

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD CHAUNCEY MURPHY,

Defendant-Appellant.

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UNPUBLISHED

October 12, 2006

No. 258397

LC No. 04-001084-01

ON RECONSIDERATION

Before: Schuette, P.J. and Bandstra and Cooper, JJ.

COOPER, J. (*concurring*).

I concur with the majority in result, but find I must write separately to address a critical constitutional issue: the right to counsel.

I cannot agree with the majority's position that there can be an ordinary case where failure to file a brief will not constitute ineffective assistance. Rather, I agree with the Seventh Circuit's reasoning in *O'Leary*, that "no brief meant no representation at all." *United States ex rel. Thomas v. O'Leary*, 856 F2d 1011, 1017 (1988). Indeed, *O'Leary* makes clear that where there is "a complete denial of assistance of counsel during a critical stage," the court need not consider whether defendant was prejudiced by the denial of counsel, and therefore need not even embark on the inquiry as to whether failure to file could be considered a reasonably strategic tactical decision. *Id.*

I would hold that failure to afford the defendant any representation at all at a critical stage in the proceeding, such as this interlocutory appeal of an evidentiary ruling, is not only structural error requiring reversal, but possibly malpractice as well, and the threat of malpractice claims should be sufficient to prevent the defense bar from adopting failure to file as a tactic, as the prosecutor warns may happen.

/s/ Jessica R. Cooper