 5992.

The Twelfth District’s decision here reflects the latter view—that error occurs only where the court denies a request for closing argument, and that no constitutional violation exists here because there was no affirmative request or denial. The court’s ultimate conclusion was correct—there was no constitutional violation. But neither of the camps of legal thought on this issue is entirely faithful to the practical realities of trial and waiver, on the one hand, and to the constitutional guarantees of *Herring*, on the other. Both camps of thought stake out *per se* rules. That is, the first camp holds that closing argument can *never* be waived by mere silence, and the second camp holds that the right is *always* waived where it was never requested or affirmatively denied.

Both views are imperfect. The first view—that failure to request closing argument can *never* constitute waiver—overlooks the fact that some rights are more likely than others to be forgone knowingly or as a matter of strategy, and therefore, noiselessly. Compare, e.g., *United States v. Anderson* (7th Cir. 1975), 514 F.2d 583, 586 (“A double jeopardy defense is normally not the type of claim that would be foregone for some strategic purpose”), with *United States ex rel. Spears v. Johnson* (3d Cir. 1972), 463 F.2d 1024, 1026 (in a bench trial, where evidence against defendant is strong, counsel may prefer not to present a formal summation). This case is a prime example. McCausland’s case was tried in less than one afternoon. It was a bench trial, and therefore tried before a factfinder with experience in assessing the credibility of witnesses, the relevance of the evidence, and the weight of the evidence. And there is nothing to suggest that this was anything but a factually and legally straightforward speeding and OVI case. Under these circumstances, it is reasonable to construe a defense counsel’s failure to request closing argument (and failure to object to a lack of closing argument) as a knowing waiver.

The first camp’s approach is also flawed because it can be easily exploited. That is, a defense counsel discouraged by the progress of a case could simply invite reversible error at the end of trial by deliberately failing to request closing argument. In short, the first camp’s rigid view does not sufficiently account for the practical realities of trial and it makes the *Herring* right vulnerable to manipulation.

The second camp’s view—that a defendant *always* waives if she does not affirmatively request closing argument—is also imperfect. Generally, waiver will be found only where the record clearly demonstrates “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464. Accordingly, waiver of a fundamental right should not be lightly presumed. And yet that is what the second camp of thought risks doing by

presuming waiver in *every* case where closing argument is not requested. That reasoning fails to account for the cases in which a defendant simply had no *opportunity* to request closing argument and where it is therefore unrealistic to infer that the failure to request summation constitutes a waiver. See, e.g., *Columbus v. Woodrick* (10th App. 1976), 48 Ohio App. 2d 274 (trial court launched into “summary pronouncement” of verdict at the close of evidence, which left no opportunity for counsel to request closing argument); *Hunter v. Moore* (11th Cir. 2002), 304 F.3d 1066, 1071-72 (where trial court “immediately” made a finding of guilt at the close of evidence, there was no opportunity to request closing argument). In short, the second camp of thought risks cutting off legitimate *Herring* rights by failing to account for whether the defendant even had the opportunity to request closing argument.

The more reasonable view occupies a pragmatic middle ground by considering all of the surrounding circumstances to determine whether the failure to request closing argument constitutes a waiver. The U.S. Courts of Appeals for the Fifth Circuit and Seventh Circuit, for instance, have adopted just such an approach. See *Hampton v. Detella* (7th Cir. 2000), No. 98-3897, 2000 U.S. App. LEXIS 16020; *United State v. Martinez* (5th Cir. 1992), 974 F.2d 589; *United States v. Spears* (7th Cir. 1982), 671 F.2d 994. Under this approach, where a defendant had the opportunity to request closing argument before judgment, but made no such request, and thereafter failed to bring the issue to the trial court’s attention, the right of summation is waived. *Spears*, 671 F.2d at 995; *Martinez*, 974 F.2d at 591-92 (critical factor in deciding whether silence constitutes waiver is whether there was opportunity for counsel to request argument or to object; waiver will be found where counsel had the opportunity but failed to request closing argument, and where counsel then makes no post-trial effort to assert the right in the trial court). This inquiry strikes the right balance. It accounts for the practical realities of trial and waiver by

acknowledging that a defendant can knowingly waive closing argument by failing to request it and failing to object in the trial court, but it does not allow a finding of waiver where the defendant had no *opportunity* even to make the request. See *State v. Hoffner*, 102 Ohio St. 3d 358, 366, 2004-Ohio-3430, at ¶ 47 (recognizing that decision to waive closing argument, even in capital jury trials, can be a tactical one); see also *Illinois v. Gates* (1983), 462 U.S. 213, 238-39 (commending, in the criminal context, a totality-of-the-circumstances approach as a “flexible, easily applied standard” that leads to “practical, common-sense decision[s].”).

In light of that standard, no constitutional violation occurred in this case. McCausland had an opportunity to request closing argument. After the parties rested, a “pause” was noted on the record, only after which the judge pronounced his findings of guilt. (In his brief, McCausland summarily claims that the judge “immediately” went into his decision, but there is no record support for that claim, and McCausland fails to address the record’s explicit reference to a “pause.” McCausland also fails to address the fact that defense counsel and the judge had a colloquy about the relevant code sections for the drunk-driving charges before the judge pronounced his findings on the OVI offenses—yet another opportunity for counsel to request closing argument). See *Martinez*, 974 F.2d at 592 (brief recess after close of evidence offered opportunity to request summation, and counsel also had the opportunity to object to lack thereof); *Kearney v. United States* (D.C. Ct. App. 1998), 708 A.2d 262, 265 (at close of evidence, where trial judge indicated he would proceed to decision after few minutes of recess, counsel’s silence held to constitute waiver of right to summation). Moreover, McCausland failed to object to the lack of a closing argument, even though, prior to pronouncing the sentence and adjourning court, the judge had at least two more conversations on the record with McCausland’s counsel. Accordingly, McCausland waived the right to closing argument.

In addition, McCausland has failed to demonstrate—indeed, he has not even *alleged*—plain error or any prejudice arising from the lack of a closing argument. Absent such a showing, there is no basis for finding reversible constitutional error.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

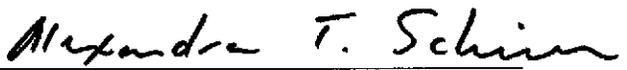
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellee State of Ohio was served by U.S. mail this 30th day of June 2009, upon the following counsel:

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