ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 2009-0886
v.	:	On Appeal from the Sixth Appellate District,
JAMES R. DOWNOUR,	:	Lucas County Case No. L-08-1029
Defendant-Appellant.	:	

BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT JAMES R. DOWNOUR

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STATEMENT OF THE CASE AND FACTS

Amicus adopts the statement of the case and facts set forth by Appellant James R. Downour.

INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender ("OPD") is a state agency responsible for providing legal representation and other services to indigent criminal defendants convicted in state court. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and ensure the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As *amicus curiae*, the OPD offers the Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in this case insofar as Crim.R. 24(G) defines the role of an alternate juror. Allowing outsiders to be present during deliberations is an infringement on criminal defendants' Sixth Amendment right to a trial by jury. That right, one of the most critical that our federal and state constitutions offer, should not be compromised lightly.

LAW AND ARGUMENT

A. When, over objection, an alternate juror is present during deliberations, the burden shifts to the State to prove an absence of prejudice.

When trial counsel objects to the presence of alternate jurors in the jury room during deliberations, the burden shifts to the State to prove an absence of prejudice. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, at ¶136. In *Gross*, this Court held that reversible error occurs when, over objection, alternate jurors participate in deliberations and either 1) the State does not prove the error to be harmless, or 2) the trial court does not cure the error. Id. at ¶137. Specifically, the Ohio Supreme Court reversed Gross' sentence because the State failed to show an absence of prejudice and there was evidence that the alternate jurors participated. Id. at ¶136.

This Court should clarify the rule in *Gross* by holding that when trial counsel objects to the presence of alternate jurors during deliberations – with or without evidence of participation – the burden shifts to the State to prove an absence of prejudice. As long as the alternates were present in the jury room and there was a contemporaneous objection, the rule should be that prejudice is presumed. It is then up to the State to rebut that presumption. The question of whether alternate jurors participated – over and above being simply present – would matter only when there was no contemporaneous objection. See *United States v. Olano* (1993), 507 U.S. 725, 739 (holding that the presence of alternate jurors without objection is prejudicial when they participated in deliberations or exacted a "chilling effect" on the proceedings).

The State does not have an impossible burden of proof. While that burden is high, it is necessarily so. Applying the logic of the Maryland Supreme Court, which Mr. Downour cites in his merit brief, the presumption can be rebutted only when an alternate juror has "no real opportunity to influence the jury, such as where the alternate was in the jury room only momentarily . . . ." *Stokes v. Maryland* (2004), 379 Md. 618, 641-42, 843 A.2d 64, 78. Those

circumstances would not require evidence from the jurors, which would violate Evid.R. 606(B). Therefore, the State can meet its burden to prove absence of prejudice when there is a nonjuror source of information. Additionally, trial courts can interview jurors on the subject of alleged misconduct during the course of a trial. See *State v. Hessler*, 90 Ohio St.3d 108, 121, 2000-Ohio-30 (the trial court did not abuse its discretion in interviewing a juror before the verdict about alleged misconduct during deliberations). Such an interview would alleviate the need to shift the burden onto the State.

B. In the alternative, it is structural error for an alternate juror to be in the jury room during deliberations over objection.

Structural errors are constitutional defects that cannot be analyzed under a harmless-error standard. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, at ¶17, citing *State v. Fischer*, 99 Ohio St.3d 127, 2003-Ohio-2761. They affect the entire framework of the proceedings, not just some part of the trial process. *Perry*, at ¶17. Structural-error analysis is irrelevant unless a constitutional error has occurred. *State v. Esparza* (1996), 74 Ohio St.3d 660, 662. Only a limited class of cases are subject to automatic reversal because of structural error. *Perry*, at ¶18. See *Johnson v. United States* (1997), 520 U.S. 461 (complete denial of counsel); *Tumey v. Ohio* (1927), 273 U.S. 510 (biased trial judge); *Vasquez v. Hillery* (1986), 474 U.S. 254 (racial discrimination in grand jury selection); *McKaskle v. Wiggins* (1984), 465 U.S. 169 (denial of self-representation at trial); *Waller v. Georgia* (1984), 467 U.S. 39 (denial of public trial); *Sullivan v. Louisiana* (1993), 508 U.S. 275 (defective reasonable doubt instruction).

1. <u>The presence of alternate jurors in the jury room during deliberations is structural error, because it involves constitutional error that defies harmless-error analysis and affects the entire proceedings</u>.

The Sixth Amendment guarantees criminal defendants "the right to a speedy and public trial, by an impartial jury...." That guarantee encompasses the right to have the jury make

findings of guilty and render a verdict. *Sullivan,* 508 U.S. at 277. The Sixth Amendment right includes a jury verdict based on a finding of guilty beyond a reasonable doubt. Id. at 278. For that reason, the *Sullivan* Court held that failure to properly instruct the jury as to reasonable doubt was structural error. Id. at 281-82. The *Sullivan* analysis acknowledged that errors in a jury's verdict are of constitutional magnitude. Id.

Sullivan recognized that some constitutional errors invalidate convictions. Id. at 279. In assessing which errors fall into that structural-error category, the Court stated that the proper inquiry is "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." Id. (emphasis original). Harmless-error review does not apply in those circumstances because the verdict does not satisfy the Sixth Amendment. Id. at 280. Because there was no jury verdict of guilty beyond a reasonable doubt – as the trial court's instructions were incorrect – there was effectively no verdict. Id. Therefore, "there is no *object*, so to speak, upon which harmless-error scrutiny can operate." Id. (emphasis original).

Here, the presence of an alternate juror during the jury's private, cloistered deliberations is a similar constitutional error implicating the Sixth Amendment right to a trial by jury. The alternate is not a part of the jury. *State v. Murphy*, 91 Ohio St.3d 516, 532, 2001-Ohio-112. Rather, the alternate's presence is structural error, which requires automatic reversal of Mr. Downour's conviction. See, e.g., *Washington v. Recuenco* (2006), 548 U.S. 212, 219 (structural errors require automatic reversal).

2. <u>Mr. Downour's case is distinguishable from cases declining to apply structural error when no objection was made at trial.</u>

When there is no objection on the record, this Court has been reluctant to apply structural error. *Perry*, at ¶20, 24; *State v. Fischer*, 99 Ohio St.3d 127, 2003-Ohio-2761; *State v. Hill*, 92 Ohio St.3d 191, 2001-Ohio-141. In *Hill*, this Court declined to apply structural error to the use

of an anonymous jury, holding that courts should exercise caution in applying structural-error distinctions within a plain-error standard. *Hill*, 92 Ohio St.3d at 199. Because structural errors are so fundamental that they defy harmless-error analysis, "it is arguable whether the harmless-error/structural error distinction... should also apply to a plain-error case in which no objection was raised at trial." Id. In particular, this Court noted that an unwarranted expansion of Crim.R. 52(B) would have destructive effects on the jury trial process. *Perry*, at ¶20.

Applying that logic, this Court addressed the presence of alternate jurors in the jury room during deliberations under a plain-error standard. *State v. Jackson*, 92 Ohio St.3d 436, 2001-Ohio-1266. This Court acknowledged in *Jackson* that the trial court's failure to follow Crim.R. 24(F) – now Crim.R. 24(G)(1) – was error. Id. at 439. Accord *Murphy*, 91 Ohio St.3d at 531. But there was no objection to the alternates in *Jackson*. Therefore, in the context of plain error, the *Jackson* Court was unwilling to presume prejudice. Id. This Court relied on the United States Supreme Court's ruling in *Olano*, 507 U.S. at 725, which held that the presence of alternate jurors in deliberations did not amount to plain error. Id. Because the appellant failed to either object at trial or show that he was prejudiced on appeal, the *Jackson* Court overruled the proposition. Id. at 440.

Unlike those cases, Downour's trial counsel made a contemporaneous objection in the trial court. That objection preserved the issue for review and supports structural-error analysis. This Court is not bound by its precedent in the *Jackson* line of cases or by the United States Supreme Court's decision in *Olano* interpreting the effect of alternate jurors on deliberations under a plain-error standard of review. Rather, this Court should hold that allowing the alternate jurors to be present in the jury room during deliberations, over objection, was structural error and merits reversal. Because there was an object on the record, and because the presence of the

alternate jurors was structural error, Mr. Downour is entitled to an automatic reversal of his conviction.

CONCLUSION

Based upon the foregoing, this Court should reverse the ruling of the Sixth District Court of Appeals and grant Mr. Downour a new trial.

Respectfully submitted,

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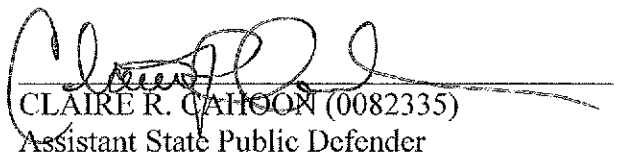
CERTIFICATE OF SERVICE

I hereby certify that a true copy of this **BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT JAMES R. DOWNOUR** has been served upon Tim A Dugan, 2460 Navarre Avenue, Suite 6, Oregon, Ohio 43616, and Dan Nathan, 520 Madison Avenue, Suite 830, Toledo, Ohio 43604, on this 18th day of November, 2009.



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