

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, | : | Supreme Court #: 07-1759 |
| PLAINTIFF-APPELLANT, | : | On Appeal from the Crawford |
| vs. | : | County Court of Appeals, Third |
| | : | Appellate District |
| SCOTT MASTERS, | : | Court of Appeals |
| | : | Case No. 3-06-020 |
| DEFENDANT-APPELLEE. | : | |

APPELLANT'S MERIT BRIEF

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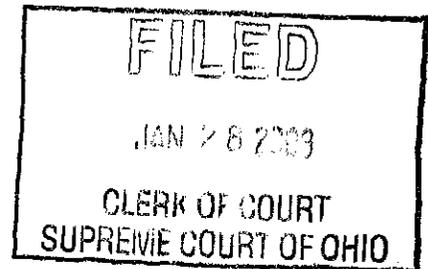


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STATEMENT OF THE CASE

Procedural Posture

The defendant-appellee, Scott Masters, was indicted on May 9, 2005 for one Count of Felonious Assault in violation of Ohio Revised Code Section 2903.11. The appellee was arraigned on May 13, 2005. On September 28, 2005 the Trial Court issued a standard pre-trial scheduling Order setting the case for Trial on January 12, 2006. On January 9, 2006 the appellee filed a motion requesting that the Trial Court continue the schedule trial date. Within the motion the appellee advised the Court through counsel that "Defendant waives time herein". The Court by Judgment Entry continued the Trial date by Judgment Entry file stamped January 9, 2006. The case was reset by Pre-trial scheduling Order file stamped February 15, 2006 for Trial on May 4, 2006.

On the scheduled Trial date of May 4, 2006 the Court by Judgment Entry dated May 4, 2006 stated that the Court would not accept the proposed plea negotiations and recommended sentence and therefore Ordered the matter rescheduled for Trial on September 7, 2006. On June 6, 2006 the appellee filed a "Motion to Dismiss" suggesting that his speedy trial rights were violated. The appellee essentially suggested that his waiver of time was conditional despite the language of the time waiver.¹ The Trial Court over-ruled appellee's motion finding that the appellee signed an express time waiver of unlimited duration. The appellee waived his right to have a Trial by Jury and the matter thereupon proceeded to a bench Trial. The appellee was convicted at the Trial and sentenced on October 23, 2006 to two years in prison.

¹ The Third District Court of Appeals correctly ruled that the appellee's filing constituted an express waiver of unlimited duration.

On appeal, the Third District Court of Appeals held that the appellee was not required to expressly retract his previously filed time waiver of unlimited duration. Further, the Third District Court of Appeals held that the appellee was not required to file a demand for a trial as his motion to dismiss implied the same. Finally, the Third District Court of Appeals held that the appellee, upon filing his motion to dismiss, required the Trial Court to bring the appellee to Trial within the remaining time period of 2945.71. By Judgment Entry dated September 25, 2007, the Court of Appeals denied appellant's request for certification of a conflict. The instant matter was accepted upon a discretionary appeal by the Supreme Court of Ohio.

Statement of the Facts

The evidence at Trial established that on April 20, 2005 at approximately 2:00 a.m. in the morning, that the appellee arrived at the victim's, Larry Whittington's, residence. Upon arriving at the residence, the appellee requested that the victim's wife, Kelly Whittington, wake up her husband. T.R. page 9 lines 8-15. Upon the victim arriving at the doorway, the appellee without saying anything proceeded to strike the victim with a closed fist. T.R. page 26 lines 14-25; T.R. page 26 lines 1-12. The victim escaped back into the residence whereupon the appellee followed the victim into the residence. T.R. page 27 lines 13-22. By this time, the victim retrieved a rag in an effort to stop the bleeding of various parts of his face caused by the appellee's assault. T.R. page 28 lines 2-8.

The victim testified that as a result of the assault, his eye swelled shut for approximately one week, preventing his use of that eye for that time duration; that his injuries required

treatment from five separate physicians; that he suffered a broken nose, fractured eye socket and a fractured cheek. T.R. page 29 lines 1-22; T.R. page 30 lines 23-25. The victim further testified that as a result of the assault that he suffered a loss of hearing on his left side; suffered from a constant ringing in the ears and numbness in two teeth that continued even up to the time of Trial. T.R. page 30 lines 1-9; T.R. page 32 lines 7-16.

The victim described the pain he suffered as a result of the injuries as “Severe” for up to a week requiring him to take prescribed pain medicine. T.R. page 31 lines 9-24. The victim further testified that the pain continued requiring him to undertake another month of pain medicine. The victim further testified to missing work. The victim testified that the appellant struck him at least three times in the face. T.R. page 8 lines 15-16.

PROPOSITION OF LAW NO. I:

PROPOSITION OF LAW NO. I: THE FILING OF AN EXPRESS TIME WAIVER OF UNLIMITED DURATION BY AN ACCUSED WAIVES THE TIME PERIOD SPECIFIED FOR SPEEDY TRIAL CONTAINED WITHIN OHIO REVISED CODE SECTION 2945.71. TO REVOKE THIS TIME WAIVER, AN ACCUSED MUST EXPRESSLY RETRACT THE WAIVER AND EXPRESSLY DEMAND A TRIAL. SUCH A TRIAL MUST THEN OCCUR WITHIN A REASONABLE TIME FRAME WITHOUT DEFERENCE TO R.C. 2945.71.

The right to a speedy trial by the State is guaranteed to a criminal defendant by the Sixth and Fourteenth Amendments to the United States Constitution. **Klopfer v. North Carolina** (1967), 386 U.S. 213, 222-223, 87 S. Ct. 988, 18 L. Ed. 2d 1. The same right is conferred to a criminal defendant by Section 10, Article I, Ohio Constitution. **State v. O'Brien** (1987), 34 Ohio St.3d 7, 8, 516 N.E.2d 218. A criminal defendant may waive his right to a speedy trial only if it is knowingly, voluntarily and intelligently made. **State v. Adams** (1989), 43 Ohio St.3d 67, 69, 538

N.E.2d 1025. The waiver must also be expressed in writing or made in open court on the record. **State v. King** (1994), 70 Ohio St.3d 158, 1994 Ohio 412, 637 N.E.2d 903, syllabus.

R.C. 2945.71 et seq. is an enforcement mechanism to make sure the constitutional right to a speedy trial is upheld. **State v. Pachay** (1980), 64 Ohio St.2d 218, 416 N.E.2d 589, syllabus.

R.C. 2945.71 dictates the time limits in which a defendant must be brought to trial. R.C. 2945.71(C)(2) provides that "a person against whom a charge of felony is pending *** shall be brought to trial within two hundred seventy days after the person's arrest." R.C. 2945.71(E) addresses the computation of time and provides that "each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." Time is calculated to run the day after the date of arrest. **State v. Friedhof** (July 10, 1996), 9th Dist. No. 2505-M, 1996 Ohio App. LEXIS 3018, citing **State v. Steiner** (1991), 71 Ohio App.3d 249, 250-51, 593 N.E.2d 368. See, also, Crim.R. 45(A).

Pursuant to R.C. 2945.73, if a defendant is not brought to trial within the prescribed time period, the trial court must discharge the defendant upon motion for dismissal prior to or at the commencement of trial. R.C. 2945.73(B). However, the time within which a defendant must be brought to trial can be tolled. R.C. 2945.72(H) provides that the statutorily prescribed time for a speedy trial may be lengthened by any period of continuance granted on the accused's own motion, or by any reasonable period granted other than on the accused's motion. Ohio Courts have held that the time in which a trial court is required to bring a criminal defendant to trial is effectively extended, or tolled, when the defendant files a motion to dismiss until the time when the trial court denies the motion. **State v. Hughes**, 9th Dist. No. 02CA008206, 2003 Ohio 5045, at P15, citing **State v. Bickerstaff** (1984), 10 Ohio St.3d 62, 67, 10 Ohio B. 352, 461 N.E.2d

892.

R.C. 2945.72(D) provides that the statutorily prescribed time for a speedy trial may be lengthened by "[a]ny period of delay occasioned by the neglect or improper act of the accused." The Ohio Supreme Court recently (after the case was briefed to the Court of Appeals) held that the "failure of a criminal defendant to respond within a reasonable time to a prosecution request for reciprocal discovery constitutes neglect that tolls the running of speedy-trial time pursuant to R.C. 2945.72(D)." **State v. Palmer**, 112 Ohio St.3d 457, 2007 Ohio 374, 860 N.E.2d 1011, at paragraph one of the syllabus. Discovery was provided to the appellee by the State on May 26, 2005 by letter with a request for reciprocal discovery. Reciprocal discovery was never provided by the appellee to the State. This issue was not addressed by the Third District Court of Appeals.

"An accused may waive his constitutional right to a speedy trial, provided his waiver is made knowingly and voluntarily. **Barker v. Wingo** (1972), 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101. Waiver removes the case from the operation of the speedy trial statutes. **Westlake v. Cougill** (1978), 56 Ohio St.2d 230, 383 N.E.2d 599. The question then becomes twofold: First, can an appellee retract a waiver by implication and Second, upon the retraction of a waiver what time period is available to the Court to bring a defendant to Trial (i.e. the remaining time period specified in R.C. 2945.71 or a reasonable time period specified in **Barker v. Wingo**).

In the present case, the Third District Court of Appeals found that "It is undisputed that Masters (i.e. defendant appellee) did not file a formal written objection of the Court's May 4, 2006 Order, nor did he file a formal demand for trial" (At paragraph 26 of their decision). The Third District Court of Appeals then found that "Although this motion (i.e. defendant-appellee's motion to dismiss) contained no specific revocation of his prior blanket waiver or any specific

indication that the ostensible purpose of the waiver, i.e. settlement, was no longer being pursued, it is nevertheless our conclusion that at the very least, the motion to dismiss should have unequivocally acted to notify the trial court that the prior waiver dated January 5, 2006 was now being revoked or withdrawn”.

The Third District Court then determined that the total time period under Ohio Revised Code Section 2945.71 was “... 39 days over the 270 day time limit.” In sum, the decision of the Third District Court of Appeals allows a defendant, who has filed an express time waiver of unlimited duration, to retract by implication such a time waiver, thus requiring the State to bring the defendant to Trial in the remaining time frame allotted under Ohio Revised Code Section 2945.71. In effect, this decision by the Third District defining “a reasonable time period” as the time remaining under Ohio Revised Code Section 2945.71 nullifies the very meaning of a time waiver and will reek havoc on a Trial Court’s ability to efficiently schedule Criminal Trials.

The State believes that the decision of the Third District altered Ohio law by: (1) removing the bright line requirement for retraction of a time waiver of unlimited duration that requires a defendant to file a formal retraction and demand for Trial; and (2) that upon the filing of an implicit retraction of a time waiver a requirement that an accused must be tried within the remaining time period of Ohio Revised Code Section 2945.71.

In State v. O’Brien (1987), 34 Ohio St.3d 7, 9, 516 N.E.2d 218 this Court found that the General Assembly, in its attempt to prescribe reasonable speedy trial periods consistent with the constitutional provisions set out in Barker v. Wingo (1972), 407 U.S. 514, 523, enacted 2945.71. This Court in O’Brien determined that “* * * R.C. 2945.71 et seq., constitutes a rational effort to enforce the constitutional right to a public speedy trial of an accused charged

with the commission of a felony or a misdemeanor and shall be strictly enforced by the courts of this state." Thus, for purposes of bringing an accused to trial, the statutory speedy trial provisions of R.C. 2945.71 et seq. and the constitutional guarantees found in the United States and Ohio Constitutions are coextensive. **Id.**

This Court in **O'Brien** held that, following an express written waiver of unlimited duration by an accused of his speedy trial rights the accused is not entitled to a discharge for delay in bringing him to trial **unless the accused files a formal written objection to any further continuances and makes a demand for trial**, following which the state must bring him to trial within a reasonable time. paragraph two of the syllabus. In the present case, the record establishes that the accused did not file a formal written objection to any further continuances nor did the accused make a demand for a trial within any specified period. The Third District's decision that an accused can implicitly perform this task by filing a motion to dismiss is contrary to the decision issued in **O'Brien** and other Appellate authorities within this State. The Third District decision holding that after an implicit retraction of a waiver an accused must be brought to Trial "within a reasonable time" defined by the Third District Court of appeals as the time remaining from Ohio Revised Code Section 2945.71 is contrary to existing Appellate authority within this State.

In **City of Eastlake v. Hayward** (11th District) 1993 Ohio App. # 93-L-076 appellant, William Hayward, was charged with violating Eastlake Codified Ordinance 901.02. The complaint was served upon appellant on April 5, 1989. Thereafter, on May 23, 1989, appellant's attorney filed a motion waiving "any & all time." A trial date of July 7, 1989 was set. On June 27, 1989, appellant filed a motion for a jury trial and for a jury view of the premises involved.

Such motion was overruled on July 5, 1989; however, the portion overruling appellant's jury trial request was vacated and a jury trial was set for August 14, 1989. This trial date was extended four days to August 18, 1989 by the trial court. The trial was not held and appellant was notified to appear in court on October 17, 1989. On July 18, 1990, appellant filed a motion to dismiss contending the City of Eastlake failed to expeditiously bring the matter to trial in compliance with R.C. 2945.71.

Approximately two and one-half years passed before the court overruled appellant's motion for the reason that he waived his right to a speedy trial. A jury trial was scheduled for March 5, 1993. Due to a conflict with the prosecution's schedule, the trial was continued until April 1, 1993. On March 12, 1993, appellant again requested dismissal. On April 2, 1993, he pleaded no contest; was found guilty; and was ordered to pay a one hundred dollar (\$ 100.00) fine. The Appellant appealed, assigning the following as error:

"The Court below, in failing to rule upon Defendant's Motions to Dismiss for a period of two and one-half (2 ½) years and continuing trial dates beyond the statutory limitations without reason, violated Defendant's right to a speedy trial."

The Hayward Court held that the appellant waived his 2945.71 rights and therefore was required to object to the continuances and request a trial with such trial being set within a reasonable time. The Hayward Court cited to this Court's opinion in O'Brien that:

"The trial court is charged with the duty of scheduling trials, and it would seem to be reasonable to require the defendant to formally inform the court of an objection to a further continuance, and a reassertion of the defendant's right to a speedy trial. Otherwise the trial court may reasonably rely upon the written waiver of speedy trial as filed within the case. Defendant here made no such objection or demand for trial, and his initial waiver thus remained effective." Id. at 9, 10.

In **State v. Faust** (5th District) 2000 Ohio App. Case # CA 897 appellee was arrested for violating a protection order and resisting arrest. Before trial, appellee requested an extension of time and filed a waiver to a speedy trial. A jury convicted appellee of resisting arrest, but was unable to reach a verdict on the protection order violation. Appellee's motion to dismiss the case, on the basis that appellee was denied his constitutional right to a speedy trial, was granted. The State appealed. The 5th District Court of Appeals on Appeal concluded that appellee signed a knowing and voluntary express, written time waiver of his constitutional right to a speedy trial. Also, the appellee never filed a formal written objection and demand for trial which was required in order to get a discharge for delay in bringing him to trial. The **Faust** Court then opined that "Even if we were to determine that appellee effectively revoked his written time waiver on September 15, 1999, the record indicates the trial court rescheduled this matter for trial on September 22, 1999, only one week after declaring a mistrial which is clearly within a reasonable time." Again, without deference to Ohio Revised Code Section 2945.71

In **Richmond Heights v. Abriani** (8th District) 2000 Ohio App. Lexis 3810 the defendant was arrested for drunk driving. The defendant's attorney filed a handwritten statement with a not guilty plea, waiving a hearing on automatic license suspension, and also filed a notice of scheduling conflict requesting trial before or after his expected absence about three months later. Because the applicable speedy trial statute, Ohio Rev. Code Ann. § 2945.71(B)(2), provided a 90-day speedy trial period, the court held that defendant's counsel's filings, by their plain language, waived speedy trial. Despite this waiver, Ohio Constitution and United States Constitution provisions still required trial within a reasonable time, determined by looking to length of and justification for delay, a defendant's assertion of speedy trial rights, and resulting

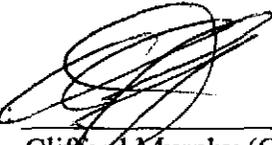
prejudice. In Abriani, the Court found that the defendant's failure to assert speedy trial rights in any way, by demanding a trial or objecting to continuances, meant that his waiver remained effective.

In Village of Glenwillow v. Tomsick (1996), 111 Ohio App. 3d 718, 676 N.E.2d 1259, the Court found that Mr. Tomsick's failure to demand trial or revoke or attempt to revoke his waiver of his speedy trial rights barred his speedy trial claims. In Tomsick, the defendant was arrested on November 24, 1994 and charged with driving under the influence of alcohol. Mr. Tomsick subsequently waived his speedy trial rights and his trial was originally scheduled for March 13, 1995. However, after requests for continuances from both the defense and the prosecutor and other delays, the trial did not commence until August 28, 1995, over nine months after his arrest. Prior to and at trial, defendant moved to dismiss the case alleging a violation of his right to speedy trial. After the trial court denied his motions, Mr. Tomsick asserted on appeal that the trial court erred in not granting his motions to dismiss based on his right to speedy trial. The Court held that the record here indicates that Tomsick waived his right to speedy trial in both the Glenwillow Mayor's Court and in the Bedford Municipal Court. Although Tomsick filed an objection to the March 13, 1995 trial continuance, he never objected to any of the other continuances and in some instances instigated them. Additionally, at no time did Tomsick demand trial or revoke or attempt to revoke the waiver. Hence, in accordance with the holding in State v. O'Brien, supra, the Court concluded that the trial court tried Tomsick within a reasonable time after the service of summons and therefore did not violate his right to speedy trial.

CONCLUSION

For these reasons, the State of Ohio respectfully requests that this honorable Court rule that the appellee is required to specifically revoke their previously submitted time waiver, formally demand a trial with such trial being scheduled within a reasonable period of time pursuant to **Barker v. Wingo** without deference to the remaining original time period contained within Ohio Revised Code Section 2945.71.

Respectfully submitted,

By: 
Clifford Murphy (COUNSEL OF
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COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the foregoing Merit Brief of the Appellant has been served via Ordinary U.S. Mail, postage pre-paid, this 25th day of January 2008 upon Appellee's Counsel Patrick T. Murphy at his address listed in the cover page of this Merit Brief.


Clifford Murphy
COUNSEL FOR APPELLANT,
STATE OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Supreme Court #: **07-1759**

PLAINTIFF-APPELLANT, : On Appeal from the Crawford

vs. : County Court of Appeals, Third

SCOTT MASTERS, : Appellate District

DEFENDANT-APPELLANT. : Court of Appeals Case #: 3-06-0020

NOTICE OF APPEAL OF THE STATE OF OHIO

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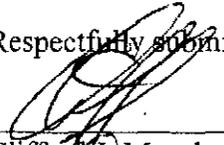
COUNSEL FOR APPELLEE, SCOTT MASTERS

FILED
 SEP 24 2007
 CLERK OF COURT
 SUPREME COURT OF OHIO

NOTICE OF APPEAL OF THE STATE OF OHIO

Appellant, the State of Ohio, hereby gives notice of Appeal to the Supreme Court of Ohio from the Judgement of the Third District Court of Appeals which over-ruled Appellee's Trial Conviction for Felonious Assault. The Third District Court of Appeals ruled that a defendant is not required to expressly retract a time waiver of unlimited duration and demand a Trial within the confines of Ohio Revised Code Section 2945.71. The Third District Court of Appeals further ruled that upon an implied retraction of an unlimited time waiver, that the remaining time to bring an accused too Trial is under 2945.71 not a reasonable time period pursuant to **Barker v. Wingo** (1972) 407 U.S. 514 as applied by other Ohio Appellate Districts. This issue raises a substantial Constitutional question and is of public or great general concern. The State has also filed a motion to certify a conflict with decisions rendered from other Ohio Districts. No decision has yet been rendered on this application to certify a conflict.

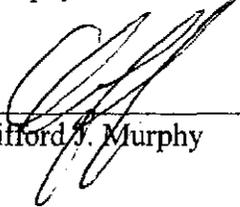
Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that true copies of the foregoing Notice of Appeal to the Supreme Court of Ohio has been served via Ordinary U.S. Mail, postage pre-paid, this 21st day of September 2007 upon Appellee's Counsel Patrick T. Murphy at the address listed in the cover page.



Clifford J. Murphy

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY**

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 3-06-20

v.

SCOTT MASTERS,

OPINION

DEFENDANT-APPELLANT.

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas
Court**

JUDGMENT: Judgment Reversed and Cause Remanded

DATE OF JUDGMENT ENTRY: August 20, 2007

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SHAW, J.

{¶1} Defendant-Appellant Scott Masters (“Masters”) appeals from the October 24, 2006 Judgment Entry of the Court of Common Pleas, Crawford County, Ohio sentencing him to two years in prison for his conviction of Felonious Assault, a felony of the second degree in violation of Ohio Revised Code section 2903.11(A)(1).

{¶2} This matter stems from events occurring on April 20, 2005 in Crawford County, Ohio. On this date Masters went to the home of his friend, Larry Whittington, to talk to Larry after receiving information from his wife that she and Larry had an affair approximately 20 years ago. When Masters arrived at Larry’s home he became upset, lost his composure and struck Larry in the face.

{¶3} On May 10, 2005 the Crawford County Grand Jury indicted Masters on one count of Felonious Assault, a felony of the second degree in violation of R.C. 2903.11(A)(1). On May 13, 2005 Masters appeared for his arraignment and entered a plea of not guilty. Masters was released on bond with the restriction that he have no contact with the victim. (See May 17, 2005 Judgment Entry).

{¶4} On September 28, 2005 the trial court entered a Pretrial Scheduling Order and set this matter for a jury trial commencing on January 12, 2006.¹

¹ The Pretrial Scheduling Order also stated as follows: “Continuances or substitution of counsel will not be granted within three (3) weeks of trial absent extraordinary circumstances. If a continuance is requested, a time waiver must be submitted with same.”

However, on January 5, 2006 Masters filed a motion requesting a continuance of the trial date. In his motion Masters stated that the prosecutor joined in this request so as to allow the parties to pursue the possibility of resolving this matter without a trial. Masters also advised the court in the motion that “Defendant waives time herein.” The trial court granted Masters’ request for a continuance and ordered that the trial be reassigned by the court’s assignment commissioner. Although this matter was initially reset for trial on May 4, 2006, the trial was subsequently continued to September 7, 2006.

{¶5} On June 27, 2006 Masters filed a motion to dismiss the indictment and all charges against him alleging that he had been denied his right to a speedy trial. This motion was denied by the trial court on June 30, 2006.

{¶6} On September 1, 2006 Masters filed a jury trial waiver. Accordingly, this matter proceeded to a trial to the court on September 7, 2006. At the close of evidence, the court found Masters guilty of one count of Felonious Assault, a felony of the second degree in violation of R.C. 2903.11(A)(1). On October 23, 2006 the trial court conducted Masters’ sentencing hearing and sentenced him to two years in prison for his conviction. The trial court also ordered Masters to pay restitution in the amount of \$1,253.62. (See October 24, 2006 Judgment Entry).

{¶7} Masters now appeals, asserting five assignments of error.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT COMMITTED PLAIN AND REVERSIBLE (SIC) IN IT'S (SIC) FAILURE TO DISMISS THE CASE AS THE DEFENDANT WAS NOT AFFORDED HIS RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY SECTION 2945.71 OF THE OHIO REVISED CODE, ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION, AND THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT COMMITTED PLAIN AND REVERSIBLE ERROR WHEN OVER OBJECTION THE TRIAL COURT ALLOWED LAY WITNESSES TO TESTIFY WITHOUT FOUNDATION, KNOWLEDGE AND EXPERTISE TO AN ESSENTIAL ELEMENT OF THE OFFENSE THAT INVOLVED MEDICAL DIAGNOSIS AND PROGNOSIS.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT COMMITTED PLAIN AND REVERSIBLE ERROR WHEN IT CONVICTED THE DEFENDANT OF FELONIOUS ASSAULT IN VIOLATION OF SECTION 2903.11 OF THE REVISED CODE WHEN THERE WAS NO COMPETENT EVIDENCE OF SERIOUS PHYSICAL HARM.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO GRANT A RULE 29 MOTION TO ACQUIT AT THE CONCLUSION OF THE STATES (SIC) CASE AS AGAIN ARGUED AFTER THE CONCLUSION OF ALL THE EVIDENCE ON THE GROUNDS THERE WAS NO COMPETENT EVIDENCE TO SUPORT (SIC) A CONVICTION OF FELONEOUS (SIC) ASSAULT.

ASSIGNMENT OF ERROR NO. 5
THE VERDICT WAS UNSUPPORTED BY AND AGAINST
THE MANIFEST WEIGHT OF THE EVIDENCE.

Assignment of Error No. 1

{¶8} In his first assignment of error, Masters argues that the trial court erred in failing to dismiss this case when Masters was not afforded his right to a speedy trial pursuant to the Ohio and United States Constitutions and Ohio Revised Code section 2945.71.

{¶9} Both the United States and Ohio Constitutions guarantee a criminal defendant the right to a speedy trial. *State v. Baker* (1997), 78 Ohio St.3d 108, 110, 676 N.E.2d 883. Additionally, Ohio Revised Code sections 2945.71 to 2945.73 provide specific time requirements in which the state must bring an accused to trial. *Id.* The Ohio speedy trial statute is mandatory, constitutional and must be construed strictly against the state. *State v. Steinke* (2004), 158 Ohio App.3d 241, 242, 841 N.E.2d 1230 citing *State v. Singer* (1977), 50 Ohio St.2d 103. Pursuant to R.C. 2945.71(C)(2), a person against whom a felony charge is pending must be brought to trial within 270 days from the date of his arrest, not including the date of his arrest. *State v. Davenport* 12th Dist. No. CA2005-01-005, 2005-Ohio-6686 citing *State v. Baker* (1997) 78 Ohio St.3d at 110. R.C. 2945.71(E), known as the “triple count provision” states that where an accused is

held in jail in lieu of bail on the pending charge, each day shall be counted as three days. *Id.*

{¶10} Once a criminal defendant shows that he was not brought to trial within the permissible period, the accused presents a *prima facie* case for release. *State v. Steinke* (2004), 158 Ohio App.3d at 243 citing *State v. Caudill* (Dec. 2, 1998), 3rd Dist. No. 05-97-35, 1998 WL 833729; see also *State v. Howard* (1992), 79 Ohio App.3d 705, 707, 607 N.E.2d 1121. At that point, the burden shifts to the state to demonstrate that sufficient time was tolled or extended under the statute. *State v. Butcher* (1986), 27 Ohio St.3d 28, 31, 500 N.E.2d 1368. Furthermore, a defendant's right to a speedy trial may be waived provided that such waiver is either expressed in writing or made in open court on the record. *State v. King* (1994), 70 Ohio St.3d 158, 637 N.E.2d 903, syllabus.

{¶11} Appellate review of speedy-trial issues involves a mixed question of law and fact. *State v. High*, 143 Ohio App.3d 232, 242, 2001-Ohio-3530. A reviewing court must give due deference to the trial court's findings of fact if they are supported by competent, credible evidence, but will independently review whether the trial court correctly applied the law to the facts of the case. *Id.*

{¶12} Our review of the record reveals that Masters was arrested on May 13, 2005. Time starts to run from the date of the arrest; however, the day of the arrest itself is not counted when computing the statutory time period. *State v.*

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Stewart (Sept. 21, 1998), 12th Dist. No. CA98-03-021, 1998 WL 640909, unreported. Therefore, the first date that counts for Masters' speedy trial purposes is May 14, 2005.²

{¶13} On January 5, 2006 Masters requested a continuance of the January 12, 2006 trial date, which was granted by the trial court. Masters' motion for continuance also stated "[d]efendant waives time herein." A defendant's motion for a continuance will toll the speedy trial time period. R.C. 2945.72(H). Accordingly, in this case, the speedy trial time period was tolled on January 5, 2006. Therefore, from May 14, 2005 to January 5, 2006, 237 days elapsed for speedy trial purposes.

{¶14} On February 15, 2006 the trial court entered a second Pretrial Scheduling Order and reset this matter for a jury trial on May 4, 2006. This order contained the exact same language regarding continuances or substitution of counsel with the time waiver provision as the court's September 28, 2005 Pretrial Scheduling Order: "Continuances or substitution of counsel will not be granted within three (3) weeks of trial absent extraordinary circumstances. *If a continuance is requested, a time waiver must be submitted with same.*" (Emphasis added).

² We note that at the May 13, 2005 arraignment Masters was released on bond with the restriction that he have no contact with the victim. Accordingly, it is not necessary for us to compute the amount of time that has elapsed for speedy trial purposes pursuant to the "triple count provision" of R.C. 2945.71(E).

{¶15} Therefore, the time between Masters' filing his motion for a continuance on January 5, 2006 and the May 4, 2006 jury trial date set by the court equals 119 days. This time is charged to Masters for speedy trial purposes and tolls the calculation of the speedy trial time.

{¶16} However, on April 12, 2006 the court's assignment commissioner sent notice to the parties advising them that the jury trial set for May 4, 2006 had been cancelled but that the matter had been rescheduled for a 15-minute hearing on that date.³ At the May 4, 2006 hearing, the parties advised the court of their proposed negotiated plea and recommended sentence. However, the court advised the parties that the proposal would not be approved. On the same day the trial court issued an order continuing this matter and resetting it for a jury trial on September 7, 2006.

{¶17} We note that the trial court's May 4, 2006 Order of Continuance and Pretrial Scheduling Order contained the *exact same language* regarding continuances or substitution of counsel with the time waiver provision as contained in the September 28, 2005 and February 15, 2006 Pretrial Scheduling Orders: "Continuances or substitution of counsel will not be granted within three (3) weeks of trial absent extraordinary circumstances. *If a continuance is requested, a time waiver must be submitted with same.*" (Emphasis added).

³ This notice provided no reason why the May 4, 2006 jury trial was cancelled.

{¶18} On June 27, 2006 Masters filed a motion to dismiss, requesting that the court dismiss the indictment and all charges against him as he had been denied his right to a speedy trial. Specifically, Masters argued that he did not cause the delay that caused this matter to be set for trial outside of the 270 day requirement.

{¶19} The trial court denied Masters' motion to dismiss and found that Masters had previously waived his right to a speedy trial in his January 5, 2006 motion for continuance. The trial court found that this waiver acted as a waiver of unlimited duration because Masters' motion did not mention a specific time period to be waived.

{¶20} Masters now argues that the waiver contained in his January 5, 2006 motion for a continuance was not of unlimited duration. Rather, Masters contends that his motion for a continuance of the January 12, 2006 trial was for the limited purpose of allowing the parties the opportunity to pursue the possibility of resolving this matter without a trial. Masters further notes that when the trial court granted Masters' motion and rescheduled the trial date to May 4, 2006, the court's February 15, 2006 order doing so contained language specifically stating that any further continuances would require a time waiver. It is well established that in Ohio, a court speaks through its journal. *State ex rel Worcester v. Donnellon* (1990), 49 Ohio St.3d 117, 118, 551 N.E.2d 183. As a result, Masters would argue that it is apparent from the language of the court's own order of continuance

that the trial court did not consider Masters' January 5, 2006 time waiver to be a waiver of unlimited duration—and accordingly, it would not be appropriate for this court to construe it as such now.

{¶21} In sum, Masters argues that the stated purpose for the January 5, 2006 motion for continuance and time waiver expired when the trial court refused to accept the proposed plea bargain on May 4, 2006. Therefore, Masters' argues that pursuant to his signed time waiver, the time period from January 5, 2006 to May 4, 2006 was tolled. However, by the terms of the trial court's own judgment entry of continuance, time started to run again on May 4, 2006. Since 237 days passed between Masters' arrest and the date of his signed time waiver, and time started to run again on May 4, 2006; as of the date Masters filed his motion to dismiss (June 27, 2006), 291 days had elapsed from the date of Masters' arrest. This is 21 days over the time limit set forth in R.C. 2945.71(C)(2) which provides that a person against whom a felony charge is pending must be brought to trial within 270 days from the date of his arrest. When Masters finally appeared for trial on September 7, 2006, 363 days had elapsed from the date of his arrest, which is 93 days over the 270 day time limit.

{¶22} In considering this argument, we would note that the record reflects that it was the court's assignment commissioner who advised the parties on April 12, 2006 that the May 4, 2006 trial date was cancelled. Although the time within

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which an accused must be brought to trial may be extended by the period of any reasonable continuance granted other than upon the accused's own motion, such as a continuance granted by the court, we note that the trial court never journalized the reason for this cancellation. See R.C. 2945.72(H). The Ohio Supreme Court addressed this situation in *State v. Mincy* (1982), 2 Ohio St.3d 6, and stated in its syllabus as follows:

When sua sponte granting a continuance under R.C. 2945.72(H), the trial court must enter the order of continuance and the reasons therefor by journal entry prior to the expiration of the time limit prescribed in R.C.2945.71 for bringing a defendant to trial. (Emphasis added).

{¶23} Additionally, in *State v. Benson* (1985), 29 Ohio App.3d 321, 323, 505 N.E.2d 987, the Eighth District Court of Appeals set forth the requirements for continuing a trial when it found as follows:

The test for whether a continuance sua sponte or otherwise, may extend the speedy trial limitation is whether the granting of the continuance is journalized and identifies the party to whom the continuance is chargeable. In the case of a sua sponte continuance, the reason therefor must also be indicated in the journal entry.

{¶24} Not only is the April 12, 2006 notice from the assignment commissioner silent as to the reasons for cancelling the May 4, 2006 jury trial, we also note that there is no transcript of the hearing that occurred on May 4, 2006 in place of the cancelled jury trial. Although the record indicates that the court did not accept the parties' plea agreement and continued the jury trial to September 7,

2006, the court's May 4, 2006 Order of Continuance and Pretrial Scheduling Order does not identify the party to whom the continuance is chargeable and again contained language requiring that any further continuances must include a time waiver.

{¶25} In contrast to the foregoing argument and circumstances, the State would point our attention to *State v. O'Brien* (1987), 34 Ohio St.3d 7, 516 N.E.2d 218, wherein the Supreme Court of Ohio held that a defendant's express written waiver of his statutory rights to a speedy trial may also constitute a waiver of speedy trial rights guaranteed by the United States and Ohio Constitutions. *Id.* at paragraph one of the syllabus. Specifically, the Supreme Court of Ohio held that "[f]ollowing an express, written waiver of unlimited duration by any accused of his right to a speedy trial, the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection and demand for trial." *Id.* at paragraph two of the syllabus.⁴ It is undisputed that Masters did not file a formal written objection to the court's May 4, 2006 Order, nor did he file a formal demand for trial.

{¶26} However, on June 27, 2006 Masters filed a motion to dismiss for

⁴ "The Supreme Court of Ohio in *O'Brien* did not favor us with the specific language therein found to be "unlimited" in duration." See *State v. Scolaro et al.* (1992), 73 Ohio App.3d 555, 558, 597 N.E.2d 1184. In *Scolaro*, the Fifth District Court of Appeals found that the waiver in that case was a waiver of *limited and reasonable duration* and not a waiver of unlimited duration; therefore the waiver in *Scolaro* was distinguishable from the express waiver of unlimited duration as contained in *State v. O'Brien*, *supra*.

failure to bring him to a timely trial. Although this motion contained no specific revocation of his prior blanket waiver or any specific indication that the ostensible purpose of the waiver, i.e. settlement, was no longer being pursued, it is nevertheless our conclusion that at the very least, the motion to dismiss should have unequivocally acted to notify the trial court that the prior waiver dated January 5, 2006 was now being revoked or withdrawn. As a result, the trial court should have considered, at the very least, that time could no longer be tolled after June 27, 2006.

{¶27} In sum, it is our conclusion that regardless of Masters' argument for a May 4, 2006 cut off date, at the very latest, as of June 27, 2006, Masters no longer was willing to waive time and time started to run again on June 28, 2006.⁵

{¶28} Thus, the relevant time calculation is as follows: 237 days passed between Masters' arrest and the date of his signed time waiver on January 5, 2006; time was tolled as of January 5, 2006 but at the latest should have started to run again on June 28, 2006; between June 28, 2006 and September 7, 2006, 72 days elapsed for speedy trial purposes. Taken together, the 237 days which elapsed between Masters' arrest and the date of his signed time waiver on January 5, 2006 and the 72 days which elapsed between the date of Masters' motion to dismiss and

⁵ We would note at this point the State would have had some 33 days remaining to bring Masters to trial.

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the date he finally appeared for trial, equals 309 days. This is 39 days over the 270 day time limit.

{¶29} Accordingly, under either interpretation set forth above, Masters was not brought to trial in time pursuant to R.C. 2945.71(C)(2) which provides that a person against whom a felony charge is pending must be brought to trial within 270 days from the date of his arrest.

{¶30} Accordingly, to this extent, Masters' first assignment of error is sustained. Based upon our disposition of Masters' first assignment of error, his second, third, fourth and fifth assignments of error are moot, and we decline to address them. See App.R. 12(C).

{¶31} Accordingly, Masters' conviction for Felonious Assault is reversed and he is hereby ordered discharged.

***Judgment Reversed and
Cause Remanded.***

ROGERS, P.J. and PRESTON, J., concur.

/jlr

AUG 20 2007

SUE SEEVERS
CRAWFORD COUNTY CLERK

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

CRAWFORD COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 3-06-20

v.

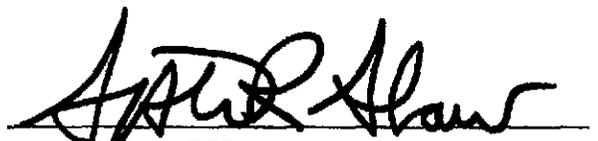
SCOTT MASTERS

JOURNAL
ENTRY

DEFENDANT-APPELLANT

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is reversed at the costs of the appellee for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.




JUDGES

DATED: August 20, 2007

/jlr

USCS Const. Amend. 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

USCS Const. Amend. 14

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives--Power to reduce apportionment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned--Debts of the Confederacy and claims not to be paid.]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

OHIO CONSTITUTION SECTION 10 ARTICLE 1

§ 10. Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

History:

(As amended September 3, 1912.)

§ 2945.71. Time within which hearing or trial must be held

(A) Subject to division (D) of this section, a person against whom a charge is pending in a court not of record, or against whom a charge of minor misdemeanor is pending in a court of record, shall be brought to trial within thirty days after the person's arrest or the service of summons.

(B) Subject to division (D) of this section, a person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial as follows:

(1) Within forty-five days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree, or other misdemeanor for which the maximum penalty is imprisonment for not more than sixty days;

(2) Within ninety days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days.

(C) A person against whom a charge of felony is pending:

(1) Notwithstanding any provisions to the contrary in Criminal Rule 5(B), shall be accorded a preliminary hearing within fifteen consecutive days after the person's arrest if the accused is not held in jail in lieu of bail on the pending charge or within ten consecutive days after the person's arrest if the accused is held in jail in lieu of bail on the pending charge;

(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

(D) A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree of offense charged, as determined under divisions (A), (B), and (C) of this section.

(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.

(F) This section shall not be construed to modify in any way section 2941.401 or sections 2963.30 to 2963.35 of the Revised Code.

History:

134 v H 511 (Eff 1-1-74); 135 v H 716 (Eff 1-1-74); 136 v S 83 (Eff 10-17-75); 138 v S 288 (Eff 10-22-80); 139 v S 119 (Eff 3-17-82); 148 v S 49. Eff 10-29-99.

§ 2945.72. Extension of time for hearing or trial

The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

(A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability;

(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined, or any period during which the accused is physically incapable of standing trial;

(C) Any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law;

(D) Any period of delay occasioned by the neglect or improper act of the accused;

(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

(F) Any period of delay necessitated by a removal or change of venue pursuant to law;

(G) Any period during which trial is stayed pursuant to an express statutory requirement, or pursuant to an order of another court competent to issue such order;

(H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion;

(I) Any period during which an appeal filed pursuant to section 2945.67 of the Revised Code is pending.

History:

134 v H 511 (Eff 1-1-74); 136 v H 164 (Eff 1-13-76); 136 v S 368 (Eff 9-27-76); 137 v H 1168. Eff 11-1-78.

§ 2945.73. Discharge for delay in trial

(A) A charge of felony shall be dismissed if the accused is not accorded a preliminary hearing within the time required by sections 2945.71 and 2945.72 of the Revised Code.

(B) Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code.

(C) Regardless of whether a longer time limit may be provided by sections 2945.71 and 2945.72 of the Revised Code, a person charged with misdemeanor shall be discharged if he is held in jail in lieu of bond awaiting trial on the pending charge:

(1) For a total period equal to the maximum term of imprisonment which may be imposed for the most serious misdemeanor charged;

(2) For a total period equal to the term of imprisonment allowed in lieu of payment of the maximum fine which may be imposed for the most serious misdemeanor charged, when the offense or offenses charged constitute minor misdemeanors.

(D) When a charge of felony is dismissed pursuant to division (A) of this section, such dismissal has the same effect as a nolle prosequi. When an accused is discharged pursuant to division (B) or (C) of this section, such discharge is a bar to any further criminal proceedings against him based on the same conduct.

History:

134 v H 511. Eff 1-1-74.