

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

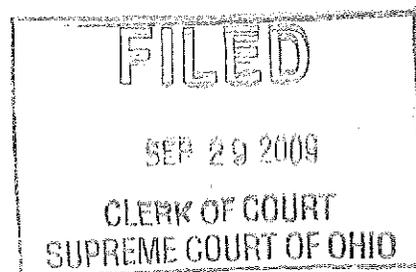
**SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF-APPELLEE**

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## ARGUMENT

**Supplemental Proposition of Law:** A claim of Crim.R. 22 error is forfeited if the party raising that error on appeal failed to timely object to the lack of recordation in the trial court. Such a claim is also forfeited if the party claiming Crim.R. 22 error has failed to exhaust App.R. 9 procedures to settle the record regarding the unrecorded proceeding.

This reply brief is being submitted pursuant to this Court's September 1<sup>st</sup> order allowing the parties to file reply briefs within ten days of the filing of the opponent's brief.

Although defendant's September 21<sup>st</sup> supplemental brief quotes extensively from the majority opinion in attempting to refute the State's contentions, such extensive quoting misses the point. The State was deprived of the opportunity to brief the issues on which the majority expounded vis-à-vis Crim.R. 22 and "due process." Had the Court given the parties a chance to brief the issues, the Court could have reached different conclusions.

Because of the lack of notice and opportunity to be heard, the State was deprived of a fundamentally fair appeal. Reconsideration should be formally granted so that these issues can be addressed anew without the hindrance of the "reconsideration" standard of review. Defendant naturally wants this Court to treat the majority's resolution of these issues as a fait accompli. But, given the State's lack of notice and opportunity to be heard, the exact opposite tack should be taken, with the majority's resolution being vacated, and the issues being fully considered anew with the benefit of the parties' briefing. To treat the majority's original resolution as conclusive would be to deprive the State of a fair appeal, as the original resolution was a premature

resolution reached after no briefing on the pertinent issues.

A.

Defendant essentially argues that any error in applying Crim.R. 22 would be harmless because the majority also found a “due process” violation and because the majority also reversed based on error under former Crim.R. 24(G)(2) in the substitution of an alternate during deliberations. These arguments are incorrect.

Insofar as the substitution-of-alternate issue is concerned, defendant fails to note that the State is seeking reconsideration on that issue. The majority failed to apply the applicable plain-error standard of review and failed to address the State’s challenge to the constitutionality of former Crim.R. 24(G)(2), both of which were issues the State had been raising ever since defendant first raised the purported rule violation in the court of appeals. See State’s Motion for Reconsideration, at 16-20. The majority also erred in contending that a mistrial was a necessary result once the ill juror was excused. *Id.* at pp. 19-20. In light of the majority’s errors in addressing the substitution-of-alternate issue, that issue does not provide a true, independent basis for reversing defendant’s convictions. It is hoped the Court will recognize that the substitution-of-alternate issue does not provide a basis for reversal at all.

Insofar as defendant contends “due process” justifies reversal regarding lack of recordation of the dismissal of the ill juror, the “due process” issue also suffered because of the lack of briefing and therefore warrants consideration anew in light of the parties’ briefing here. As the State pointed out in its September 18<sup>th</sup> supplemental brief, there is no basis for finding a “due process” violation when the defense failed to

avail itself of App.R. 9 procedures, which are procedures that easily satisfy the demands of procedural due process.

It is also apparent that the majority would not have reached the same “due process” conclusion without finding a violation of Crim.R. 22 and finding that the defense had taken “sufficient” steps to try to reconstruct the record. The majority addressed Crim.R. 22, App.R. 9, and “due process” as an inseparable mixture in the analysis, emphasizing from the outset that the rules require recordation because “the unique nature of capital cases demand a heightened level of care in constructing the record to guarantee regularity of the proceedings and assist in appellate review.” Opinion, at ¶ 12. While the majority said it would not “extend” the Crim.R. 22 ruling in *State v. Palmer* (1997), 80 Ohio St.3d 543, to matters of “critical importance” in a “capital case,” it then proceeded to apply the three prongs of *Palmer* as if it was applying that ruling. Indeed, in determining whether the defense had sufficiently brought the matter to the trial court’s attention, the majority emphasized that the attorney’s “attempt to address the deficiency in the record was sufficient in this context to satisfy the concerns of App.R. 9 \* \* \*.” Opinion, at ¶ 16.

This Court’s prior holdings regarding Crim.R. 22 error in fact show that there is no “due process” violation. The requirement that the appellant exhaust App.R. 9 procedures provides the appellant with adequate due process to obtain a sufficient reconstructed appellate record. The majority notably failed to take into account the long line of this Court’s cases, which hold that exhaustion of App.R. 9 procedures is required, including even in capital cases in which the death penalty was imposed,

including even on constitutional issues, and including even in cases involving the unavailability of “critical” testimony. Sec 9-18-09 Supplemental Brief, at 12-20. The majority’s failure to apply this long line of authority resulted in a concomitant mistake in concluding that “due process” was somehow violated. The “due process” issue does not provide an independent basis for reversal of defendant’s convictions.

B.

Defendant quotes the majority opinion for the proposition that “the unique nature of capital cases demand a heightened level of care in constructing the record \* \* \*.” But there is nothing “unique” about capital cases vis-à-vis the need to exhaust App.R. 9 procedures. In case after case, this Court has applied the exhaustion requirement to capital cases in which death was actually imposed. See 9-18-09 Supplemental Brief, at 15-17. This Court itself has 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. As stated in *B.E.*:

{¶ 14} \* \* \* 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.

{¶ 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. 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; parallel citations omitted)

In short, *B.E.* cited capital cases as *prime examples* of the applicability of the exhaustion requirement.

Notably, defendant does not attempt to defend the majority’s analysis in relation to this long line of prior cases. He merely quotes the erroneous “unique nature” language of the majority opinion as if it were a *fait accompli*.

Defendant does accuse the State of “twisted logic” in arguing that an appellant must exhaust App.R. 9 procedures. But there is nothing “twisted” about requiring that an appellant exhaust such procedures. Such procedures are readily available if a transcript is missing or if a proceeding went unrecorded. It is hardly “twisted” that an appellant should not receive the windfall of a new trial without first attempting to exhaust these available procedures. If defendant believes the State’s logic is “twisted,” defendant must believe that the logic of this Court is twisted as well, as this Court has applied that logic time and time again, including *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, including *State v. Jones* (1994), 71 Ohio St.3d 293, including *B.E.*, and including a host of capital cases in which the death penalty was

actually imposed. Again, defendant does not address this long line of authority, but, instead, resorts to an unsupportable “twisted logic” characterization.

C.

In another straw-man argument, defendant asserts that “the State argues that the Rule does not really mean what it says.” Defendant also contends that “[i]t appears to be the State’s position that the defendant alone is responsible for insuring that he receives a fair trial.” The State is making neither of these arguments, and defendant is wasting the Court’s time with such inapposite characterizations.

Of course, Crim.R. 22 “means what it says,” but the contemporaneous-objection requirement, and the exhaustion requirement, both mean what they say too. As this Court’s cases show, a violation of Crim.R. 22 does not perforce require appellate reversal and a new trial. Absent a timely objection to the lack of recordation, the issue is deemed waived/forfeited. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶¶ 182, 183; *Palmer*, 80 Ohio St.3d at 555; *State v. Grant* (1993), 67 Ohio St.3d 465, 481; *Brewer*, 48 Ohio St.3d at 60-61. And the many cases like *B.E.* confirm that an appellant’s failure to exhaust App.R. 9 procedures constitutes a waiver/forfeiture as well. *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.’”).

Adding to the waiver/forfeiture is the fact that no claim of error under Crim.R. 22 and/or “due process” was ever raised in the court of appeals, thereby waiving/forfeiting the issue there as well. See *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 failure to raise the claim of error in the court of appeals is of critical importance, since, if the defense had pursued such a claim, *the State* could have initiated App.R. 9 procedures itself at that point to settle the record. But there was no need to do so, as the defense chose instead to argue that the record was already sufficient to support reversal regarding the excusal of the juror. The State correctly argued that the defense was wrong, and the State rightly contended that the burden of settling the record was on defendant as appellant. Now, after full briefing and oral argument in this Court, the majority sua sponte addressed the issue without briefing from the State, thereby disregarding waivers/forfeitures at both lower court levels and thereby depriving the State of what would have been its own opportunity to seek settlement of the record while the appeal was pending in the court of appeals. Defendant has no entitlement to such an appellate windfall.

D.

Defendant wrongly quotes from Judge Whiteside's dissent below, which contended that an objection would have been "futile" because "[t]he juror was excused and no longer available." Judge Whiteside was wrongly relying on defense counsel's unilateral rendition of what had occurred, and the majority here correctly recognized that the record was speculative without a record settlement. Since not even counsel's unilateral assertions addressed the juror's whereabouts, the record was especially

speculative on that point. For aught that appears in the record, the juror very well could have been still in the court's chambers or the jury room so that an objection to lack of recordation could have been made, and the court could have had a hearing on the record to address the matter further. The fact that the defense never objected to lack of recordation, and, indeed, never objected to the excusal of the juror, shows the defense saw no need for recordation and that the defense, for whatever reason, welcomed the excusal of the juror, even without recordation.

And, as the State argued in its merit brief, had the defense timely objected to the excusal, the court could have stopped the proceedings and very well could have contacted the juror it had excused, perhaps even before the juror left the court's chambers or jury room. See *United States v. DiPietro* (C.A.1, 1991), 936 F.2d 6, 11 (“Had an objection been registered, the court could have reconsidered its decision. Although the jury was dismissed when the mistrial was declared, upon an immediate objection, the court could have asked the jury to remain while reconsidering its decision.”). Even when the discharge of a full jury has been announced after the verdict, the discharge is not complete until the jury disperses and goes outside the control of the court. *State v. Myers* (S.C. 1995), 318 S.C. 549, 551, 459 S.E.2d 304, 305 (“Notwithstanding a ‘formal discharge,’ several courts recognize that the jury may be reassembled so long as it remains an essentially undispersed unit, and has not been subjected to any outside influence in between the ‘discharge’ and the reassembly.”); see, also, *Sargent v. State* (1842), 11 Ohio 472 (jury discharged and separated could not be recalled).

Even if the juror had already left the courthouse, it is axiomatic that a court only speaks through its journal and that, until an entry is journalized, the court retains the right and discretion to review and reverse its previous rulings. *State ex rel. Hansen v. Reed* (1992), 63 Ohio St.3d 597, 599. The release of the juror at that point had been recent, and it was unlikely that anything had occurred in the interim that would permanently affect the juror's ability to sit on the jury, provided that the medical issues were resolved. A voir dire of the juror could have been conducted upon the juror's return to ensure that the juror had not been tainted by the release. Defendant cannot show that the outcome clearly would have been different, as a mistrial might have been avoided through a timely objection and reconsideration.

E.

Defendant errs in contending that there was a timely objection or sufficient effort by defense counsel to settle the record. Defense counsel never objected to the lack of recordation, and his comments three weeks after the verdicts could not be considered timely. Defense counsel might have sought a settlement of the record at that point, but, as the State has argued in its motion for reconsideration and supplemental brief, counsel never asked the *trial court* to settle the record.

Even if the defense had timely objected to the lack of recordation in the trial court, and even if counsel's comments three weeks later were a sufficient request to settle the record, defendant *still* would have been required to exhaust App.R. 9 procedures, which were undoubtedly available during the appeal in the court of appeals. For example, in *Keenan*, 81 Ohio St.3d at 139, the objection to lack of recordation in

the trial court did not obviate the need for the defense to exhaust App.R. 9 procedures. “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.’” *Id.*

The App.R. 9 procedures must be exhausted because a new trial will not be automatically granted on the basis of a silent or incomplete record. “[A]bsent 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.” *Jones*, 71 Ohio St.3d at 298 (emphasis added). A new trial is warranted on a silent or incomplete record “only after all reasonable solutions to this problem are exhausted.” *Knapp*, 61 Ohio St.2d at 200.

Even if counsel’s comments three weeks afterward were “sufficient,” it is still readily apparent that App.R. 9 procedures were available to defendant while the case was on appeal to the court of appeals. He failed to exhaust those procedures. He filed no motion in the trial court during the appeal asking that court to settle or correct the record. He sought no relief from the court of appeals to order the trial court to settle the record. He sought no appellate relief in his briefing that would remand the case for a record-settling hearing. Given these available appellate remedies to settle the record, and given defendant’s failure to invoke them, it is clear that defendant did not exhaust “all reasonable solutions to this problem \* \* \*.” *Id.* As a result, lack of recordation cannot provide any basis for reversal.

F.

Inasmuch as the trial court’s purported error was in failing to settle the record

after defense counsel's "sufficient" request for settlement three weeks later, the State also is arguing that the proper appellate remedy for such an error would be a remand for a record-settling hearing, not outright reversal. In *Knapp* and *Jones*, this Court had remanded for such record-settlement proceedings, and the State contends that record settlement would fully vindicate the purported error in the trial court's failure to conduct those proceedings. See 9-18-09 Supplemental Brief, at 20-22. After such record settlement, defendant could then appeal based on what the settled record showed vis-à-vis the excusal of the juror. "[A]n 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." *Jones*, 71 Ohio St.3d at 298 (emphasis added).

Such a remand would do nothing more than place defendant in the position he would have occupied if he had raised a claim of Crim.R. 22 error in the court of appeals. Had defendant pursued such a claim in the court of appeals, the State itself could have initiated such proceedings, whether or not defendant welcomed such proceedings. Defendant failed to raise such a claim of error, thereby obviating any need for the State to initiate such proceedings.

Defendant now contends that such a remand for record settlement would be "an exercise in futility." But he does not explain how it would be "futile." He speculates that one or more of the key participants may no longer be available, but he provides no support for that assertion. Such potential "futility," and other issues affecting the settlement of the record, should first be vetted in the trial court. An outright new trial should not be awarded merely on the assumption or speculation that the record cannot

be settled. In *B.E.*, for example, the new hearing was awarded only after the appellant had attempted to exhaust App.R. 9 procedures but had been unable to reconstruct the missing testimony.

Defendant also complains that the State has “chastised the defense for attempting to ‘settle the record’ three weeks after the dismissal of the deliberating juror \* \* \*.” The State questions the “chastise” characterization, but, whatever the tone of the State’s criticisms of defense counsel’s unilateral rendition three weeks after the fact, the State’s chief criticism was that the unilateral rendition of events was not an “official” record of proceedings. That criticism is undoubtedly true, as shown by the majority’s conclusion here that the record was speculative. The State’s truthful observation about the unofficial nature of defense counsel’s comments bears no relevance to the “futility” of ordering a remand for a record-settling hearing. The State disputes whether any appellate remedy is warranted, but, if there is to be appellate relief in this regard, *Knapp* and *Jones* show that the relief should be a remand for a record-settling hearing in the trial court.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in the State's 12-1-08 merit brief, in the State's 6-29-09 motion for reconsideration, and in the State's 9-18-09 supplemental brief, plaintiff-appellee respectfully requests that this Court reconsider and vacate the 6-17-09 decision, grant oral reargument, and thereafter affirm the judgment of the Tenth District Court of Appeals.<sup>1</sup>

Respectfully submitted,

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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 29<sup>th</sup> day of Sept., 2009, to William S. Lazarow, 400 South Fifth Street, Suite 301, Columbus, Ohio 43215, counsel for defendant.

  
STEVEN L. TAYLOR 0043876  
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<sup>1</sup> 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.