

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

PLAINTIFF-APPELLANT

v.

CHRISTOPHER ANDERSON,

DEFENDANT-APPELLEE.

:  
: CASE No. 2012-1834  
:  
: ON DISCRETIONARY APPEAL FROM THE  
: MAHONING COUNTY COURT OF APPEALS,  
: SEVENTH APPELLATE DISTRICT,  
: CASE No. 11-MA-43  
:  
:

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**MERIT BRIEF OF AMICUS CURIAE THE OFFICE OF THE OHIO PUBLIC DEFENDER  
IN SUPPORT OF APPELLEE CHRISTOPHER ANDERSON**

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender protects and defends the rights of indigent persons by providing and supporting representation in the criminal and juvenile justice systems across the State of Ohio.

The Office is the state agency responsible for providing legal representation and other services to those accused of a crime who cannot afford to hire their own attorney. The focus of the Office is on appeals and post-trial activities in criminal cases and juvenile delinquency cases. The Office also offers representation at trial when requested by the courts, as well as at parole and probation revocation hearings for the more than 50,000 people in Ohio's prisons. Other services include technical assistance, research services, educational programs, investigation and mitigation services, and assistance to court-appointed attorneys throughout the state.

State Public Defender Tim Young and the Ohio Public Defender Commission are fully committed to improving Ohio's indigent defense system. Working with local public defenders, courts, and county commissioners, as well as state leaders and organizations, the Office of the Ohio Public Defender strives to change laws, rules, and practices in order to provide a more effective and efficient indigent defense delivery system.

## INTRODUCTION

In holding that a motion to dismiss based on double jeopardy is a final order, this Court should follow the path set in *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785. In that case, this Court faced a precedent that, based on a previous version of R.C. 2505.02, denied the right of interlocutory appeal when a trial court denies a defendant counsel of choice. *State ex rel. Keenan v. Calabrese*, 69 Ohio St.3d 176 (1994). But this Court recognized that the harm of going to trial without counsel of choice cannot be rectified after verdict, and that the changes to R.C. 2505.02 now provided an immediate appeal of such decisions. *Chambliss* at ¶ 26, quoting *Keenan* at 180 (Pfeifer, J., dissenting) (“A post-conviction appeal may offer a remedy, but not an *adequate* one—the choice of counsel is fundamental and impacts the entirety of the case.” (Emphasis sic.)

Similarly, under the previous version of R.C. 2505.02, this Court held that a defendant cannot appeal the denial of a motion to dismiss based on double jeopardy. *State v. Crago*, 53 Ohio St.3d 243 (1990). But now that provisional remedies can be final orders, this Court should recognize that the changes to R.C. 2505.02 permit an interlocutory appeal to protect against the harm of being required to face a trial in violation of double jeopardy protections. Moreover, this Court should overrule *Wenzel v. Enright*, 68 Ohio St.3d 63, 66 (1993), because an appeal after verdict cannot remedy the harm of being required to face a trial—the United States Supreme Court has unequivocally held that the harm of a double jeopardy violation is the second trial, not

simply the verdict resulting from the second trial. *Abney v. United States*, 431 U.S. 651, 661-62 (1977). Both the State and the dissent below incorrectly rely on *Wenzel* and therefore fail to follow the binding constitutional law explained in *Abney*.

## STATEMENT OF THE CASE AND THE FACTS

The Office of the Ohio Public Defender defers to the appellee's statement of the case and the facts.

## ARGUMENT

### Proposition of Law:

**The denial of a motion to dismiss based on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is a final appealable order. R.C. 2505.02.**

### I. **The harm of a double jeopardy violation is the second trial.**

The United States Supreme Court is clear about the harm that the Double Jeopardy Clause seeks to avoid. In the current case, the harm is not simply an unjust conviction—it is *the trial itself*.<sup>1</sup> As the Court explained:

[The] protections [of the Double Jeopardy Clause] would be lost if the accused were forced to “run the gauntlet” a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, *his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.*

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<sup>1</sup> This case concerns only the prohibition against second trials. This case does not concern the multiple punishment component of double jeopardy.

(Emphasis added.) *Abney v. United States*, 431 U.S. 651, 661-62 (1977). Accordingly, retrial is the harm Mr. Anderson has the right to avoid.

Of course, *Abney* does not mandate that Ohio provide for a pretrial appeal as a matter of state procedural law, but the decision unequivocally holds that as a matter of federal constitutional law, the retrial itself is the constitutional harm at issue. Even an acquittal cannot remedy the harm. The question in this case is whether R.C. 2505.02 provides a remedy for this harm, or whether federal district courts should continue to serve as de facto state courts of appeal.

**II. *State v. Crago*, 53 Ohio St.3d 243 (1990), fails to remedy the harm of a double jeopardy violation, but this Court need not overrule the decision.**

**A. *Crago* gives to federal district courts authority that should belong to Ohio's courts of appeals.**

*Crago* turns federal district court judges into Ohio intermediate appellate judges, and denies Ohio courts of appeals their proper role as courts of error correction. Citing to *Crago*, the United States Court of Appeals for the Sixth Circuit holds that because Ohio does not permit immediate appeals of the denial of motions to dismiss, a defendant can bring a double jeopardy claim directly to federal court before going to trial in state court. *Harpster v. Ohio*, 128 F.3d 322, 325-26 (6th Cir.1997) (“[T]he federal adjudication of double jeopardy claims raised on pre-trial petitions for habeas corpus is appropriate when those claims have been raised and rejected in the state trial court and under state law there is no right to interlocutory appeal.”) Further, because there is no

final state court judgment, defendants receive de novo review of all legal issues instead of the highly deferential review of final convictions usually provided in federal habeas actions. *Phillips v. Court of Common Pleas*, 668 F.3d 804, 810 (6th Cir.2012).

Ohio courts of appeals are better at correcting state court error than federal district court judges. Ohio appellate judges are experienced in sorting through and prioritizing initial appeals. Ohio judges are also more familiar with Ohio law, which is often central to resolving a double jeopardy claim. See *State v. Gunnell*, 132 Ohio St.3d 442, 2012-Ohio-3236, ¶ 8-13 (juror received incorrect information on the definition of “manslaughter), *State v. Ross*, 128 Ohio St.3d 283, 2010-Ohio-6282, ¶ 48 (determining whether a motion was governed by Crim.R. 33 or Crim.R. 29), and *State v. Rose*, 12<sup>th</sup> Dist. No. CA2011-11-214, 2012-Ohio-5607, ¶ 29-33 (concerning a defendant’s acquiescence to a mistrial to avoid a Crim.R. 25 substitution of judges during trial). Similarly, state court of appeals judges are more familiar with the lawyers and judges in their district. As a result, state appellate judges are in a better position to determine the credibility of claims that a prosecutor or defense lawyer intentionally provoked a mistrial. Because state court judges know state law and state court actors, the quality of decision will likely be higher when state court judges hear double jeopardy appeals.

**B. *Crago* causes unreasonable delays.**

The unavailability of an immediate appeal can lead to years of delays in a case. Here, the indictment was filed in 2002, but Mr. Anderson’s case has not yet been

resolved. As Justice Lanzinger noted, a defendant whose first trial was in 2005 had to go through three trials before she finally received double jeopardy relief—in 2012. *State v. Gunnell*, 132 Ohio St.3d 442, 2012-Ohio-3236, ¶ 42 (Lanzinger, J., concurring). Immediate appeals can further the prompt administration of justice by timely resolving double jeopardy claims.

**III. R.C. 2505.02(B)(4) supercedes *Crago*.**

**A. This Court need not overrule *Crago*.**

As this Court unanimously held in *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785, orders that were not final before the 1998 amendment to R.C. 2505.02 may be final under the new provisional remedy prong of the statute. *Id.* at ¶ 23-7. And just as the amendment made the denial of retained counsel of choice a final order, the denial of a motion to dismiss based on double jeopardy is now a final order. Because *Crago* was decided before R.C. 2505.02 was amended, this Court need not overrule the decision.

**B. This Court should overrule *Wenzel v. Enright*, 68 Ohio St.3d 63, 66 (1993).**

While *Crago* need not be overruled, this Court should overrule *Wenzel v. Enright*, 68 Ohio St.3d 63, 66 (1993). In *Wenzel*, this Court ruled that a defendant could not enforce double jeopardy rights through extraordinary writs because, “there exists an adequate remedy in the ordinary course of law to challenge an adverse ruling on the issue, to wit: an appeal to the court of appeals at the conclusion of the trial court proceedings.” *Id.* at 66. But as explained above, an appeal after conviction cannot

remedy the harm the double jeopardy clause is intended prevent—“running the gauntlet.” Compare *id.* with *Abney*, 431 U.S. at 661. Accordingly, the *Wenzel* holding that a post-verdict appeal is an adequate remedy should be expressly overruled.

**IV. A motion to dismiss based on a double jeopardy claim is a final order under R.C. 2505.02(B)(4).**

**A. Definition of a provisional remedy.**

Under the 1998 amendment to R.C. 2505.02, a “provisional remedy” is a proceeding ancillary to an action[.]” R.C. 2505.02(A)(3). And an “ancillary” proceeding must be “attendant upon” or “aid[.]” the underlying criminal proceeding. *State v. Muncie*, 91 Ohio St.3d 440, 449-50 (2001).

**B. Definition of when a provisional remedy is a final order.**

A “provisional remedy” becomes a final order when it “in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.” R.C. 2505.02(B)(4)(a). The order is only final if “the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment[.]” R.C. 2505(B)(4)(b).

**C. A remedy is ancillary when it aids in resolving a case, even if that resolution favors the defendant.**

The State argues that “defendant’s pre-trial motion to dismiss (whether it’s based upon double jeopardy and/or due process) cannot be ancillary to the action, because it seeks to terminate the entire criminal proceeding against the defendant rather than aid

the criminal action.” Appellant’s Merit Brief at 24. The State apparently believes that only those proceedings that further the theory of the prosecution qualify as “ancillary,” because only those proceedings “aid the criminal action.” But that claim is incorrect— an appellate reversal of a wrongly denied double jeopardy motion certainly “aids” the underlying criminal action by establishing that the action is being wrongly prosecuted.

This Court underlined that a provisional remedy can terminate an action in *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307. In that case, this Court found that a mandatory-bindover hearing was an ancillary proceeding, because it “aids the juvenile court in determining whether it has a duty to transfer jurisdiction[.]” *Id.* at ¶ 23. This Court made that finding even though the denial of the motion “terminates the state’s ability to secure an indictment for the acts charged[.]” *Id.* at ¶ 33. So even though a motion to dismiss may terminate an action, it “aid[s]” the resolution of the case by allowing the trial court to determine whether the case should proceed to trial.

**D. A defendant has no meaningful appeal after trial.**

The definition of a provisional remedy is broad, but only a tiny subset of “provisional remedies” are final orders. To be a final order, the decision on the provisional remedy also must “prevent[] a judgment in the action in favor of the appealing party with respect to the provisional remedy.” R.C. 2505.02(B)(4)(a). Further, the appellant must show that he or she “would not be afforded a meaningful or

effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.” R.C. 2505.02(B)(4)(b).

But a post-verdict appeal cannot provide a remedy for a double jeopardy violation. The State’s argument to the contrary (as well as the dissent below) relies on the unquestionably wrong decision in *Wenzel v. Enright*, 68 Ohio St.3d 63, 66 (1993). See Appellant’s Merit Brief at 25, quoting *Wenzel* at 66 (“In *Wenzel*, this Court recognized that ‘there exists an adequate remedy in the ordinary course of law to challenge an adverse ruling on the issue, to wit: an appeal to the court of appeals at the conclusion of the trial court proceedings’”). See also *State v. Anderson*, 7<sup>th</sup> Dist. No. 11-MA-43, 2012-Ohio-4390, ¶ 55 (Vukovich, J., dissenting and citing *Wenzel* at 66). As explained above, *Abney* expressly holds that the harm of the double jeopardy violation *is the trial itself*; while an appeal can erase a verdict resulting from a trial, an appeal cannot erase the trial itself. *Abney*, 431 U.S. at 661-62.

It is true that in *Wenzel*, this Court correctly noted that “*Abney* does not mandate, as a matter of federal constitutional law, that a state provide a mechanism for an interlocutory appeal from the denial of a motion to dismiss on grounds of double jeopardy.” *Wenzel* at 72, n.1. By enacting the changes to R.C. 2505.02(B), the Ohio legislature determined that it was best to provide just such a mechanism. And while *Abney* does not require a state to provide an immediate appeal, it definitively holds that

a second trial, not just a conviction, is the harm of the double jeopardy clause is designed to prevent. *Abney* at 661-2.

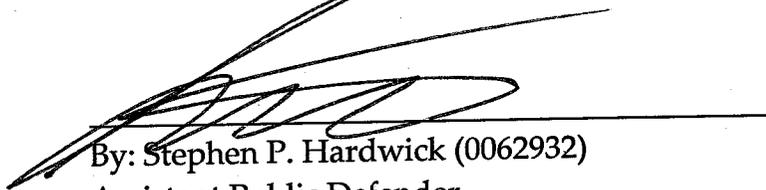
*Wenzel* was wrongly decided and should be overruled.

### CONCLUSION

This Court should affirm the decision of the court of appeals.

Respectfully submitted,

Office of the Ohio Public Defender

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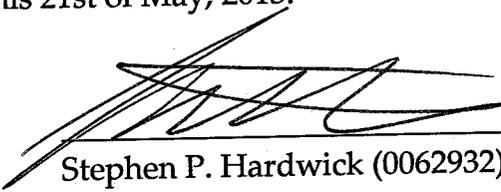
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## Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded by regular U.S. Mail, postage pre-paid to the office of Ralph M. Rivera, Assistant Mahoning County Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman Street, Youngstown, Ohio 44503 and to John B. Juhasz, 7081 West Boulevard, Suite 4, Youngstown, Ohio 44512-4362 on this 21st of May, 2013.



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