

ORIGINAL

NO. 2008-2251

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO
NO. 91272

STATE OF OHIO,
Plaintiff-Appellee

-vs-

TRAVIS SANDERS
JAMES BENNETT
DANTAE CHAMBLISS
Defendant-Appellants

MERIT BRIEF OF APPELLEE

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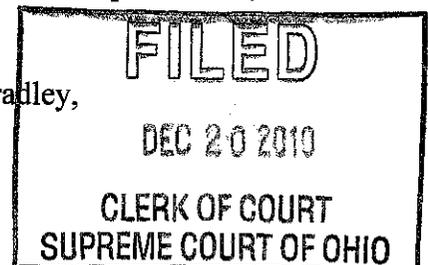
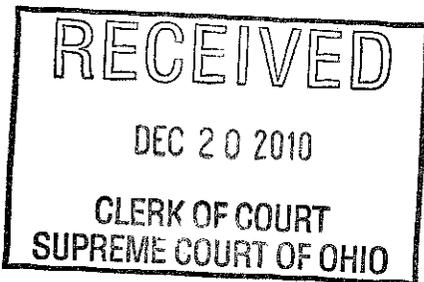


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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The State asks that this Court dismiss this appeal as improvidently accepted. This Court already has established a bright line rule of law concerning whether removal of retained counsel is a final appealable order—it is not. This rule of law is consistent with United States Supreme Court precedent holding that a Sixth Amendment violation can be effectively vindicated after conviction from a direct appeal.

Adoption of the Appellants' analysis and proposition will cast into doubt many long standing rules concerning what are final appealable orders. The analysis undertaken by Appellants can be applied with equal force to a host of additional pre-trial and trial rulings such as speedy trial and double jeopardy motions and although limited by the proposed proposition has equal force and application to rulings made during a criminal trial. This will result in substantial delay in criminal trials.

The legislature has not issued a clear directive that removal of retained counsel is a final appealable order. The legislature is the appropriate branch of government to address the concerns raised by Appellants. This appeal should be dismissed or this court should continue to hold that removal of retained counsel is not a final appealable order.

STATEMENT OF THE CASE AND FACTS

The trial court refused to accept an agreed sentence and allowed all Appellants to withdraw previously entered guilty pleas.¹ Before trial, the trial court found that defense counsel was attempting to establish a claim of ineffective assistance of counsel. The trial court determined that based on statements attributable to defense counsel that he was attempting to build in a claim of ineffective assistance of counsel and held that the defense attorneys had to be removed and the defendant's bonds revoked as they were attempting to create a record of automatic reversal if the State successfully proved its case.²

The Appellants appealed the revocation of their bonds and the Eighth District ordered briefing on the issue of removal of retained counsel. The Eight District ultimately followed this Court's explicit precedent and held that removal of retained counsel was not a final appealable order.

LAW AND ARGUMENT

I. Proposed Proposition of Law I: 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.

¹ *State v. Chambliss et al*, Cuyahoga App. No. 91272, 2008-Ohio-5285, at ¶ 4.

² *Id.* at ¶ 5.

R.C. 2505.02 controls whether a particular order is final and appealable. In examining the statute, this Court held that removal of retained counsel is not a final order under R.C. 2505.02(B)(2).³ In hopes of reversing that decision, Appellants ask this Court to rely on R.C. 2505.02(B)(4) and the United States Supreme Court decision in *U.S. v. Gonzalez-Lopez*, (2006), 548 U.S. 140, and find the legislature intended that removal of retained counsel is in fact a final order. This position is untenable. Appellants rely on an amendment to R.C. 2505.02 that does not directly address this issue, was enacted *after* this Court's precedent in *Keenan*, and enacted *years before* the United States Supreme Court decision in *Gonzalez-Lopez*. Moreover, this Court and the United States Supreme Court rejected several arguments posited by Appellants in support for why R.C. 2505.02(B)(4) allows for a direct appeal from the denial of retained counsel.

A. Does R.C. 2505.02(B)(4) allow for a direct appeal from the denial of chosen counsel in a criminal case?

Appellants rely on R.C. 2505.02(B)(4) to support the proposed rule of law. Three conditions must be established before a party can invoke R.C. 2505.02(B)(4) to pursue an interlocutory appeal:

³ *State ex rel Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 178.

- is the proceeding a provisional remedy;
- does the order *both* determine the action *and* prevent a judgment in favor of the appealing party with respect to the provisional remedy and;
- is there a meaningful *or* effective remedy following a final judgment in the case.⁴

Based on this Court's precedent in *Muncie* which garnered support from a case wherein denial of retained counsel was held to be a provisional remedy that determined the action and prevented a judgment, the State concedes that removal of retained counsel meets the first two prongs of the analysis.⁵ The State will focus on the third prong of this analysis—the meaningful or effective remedy test. The question becomes whether a person denied retained counsel has either a meaningful *or* an effective remedy by way of appeal. Appellant's arguments focus on their belief that they do not have an *effective* remedy by appeal but they do not discuss whether an appeal of denial of retained counsel is meaningful. A direct appeal is both *meaningful and effective*. But even if the appeal is not effective, an appeal can still be *meaningful* in determining whether the order should be final and appealable under R.C. 2505.02(B)(4).

⁴ *State v. Muncie*, 91 Ohio St.3d 440, 446, 2001-Ohio-93 (citing R.C. 2505.02(B)(4)).

⁵ *Id.* at 447-451 (citing in part to *State v. Saadey* (June 30, 2000), Columbiana App. No. 99CO49).

1. Is a direct appeal after conviction a meaningful forum in which to challenge dismissal of counsel?

“[W]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning; there is no need for this court to apply the rules of statutory interpretation. * * * ‘Where a statute is found to be subject to various interpretations, however, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at the legislative intent.’ If interpretation is necessary, the General Assembly has expressly provided that courts should interpret statutory terms and phrases according to their common and ordinary (or, if applicable, technical) usage.⁶

The Ohio Revised Code does not define meaningful. The common and normal definition of meaningful is: “full of meaning; having significance or purpose.”⁷

A direct appeal with an assignment of error that a criminal defendant was erroneously denied the right to retained counsel in violation of the Sixth Amendment to the United States Constitution has “significance and purpose.” If the appellate court agreed that the trial court abused its discretion in dismissing retained counsel, appellant will be entitled to

⁶ *State v. Muncie*, 91 Ohio St.3d 440, 447 2001-Ohio-93 (citations omitted).

⁷ Webster’s New World College Dictionary, 891. (Fourth Ed.).

automatic reversal, *and* the court can still consider any claims regarding the sufficiency of the evidence. That direct appeal is *meaningful* under R.C. 2505.02(B)(4)(b). This Court should hold that any appeal in which a trial court error causes reversal is *meaningful* as contemplated by R.C. 2505.02(B)(4)(b).

2. Is a direct appeal after conviction an *effective* manner to challenge dismissal of counsel?

The United States Supreme Court and this Court have both held that an appeal after conviction is effective to remedy a Sixth Amendment violation because the Sixth Amendment does not protect a person from having to face trial.

The United States Supreme Court established that a direct appeal from a potential conviction is an effective remedy if retained trial counsel is erroneously dismissed. The United States Supreme Court noted back in 1984 that “promptness in bringing a criminal case to trial has become increasingly important as crimes has increased, court dockets have swelled, and detention facilities have become overcrowded.”⁸ The United States Supreme Court goes on to explain that the Sixth Amendment does not give

⁸ *Flanagan et al v. U.S.* (1984), 465 U.S. 259, 264.

a criminal defendant a right to not be tried⁹ and a direct appeal for a violation of the Sixth Amendment right is effective:

[J]ust as the speedy trial right is merely a right not to be convicted at an excessively delayed trial, the asserted right not to have joint counsel disqualified is, like virtually all rights of criminal defendants, merely a right not to be convicted in certain circumstances.

* * *

*Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.*¹⁰

* * *

In sum, as petitioners concede, if establishing a violation of their asserted right requires no showing of prejudice to their defense, a pretrial order violating the right does not meet the third condition for coverage by the collateral order exception: it is not “effectively unreviewable on appeal from a final judgment.”¹¹

In addition to the United States Supreme Court holding that a direct appeal for this type of action is *fully* effective, this Court has also held that “appeal following conviction and sentence would be neither impracticable

⁹ This finding by the United States Supreme Court is in direct opposition to the second argument raised by Appellants to argue that retrial is not an effective remedy.

¹⁰ This finding is in direct opposition to the fourth argument raised by Appellants as to why an appeal is not an effective remedy.

¹¹ *Flanagan et al v. U.S.* (1984), 465 U.S. 259, 264 (emphasis added).

nor ineffective since any error in granting the motion [to disqualify retained counsel] would, in certain circumstances, be presumptively prejudicial.”¹²

This finding made by this court about the effectiveness of a direct appeal after conviction is *stronger* after *Gonzalez-Lopez* not weaker as Appellants suggest. An appellant had more hurdles to successfully win an appeal before *Gonzalez-Lopez* and the removal of choice of counsel was that much more of a detriment to the litigant’s case prior to *Gonzalez-Lopez*. Now the direct appeal after conviction is an even stronger forum to litigate erroneous removal of counsel because an Appellant does not have to establish prejudice.

The issues raised by Appellants as to why reversal after conviction is not effective ignores the prior rulings of this court and the United States Supreme Court. Appellants raise two additional issues—not flatly rejected by the United States Supreme Court—to show that an appeal after conviction is not an effective remedy.

First, Appellants argue that the attorney that ultimately tries the case may pursue a strategy that will prevent retained counsel from pursuing a previously chosen strategy at a second trial. This argument fails because if the first trial is plagued by a structural error the trial court judge in the

¹² *State ex rel Calabrese v. Keenan*, 69 Ohio St.3d 176, 179.

second trial can correct any issue from the first trial that prevents retained counsel from pursuing a particular strategy in the second trial. Moreover, this claim is largely speculative and is necessarily a case by case analysis.

Appellants also raise that the case may be stale if a second trial has to occur after a complete appeal. They point to this case to show how quickly these types of claims can be decided. This argument is a little misleading as this appeal initially started as a denial of bail and the parties were only given 2 days to brief this issue before immediate oral argument. And since the date of the first notice of appeal in this case it has been approximately 2 years and 8 months and this case has still not gone to trial. Moreover, in the Eighth District, the hearing removing retained counsel could not exceed 100 transcript pages if it is to be placed on the accelerated calendar.¹³ Based on counsel's experience with accelerated appeals in the Eighth District, an accelerated appeal still takes approximately 6-8 months to litigate. Thus, any issues relating to staleness or potential speedy trials issues are just as prevalent if a direct appeal from removal of counsel is allowed.

3. Did the legislature intend to allow an immediate and direct appeal after removal of retained counsel?

¹³ Cuyahoga Local App. R. 11.1 does not allow an accelerated appeal if the transcript is longer than 100 pages.

To the extent that R.C. 2505.02(B)(4) is ambiguous as to whether a direct appeal from denial of retained counsel is a final appealable order, legislative intent becomes the foundation for which this Court's opinion can stand. The Legislative response to other issues and its lack of direct response to the particular issue raised by Appellants helps show that the legislature did not intend for removal of retained counsel to be a final and appealable order.

The legislature has quickly made other orders final and appealable after this Court's decisions. In *City of Norwood v. Horney*, 2006-Ohio-3799 this Court held that the right to property was fundamental. That decision was issued on July 26, 2006 and within 15 months the legislature amended R.C. 2505.02 to make an appropriation order final and appealable.¹⁴

The legislature amended R.C. 2505.02 four years after this Court's decision in *Keenan* and did not specifically provide that removal of retained counsel was a final and appealable order. In addition the statute was amended after the decision of *Gonzalez-Lopez* and the legislature did not indicate that removal of retained counsel should be a final appealable order.

¹⁴ R.C. 2505.02(B)(7) and see the uncodified law to 2007 S § 4.

The Legislature is presumed to know the law. The statute has been amended after this Court's decision in *Keenan* and the United States Supreme Court decision in *Gonzalez-Lopez* without specifically providing for a direct appeal from the denial for retained counsel. This is evidence that the legislature did not intend that orders removing counsel be final and appealable.

II. This appeal should be dismissed as improvidently granted.

- A. Should this Court use judicial resources on a case that already has a stated law in Ohio, has not been directly addressed by the general assembly, and will provide little in the way of precedential value as these issues are extremely rare?**

This case should be dismissed for 3 reasons; 1) this Court has already determined that removal of retained counsel is not a final order, 2) there is not a clear directive from the General Assembly that removal of retained counsel is a final order and 3) removal of retained counsel is extremely unusual and this case will provide little precedential value.

This Court established that removal of retained counsel is not a final appealable order. Moreover, adoption of the proposed rule of law will create more questions than answers:

- If a defendant moves for a continuance 1 day prior to trial so that a newly retained attorney can represent him and that motion is denied, is that denial of retained counsel that is a final appealable order or is it a denial of a continuance that is not

final appealable order? Does the analysis change if the request is made 1 week or 1 month before trial? Does the analysis change if no request for a continuance is made but a request to replace with a retained attorney is made?

- If a defendant is in the midst of trial and wants to replace counsel with a retained attorney and that motion is denied, can the defendant lock down a jury trial to pursue the denial of counsel issue? Why is Appellants' proposition limited to pretrial issues when its argument can be applied with equal force to this claim during a trial? Does the analysis change if it is a bench trial?

In addition to these direct questions about removal of retained counsel, numerous types of additional rulings will have to be made to determine whether the following are final appealable orders under the *analysis* taken by Appellants:

- Should a defendant be forced to run the gauntlet of another trial if a motion to dismiss for violating double jeopardy is filed? Is the analysis any different if the double jeopardy claim is based on a hung jury or jury misconduct, or prosecutorial misconduct in closing arguments?
- Should a defendant be permitted to appeal denial of a motion to dismiss for a constitutional or statutory speedy trial delay? Does the analysis change if the motion is made after trial starts?
- Should a defendant be permitted to appeal the granting of a request for witness certification under the new Crim.R. 16? Does the analysis change if the certification pertains to the only witness who made an identification during a cold stand?

The expansion of the proposed rule of law will have to be litigated if Appellants' *analysis* of R.C. 2505.02(B)(4) is adopted. The above questions and a speedy resolution of the issue presented may be necessary to criminal defendants so that counsel can provide effective assistance under the Sixth Amendment during the trial will be the argument attempting to establish the basis for those direct appeals. The ground work should not be laid for these questions without a clear directive from the legislature determining that this issue should be final and appealable especially when this Court has already established a clear rule of law establishing that a defendant's right to appeal is a constitutionally adequate manner by which to vindicate the right to counsel of choice.

Moreover, the General Assembly is the body that constitutionally has the power to establish the jurisdiction of the courts of appeals. The United States Supreme Court issued the *Gonzales-Lopez* opinion approximately 4-years ago. The Ohio Legislature has not amended R.C. 2505.02 to allow for a direct appeal of removal of retained counsel, although the statute has been amended in direct relation to an opinion by this Court. Without a clear directive from the General Assembly, this Court should not attempt to interpret a statutory provision defining final appealable orders to comply with a United States Supreme Court decision issued 8-years *after* the

amendment to R.C. 2505.02. In addition to the above issues that will be raised if Appellants' rule of law is adopted, removal of retained counsel is an extremely rare occurrence. Based on counsel experience, this is the only case wherein retained counsel was removed for a reason other than conflict. The establishment of a new rule of law will have little precedential value beyond the facts of this case.

The proposed rule of law creates too much uncertainty in an area that this Court settled with a bright line rule of law that is easy to apply. A defendant's direct appeal—if there is even a conviction—is constitutionally adequate to vindicate a defendant's Sixth Amendment rights. This Court should not adopt the proposed proposition when the federal government has not even made removal of retained counsel a final appealable order more than 4-years after the decision in *Gonzalez-Lopez*.

CONCLUSION

Like the United States Supreme Court has previously held in deciding that removal of retained counsel is not a final appealable order “[t]he costs of such expansion are great, and the potential rewards are small.” This Court's precedent in *Keenan* is still on point, has not been modified by the Legislature, and should be followed. This appeal should be dismissed as improvidently allowed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Answer Brief was mailed by regular U.S. Mail on the 17th day of December 2010 to Gregory Scott Robey 14402 Granger Road Cleveland Ohio 44137, Mark E. Marein Marein and Bradley 526 Superior Ave. 222 Leader Building Cleveland Ohio 44114 Steven L. Bradley Marein and Bradley, 526 Superior Ave 222 Leader Building Cleveland Ohio 44114.



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