NO. 34746

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

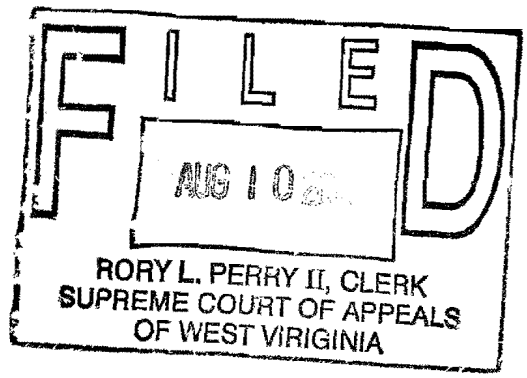
STATE OF WEST VIRGINIA,

Appellee,

v.

DeAARON FIELDS,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

This matter is before the Court pursuant to DeAaron Fields' ("Appellant") appeal from his conviction in the Circuit Court of Cabell County of first degree murder. On appeal, Appellant claims that the circuit court erroneously denied him counsel of his choice when the court, on its own motion, dismissed and disqualified his counsel for insufficient cause. The State disagrees.

II.

STATEMENT OF FACTS

The victim in this case, Karen L. Stultz, was 39 years old at the time of her murder. (Tr., 393, Apr. 19-22, 2005.) Her murder took place around 9:00 p.m. on April 21, 2004, in close

proximity to the Chevron station located on Hal Greer Boulevard in Huntington, West Virginia. (Tr. 131, 290-91.) Ms. Stultz's death was caused when she was shot four times.[1] (Tr. 140, 330, 392.)

The area around the Chevron station where Ms. Stultz was killed is known to be an area where crack cocaine is frequently sold and purchased. (Tr. 178, 180.) Ms. Stultz was known to frequent the Chevron station for the purpose of buying crack cocaine. (Tr. 165, 182.) Appellant was also known to frequent the Chevron station where he would sell crack cocaine. (Tr. 153-54, 162, 651.) In fact, Ms. Stultz was a customer of Appellant. (Tr. 166.)

On April 21, 2004, and prior to Ms. Stultz's murder, Appellant visited the home of one of his friends, Justin Elliott. (Tr. 467.) While there, Appellant stated that Karen Stultz had "got him for a forty."[2] (Tr. 468.) Angered by the situation, Appellant then asked Justin Elliott "to give him his burner [gun] because he was going to 'merc' [kill] that bitch." (Tr. 469.) After he retrieved his gun, Appellant proceeded to go to the Chevron station. (Tr. 472.)

At the moment of the incident, Appellant jumped out of Ms. Stultz's car and yelled "[f]uck you, you bitch" and shot Ms. Stultz several times and fled the scene.[3] (Tr. 207-08, 210, 541.) Following this incident, Appellant ran into two of his friends, Chris White and Christopher Stinson, and admitted that he shot and killed Ms. Stultz. (Tr. 473, 543.)

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[1]Ms. Stultz received two gunshots to the torso area of her body and two shots to her left thigh. (Tr. 330, 392.)

[2]"A forty" refers to $40.00 of crack cocaine or $40.00 in cash. (Tr. 469.)

[3]Ms. Stultz's murder was actually witnessed by another one of Appellant's friends, Chris Tinch. (*See generally* Tr. 204-17.)

On April 22, 2004, a juvenile delinquency petition was filed in the Circuit Court of Cabell County charging Appellant with the first degree murder of Karen Stultz. (R. at 1.)[4]

On the same day, by Order of April 22, 2004, the court appointed a public defender to represent Appellant.[5] (R. at 2.)

By motion, dated May 13, 2004, the State, through its Prosecuting Attorney Christopher Chiles, requested the court to transfer the case to the adult jurisdiction of the circuit court in order that Appellant be tried as an adult. (R. 12.)

On June 2, 2004, David Perry entered a Notice of Appearance indicating that he had been retained by Appellant's father, Charles Fields, to represent Appellant. (R. 19.) Mr. Perry was paid $1.00 for his representation of Appellant. (*See* Hr'g Tr., 53, Jan 31, 2005.) Appellant was also represented by another private attorney, Glen Conway.[6]

On July 7, 2004, a hearing was held to determine whether the case should be transferred to the adult jurisdiction of the circuit court. After hearing the evidence presented by the State, the court found that there was probable cause that Appellant had committed the crime for which he was charged and ordered that the case be transferred to adult status. (*See* Hr'g Tr., 103-04, 114, July 7,

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[4]Prior to this murder charge, Appellant was no stranger to the "system." His previous charges include making a "hit list" and plan to carry it out, breaking and entering into an automobile, possession of a controlled substance/marijuana, destruction of property, burglary, and arson. (R. at 92, 96, 101, 117, 127, and 13; Hr'g Tr., 19-20, April 26, 2005.)

[5]The Order itself does not indicate the name(s) of the public defender(s) assigned to represent Appellant.

[6] It is unclear from the record when Mr. Conway began representing Appellant. However, the record does indicate that Mr. Conway was representing Appellant at least by January 28, 2005, as he filed pleadings on behalf of Appellant bearing the same date. (R. at 191, 195, 199.)

2004.) Thereafter, by Order of July 23, 2004, the court granted the State's motion to transfer the case to the adult jurisdiction of the circuit court. (R. at 33.)

Following the transfer of the case to adult status, the Cabell County Grand Jury indicted Appellant for the first degree murder of Karen Stultz. (R. at 35.) On October 28, 2004, the court arraigned Appellant and set the case for trial on December 7, 2004, which was later changed to December 8, 2004. (R. at 38, 83; *see* Hr'g Tr., 50, Jan. 31, 2005.) Thereafter, by Order of December 8, 2004, the court reset the trial date to February 1, 2005. (R. at 156.)

Also, by Order, dated December 8, 2004, the court appointed David Perry to represent Appellant. (R. at 155.)

Following this appointment, on January 31, 2005, a hearing was held to address various pending motions of the parties. During this hearing, the court removed David Perry and Brent Walters as counsel for Appellant and the State, respectively. (Hr'g Tr., 64-65, Jan. 31, 2005.) The court discussed at length and in much detail that because of the attorneys' violations of numerous discovery rules the case was not ready to be tried on its original trial date of December 8, 2004, and similarly that it was not ready for trial on its second scheduled date of February 1, 2005.[7]

Specifically, regarding the first trial date of December 8, 2004, the court noted on November 8, 2004, defense counsel Perry filed 14 discovery motions that had never been set for hearing. (Hr'g Tr., 50-51, Jan. 31, 2005.) Mr. Perry filed a motion for the Grand Jury transcript on November 18, 2004, which was 20 days prior to the original trial date. (Hr'g Tr., 51, Jan. 31, 2005.) Assistant Prosecutor Walters filed a response to Appellant's request for discovery on December 1,

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[7]The court stated that the parties violated West Virginia Rules of Criminal Procedure 12.1, 16, 45(2)(d), 45(2)(e), and Trial Court Rule 32.01(a).

2004, approximately 22 days after the request and only seven days before the first trial date. In response to the prosecution's request, Mr. Perry filed a witness list on December 6, 2004, only two days prior to the original trial date. *Id.* The witness list filed by Mr. Perry failed to comply with Rule 12 of the West Virginia Rules of Criminal Procedure because it did not provide the addresses of the witnesses. (Hr'g Tr., 51-52, Jan. 31, 2005.) One of the witnesses listed by Mr. Perry did not provide the witness's name, but simply identified him as a "gunshot residue expert." (*Id.* at 52.)

Regarding the second trial date of February 1, 2005, the court noted that defense counsel Perry filed the names and addresses of Appellant's alibi witnesses on January 21, 2005, 49 days after the State requested the identity of these witnesses. (Hr'g Tr., 54, Jan. 31, 2005.) The court opined that Mr. Perry would have been aware of these witnesses for quite some time, rather than finding out at the last minute about these witnesses. (*Id.*) Also, on January 21, 2005, Mr. Perry filed a supplemental list of six witnesses, which again did not contain the addresses of these witnesses. (*Id.*) Seven days prior to the second trial date, on January 25, 2005, Mr. Perry disclosed an additional three witnesses. (*Id.)* On January 26, 2005, six days before the second trial date, Mr. Perry requested a hearing on pretrial motions. (Hr'g Tr., 54-55, Jan. 31, 2005.)

In discussing Mr. Perry's removal, the court found that it was in "the best interest [of Appellant] . . . that he be removed as counsel." (*Id.* at 65.)[8] In discussing the removal of both attorneys, the court found that "this case is not ready for trial," as the attorneys were "filing discovery right up to the last minute" and "that is not the way a case is supposed to be tried, either civilly or

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[8]After Appellant's trial, the court stated that it took some criticism in removing Mr. Perry, but that it felt at the time and still felt that it was in "the best interests of this defendant that that be done." (Hr'g Tr., 13, Apr. 26, 2005.)

criminally." (*Id.* at 61-62.)[9] From the record, it does not appear that defense counsel Perry objected to the court disqualifying him from the case. In fact, Mr. Perry indicated that if the court wished, he would "make a written motion to withdrawal in this matter."[10] (Hr'g Tr., 63, Jan. 31, 2005.)

Although there was no gag order in place, the court also expressed its displeasure with defense counsel Perry's statements to the press: "I don't believe cases should be tried in the news media. I believe they should be tried in the courtroom."[11] (*Id.* at 45; *see also id.* at 46-47.) The court was also concerned that Mr. Perry's statements to the press were possibly being used as a means of generating trial publicity in order to increase his business. (*Id.* at 53.) The court, failing to understand why Mr. Perry or anybody else would accept a case for $1.00, indicated that, in retrospect, it would have made Mr. Perry represent Appellant for $1.00 rather than appoint him as counsel in order that he could be compensated. (*Id.* at 65.)

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[9]Again, after Appellant's trial, the court noted that "[h]ad that trial gone on the original time [when Mr. Perry and Mr. Walters were still on the case]" "[i]t was not ready to be tried." (Hr'g Tr., 17, Apr. 26, 2005.) *See also* January 31, 2005, hearing transcript at 55 (The court stated that "up to three days prior to the trial you guys [Mr. Walters and Mr. Perry] are still giving each other witnesses' names" and "[t]hat's not the way that it is supposed to happen.").

[10]"[D]efendant did not object to the removal of counsel, and the claim is therefore forfeited." *People v. Avila*, 208 P.3d 634, 652 (Cal. App. 2009). Although the record is silent on this issue, Appellant, on appeal, indicates that Mr. Perry filed a Petition for a Writ of Prohibition with this Court on February 18, 2005, which was rejected without a hearing on the merits. (Appellant's Brief at 2 n.1.) However, there is nothing in the record showing that Appellant first submitted his Petition with the circuit court thereby formally objecting to his removal by the circuit court.

[11]It appears from the record that Mr. Perry contacted and spoke with at least three press organizations, including Channels 8 and 13, as well as the *Herald-Dispatch*. (Hr'g Tr., 43, Jan. 31, 2005.) At one point, Assistant Prosecuting Attorney Sean Hammers stated that Mr. Perry's statement to the press that one of the State's witnesses "can't be trusted or can't be relied upon" "tainted the jury pool." (*Id.* at 38.)

Near the end of the hearing, and after dismissing Mr. Perry, the court permitted Appellant's other attorney, Glen Conway, to continue representing Appellant and agreed to issue an order allowing the same. (*Id.* at 65.)

On February 1, 2005, David Perry entered a second Notice of Appearance indicating that he had been re-retained by Appellant's parents, Mary and Charles Fields, to represent Appellant. (R. at 229.)

By Order of February 2, 2005, the court formally removed David Perry as counsel for Appellant. The court also removed Brent Walters as counsel for the State. The court further ordered that John Laishley and Glen Conway be appointed to represent Appellant. (R. at. 235.)

On February 7, 2005, the court entered an Amended Order again removing David Perry and Brent Walters as counsel for Appellant and the State, respectively. As cause for his removal, the court stated that Mr. Perry failed to comply with Rules 12.1 and 16 of the West Virginia Rules of Criminal Procedure, as well as Rule 32.03 of the Trial Court Rules and for such other cause stated in the record.[12] Also, in this Order, the court again appointed John Laishley and Glen Conway to represent Appellant. (R. at 235.)

In response to David Perry's second Notice of Appearance, the court, by Order of February 9, 2005, acknowledged that Mr. Perry had been re-retained by Appellant's parents for the sum of $10.00. However, the court found that Mr. Perry was attempting to circumvent the court's previous Order removing him as counsel and that it was "not in the best interest" of Appellant that Mr. Perry continue as counsel for Appellant. As such, the court ordered that Mr. Perry not be permitted to

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[12]Rule 12.1, W. Va. R. Crim. P., relates to notice of alibi witnesses. Rule 16, W. Va. R. Crim. P., involves discovery and inspection of evidence. Rule 32.03 of the Trial Court Rules pertains to discovery conferences.

represent Appellant, that his second Notice of Appearance be stricken, and further that John Lashley and Glen Conway would continue to represent Appellant. (R. at 247.)

Appellant's jury trial lasted four days beginning on April 19, 2005, and ending on April 22, 2005. (Tr. 241.) The State was represented by Prosecuting Attorney Christopher Chiles and Assistant Prosecuting Attorney Sean Hammers. Appellant was represented by John Laishley and Glen Conway. (Tr. 241.) In addition to the documentary, photographic and physical evidence, a total of 22 witnesses testified, including 11 witnesses for the prosecution and 11 for Appellant. (Tr. 3, 274, 528-30.) At the close of the evidence, argument of counsel, and the court's charge and jury instructions, the jury unanimously convicted Appellant of first degree murder. (Tr. 891-93.)

Following the trial, on April 26, 2005, a hearing was held during which the court sentenced Appellant to life in the penitentiary with mercy.[13] (Hr'g Tr., 24-25, Apr. 26, 2005.)

The following day, on April 27, 2005, the court formally ordered that Appellant be incarcerated in a juvenile detention center until age 18, at which time he was to be imprisoned in a State penitentiary for a period of life with mercy. (R. at 368.)

Thereafter, Appellant brought the current appeal of his conviction for first degree murder.

III.

ASSIGNMENTS OF ERROR

On appeal, Appellant makes the following assignment of error:

I. DeAaron Fields Was Denied Counsel of His Choice When the Trial Court on its Own Motion Dismissed and Disqualified Counsel for Insufficient Cause.

(Appellant's Brief at 7.)

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[13] Among other things, the court considered carefully the testimony of Karen Stultz's parents, Raymond and Bernadine Byrd, who asked the court that mercy be incorporated into Appellant's life sentence. (*See generally* Hr'g Tr., 6-11, Apr. 26, 2005.) Based upon their wishes, the State did not seek a sentence of life without parole.

IV.

STANDARD OF REVIEW

> "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syllabus point 2, *Walker v. West Virginia Ethics Commission,* 201 W. Va. 108, 492 S.E.2d 167 (1997).

Syl. Pt. 1, *Trickett v. Laurita*, 223 W. Va. 357, 674 S.E.2d 218 (2009).

"Recognizing the trial court's need for latitude, several courts have applied an abuse of discretion standard when reviewing decisions on disqualification motions. . . . We agree that this is the appropriate standard of review." *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 418, 624 S.E.2d 844, 855 (2005) (citations omitted). *See Davenport v. State*, 656 S.E.2d 514, 516 (Ga. 2008) (*quoting Davis v. State*, 403 S.E.2d 800, 801 (Ga. 1991)) ("'The choice of appointed counsel is a matter governed by the trial court's sound exercise of discretion and will not be disturbed on appeal unless abused.'"). *See also People v. Avila*, 208 P.3d at 652 (citation and internal quotations omitted) ("A trial court's removal of appointed counsel for an indigent defendant is reviewed for abuse of discretion."). *Accord State v. Keenan*, 213 W. Va. 557, 561, 584 S.E.2d 191, 195 (2003) (*citing State v. Britton*, 157 W. Va. 711, 203 S.E.2d 462 (1974)) ("[W]hether a trial court should disqualify a prosecutor, or his office, from prosecuting a criminal defendant is reviewed under an abuse of discretion standard.").

Finally, this Court reviews a trial court's decisions in managing a trial for abuse of discretion. *State v. Snider*, 196 W. Va. 513, 474 S.E.2d 180 (1996). "The conduct of the trial must necessarily be left largely to the discretion of the presiding judge – a discretion which cannot, in its very nature,

be made a subject of review, by this court, except in a clear case of abuse of that discretion." Syl., *State v. Larue*, 98 W. Va. 667, 128 S.E. 116 (1925).

V.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR WHEN IT, ON ITS OWN MOTION, DISMISSED AND DISQUALIFIED APPELLANT'S COUNSEL, DAVID PERRY, AS THERE WAS SUFFICIENT CAUSE FOR HIS REMOVAL.

1. At Time of His Removal, Defense Counsel Perry Was Appointed Counsel.

On appeal, Appellant asserts that

> [t]he trial court committed structural error by denying . . . [him] the right to counsel of his choice" as "[t]he trial court lacked a sufficient basis for removing . . . [his] trial counsel, and failed to properly weigh . . . [his] rights to counsel under the Sixth Amendment to the Constitution of the United States, and Article III, section fourteen of the West Virginia Constitution in doing so.[14]

(Appellant's Brief at 14.)

To begin with, given the right circumstances, a court, on its own motion, is permitted to remove a defendant's attorney from the case. *See People v. Shelley*, 202 Cal. Rptr. 874, 880 (Cal. Ct. App. 1984) (citation and internal quotations omitted) ("Under appropriate circumstances [c]ounsel may also be relieved on the court's own motion, even over the objections of defendant or counsel."). Such circumstances exist in this case.

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[14]The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." In relevant part, Article III, Section 14 of the West Virginia Constitution likewise provides that "[i]n all . . . [criminal] trials, the accused shall . . . have the assistance of counsel . . . ."

Importantly, and despite his contention to the contrary,[15] at the time of his removal, Appellant's defense counsel, David Perry, was appointed counsel rather than retained counsel.[16] Mr. Perry was originally retained by Appellant's father for the sum of $1.00. Thereafter, at his own request in order that he could be compensated, the court appointed Mr. Perry to represent Appellant. It was during this period of appointment that the court dismissed Mr. Perry as counsel for Appellant.[17]

2. Good Cause Existed for Removal of Defense Counsel Perry As Appointed Counsel.

While he has a right to be appointed counsel, Appellant is not entitled to have Mr. Perry represent him as appointed counsel when, as the court properly found, there was good cause for Mr. Perry's removal. "[A]n indigent defendant, while entitled to appointment of counsel, is not entitled to the appointment of a lawyer of his own choosing." *State v. Sheppard*, 172 W. Va. 656, 668, 310 S.E.2d 173, 186 (1983) (citation omitted). "Although an indigent criminal defendant has a right to be represented by counsel, he does not have a right to be represented by a particular lawyer, or to demand a different appointed lawyer except for good cause." *Watson v. Black*, 161 W. Va. 46, 52, 239 S.E.2d 664, 668 (1977). "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126

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[15]*See* Appellant's Brief at 10, wherein Appellant asserts that "[i]t is clear Mr. Perry was retained as . . . [Appellant's] counsel of choice."

[16]Simultaneous with the removal of Mr. Perry, the court also dismissed Assistant Prosecuting Attorney Brent Walters.

[17]As discussed *infra*, after his removal, Mr. Perry sent a second Notice of Appearance to the court indicating that he had been re-retained by Appellant's parents for the sum of $10.00, which the court properly rejected.

S. Ct. 2557, 2565 (2006) (citations omitted). *See People v. Moore*, 389 N.E.2d 944 (Ill. App. 1979) (citations omitted) ("[A]n indigent defendant does not have the right to court-appointed counsel of his choice."). *See also State v. Reeves*, No. 2006-KA-2419, 2009 WL 1423350, *21, ** 39 (La. May 5, 2009) ("[S]imilar to the constitutional rights afforded under the federal constitution, under our state constitution, a criminal defendant is not entitled to choose his appointed private counsel or the appointed public defender."). "'The duty of the trial court in this respect is only to ensure that the accused is effectively represented by a lawyer reasonably skilled and experienced in the practice of criminal law.'" *Sheppard*, 172 W. Va. at 668, 310 S.E.2d at 186 (*quoting Watson v. Black*, 161 W. Va. at 52, 239 S.E.2d at 668).

On appeal, Appellant asserts that the trial court's "finding of a discovery problem" was not extreme or flagrant enough to warrant the court's dismissal of Mr. Perry as defense counsel.[18] (Appellant's Brief at 11.) First, the discovery violations of Mr. Perry, as well as Prosecutor Walters, were not just a minor problem. At a hearing on January 31, 2005, during which the court removed Mr. Perry and Mr. Walters, the court found and fully explained numerous discovery violations,

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[18] It should be noted that a circuit court has wide discretion concerning discovery violations by the parties:

> In exercising discretion pursuant to Rule 16(d)(2) of the West Virginia Rules of Criminal Procedure, a circuit court is not required to find actual prejudice to be justified in sanctioning a party for pretrial discovery violations. Prejudice may be presumed from repeated discovery violations necessitating numerous continuances and delays.

Syl. Pt. 4, *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 454 S.E.2d 427 (1994). "[I]f a party fails to comply with the discovery rules, the circuit court has general authority to enter whatever order he deems necessary under the circumstances." *Id.* at 138, 454 S.E.2d at 432. "Clearly, the extent and scope of pretrial discovery is within the circuit court's discretion, and we will not disturb a circuit court's ruling unless there is a clear abuse of discretion." *Id.* at 142, 454 S.E.2d at 436 (*citing State v. Lassiter*, 177 W. Va. 499, 354 S.E.2d 595 (1987); *State v. Audia*, 171 W. Va. 568, 301 S.E.2d 199, *cert. denied*, 464 U.S. 934 (1983)).

including West Virginia Rules of Criminal Procedure 12.1, 16, 45(2)(d), 45(2)(e), and Trial Court Rule 32.01(a) violations. Again, in its February 7, 2005, Order, the court found that Mr. Perry violated three discovery rules, including Rules 12.1 and 16 of the West Virginia Rules of Criminal Procedure, as well as Rule 32.03 of the Trial Court Rules.

More important than the number of discovery violations committed by Mr. Perry and Mr. Walters is the timing of these violations, as they rendered the case unprepared for trial and required that the trial be continued on two separate occasions. Specifically, in discussing the removal of both attorneys, the court properly found that "this case is not ready for trial," as the attorneys were "filing discovery right up to the last minute [three days]" and "that is not the way a case is supposed to be tried, either civilly or criminally." Because of this, the court correctly found that it was in "the best interest [of Appellant] . . . that . . . [Mr. Perry] be removed as counsel." These statements make clear that the court did not remove Mr. Perry solely because of some minor discovery violations. Rather, the court dismissed Mr. Perry because he was not prepared for trial and, thus, it was in Appellant's best interests that Mr. Perry be removed. What more extreme and flagrant reason for removing an attorney from a case is there than not to be prepared for trial? This is particularly true in a trial, as here, in which the client is accused of and on trial for first-degree murder. "A court may remove appointed counsel both to prevent substantial impairment of court proceedings and when counsel, without good cause, does not become ready for trial." *People v. Avila*, 208 P.3d at 652 (citations and internal quotations omitted).

After his removal, Mr. Perry submitted a second Notice of Appearance indicating that he had been re-retained by Appellant's parents for the sum of $10.00. Mr. Perry's attempt to reenter the

case as Appellant's retained counsel in this manner was nothing more than a means of circumventing the court's previous Order removing him from the case, and the court so found.

In its Order of February 9, 2005, the court acknowledged that Mr. Perry had been re-retained by Appellant's parents for the sum of $10.00. However, the court properly found that Mr. Perry was attempting to circumvent the court's previous Order removing him as counsel and that it was "not in the best interest" of Appellant that Mr. Perry continue as counsel for Appellant. As such, the court correctly ordered that Mr. Perry not be permitted to represent Appellant, that his second Notice of Appearance be stricken, and further that John Laishley and Glen Conway would continue to represent Appellant. "'The right to choice of counsel must not obstruct orderly judicial procedure or deprive courts of their inherent power to control the administration of justice.'" *United States v. Gonzalez-Lopez*, 399 F.3d 924, 929 (8th Cir. 2005) (*quoting United States v. Vallery*, 108 F.3d 155, 157 (8th Cir. 1997)). "[A] defendant's right to retain counsel of his choice . . . may not be insisted upon in a manner that will obstruct an orderly procedure in courts of justice . . . ." *State v. Barber*, 206 P.3d 1223, 1233 (Utah App. 2009) (citation and internal quotations omitted).

> An indigent's right to choose his counsel only extends so far as to allow the accused to retain the attorney of his choice, if he can manage to do so, but that right is not absolute and cannot be manipulated so as to obstruct orderly procedure in courts and cannot be used to thwart the administration of justice.

State v. Reeves, No. 2006-KA-2419, 2009 WL 1423350, *20, **37 (La. May 5, 2009) (*citing State v. Jones*, 376 So. 2d 125 (La. 1979); *State v. Leggett*, 363 So. 2d 434 (La. 1978); *State v. Mackie*, 352 So. 2d 1297 (La. 1977)).

3. Appellant's Entitlement to Have Defense Counsel Perry Represent Him As Retained Counsel Is Not Absolute.

As discussed above, at the time that the court removed Mr. Perry as counsel for Appellant, he was appointed counsel. As also explained above, the court dismissed Mr. Perry for good cause. However, assuming *arguendo* that Mr. Perry was retained counsel, Appellant's right to have Mr. Perry represent him is not absolute, as the court had good cause for removing Mr. Perry. "Although a criminal defendant has a right to the effective assistance of counsel pursuant to the Sixth Amendment and Article III, Section 14, the right to choice of counsel is not absolute." *State ex rel. Blake v. Hatcher*, 218 W. Va. at 413, 624 S.E.2d at 850. "'[W]hile an accused who is financially able to retain counsel of his own choosing must not be deprived of a reasonable opportunity to do so, the right to retain counsel of one's choice is not absolute.'" *Gonzalez-Lopez*, 399 F.3d at 929 (*quoting United States v. Vallery*, 108 F.3d at 157). *See United States v. O'Malley*, 786 F.2d 786, 789 (7th Cir. 1986) (right to choice of counsel is not absolute). *See also State ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 889, 575 S.E.2d 864, 868 (2002) (right to choice of counsel is not absolute). Further,

> [W]hen addressing a criminal defendant's right to counsel of choice in light of the Sixth Amendment, the United States Supreme Court has stated "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant rather to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."

State ex rel. Blake v. Hatcher, 218 W. Va. at 413, 624 S.E.2d at 850 (*quoting Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct 1692, 1697 (1988)). "The essential aim is to guarantee an effective advocate for each criminal defendant rather to insure that a defendant will inexorably be represented by the lawyer whom he prefers." *Avila*, 208 P.3d at 652 (citation and internal quotations omitted).

Here, because of the egregious dilatory actions of defense counsel Perry, as well as Prosecutor Walters, the court had good cause in finding that it was in the best interest of Appellant that Mr. Perry be removed from the case, as the case itself was not prepared to be tried. Thus, assuming, as Appellant asserts, that Mr. Perry was retained counsel, Appellant's rights to choice of counsel under the Sixth Amendment to the United States Constitution, and Article III, Section 14 of the West Virginia Constitution were not wrongfully denied. "A choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied." *United States v. Gonzalez-Lopez*, 548 U.S. at 150, 126 S. Ct. at 2565 (emphasis in original). It was likewise, for the same reasons, in the best interest of Appellant that the Court, after removing Mr. Perry, to appoint John Laishley to represent Appellant. "[T]he right to assistance of chosen counsel is not absolute, and . . . a trial judge may in the interest of justice substitute one counsel for another." *Finkelstein v. State*, 574 So. 2d 1164, 1168 (Fla. Dist. Ct. App. 1991) (citation omitted).

4. <u>Trial Court Properly Weighed Appellant's Right to Chosen Counsel against Reasons for Disqualification of Defense Counsel Perry, and Developed an Adequate Record to Support Removal of Defense Counsel Perry</u>.

On appeal, Appellant also asserts that "the trial court failed to weigh . . . [Appellant's] right to chosen counsel against the reasons for disqualification" of defense counsel Perry. (Appellant's Brief at 11.) On the contrary, the court carefully balanced Appellant's right to be represented by Mr. Perry against the ultimate reason that the court disqualified Mr. Perry, which was that Mr. Perry's continued representation of Appellant was not in the best interest of Appellant, as Mr. Perry was not prepared to try this case. Had the court, at that time, allowed the trial to continue on its scheduled date with Mr. Perry representing Appellant, it would have jeopardized the interests and welfare of

Appellant, "not to mention" the integrity of the court and its administration of justice. The court rightfully did not allow that to happen. "[A] trial court must balance 'the constitutional right of the defendant to representation by counsel of his choosing with the Court's interest in the integrity of its proceedings and the public's interest in the proper administration of justice.'"*State ex rel. Blake v. Hatcher*, 218 W. Va. at 415, 624 S.E.2d at 852 (*quoting United States v. Reese*, 699 F.2d 803, 805 (6th Cir. 1983)). "[T]he . . . court must carefully balance the defendant's right to be represented by the counsel of his choice against the court's interest in the orderly administration of justice." *Gonzalez-Lopez*, 399 F.3d at 929 (citations and internal quotations omitted).

This Court has held that:

> "Before a circuit court disqualifies a lawyer in a case . . . , a record must be made so that the circuit court may determine whether disqualification is proper. Furthermore, this Court will not review a circuit court's order disqualifying a lawyer unless the circuit court's order is based upon an adequately developed record. In the alternative, if the circuit court's order disqualifying a lawyer is based upon an inadequately developed record, this Court, under appropriate circumstances, may remand the case to the circuit court for development of an adequate record." Syllabus Point 5, *Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991).

Syl. Pt. 5, in part, *State ex rel. Blake v. Hatcher, supra.*[19]

On appeal, Appellant argues that the trial court failed to abide by these principles by "putting on the record findings of fact and law to support disqualification" of defense counsel Perry. (Appellant's Brief at 11.) To see that Appellant is mistaken on this point, one only needs to look at the findings and conclusions made by the court at the January 31, 2005, hearing, during which Mr.

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[19]A circuit court should make findings on the record when ordering sanctions for noncompliance with discovery orders in a criminal proceeding, using the factors set forth by this Court and any other relevant considerations to facilitate appellate review. *State ex rel. Rusen v. Hill*, 193 W. Va. at 141, 454 S.E.2d at 435.

Perry was removed as counsel for Appellant. In fact, the court's discussion of Mr. Perry's dismissal was so lengthy that it will not be reproduced here. However, it is important to note that the court's discussion of this issue takes up "the better part of" approximately 18/19 pages of transcript.[20] Furthermore, the court's discussion on this issue is every "bit" as detailed as it is long.

5. **Competence of Appellant's Substituted Counsel John Laishley.**

Finally, after defense counsel Perry was removed from the case, the court appointed John Laishley to represent him.[21] On appeal, Appellant insinuates that Mr. Laishley was incompetent in his representation of Appellant:

> The . . . Circuit Court denied . . . [Appellant] counsel of his and his parents choice. Attorney David Perry was hired to represent . . . [Appellant], but was improperly removed. This forced . . . [Appellant] to face a murder charge and possible life sentence . . . by an attorney about whom his parents stated 'we have dealt with him before and were unimpressed with his ability as a lawyer or concern for our son as a person.'

(Appellant's Brief at 1.)

Nothing could be further from the truth. Both prior to and during Appellant's trial, Mr. Laishley made numerous motions and objections. During Appellant's trial, Mr. Laishley thoroughly cross-examined all 11 witness presented by the prosecution. Mr. Laishley also put on 11 witnesses for Appellant, including several alibi witnesses.

Perhaps more telling as to Mr. Laishley's handling of Appellant's case are the statements of Appellant's Guardian Ad Litem, Neil Bouchillon:

> Let me say, Your Honor, for the record that Jack Laishley is doing an excellent job in this case. He calls me, if not every day, at least every other day,

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[20]*See* Hr'g Tr., 47-65, Jan. 31, 2005.

[21]The court also appointed Glen Conway to represent Appellant.

> advising me what he is doing, what he is thinking, what his investigator is thinking. He has discussed his strategy with me. He is telling me what he is chasing. He is telling me what DeAaron [Appellant] is saying and thinking. And I will tell you I don't know how he is doing anything else in his practice. He has committed his entire last couple of weeks to this case.
>
> . . . .
>
> Also, I will advise the Court that I have met with DeAaron at the Center. I have talked to him on the phone, exchanged a letter or two, and we have even talked as of this morning; and I believe it is his opinion that he believes Jack is doing a really good job and he is chasing everything he believes that needs to be chased.

(Hr'g Tr., 7-8, Apr. 5, 2005.)

> Your Honor, from the Guardian Ad Litem's standpoint I reiterate what I said at the last hearing. Mr. Laishley has been wonderful. He has advised the Guardian Ad Litem all the way through. He is put his blood, sweat and tears in this thing and has just done an excellent job.

(Hr'g Tr. 37-38, Apr. 14, 2005.)[22]

Clearly, these statements show that Mr. Laishley did a fine job in representing Appellant and was not, as Appellant suggests, incompetent in his representation of Appellant. Obviously, had Mr. Laishley been incompetent, then Appellant would have assigned more errors on appeal to this Court, such as ineffective assistance of counsel on the part of Mr. Laishley. The same can be said of the trial court's handling of Appellant's case.

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[22]The court also commented on Mr. Laishley performance: "I think Mr. Laishley and his counsel did an excellent job. I don't know what else they could have done. His closing argument he hit on the right points. And, you know, it's – I just don't know what else he could do." (Hr'g Tr., 13, Apr. 26, 2005.)

VI.

CONCLUSION

For these reasons, Appellant's conviction should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
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By counsel

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 10th day of August, 2009, addressed as follows:

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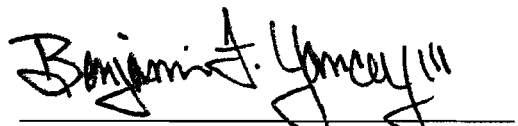

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