

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	Case No. 08-2251
Appellee	:	
-vs-	:	On Appeals from the
DANTAE CHAMBLISS, ET AL	:	Cuyahoga County Court of
	:	Appeals, Eighth
	:	Appellate District Court
Appellant	:	Of Appeals
	:	91272

REPLY BRIEF OF APPELLANTS
DANTAE CHAMBLISS, JAMES BENNETT AND TRAVIS SANDERS

WILLIAM MASON, ESQ.
 Cuyahoga County Prosecutor
 THORIN FREEMAN, ESQ.
 Assistant County Prosecutor –
 Counsel of Record
 The Justice Center – 9th Floor
 1200 Ontario Street
 Cleveland, OH 44113
 (216) 443-7800

COUNSEL FOR APPELLEE,
 THE STATE OF OHIO

STEVEN L. BRADLEY, ESQ. (0046622)
 Marein and Bradley
 526 Superior Avenue
 222 Leader Building
 Cleveland, Ohio 44114
 (216) 781-0722
 Fax (216) 781-6010

COUNSEL FOR APPELLANT,
 DANTATE CHAMBLISS

MARK B. MAREIN, ESQ. (0008118)
 Marein and Bradley
 526 Superior Avenue
 222 Leader Building
 Cleveland, Ohio 44114
 (216) 781-0722
 Fax (216) 781-6010

COUNSEL FOR APPELLANT,
 JAMES BENNETT

GREGORY SCOTT ROBESY, ESQ. (0055746)
 Robey & Robey
 14402 Granger Road
 Cleveland, Ohio 44137
 (216) 581-8200
 (216) 581-2822 FAX

COUNSEL FOR APPELLANT,
 TRAVIS SANDERS

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STATEMENT OF THE CASE AND FACTS

In its Statement, Appellee State of Ohio notes that “the trial court found that defense counsel was attempting to establish a claim of ineffective assistance of counsel.” (Brief of Appellee, at 2). It should be noted that the “claim of ineffective assistance” was the direct result of the trial court’s failure to unseal the search warrant application, which was necessary for counsel to exercise due diligence regarding suppression issues. This was not a situation where counsel were being dilatory or trying to artificially inject error into the proceedings. Indeed, the State of Ohio has never attempted, in the trial court or on appeal in the Eighth District or before this Court, to defend the merits of the trial court’s decision to remove counsel from the case.

ARGUMENT

In addition to those arguments previously set forth in the Merit Brief of Appellants, the Appellants now set forth the following in reply to the State of Ohio’s Brief of Appellee.

In Reply to 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.

The parties agree that the instant case rests on one issue: Is a post-conviction appeal a “meaningful or effective” remedy to cure the pre-trial dismissal of counsel of choice?

This Court has already determined that “meaningful or effective” under R.C. 2505.02(B)(4) is synonymous with “adequate.”

This division of the final order statute recognizes that, in spite of courts' interest in avoiding piecemeal litigation, occasions may arise in which a party seeking to appeal from an interlocutory order would have no *adequate* remedy from the effects of that order on appeal from final judgment. In some instances, “[t]he proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage” suffered by the appealing party. [citations omitted].

State v. Muncie, 91 Ohio St.3d 440, 451, 2001-Ohio-93 (emphasis added).

The State's Legislative Intent Argument

The State maintains that the General Assembly must have intended post-conviction appeals of the denial of counsel to be “meaningful or effective,” because R.C. 2505.02 was never amended to specifically supersede this Court’s decision in *State ex rel. Keenan v. Calabrese*, (1994), 69 Ohio St.3d 176. The State’s argument in this regard is flawed. First, R.C. 2505.02 sets forth criteria for determining when orders are final; the statute is not intended to contain a list of particular types of orders that are final. For example, the order regarding a mandatory juvenile bindover in *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, is not one that is specified in R.C. 2505.02, which is why this Court had to interpret R.C. 2505.02 to determine if mandatory bindover denials should be final orders. The General Assembly is not going to override or affirm via a legislative amendment every decision of this Court, or any other court, regarding what is or is not a final order.

Second, while *Keenan* discussed R.C. 2505.02 in an earlier form that was substantially amended approximately four years later, *Keenan* was not an action brought under R.C. 2505.02 – it was brought as a writ of mandamus. Thus, the General Assembly would not associate *Keenan* with R.C. 2505.02. Similarly, *United States v. Gonzalez-Lopez* (2006), 548 U.S. 140, was not brought as an interlocutory appeal. Once again, the General Assembly would not associate *Gonzalez-Lopez* with the issue of final orders. It is for this Court to interpret R.C. 2505.02, particularly in light of the considerations raised in and by *Gonzalez-Lopez*.

The State's Concern That the Proposition of Law Will Be Exploited

The State argues that the Proposition of Law presented herein, this Court will “create more questions than answers.” (Brief of Appellee, at 11). This is incorrect.

The State points to two scenarios that it argues will be directly affected. In the first, the State wonders whether the denial of a last-minute continuance motion to allow newly retained counsel to prepare will constitute a final appealable order. It will not. The State's hypothetical order is a denial of a continuance -- not an order that denies the new attorney the ability to make an appearance. The denial of a continuance simply holds new counsel to the litigation schedule already established. Whether the trial court's ruling constituted an abuse of discretion that denied the defendant the effective assistance of that new attorney is a decision that can, and should, be determined after trial -- when the court of appeals can evaluate counsel's last-minute performance at trial and determine if it prejudiced the defendant. Unlike a denial of a continuance, the *disqualification* of counsel is a structural error. *Gonzalez-Lopez*.

The State's argument that there would be no reason to differentiate between pre-trial denials of counsel of choice and mid-trial denials of counsel of choice is also incorrect. Obviously, the swearing of the jury and the attachment of jeopardy distinguishes the two situations. It is reasonable to differentiate between the two circumstances on that basis alone.

The State's Argument that the Proposition of Law Will Open the Door to Myriad Other Interlocutory Appeals

The State suggests that, if this Court adopts the Proposition of Law propounded herein, then the door will be open to numerous other pre-trial appeals. (Brief of Appellee at 12-13). The State is wrong. This has already been addressed in the Appellants' Merit Brief, at page 15.

The short answer to the State's argument in this regard is that the other scenarios propounded by the State are not such that a new trial will be conducted by different counsel (i.e. counsel of choice) who may well be hamstrung by the tactical decisions made by the previous counsel (i.e. default counsel). For example, denial of a motion to dismiss for want of speedy trial will never result in a new trial -- if the defendant prevails on appeal, the case is dismissed.

Appeals of discovery rulings, if successful, will result in a new trial, but the same counsel will be able to chart the course of defense on retrial, and will not be saddled with prior counsel's tactical choices. As with the denial of a continuance, there is nothing structural about a discovery error

The State's mention of whether a defendant would be permitted to take an interlocutory appeal of a denial of a motion to dismiss on the basis of double jeopardy is particularly misplaced. Defendants already can challenge the denial of a motion to dismiss for want of double jeopardy. However, that challenge takes place directly in federal court via application for a writ of habeas corpus. *Harpster v. State of Ohio* (C.A. 6, 1997), 128 F.3d 322.

The State's Contention That Trial Courts Can Correct First-Trial Tactical Choices Before the Second Trial

Without any support, the State argues that a trial court judge presiding over the second trial can "correct any issue from the first trial that prevents retained counsel from pursuing a particular strategy in the second trial." (Brief of Appellee, at 9). Respectfully, this is not always possible. If, for example, the defendant testifies at the first trial on the advice of default counsel, whereas counsel-of-choice would have counseled the defendant to the contrary, there is no way to "correct" this issue other than to disqualify the original prosecutors, seal the transcript, and require the State of Ohio to pursue the case with "untainted" prosecutors.

If, default counsel asks a question on cross-examination of a State's witness that elicits an answer helpful to the State, the same type of taint problems arise at the second trial but with one further exacerbation – the witness now has had his or her memory refreshed about a fact helpful to the prosecution. It is hard to imagine how this issue can be corrected unless the State is not allowed to call witnesses it had procured for the first trial. And this would not be fair to the State.

Ultimately, it is practically impossible to have a second trial be unaffected by the circumstances of the first trial. The State's argument to the contrary ignores the practical impossibility that the bell can be unrung at a second trial. Cf. *Muncie* at 451 (“[t]he proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage’ suffered by the appealing party.”).

The State's Reliance Upon *Flanagan v. United States* (1984), 465 U.S. 259

The State relies upon the United States Supreme Court's decision in *Flanagan*, which held that the disqualification of counsel was not subject to an immediate appeal under 28 U.S.C. 1291 and federal caselaw. There are two reasons why this Court should not follow *Flanagan*.

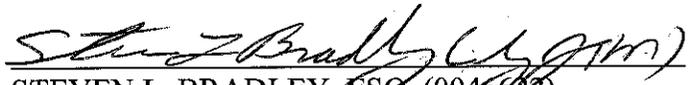
First, in that *Flanagan* is a case involving federal procedural rules, it is not binding on this Court. *Flanagan* turns on an interpretation of a federal statute and interpretative caselaw, not on Constitutional grounds. The statutory framework confronting *Flanagan* is different than the statutory framework confronting this Court.

Second, like this Court's decision in *Keenan*, *Flanagan* was decided prior to *Gonzalez-Lopez*. The Supreme Court has now recognized the myriad of practical problems arising from the denial of counsel of choice. As has been discussed in Appellant's merit brief and in this reply brief, those practical problems constitute compelling circumstances that undermine the adequacy of a post-conviction appeal.

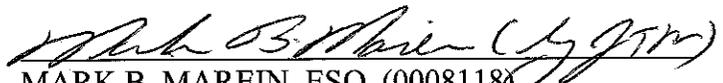
CONCLUSION

For these reasons, the decision of the Eighth District should be reversed and the case remanded to the Eighth District for determination of the merits of the issue of whether counsel was wrongly disqualified.

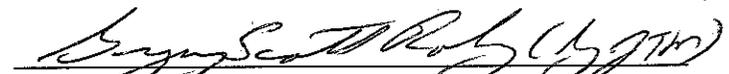
Respectfully submitted,


STEVEN L. BRADLEY, ESQ. (0046622)

Marein and Bradley
526 Superior Avenue
222 Leader Building
Cleveland, Ohio 44114
(216) 781-0722
Fax (216) 781-6010
COUNSEL FOR APPELLANT,
DANTAE CHAMBLISS


MARK B. MAREIN, ESQ. (00081186)

Marein and Bradley
526 Superior Avenue
222 Leader Building
Cleveland, Ohio 44114
(216) 781-0722
Fax (216) 781-6010
COUNSEL FOR APPELLANT,
JAMES BENNETT


GREGORY SCOTT ROBEY, ESQ. (0055746)

Robey & Robey
14402 Granger Road
Cleveland, Ohio 44137
(216) 581-8200
(216) 581-2822 FAX
COUNSEL FOR APPELLANT,
TRAVIS SANDERS

CERTIFICATE OF SERVICE

It is hereby certified that one true copy of the within Reply Brief of Appellees has been sent via United States mail to Thorin Freeman, Esq. Assistant County Prosecutor, Office of the County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113 on this 31st day of January, 2011.



STEVEN L. BRADLEY, ESQ. (0046622)

Marein and Bradley
526 Superior Avenue
222 Leader Building
Cleveland, Ohio 44114
(216) 781-0722
Fax (216) 781-6010
COUNSEL FOR APPELLANT,
DANTAE CHAMBLISS



MARK B. MAREIN, ESQ. (0008118)

Marein and Bradley
526 Superior Avenue
222 Leader Building
Cleveland, Ohio 44114
(216) 781-0722
Fax (216) 781-6010
COUNSEL FOR APPELLANT,
JAMES BENNETT



GREGORY SCOTT ROBEY, ESQ. (0055746)

Robey & Robey
14402 Granger Road
Cleveland, Ohio 44137
(216) 581-8200
(216) 581-2822 FAX
COUNSEL FOR APPELLANT,
TRAVIS SANDERS

TITLE 28--JUDICIARY AND JUDICIAL PROCEDURE

PART IV--JURISDICTION AND VENUE

CHAPTER 83--COURTS OF APPEALS

Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, Sec. 48, 65 Stat. 726; Pub. L. 85-508, Sec. 12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97-164, title I, Sec. 124, Apr. 2, 1982, 96 Stat. 36.)