IN THE SUPREME COURT OF OHIO
2009

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

DAVID B. CLINKSCALE,

Defendant-Appellant

Case No. 08-1012

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals Case No. 06AP-1109

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE

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INTRODUCTION

On June 17, 2009, in a 4-3 opinion, the four-justice majority reversed defendant Clinkscale's convictions on two grounds: (1) the trial court had violated Crim.R. 22 and due process by failing to settle the record after not recording the proceedings surrounding the dismissal of a deliberating juror; and (2) the trial court had violated former Crim.R. 24(G)(2) by substituting an alternate for the excused juror.

On June 29, 2009, the State timely moved for reconsideration, for supplemental briefing of the Crim.R. 22 issue, and for oral reargument. The State sought reconsideration, supplemental briefing, and reargument because the State had not been given notice that this Court would be addressing any Crim.R. 22 claim of error and therefore had not briefed the issue. The State pointed out, inter alia, that the majority had erred in several respects regarding the issue of Crim.R. 22 error. These errors included: (1) failure to apply waiver/forfeiture doctrine regarding the Crim.R. 22 error; (2) failure to apply this Court's long-standing doctrine that appellants must exhaust App.R. 9 procedures for correcting/settling the record before they can win appellate relief; and (3) the Crim.R. 22 error at most would warrant a remand for a record-settling hearing; it would not require outright reversal.

The State sought reconsideration and reargument on other grounds as well: (1) the majority had failed to apply plain-error analysis to the violation of former Crim.R. 24(G)(2) regarding substitution of the alternate during deliberations; (2) the majority had failed to address the State's claim that former Crim.R. 24(G)(2) was unconstitutional as in conflict with substantive provisions in R.C. 2945.29 and

R.C. 2313.37(D), both of which *commanded* the substitution of the alternate; and (3) the majority had used a demonstrably false premise in contending that the sole outcome after dismissal of an ill deliberating juror is a mistrial; Ohio law allows a trial by jury of 11 with consent of the defendant, and, even if the defense had objected in the trial court, the court might have been able to reinstate the just-recently-excused juror.

On September 1, 2009, this Court granted the State's motion for supplemental briefing and ordered the parties to provide supplemental briefing on the Crim.R. 22 issues through simultaneous briefing within 20 days, with 10 days for reply briefing thereafter.

The present brief is being submitted in response to the September 1st entry. The State wishes to emphasize that its other reconsideration issues remain pending, and the present briefing is devoted to Crim.R. 22 issues because that is the scope of the supplemental briefing ordered by this Court. As to the other reconsideration issues, the present brief should be read in conjunction with the State's June 29th motion for reconsideration and for reargument.

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.

The State is greatly appreciative of the opportunity to provide supplemental briefing under this Court's September 1st order. However, because defendant is not conceding that the State was deprived of notice and the opportunity to be heard vis-à-vis the Crim.R. 22 issues, and because this Court has not yet formally granted reconsideration, the State believes it is important to reiterate why reconsideration is warranted vis-à-vis the Crim.R. 22 issues.

The September 1st order of supplemental briefing ameliorates some of the prejudice from the State's earlier lack of notice and opportunity to be heard. But review on a motion for reconsideration is more circumscribed than the plenary review that comes with full briefing and oral argument. To really cure the State's lack of notice and opportunity to be heard, the State respectfully submits that reconsideration should be formally granted so that plenary review, unhindered by the "reconsideration" standard, can occur.

A. Deliberations and Assertions Thereafter

The jury began deliberations at 2:01 p.m. on Friday, September 8, 2006. (T. 1474) After two other written jury questions were answered, the jury sent out a written question at 4:50 p.m. indicating that one member of the jury was not comfortable returning a guilty verdict based on the testimony of one witness because "[t]he juror

does not believe a guilty verdict could ever be declared without more evidence." (T. 1478) The jury question indicated that the issue did not appear to be resolvable through more time and discussion, and therefore the question indicated that "[a]ny advice would be appreciated." (T. 1478)

At 5:55 p.m., the court convened the jury and told them that, upon their request, they were being excused for the weekend and that on Monday morning there would be additional instructions based upon their last question. (T. 1478-79)

The case reconvened on the morning of Monday, September 11, 2006, with a second judge substituting for the first judge, who was out of town. (T. 1479, 1481) The discussion focused on how the "single witness" question would be answered. (T. 1481-88)

When the jury reconvened to receive the answer to the "single witness" question, the court indicated that one of the jurors had been excused because of a "medical issue." (T. 1493) The court ordered that the first alternate, Mr. Thaler, be substituted, and Thaler was sworn. (T. 1493-94) The defense raised no objection to the excusal or substitution, nor did the defense object to the lack of recordation of any proceedings regarding the excusal of the juror.

At that point, the court responded to the "one witness" question from Friday by giving a supplemental instruction. (T. 1494-96) Given the substitution of the alternate juror, the court also instructed the jurors to begin deliberations anew. (T. 1497) Again, there was no objection to the excusal or substitution or to any lack of recordation.

The jury returned its guilty verdicts at noon on that Monday, September 11th,

and the defense requested a jury poll. (T. 1505-1511) All jurors, including Thaler, voiced their assent to the verdicts. (T. 1510-11) Thaler was now juror number six on the jury. (T. 1510-11) There was still no objection to the excusal or substitution or to any lack of recordation.

When court reconvened for the penalty phase three weeks later on October 2, 2006, defense counsel raised an issue regarding the "process" surrounding the excusal. (T. 1524 – "We wanted to object to that process * * *")[1] Counsel conceded that no objection had been raised on September 11th. (T. 1524) According to counsel, the bailiff had informed the attorneys that juror number *three* was having heart palpitations. (T. 1523)[2] Counsel stated that the juror had previously disclosed in jury selection that she had a previous heart condition. (T. 1523) According to counsel, the juror wanted to be excused. (T. 1523)

Counsel indicated that the substitute judge went into the first judge's office and "presumably talked to Juror Number Three about her condition." (T. 1523) Counsel indicated that the substitute judge then "came out and said something to the effect that

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[1] This Court's majority opinion erred in stating that "Clinkscale's counsel stated that he had wanted to object *to the dismissal* * * *" and in further stating that "Appellee contends that review is precluded because appellant placed his *objection to the dismissal* on the record at the sentencing hearing instead of using App.R. 9 to supplement the record." Opinion, at ¶¶ 8, 17 (emphasis added). The State has repeatedly contended that there was no objection to the dismissal at any time in the trial court. In the belated comments three weeks after the fact, defense counsel stated only that he had "wanted to object to *that process*," a statement indicating that the defense was only complaining about the ex parte procedure surrounding the dismissal, not about the dismissal itself.

[2] Defense counsel's unofficial rendition of events appears to be flawed, since the transcript shows that alternate juror Thaler became juror number *six*, not juror number three. (T. 1510-11)

she had excused Juror Number Three. She didn't believe that somebody should lose their life, have a heart attack or something like that, because they were seated on a jury." (T. 1524) Counsel contended that the court had "already excused" the juror. (T. 1527) During this rendition three weeks after the fact, the defense still raised no objection to the excusal or substitution or to any lack of recordation.

The prosecutor stated that she had a "quite different" recollection of events. (T. 1525) The prosecutor stated that the bailiff "made us aware that there was juror who was having heart palpitations, that we were considering even calling the squad. The woman didn't think she needed that, but she did want to get to her doctor, that she had had a heart attack before * * *." (T. 1525) The prosecutor indicated that "[w]e as a group discussed what to do with it." (T. 1525)

The prosecutor further indicated that defense counsel had said at the time that he wondered whether "she's the one that they are talking about in these questions." (T. 1525) The prosecutor recounted that she asked him, "Do you want to ask that question?" (T. 1525) The prosecutor indicated that counsel said "No, I don't." (T. 1526) Defense counsel interjected and agreed that he had said "No, I don't." (T. 1526 – "That's true.")

The prosecutor stated they discussed whether they should let the juror go or whether they should just let her go to the doctor and then come back. (T. 1526) The prosecutor stated that "everyone agreed as a group that we would let her go and seat the alternate." (T. 1526)

The prosecutor noted that "[t]here was never an objection." (T. 1526) The

prosecutor noted that, if there had been an objection, the court could have held a hearing, and, more importantly, deliberations could have been halted for a recess so that the juror could go see a doctor. (T. 1526)

Defense counsel agreed that the prosecutor "does correctly state the conversation we had back there," but counsel contended that "at no point did we agree to let her go." (T. 1526-27)

The prosecutor stated that "this is an important point, because this is going to go up on appeal again. And what they are trying to do is set up an appealable issue on this, and it just didn't happen that way." (T. 1527)

The court did not endorse either view of what occurred. (T. 1527) Instead, the court said that "their objection is either on the record or it isn't on the record. We can't revise the record at this point no matter how long ago." (T. 1527)

B. Lack of Notice and Opportunity to Be Heard

Until the issuance of this Court's decision on June 17, 2009, the State had no notice that a claim of error under Crim.R. 22 and/or "due process" would be considered. Defendant had *never even cited Crim.R. 22* and had *never claimed* that a violation of that rule warranted reversal or rose to the level of a "due process" violation. Indeed, the proposition of law pertinent to the dismissal of the juror presupposed an adequate appellate record and presupposed that defendant could prevail on the merits based on his trial counsel's unilateral assertions three weeks after the dismissal. The conclusion reached by the majority here – that the appellate record was inadequate and "speculative" regarding the events surrounding the dismissal – is diametrically at odds

with the defense proposition of law and the arguments made thereunder.

In opposing defendant's speculative proposition of law, *the State* contended that the record was inadequate and that the proposition of law pertaining to juror dismissal must be rejected. The majority here *agreed* with the State, but the majority then sua sponte claimed that the trial court's failure to settle the record after lack of recordation was itself a basis for reversal. No such claim of error had ever been raised.

Sua sponte consideration of a claim of Crim.R. 22 error also went beyond this Court's narrow grant of review. The majority acknowledged that the Court "accepted jurisdiction over only two of the propositions of law * * *." Opinion, at ¶ 10. Neither of those propositions involved a claim of Crim.R. 22/"due process" error pertinent to a failure to make a record regarding the dismissal.

In defendant's memorandum opposing the motion for reconsideration, defendant contends that this Court was not limited to the propositions of law and that the Court was not limited to adopting or rejecting in toto the accepted propositions of law. But these are red-herring arguments. The State is not questioning this Court's ability to sua sponte raise issues. When the Court does so, however, it should provide notice to the parties and should order briefing on the new issues, especially when this Court's initial grant of review has limited the appeal to certain specified propositions of law. This Court's cases have recognized that fairness requires that the parties be given notice and an opportunity to address the new issue. *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. The State requested such notice and opportunity to address

unbriefed issues in footnote six of its merit brief.

In the final analysis, by going beyond the narrow grant of review, and by addressing a claim of error never raised in the trial court, the Court of Appeals, or here, the majority deprived the State of fair appellate review. The State was blindsided by the majority's consideration of a claim of Crim.R. 22 error. The proper remedy for this error would be to grant reconsideration and to engage in a plenary review of the Crim.R. 22 issues unhindered by the "reconsideration" standard of review.

The State must also add that, while the majority reached out sua sponte to address a claim of Crim.R. 22 error, the majority then failed to address arguments the State had been raising all along regarding defendant's claim of error under former Crim.R. 24(G)(2) regarding the substitution of the alternate. If this Court is going to adhere to its decision to sua sponte review the claim of Crim.R. 22 error, then the Court should address the arguments that the State has been raising all along regarding the substitution of the alternate, including the issue of the constitutionality of former Crim.R. 24(G)(2).

C. Crim.R. 22 Error Waived/Forfeited by Lack of Objection

There is a practical reason for giving the parties notice and an opportunity to be heard on sua sponte claims of error. Without the reasoned advocacy of the parties, the appellate court is more likely to make mistakes. Several mistakes occurred here.

If given notice and the opportunity to be heard before this Court's decision, the State would have pointed out that, under this Court's precedents, the claim of Crim.R. 22 error was waived/forfeited through lack of objection. The defense never claimed

Crim.R. 22 error in the trial court regarding the lack of recordation of the dismissal of the juror. Time after time, this Court has concluded that unobjected-to error under Crim.R. 22 is waived/forfeited. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶¶ 182, 183 ("Leonard failed to object or ask that these conferences be recorded and has waived this issue."; "reversal will not occur as a result of unrecorded proceedings when the defendant failed to object and fails to demonstrate material prejudice."); *State v. Palmer* (1997), 80 Ohio St.3d 543, 555 ("defense counsel made no request on the record that they be recorded, thereby waiving the error"); *State v. Grant* (1993), 67 Ohio St.3d 465, 481 ("defense counsel never requested that they be recorded, thereby waiving any error"); *State v. Brewer* (1990), 48 Ohio St.3d 50, 60-61("appellant failed to object or move for recording at trial. More significantly, appellant's present counsel failed to invoke the procedures of App. R. 9(C) or 9(E) to reconstruct what was said or to establish its importance. In the absence of an attempt to reconstruct the substance of the remarks and demonstrate prejudice, the error may be considered waived.").

Even when there was a contemporaneous objection to the lack of recordation in the trial court, this Court has required that the defendant-appellant exhaust App.R. 9 procedures or else waive the issue. *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.'").

The claim of Crim.R. 22 error also was never raised in the Court of Appeals, which meant that the issue was waived/forfeited there too and cannot succeed unless defendant shows plain error warranting reversal. *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 majority should have concluded that the claim of Crim.R. 22 error was waived and that the claim was only reviewable under a plain-error standard. Given the defense failure to raise a claim of Crim.R. 22 error in the lower courts, the majority should have refrained from even considering the claim of Crim.R. 22 error.

D. No Timely Objection and No Request that Court Settle the Record

The majority wrongly contended that, in the sentencing hearing three weeks after the fact, "defense counsel took sufficient measures, required by *Palmer*, to give notice that a deficiency in the record existed and to appropriately remedy the deficiency." Opinion, at ¶ 16. Whatever else one may think about counsel's comments three weeks after the fact, such comments do not represent a timely objection to any lack of recordation three weeks earlier. The time to object to any lack of recordation would have been before the verdicts when the parties were aware of the failure to record, not three weeks later after the defense had lost.

Waiting until after the verdicts is a classic "sandbagging" situation, and the majority's conclusion would allow a party to withhold objection, perhaps pleased with the dismissal of the juror, only then to raise it after the party has lost. This Court has repeatedly emphasized that the *contemporaneous*-objection requirement is meant to avoid this kind of gambling on the outcome. "We believe that our holdings should foster rather than thwart judicial economy by providing incentives (and not

disincentives) for the defendant to raise all errors in the trial court -- where, in many cases, such errors can be easily corrected." *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 23; see, also, *State v. Awan* (1986), 22 Ohio St.3d 120, 123; *State v. Glaros* (1960), 170 Ohio St. 471, 475; *State v. Tudor* (1950), 154 Ohio St. 249, 257-58; *State v. Adams* (1874), 25 Ohio St. 584, 587-88.

In addition, trial counsel's comments three weeks later were still insufficient. While the trial court could have endeavored to settle the record three weeks later, the problem is that the defense *never asked* ***the court*** *to do so.* Counsel only asked to put his own purported recollections on the record: "I simply wanted to put on the record what happened Monday morning * * *." (T. 1522) "So, essentially, that's what I wanted to say." (T. 1524) Counsel said "I just wanted to fill out the record, because none of that was put on." (T. 1527) Counsel "just wanted" to place his unilateral version on the record. The defense never asked the *trial court* to conclusively settle the record.

E. Crim.R. 22 Error Waived/Forfeited by Failure to Exhaust App.R. 9 Procedures

Another aspect of the problem is that, even when there is a timely objection to the failure to make a record, this Court has always required that the appellant (including capital defendants) exhaust App.R. 9 procedures in an effort to reconstruct what occurred or to establish its importance. The majority acknowledged this aspect of *State v. Palmer* (1997), 80 Ohio St.3d 543, but then contended that *Palmer* is distinguishable because "*Palmer* addresses the failure to record relatively unimportant portions of the trial." Opinion, at ¶ 14. This is a misstatement not only of the significance of *Palmer*

but also of the significance of other cases in which this Court has recognized that exhaustion of App.R. 9 procedures is required.

If given notice and an opportunity to be heard, the State could have pointed out before this Court's decision that issues just as important as the dismissal of a deliberating juror had been involved in other cases in which this Court invoked the exhaustion requirement. In *Palmer* itself, one of the unrecorded conferences involved the dismissal of a prospective juror in that capital case. *Palmer*, 80 Ohio St.3d at 555. The majority here states that "the composition of the jury in a capital case implicates important constitutional rights * * *." Opinion, at ¶15.

In fact, the exhaustion requirement goes back as far as *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, which recognized nearly three decades ago that, when a transcript of four days of testimony was missing, all reasonable efforts to reconstruct the record must be exhausted. As stated in *Knapp*:

> The plaintiffs in this action did not meet their burden to supply a transcript of the trial proceedings. Admittedly, it was through no fault of their own that plaintiffs were unable to supply a verbatim trial transcript. However, other options were available, specifically App. R. 9(C) and (D). App. R. 9(C) permits an appellant to submit a narrative transcript of the proceedings when a verbatim transcript is unavailable, subject to objections from the appellee and approval from the trial court. App. R. 9(D) authorizes parties to submit an agreed statement of the case in lieu of the record. There is nothing in the record indicating that plaintiffs even attempted to avail themselves of these alternatives. Accordingly, as to those assignments of error dependent for their resolution upon a trial transcript, the judgment of the lower court would ordinarily be affirmed in a case such as this.
>
> One fact, however, precludes such a result in this

> cause -- plaintiffs were never out of order during the entire pendency of the appeal. At all times plaintiffs acted with the permission of the court in waiting for the court reporter to regain her health so that she could transcribe her notes. * * *
>
> This does not mean, however, that plaintiffs are entitled to a new trial. Rather, the cause should be remanded to the trial court, where, pursuant to Civ. R. 63(B), a judge shall be appointed to complete the unfulfilled duties of the removed trial judge in this cause. Several options are then available to the appointed judge. We suggest that an inquiry be made as to the current health status of the court reporter. Indeed, it would not be surprising to find that she is now quite able to transcribe her notes. If not, plaintiffs should be given the opportunity to provide the court with an App. R. 9(C) narrative transcript. The parties might even reach an agreed statement of the case pursuant to App. R. 9(D). But, the appointed judge should consider granting plaintiffs a new trial, in accordance with Civ. R. 63(B), *only after all reasonable solutions to this problem are exhausted.*

Knapp, 61 Ohio St.2d at 199-200 (emphasis added).

This principle was reinforced in the 1990's in *State v. Jones* (1994), 71 Ohio St.3d 293, in which the entire transcript of the trial testimony was unavailable because the court reporter's notes had been destroyed. This Court emphasized again that the appellant must endeavor to use all reasonable efforts to reconstruct the record.

> The correct procedure the court of appeals could have followed in this case is found in App.R. 9. Where there is no record, App.R. 9(C) permits the trial court to hold an evidentiary hearing in order to settle and approve the appellate record. Where there are gaps in or disputes about the record, App.R. 9(E) provides a procedure for correction or modification. Under that provision, a court of appeals may direct the trial court to settle the record.
>
> App.R. 9 does not explicitly provide the appellate court with the authority to grant a new trial. However,

> per *Knapp v. Edwards Laboratories*, *supra*, an 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. * * *
>
> In *Knapp*, supra, the issue was whether the plaintiffs were entitled to a new trial because the court reporter was unable to transcribe portions of trial testimony necessary to properly present the assigned errors on appeal. *This court held that, absent 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.*
>
> * * *
>
> We are troubled by the fact that neither the trial court nor the court of appeals complied with App.R. 9. Furthermore, the court of appeals should have dealt with the record before it by way of an opinion instead of a simple journal entry. Due to the approach taken by both the court of appeals and the trial court, additional time has passed, making it even more difficult to compile and settle a 9(C) statement.

Jones, 71 Ohio St.3d at 297-99 (emphasis added).

Other cases requiring exhaustion of App.R. 9 procedures have involved unrecorded conferences on issues involving constitutional issues and unrecorded conferences in cases in which the death penalty actually had been imposed.

- *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 213 (death case; conversations between court and jury; "Frazier has not attempted to reconstruct what the trial court discussed with the jury in an effort to show prejudice. See App.R. 9(B) and (E)")

- *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶ 159 (death case; "counsel never requested that the unrecorded bench conferences be recorded. Nor has Ketterer attempted to reconstruct these conferences or to establish their importance or that material prejudice resulted. *Palmer*, 80 Ohio St.3d at 554. We have repeatedly refused to reverse convictions or sentences on the basis of unrecorded conferences when a defendant has not taken these steps.")

- *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 163 (death case; "defense counsel made no attempt to recreate the contents of the charts pursuant to App.R. 9(C)")

- *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, ¶¶ 96-99 (death case; claimed ex parte meeting by judge with jurors; defendant "has not established that he was prejudiced by any conversations that the trial judge may have had with the jury. In fact, he has not even attempted to reconstruct what occurred in an effort to show prejudice. See App.R. 9(B) and (E); *State v. Goodwin* (1999), 84 Ohio St.3d 331, 340. We have declined to reverse on the basis of unrecorded conferences when the accused has failed to demonstrate material prejudice.")

- *State v. Iacona* (2001), 93 Ohio St.3d 83, 106-107 (defendant claimed due process violation because trial court threatened defense with negative evidentiary ruling if defense pursued natural-death defense; record held inadequate because no App.R. 9(C) statement was made)

- *State v. Nields* (2001), 93 Ohio St.3d 6, 27 (death case; claimed denial of fair trial in violation of witness sequestration order; claim rejected because "defendant made no attempt to supplement the record under App.R. 9(C)")

- *State v. Williams* (1995), 73 Ohio St.3d 153, 161 (death case; actual polling of jury after guilt-phase verdict not transcribed; defendant "did not make a timely motion to supplement the record, nor did appellant attempt to reconstruct the record.")

If given the opportunity to brief the claim of Crim.R. 22 error before this Court's decision, the State also would have pointed out that this Court had already 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. In the *B.E.* case, an order of permanent custody had been reversed by the appellate court because a transcript of "critical testimony" was missing. This Court *rejected* the appellate court's conclusion that automatic reversal was called for, and this Court emphasized that App.R. 9 procedures must first be exhausted even in cases of

missing "critical testimony" and even in cases as serious as those involving constitutionally-protected parental rights. As stated in *B.E.*:

> **{¶ 14}** Although we agree with the result reached by the court of appeals, we decline to hold that an App.R. 9(C) statement may never be used where a juvenile court fails to comply with Juv.R. 37(A). 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)

This Court in *B.E.* ultimately concluded that reversal was called for, but only because the parent's attorney *had* attempted to use App.R. 9 to reconstruct the record and was unsuccessful because no one could recall what had occurred and the missing testimony could not be re-created.

In a dissenting opinion concurred in by Justice O'Connor, Chief Justice Moyer contended that the appellant in *B.E.* had not done enough to try to settle the record. As stated by Chief Justice Moyer:

> **{¶20}** Our cases have consistently held that an appellant -- the mother at the court of appeals in the instant case -- must satisfy two requirements before a reviewing court will grant a new trial because of an incomplete transcript. First, the appellant must "point out a specific instance where effective review is precluded by incompleteness of the transcript." *State v. DePew* (1988), 38 Ohio St.3d 275, 279. Evans, however, has failed to allege any specific instance of prejudice whatever; rather, her counsel made a general averment (if even that) suggesting that the missing information could be a basis for reversal. We rejected this precise argument in *DePew*, 38 Ohio St.3d at 279 -- a death-penalty case, no less -- where we concluded that an appeal predicated on an incomplete transcript must fail when the appellant "makes only general averments that the missing information 'could be vital' to his arguments." See, also, *State v. Palmer* (1997), 80 Ohio St.3d 543, 555, ("general averments do not act as a substitute for an actual showing of prejudice").
>
> **{¶21}** Second, an appellant must exhaust "all reasonable solutions to the problem [of a missing transcript]" before a reviewing court will grant a new trial. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 200. Lest there be doubt that Evans did not exhaust all reasonable solutions in the instant case, App.R. 9(C) specifically contemplates one solution that was not exhausted: the preparation of "a statement of the evidence or proceedings from * * * *appellant's recollection*." (Emphasis added.) Indeed, there is no evidence that counsel even attempted to contact Evans in an effort to prepare a statement based on her recollection. To be sure, counsel contacted the children's guardian ad litem, but the response of the guardian only further undermines Evans's argument; that is, the guardian ad litem informed counsel that "he did recollect the case." Nevertheless, counsel apparently did not prepare a statement of the evidence based on the guardian's recollection merely

> because he had not yet "received any proposed 'record of proceeding' from [the guardian]."
>
> {¶22} In view of the foregoing, I believe that Evans failed to satisfy both requirements -- to allege a specific instance of prejudice and to make reasonable efforts to supply an App. R. 9(C) statement -- necessary to warrant a new trial because of an incomplete transcript. To order a new trial based on the mere assertion that an App.R. 9(C) statement "does not appear to be available" frustrates the well-established rule that the appellant bears the burden to provide a transcript. *Knapp*, 61 Ohio St.2d at 199.

B.E., at ¶¶ 20-22 (Moyer, C.J., dissenting) (parallel citations omitted).

All told, the majority and dissenting opinions in *B.E.* were agreed to by five members of the present Court, and both opinions show that the majority here erred. *B.E.* shows that the nature of the underlying case is *immaterial* to the exhaustion requirement. The respective opinions in *B.E.* also show that it is immaterial that the unrecorded conference addresses an important or "critical" issue. In *B.E.*, "critical testimony" was missing, and yet this Court still required an exhaustion of App.R. 9 procedures. See, also, *Knapp*, supra (four days of testimony missing); *Jones*, supra (all testimony missing). The absence of "critical testimony" in *B.E.* would be just as "critical" to appellate review of constitutionally-protected parental rights as would be the unobjected-to dismissal of a deliberating juror in a nominally "capital" case in which the death penalty was not available. Indeed, even in cases in which the death penalty had actually been imposed, the defendant was still required to exhaust App.R. 9 procedures. See *B.E.*, at ¶¶ 14 & 15 (citing *Brewer* and *Keenan*).

Defendant never tried to exhaust App.R. 9 procedures, as he never moved the

trial court to conduct such proceedings. At the sentencing hearing three weeks after the juror's dismissal, defendant could not have invoked App.R. 9 procedures, since no appeal was pending yet. See App.R. 1(A). Presumably, a motion to settle the record could have sufficed to comply with the exhaustion requirement discussed in *B.E.* and other cases. The problem, though, is that the defense never requested that the trial court provide a conclusive settlement of the record ala App.R. 9. Again, defense counsel had only wished to state his unilateral recollection, without any request whatsoever that the trial court actually settle or correct the record. The defense waived/forfeited any error in this regard.

F. Outright Reversal is Excessive

The error found by the majority is "the trial court's failure to make either party's rendition official * * *." Opinion, at ¶ 17. But if the error is in failing to settle the record, the appellate remedy for such error would be only partial reversal so that the trial court could do what it should have done, i.e., settle the record. After the trial court would settle the record on remand, another appeal could proceed from there, at which time the defendant could receive a full merits determination of the legality of the dismissal of the juror.

It is axiomatic that the remedy for trial court error is to return the case to the status quo ante the error. "Upon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred." *State ex rel. Stevenson v. Murray* (1982), 69 Ohio St.2d 112, 113. "This rule has been applied to criminal cases." *State ex rel. Douglas v. Burlew*, 106 Ohio St.3d 180, 2005-Ohio-4382, ¶ 11.

At most, the trial court's error in failing to hold a settle-the-record hearing would return the case to the point at which the error occurred, i.e., at the point when counsel purportedly "took sufficient measures" at the outset of the October 2nd sentencing hearing to raise the issue. The error at the sentencing hearing in failing to settle the record would not justify the reversal of the guilty verdicts.

This Court's case law shows that the proper remedy for a lower court's lack of recordation and failure to settle the record is to remand for a record-settling hearing. In *Knapp* and *Jones*, this Court remanded for App.R. 9 procedures or an evidentiary hearing to settle/correct the record. *Knapp*, 61 Ohio St.2d at 200; *Jones*, 71 Ohio St.3d at 299. This makes logical sense. If the error was in the failure of the trial court to settle the record, a remand for a record-settling hearing would fully vindicate the purported error.

The majority's conclusion that the Crim.R. 22 error requires the outright reversal of the convictions was erroneous. A reversal and limited remand for App.R. 9 procedures would have been sufficient, since such procedures "are designed precisely for this type of situation." *B.E.*, at ¶ 14.

It bears emphasis that, unlike in *B.E.*, it does not appear that App.R. 9 procedures would be unable to settle the record. There is no shortage of available recollections, as the defense counsel and the prosecutor gave their conflicting accounts. The error found by the majority is "the trial court's failure to make either party's rendition official * * *." Opinion, at ¶ 17. The remedy for such an error would be a settle-the-record hearing and settle-the-record order, not outright reversal.

It also bears emphasis that the majority did not find error in the dismissal of the juror. Indeed, the majority agreed with the State that issues related to excusal of the juror could not be determined on the basis of the current speculative record. Opinion, at ¶ 18. The only error found in this regard is the failure to make a record of the dismissal, and a remand for record-settling hearing would fix this error.[3]

G. Crim.R. 22 and Due Process

Notions of "due process" entered the majority opinion as well. But a "mere error of state law" is not a violation of due process. *Engle v. Isaac* (1977), 456 U.S. 107, 121 n. 21. "[E]rrors of state law do not automatically become violations of due process." *Rivera v. Illinois* (2009), 556 U.S. ___, 129 S.Ct. 1446, 1455. "The Due Process Clause * * * safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial." Id. at 1454 (internal quotation marks omitted). A violation of Crim.R. 22, by itself, does not perforce establish any due process violation.

Procedural due process is fully satisfied by this Court's previous cases, recognizing that the absence of an adequate record will not require reversal unless

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[3] The State disagrees with the majority's assertion that the record is speculative because "we are unable to discern whether the juror was, as argued, a lone dissenting juror who wished to be dismissed for this reason." Opinion, at ¶ 18. This Court has already recognized that a deliberating juror should not be asked about how he or she is voting in that deliberation. "'As a general rule, no one -- including the judge presiding at a trial -- has a "right to know" how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror.'" *State v. Robb* (2000), 88 Ohio St.3d 59, 81, quoting *United States v. Thomas* (C.A. 2, 1997), 116 F.3d 606, 618. As the United States Supreme Court stated recently, "Courts properly avoid such explorations into the jury's sovereign space, * * * and for good reason. The jury's deliberations are secret and not subject to outside examination." *Yeager v. United States* (2009), 557 U.S. ___, 129 S.Ct. 2360, 2368.

App.R. 9 procedures have been exhausted. "The procedures outlined in App.R. 9 *are designed precisely for this type of situation, where a transcript is unavailable.*" *B.E.* at ¶ 14 (emphasis added). Requiring a party to exhaust App.R. 9 procedures does not violate due process but, in fact, provides adequate process to that party to address inadequacies in the record. Appellate review does not require a perfect record of the lower-court proceedings. *Palmer*, syllabus.

In *State v. Osborne* (1976), 49 Ohio St.2d 135, 142, death penalty vacated, 438 U.S. 911, this Court rejected a due process argument when the recording of the trial was of poor technical quality. This Court noted that "[a]ppellant did not seek to modify or correct the record, as might have been done under App. R. 9(E), by submitting to the trial court any additions or modifications that she believes would better preserve her arguments for review." See, also, *Scott v. Elo* (C.A. 6, 2002), 302 F.3d 598, 604 (rejecting "the proposition * * * that where a portion of a trial transcript is missing and unobtainable, and where a defendant makes a claim that could possibly implicate that portion of the transcript, a retrial is always necessary. Rather, * * * federal habeas relief based on a missing transcript will only be granted where the petitioner can show prejudice.").

A criminal-law procedure will be overturned on federal due process grounds only if it violates some "fundamental principle of justice." *Montana v. Egelhoff* (1996), 518 U.S. 37, 43, 58-59 (plurality and concurrence). "[C]riminal process [will be found] lacking only where it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Herrera v. Collins* (1993),

506 U.S. 390, 407-408 (internal quotation marks and citations omitted). Courts "have defined the category of infractions that violate 'fundamental fairness' very narrowly." *Medina v. California* (1992), 505 U.S. 437, 443. It does not violate any fundamental principle of justice to require a defendant-appellant to use available App.R. 9 procedures to try to settle/correct the record.

II. Court Should Abandon Sua Sponte Consideration

The State respectfully submits that the issues regarding waiver/forfeiture and lack of exhaustion should cause this Court to reconsider its decision to sua sponte raise the Crim.R. 22 claim of error. That claim of error was not preserved in the lower courts, and the defense failed to exhaust App.R. 9 procedures in order to settle/correct the record, even though the defense had been well aware of the State's contention that the appellate record is speculative. This Court agreed that the record was speculative, and now it should be considered too late to pursue the Crim.R. 22 claim of error.

I. No Plain Error Warranting Reversal

The claim of Crim.R. 22 error does not rise to the level of plain error. As stated in *State v. Murphy* (2001), 91 Ohio St.3d 516, 532, "The waiver rule requires that a party make a contemporaneous objection to alleged trial error in order to preserve that error for appellate review. The rule is of long standing, and it goes to the heart of an adversary system of justice." The principle even extends to constitutional questions. The longstanding waiver rule is "strict." *State v. Long* (1978), 53 Ohio St.2d 91, 96.

"In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings." *State v. Wamsley*, 117 Ohio St.3d 388,

2008-Ohio-1195, ¶ 19; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 9 (same). Although an issue is waived/forfeited through lack of objection, Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). But plain error will be recognized only when, "but for the error, the outcome of the trial clearly would have been otherwise." *Long*, *supra*, paragraph two of the syllabus. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus. "The power afforded to notice plain error, whether on a court's own motion or at the request of counsel, is one which courts exercise only in exceptional circumstances, and exercise cautiously even then." Id. at 94.

This Court extensively addressed the plain-error standard in *State v. Barnes* (2002), 94 Ohio St.3d 21:

> Under Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.*, a deviation from a legal rule. Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.
>
> Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states only that a reviewing court "may" notice plain forfeited errors; a court is not obliged to correct them. We have acknowledged the

> discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

Under these standards, defendant cannot show plain error warranting reversal. He failed to use App.R. 9 procedures in order to try to show he suffered material prejudice.

The problem with even focusing on a claim of Crim.R. 22 error is that the error is limited. It addresses lack of recordation, not the propriety of what action the court took or did not take during the unrecorded hearing. To find "plain error" in the lack of recordation would require the speculative assumption that there was some error that was not recorded that would otherwise warrant reversal. Such speculation simply cannot satisfy the plain-error standard.

This is why the Crim.R. 22 issue usually devolves into an all-or-nothing proposition. If the appellant timely objected to lack of recordation and made all reasonable efforts to exhaust App.R. 9 procedures, and the trial court was still unable to settle/correct the record, then automatic reversal applies. If the appellant exhausted App.R. 9 procedures and the trial court did settle/correct the record, then the Crim.R. 22 error evaporates, and the appellate review thereafter focuses on what the settled/corrected record shows. If the appellant did not make reasonable efforts to exhaust App.R. 9 procedures, then the presumption of regularity applies, and it is presumed that the trial court followed the law during the unrecorded proceeding.

Defendant here undertook no efforts at all to have the trial court settle/correct the record regarding whatever meeting occurred between the judge and the excused juror. Accordingly, it must be presumed that the judge had a good basis for meeting with the

juror on an ex parte basis. See State's Merit Brief, at pp. 22-27. It must also be presumed that the court had a valid basis to excuse the juror. It bears emphasis here that the defense was aware of the excusal, as the current appellate record shows that the excusal was announced in open court, and the defense did not object at any point to the excusal, and, even three weeks later, only objected to the "process," not the excusal. Even if an adequate appellate record were available here, a plain-error standard would apply to the excusal.

Given defendant's failure to exhaust App.R. 9 procedures, he simply cannot obtain a reversal under the plain-error standard related to the lack of recordation under Crim.R. 22.

CONCLUSION

For the foregoing reasons, for the reasons stated in the State's 12-1-08 merit brief, and for the reasons stated in the State's 6-29-09 motion for reconsideration, 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.[4]

Respectfully submitted,

RON O'BRIEN
Franklin County Prosecuting Attorney

STEVEN L. TAYLOR 0043876
(Counsel of Record)
Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 18th day of Sept., 2009, to William S. Lazarow, 400 South Fifth Street, Suite 301, Columbus, Ohio 43215, counsel for defendant.

STEVEN L. TAYLOR 0043876
Assistant Prosecuting Attorney

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[4] 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.

Rule 22. Recording of Proceedings

In serious offense cases all proceedings shall be recorded.

In petty offense cases all waivers of counsel required by Rule 44(B) shall be recorded, and if requested by any party all proceedings shall be recorded.

Proceedings may be recorded in shorthand, or stenotype, or by any other adequate mechanical, electronic or video recording device.

Rule 9. The record on appeal

(A) Composition of the record on appeal. The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered. At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonogramic, or photographic means, by the use of audio electronic recording devices, or by the use of video recording systems. If there is no officially appointed reporter, App.R. 9(C) or 9(D) may be utilized. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to the findings or conclusion.

Unless the entire transcript is to be included, the appellant, with the notice of appeal, shall file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript that the appellant intends to include in the record, a statement that no transcript is necessary, or a statement that a statement pursuant to either App.R. 9(C) or 9(D) will be submitted, and a statement of the assignments of error the appellant intends to present on the appeal. If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

If the appellant refuses or fails, within ten days after service on the appellant of appellee's designation, to order the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or apply to the court of appeals for an order requiring

the appellant to do so. At the time of ordering, the party ordering the transcript shall arrange for the payment to the reporter of the cost of the transcript.

A transcript prepared by a reporter under this rule shall be in the following form:

(1) The transcript shall include a front and back cover; the front cover shall bear the title and number of the case and the name of the court in which the proceedings occurred;

(2) The transcript shall be firmly bound on the left side;

(3) The first page inside the front cover shall set forth the nature of the proceedings, the date or dates of the proceedings, and the judge or judges who presided;

(4) The transcript shall be prepared on white paper eight and one-half inches by eleven inches in size with the lines of each page numbered and the pages sequentially numbered;

(5) An index of witnesses shall be included in the front of the transcript and shall contain page and line references to direct, cross, re-direct, and re-cross examination;

(6) An index to exhibits, whether admitted or rejected, briefly identifying each exhibit, shall be included following the index to witnesses reflecting the page and line references where the exhibit was identified and offered into evidence, was admitted or rejected, and if any objection was interposed;

(7) Exhibits such as papers, maps, photographs, and similar items that were admitted shall be firmly attached, either directly or in an envelope to the inside rear cover, except as to exhibits whose size or bulk makes attachment impractical; documentary exhibits offered at trial whose admission was denied shall be included in a separate envelope with a notation that they were not admitted and also attached to the inside rear cover unless attachment is impractical;

(8) No volume of a transcript shall exceed two hundred and fifty pages in length, except it may be enlarged to three hundred pages, if necessary, to complete a part of the voir dire, opening statements, closing arguments, or jury instructions; when it is necessary to prepare more than one volume, each volume shall contain the number and name of the case and be sequentially numbered, and the separate volumes shall be approximately equal in length.

The reporter shall certify the transcript as correct, whether in written or videotape form, and state whether it is a complete or partial transcript, and, if partial, indicate the parts included and the parts excluded.

If the proceedings were recorded in part by videotape and in part by other media, the appellant shall order the respective parts from the proper reporter. The record is complete for the purposes of appeal when the last part of the record is filed with the clerk of the trial court.

(C) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or

proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

(D) Agreed statement as the record on appeal. In lieu of the record on appeal as defined in division (A) of this rule, the parties, no later than ten days prior to the time for transmission of the record pursuant to App.R. 10, may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with additions as the trial court may consider necessary to present fully the issues raised by the appeal, shall be approved by the trial court prior to the time for transmission of the record pursuant to App.R. 10 and shall then be certified to the court of appeals as the record on appeal and transmitted to the court of appeals by the clerk of the trial court within the time provided by App.R. 10.

(E) Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

History: Amended, eff 7-1-77; 7-1-78; 7-1-88; 7-1-92.

THE STATE OF OHIO, APPELLEE, *v.* CLINKSCALE, APPELLANT.

[Cite as *State v. Clinkscale*, 122 Ohio St.3d 351, 2009-Ohio-2746.]

Criminal law — Former Crim.R. 24(G)(2) — The proceedings in which a deliberating juror is dismissed in a capital case, and an alternate juror is seated, must be recorded — Under former Crim.R. 24(G)(2), a juror cannot be replaced by an alternate juror during deliberations in a capital case.

(No. 2008-1012 — Submitted March 10, 2009 — Decided June 17, 2009.)

Appeal from the Court of Appeals for Franklin County,

No. 06AP-1109, 177 Ohio App.3d 294, 2008-Ohio-1677.

SYLLABUS OF THE COURT

1. The proceedings in which a deliberating juror is dismissed in a capital case, and an alternate juror is seated, must be recorded.
2. Under former Crim.R. 24(G)(2), a juror cannot be replaced by an alternate juror during deliberations in a capital case.

LANZINGER, J.

{¶ 1} The second trial of appellant, David B. Clinkscale, for a capital offense must be vacated and the case remanded to the trial court because a deliberating juror was replaced with an alternate juror in violation of former Crim.R. 24(G)(2) and because the trial court failed to make a record of the proceedings that resulted in the deliberating juror's dismissal and replacement.

I. Case Background

{¶ 2} In September 1997, Clinkscale was indicted on three counts of aggravated murder, one count of attempted aggravated murder, one count of

aggravated burglary, two counts of aggravated robbery, and one count of kidnapping. Each count was accompanied by specifications. The indictment alleged that during a robbery that occurred at the residence of Kenneth Coleman and Todne Williams, Coleman was killed. A jury found Clinkscale guilty of each count, and the trial judge accepted the jury's recommended sentence of life imprisonment without the possibility of parole. *State v. Clinkscale* (Dec. 23, 1999), Franklin App. No. 98AP-1586, 2000 WL 775607. The court of appeals affirmed the conviction, id., and we declined review. *State v. Clinkscale* (2000), 88 Ohio St.3d 1482, 727 N.E.2d 132. In 2004, the United States Court of Appeals for the Sixth Circuit granted Clinkscale a conditional writ of habeas corpus after holding that his trial counsel had been ineffective. *Clinkscale v. Carter* (2004), 375 F.3d 430.

{¶ 3} Clinkscale was retried in 2006, and the jury began its deliberations during the afternoon of Friday, September 8. After approximately 30 minutes of deliberations, the jury sent out a written question asking whether it would receive copies of transcripts or specific testimony. The court responded that the jury was to rely upon its collective memory of the testimony. About one hour later, the jury sent to the court a second question, asking, "What would require declaration of hung jury?" The court replied, "Many more hours of deliberations."

{¶ 4} Ten minutes later, the jury submitted a third question: "We have one member who is not comfortable making a guilty verdict based on the testimony of one person (in this case Todne Williams). This inability is not specific to this witness. The juror does not believe a guilty verdict could ever be declared without more evidence. This issue appears to not be resolvable with more time and discussion. Any advice would be appreciated." Approximately one hour later, the court excused the jurors to their homes for the weekend without responding to the third question.

{¶ 5} On Monday, September 11, a substitute judge replaced the original trial judge. Before the jury was seated, the judge and counsel for each party discussed the court's forthcoming response to the third jury question. The judge called the jury into the courtroom and then stated, "We have had a juror that has a medical issue who has been excused. So, at this time we are going to swear in the first alternate * * * ." There was no discussion on the record between the court and the parties regarding the need to dismiss the juror. Neither party's counsel objected to the dismissal of one juror or the swearing in of the alternate before the jury resumed its deliberations.

{¶ 6} After the alternate juror was sworn in, the court responded to the third jury question and the jury returned to deliberate. Later that day, the jury found Clinkscale guilty of each count.

{¶ 7} On October 2, the parties returned to the court for the sentencing phase of the capital proceedings, with the original trial judge resuming his role for the duration of the proceedings. Before the jury was called into the courtroom, Clinkscale's counsel stated that he wanted to address the dismissal of the deliberating juror, with the intention of putting the events of that morning on the record. According to Clinkscale's counsel, on the morning that the juror was replaced, the substitute judge met privately with the juror, who believed she was having heart problems. The judge then dismissed the juror before conferring with the parties' attorneys. Clinkscale's counsel stated that he had wanted to object to the dismissal but did not because the court's attention was focused on the forthcoming response to the third jury question.

{¶ 8} The state's counsel remembered the dismissal differently and claimed that the parties' counsel met with the visiting judge and discussed how to proceed with the juror. Clinkscale's counsel stressed that the defense did not agree to dismiss the juror. After listening to the parties, the trial judge stated, "Well, the record is what it is. I mean, we have a record, I assume, what

happened on September the 11th; and that record is not going to be changed. So, that's the way it is."

{¶ 9} Following this discussion, the jury was brought into the courtroom for the sentencing phase. After deliberating, the jury returned and recommended a sentence of life imprisonment with parole eligibility after 30 years for the murder charges. The court added time for the additional charges and sentenced Clinkscale to prison for 53 years to life. The court of appeals affirmed the judgment. *State v. Clinkscale*, 177 Ohio App.3d 294, 2008-Ohio-1677, 894 N.E.2d 700.

{¶ 10} We accepted jurisdiction over only two of the propositions of law set forth in Clinkscale's discretionary appeal. *State v. Clinkscale*, 119 Ohio St.3d 1444, 2008-Ohio-4487, 893 N.E.2d 515. The first proposition of law states, "It is improper for a substitute trial judge to privately meet with and dismiss a deliberating juror without notifying the parties and providing them an opportunity to question the juror, suggest alternatives to dismissal, or otherwise object, particularly when the dismissed juror is the sole dissenter at the time of her dismissal." The second proposition of law states, "It is improper for a substitute trial judge to dismiss a deliberating juror and then replace her with an alternate in direct contravention of Crim.R. 24(G)(2) which prohibits the substitution of alternate jurors during deliberation, particularly when the dismissed juror is the sole dissenter at the time of her dismissal."

II. Legal Analysis

A. This Is a Capital Case

{¶ 11} Our analysis of this case is guided by the fact that Clinkscale was charged with a capital offense under R.C. 2901.02(B) ("Aggravated murder when the indictment or the count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of Revised Code, and any other offense for which death may be

imposed as a penalty, is a capital offense"). Because the jury in his first trial did not recommend the death penalty, the state was barred from seeking the death penalty on retrial. *Bullington v. Missouri* (1981), 451 U.S. 430, 445-446, 101 S.Ct. 1852, 68 L.Ed.2d 270; *Arizona v. Rumsey* (1984), 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164. See *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 147-150. However, Clinkscale's ineligibility for the death penalty did not diminish the fact that he was charged with a capital offense: "An indictment charging aggravated murder and one or more specifications of aggravating circumstances listed in R.C. 2929.04(A) charges a capital offense, irrespective of whether the offender is eligible for the death penalty." *State v. Harwell*, 102 Ohio St.3d 128, 2004-Ohio-2149, 807 N.E.2d 330, syllabus.

B. The Record

{¶ 12} The conversation between the substitute judge and the dismissed juror was not put on the record, and the parties offer differing accounts of the proceedings on that morning. The Rules of Criminal Procedure provide that "[i]n serious offense cases, all proceedings shall be recorded." Crim.R. 22. The Rules of Appellate Procedure offer additional instructions specific to capital trials: "In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means." App.R. 9(A). When considered together, the Rules of Criminal Procedure and the Rules of Appellate Procedure clearly require that a complete and accurate record be created in capital cases. The reason for this is simple: 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.

{¶ 13} This court has recognized that gaps may occur and that "[t]he requirement of a complete, full, and unabridged transcript in capital trials does not mean that the trial record must be perfect for purposes of appellate review." *State*

v. Palmer (1997), 80 Ohio St.3d 543, 687 N.E.2d 685, syllabus. In *Palmer*, this court held that the failure to record a jury view and conferences in the judge's chambers or at the bench did not warrant reversal when the appellant had not requested that the view or the conferences be recorded and did not demonstrate that any prejudice arose from the failure to record those proceedings. Id. at 560. The court also stated that the "reversal of convictions and sentences on grounds of some unrecorded bench and chambers conferences, off-the-record discussions, or other unrecorded proceedings will not occur in situations where the defendant failed to demonstrate that (1) a request was made at trial that the conferences be recorded or that objections were made to the failures to record, (2) an effort was made on appeal to comply with App.R. 9 and to reconstruct what occurred or to establish its importance, and (3) material prejudice resulted from the failure to record the proceedings at issue." Id. at 554.

{¶ 14} There are legitimate competing arguments as to whether the application of the test outlined in *Palmer* to Clinkscale's case would warrant reversal. It is important to emphasize, however, that *Palmer* addresses the failure to record relatively unimportant portions of a trial. In *Palmer*, this court noted that most of the conferences at the bench and in chambers were recorded and that "all crucial aspects of the case" were recorded. 80 Ohio St.3d at 555, 687 N.E.2d 685. None of the unrecorded conferences concerned a matter as important as the dismissal of a deliberating juror.

{¶ 15} In marked contrast to the portions of the *Palmer* trial that went unrecorded, the recording of proceedings related to the dismissal and replacement of a deliberating juror is of critical importance to protecting a defendant's constitutional rights. "A fair trial in a fair tribunal is a basic requirement of due process. * * * [O]ur system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison* (1955), 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942. Because the composition of the jury in a capital case

implicates important constitutional rights, we decline to extend the holding of *Palmer* to encompass a trial court's failure to record proceedings relating to the dismissal of a juror in a capital case after the jury has begun its deliberations.

{¶ 16} In this case, when proceedings resumed for the sentencing phase of the trial, defense counsel took sufficient measures, as required by *Palmer,* to give notice that a deficiency in the record existed and to appropriately remedy the deficiency. Clinkscale's counsel initiated a discussion on the record in an attempt to clarify the record regarding the juror's dismissal: "[T]here's one more thing I think we need to put on the record." This amounted to an objection to the failure of the trial court to record the proceedings. While he did not state "I object," the attorney's statement was sufficient to alert the trial court that the record was inadequate. Furthermore, the attempt to address the deficiency in the record was sufficient in this context to satisfy the concerns of App.R. 9, which provides, "If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals * * * may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted." App.R. 9(E).

{¶ 17} Appellee contends that review is precluded because appellant placed his objection to the dismissal of the juror on the record at the sentencing hearing instead of using App.R. 9 to supplement the record. However, the timing of the objection is not as important as appellant's attempt to address the deficiency during the sentencing phase of the trial. What is of concern is the trial court's failure to make either party's rendition official, stating, "Well, the record is what it is. * * * [T]hat record is not going to be changed."

{¶ 18} Finally, Clinkscale suffered material prejudice from the trial court's failure to make a record of the dismissal of the juror. We cannot determine whether the trial court obtained a waiver or consent from either party

before dismissing the juror. We are also left to speculate about the reason the juror asked to be removed, the true severity of the juror's health problem, whether the trial could have been continued, or whether any alternative measures may have been taken to address the situation. Most significant, perhaps, is that we are unable to determine whether the substitute judge's action affected any of Clinkscale's constitutional rights, because we are unable to discern whether the juror was, as argued, a lone dissenting juror who wished to be dismissed for this reason.

{¶ 19} Typically, "[w]hen portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 15 O.O.3d 218, 400 N.E.2d 384. However, the important constitutional rights at issue here demand that we not apply that presumption in this case.

{¶ 20} In light of the prejudice suffered by appellant because of the trial court's failure to record the proceedings in question, and given appellant's notification to the trial court of the omission in the record, we hold that the failure to record the proceedings relating to the juror's dismissal in this capital case violated appellant's due process right to a fair trial, and appellant's conviction must be reversed.

C. Crim.R. 24 Violation

{¶ 21} The dissent argues that it would apply a plain error analysis to the trial court's failure to record the proceedings related to the juror's dismissal and would affirm because it concludes that Clinkscale has failed to demonstrate reversible error; however, in doing so it fails to recognize that the trial court committed a second error when the juror was dismissed in violation of former Crim.R. 24(G)(2). In the version of the rule effective at the time of trial, Crim.R.

24(G)(2) provided, "The procedure designated in division (F)(1) of this rule [for seating an alternate juror] shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict. *No alternate juror shall be substituted during any deliberation.* Any alternate juror shall be discharged after the trial jury retires to consider the penalty."[1] (Emphasis added.) Despite the clear statement in former Crim.R. 24(G)(2) that no alternate juror is to be substituted during any deliberation, the judge dismissed a juror and seated an alternate during the deliberation of guilt. Such a clear violation of the Rules of Criminal Procedure cannot be countenanced during a capital trial.

{¶ 22} In the plurality opinion in *State v. Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432, Chief Justice Moyer foresaw the facts of the present case while analyzing a previous version of Crim.R. 24, which did not allow an alternate juror to be seated after jury deliberations had begun. "If a juror becomes ill or is otherwise disqualified after the jury has begun its deliberations on guilt or innocence, a mistrial results; the state, however, may then retry the defendant." Id. at 47. A trial judge may not act in direct contravention of the Rules of Criminal Procedure. Although appellant did not request a mistrial, the violation of former Crim.R. 24(G)(2) constitutes reversible error.

III. Conclusion

{¶ 23} Because capital cases are distinct from noncapital cases in the nature of the statutory requirements and penalties, the court must conduct proceedings in capital cases with a strict level of care that comports with their

1. In the current version of Crim.R. 24(G)(2), effective July 1, 2008, the language related to the substitution of jurors during deliberations has been eliminated. The rule now provides, "The procedure designated in (G)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict."

unique status. While we acknowledge that it is less than desirable to have Clinkscale tried for the third time in 12 years, we emphasize that all essential phases of a capital trial must be conducted on the record and in full accordance with the Rules of Criminal Procedure. Therefore, we hold that the proceedings in which a juror is dismissed in a capital case, and an alternate juror is seated, must be recorded. We also hold that under former Crim.R. 24(G)(2), a juror cannot be replaced by an alternate juror during deliberations in a capital case.

{¶ 24} We therefore reverse the judgment of the court of appeals and remand the case for proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

MOYER, C.J., and PFEIFER and O'CONNOR, JJ., concur.

LUNDBERG STRATTON, O'DONNELL, and CUPP, JJ., dissent.

O'DONNELL, J., dissenting.

{¶ 25} The majority opinion not only charts a new course for this court in capital cases, it also formulates a new analysis for consideration of issues arising out of App.R. 9 and relaxes the appellant's burden to demonstrate error on the record and to file a timely objection.

{¶ 26} On September 11, 2006, during jury deliberations in the guilt phase of Clinkscale's retrial, after the jury in his first trial had not recommended the death penalty, the court excused juror number three, who reportedly had heart problems, and seated an alternate juror. Clinkscale did not object at that time. Three weeks later, however, on October 2, the record expressly confirms, in statements made by both defense counsel and the prosecutor, that Clinkscale raised no timely objection:

{¶ 27} "MR. SIMMONS [defense counsel]: * * * We wanted to object to that process [of dismissing the juror], but we were still arguing about the

additional jury instruction. So, we never did actually put an objection on the record concerning the excusal of Juror Number Three.

{¶ 28} "* * *

{¶ 29} "MS. REULBACH [prosecutor]: Then we decided, what are we going to do? Do we let her go to the doctor and come back? And everybody agreed as a group that we would let her go and seat the alternate.

{¶ 30} "There never was an objection."

{¶ 31} Our jurisprudence requires that a party raising an objection do so in a timely manner. See, e.g., *State v. Peagler* (1996), 76 Ohio St.3d 496, 499, 668 N.E.2d 489 ("Generally, an appellate court will not consider any error that counsel could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court"). Clinkscale did not object at the time the trial court committed the error of which he complains, and his belated efforts only confirm that his objection came too late. That the case involves capital offenses does not relieve him of the obligation to raise a timely objection to preserve error for appeal. See, e.g., *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 155 (holding that a capital defendant can, by failing to object, waive appellate review, other than plain-error review, of a claim under *Atkins v. Virginia* (2002), 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, that executing a mentally retarded person violates the Eighth Amendment's proscription against cruel and unusual punishment). And a party who fails to object forfeits all but plain error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 23-24.

{¶ 32} In *State v. Palmer* (1997), 80 Ohio St.3d 543, 554, 687 N.E.2d 685, the court expressly declined to recognize a presumption of prejudice from the existence of unrecorded bench and chambers conferences in capital cases. Rather, the court emphasized that the appellant bore the burden to "affirmatively demonstrate any material prejudice resulting from the unrecorded matters." Id.

Further, the court stated, "[R]eversal of convictions and sentences on grounds of some unrecorded bench and chambers conferences, off-the-record discussions, or other unrecorded proceedings will not occur in situations where the defendant has failed to demonstrate that (1) a request was made at trial that the conferences be recorded or that objections were made to the failures to record, (2) an effort was made on appeal to comply with App.R. 9 and to reconstruct what occurred or to establish its importance, and (3) material prejudice resulted from the failure to record the proceedings at issue." Id., citing *State v. Grant* (1993), 67 Ohio St.3d 465, 481-482, 620 N.E.2d 50; *State v. Davis* (1991), 62 Ohio St.3d 326, 347, 581 N.E.2d 1362; *State v. Spirko* (1991), 59 Ohio St.3d 1, 15-16, 570 N.E.2d 229; *State v. Jells* (1990), 53 Ohio St.3d 22, 32, 559 N.E.2d 464; *State v. Tyler* (1990), 50 Ohio St.3d 24, 41-42, 553 N.E.2d 576; *State v. Brewer* (1990), 48 Ohio St.3d 50, 60-61, 549 N.E.2d 491.

{¶ 33} I disagree with the majority's conclusion that "defense counsel took sufficient measures, as required by *Palmer*, to give notice that a deficiency in the record existed and to appropriately remedy the deficiency." Clinkscale did not meet the test established in *Palmer*.

{¶ 34} First, he raised no timely objection to the court's ex parte communication with the juror, its substitution of that juror with an alternate, or its failure to record that part of the proceeding. Instead, he waited three weeks to assert any error, after the trial court had excused the deliberating juror and seated an alternate and after the jury had returned a guilty verdict.

{¶ 35} Second, Clinkscale made no effort to comply with App.R. 9(C), which provides: "If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to

App.R. 10, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal." Clinkscale did not attempt to prepare an App.R. 9(C) statement to settle any disputed facts in the record.

{¶ 36} Third, Clinkscale has failed to affirmatively demonstrate any material prejudice. Rather, he presents this court with mere speculation that the substitution of juror number three broke a jury deadlock and resulted in his conviction. However, the record does not demonstrate the prejudice that Clinkscale alleges; rather, it is unclear whether the trial court dismissed the lone dissenting juror. Thus, Clinkscale " 'has not contradicted the presumption of regularity accorded all judicial proceedings.' " *State v. Robb* (2000), 88 Ohio St.3d 59, 87, 723 N.E.2d 1019, quoting *State v. Hawkins* (1996), 74 Ohio St.3d 530, 531, 660 N.E.2d 454.

{¶ 37} Therefore, Clinkscale has failed to demonstrate reversible error regarding the trial court's failure to record its communications with the dismissed juror.

{¶ 38} Similarly, Clinkscale has failed to demonstrate plain error relating to the substitution of the deliberating juror. The Ohio and Federal Rules of Criminal Procedure both formerly prohibited the substitution of a juror once deliberations had commenced. However, Ohio and federal appellate courts have recognized that plain-error review applies to violations of the former versions of Crim.R. 24(G)(2) and Fed.R.Crim.P. 24(c)(3). See, e.g., *Claudio v. Snyder* (C.A.3, 1995), 68 F.3d 1573, 1575; *United States v. McFarland* (C.A.9, 1994), 34 F.3d 1508, 1514; *United States v. Quiroz-Cortez* (C.A.5, 1992), 960 F.2d 418,

420 ; *United States v. Hillard* (C.A.2, 1983), 701 F.2d 1052, 1058-1060; *State v. Felder*, Cuyahoga App. No. 87453, 2006-Ohio-5332, ¶ 41; *State v. Fisher* (Mar. 12, 1996), Franklin App. No. 95APA04-437, 1996 WL 112670; *State v. Miley* (1991), 77 Ohio App.3d 786, 790, 603 N.E.2d 1070; see also 2 Wright, Federal Practice and Procedure (3d Ed.2000) 579, Section 388 (explaining that plain-error analysis applied to violations of former Fed.R.Crim.P. 24(c)).

{¶ 39} "Plain error does not exist unless 'but for the error, the outcome of the trial clearly would have been otherwise.' " *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609, ¶ 11, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 97, 7 O.O.3d 178, 372 N.E.2d 804. Speculation does not suffice to demonstrate plain error. See *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 108 (finding no plain error when the accused's claim "is totally speculative"). The record does not show that juror number three alone held out against a guilty verdict, that she sought to be dismissed because she felt pressured to reach a guilty verdict, or that the jury did not begin deliberations anew with the seating of the alternative juror. The trial court instructed the jury to start its deliberations over, and we presume that juries follow such instructions. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 147.

{¶ 40} Trial judges must conduct all trial matters on the record, in open court, and with counsel participating when it communicates with a deliberating jury. That did not occur in this instance, but Clinkscale's failure to object and to ensure the completeness of the record precludes all but plain-error review. As the Supreme Court of the United States has recently explained in the context of the excusal of a juror for cause following voir dire in a capital case, "We nevertheless take into account voluntary acquiescence to, or confirmation of, a juror's removal. By failing to object, the defense did not just deny the conscientious trial judge an opportunity to explain his judgment or correct any error. It also deprived reviewing courts of further factual findings that would have helped to explain the

trial court's decision." *Uttecht v. Brown* (2007), 551 U.S. 1, 127 S.Ct. 2218, 2229, 167 L.Ed.2d 1014. Clinkscale has failed to perfect the record for appeal and has not demonstrated reversible error, plain or otherwise. For these reasons, I respectfully dissent.

LUNDBERG STRATTON and CUPP, JJ., concur in the foregoing opinion.

Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, for appellee.

William S. Lazarow, for appellant.
