IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
	:	Supreme Court #: 2007-1759
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.	:	

MERIT BRIEF OF APPELLEE

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FILED
FEB 26 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT OF FACTS

Procedural Facts

On May 9th, 2005 the Defendant was indicted for felonious assault in violation of Section 2903.11 of the Ohio Revised Code. Defendant was then arraigned on May 13, 2005. The matter was scheduled for trial on January 12, 2006 via Pre-trial Order filed on September 28, 2005. On January 5, 2006 the Defendant moved with the State joining in the motion to have the trial date continued for the sole purpose of affording the parties additional time to resolve the case by agreement. The motion contained language that the Defendant–Appellee waived his right to a speedy trial only for the time and purpose sought for the continuance above described. The waiver specifically stated "time is waived herein". Contra to the merit brief of Appellant the Defendant-Appellee never waived his right to a speedy trial of unlimited duration. Furthermore, neither the trial Court nor the Appellate Court treated the waiver to be anything but one of limited duration not unlimited duration. On February 15, 2006 subsequent to the waiver the Trial Court issued an order rescheduling the matter for trial for May 4th, 2006 and sua sponte explicitly stated that should the Defendant desire any further continuances the Defendant would have to again waive his right to a speedy trial. On April 12, 2006 a notice was sent out by the trial Court's assignment commissioner again sua sponte canceling the jury trial of May 4, 2006 without any explanation. Said notice rescheduled the matter for a 15 minute hearing to be held on the same day. No time waiver or motion to continue the trial date was filed as required by the February 15, 2006 trial order. On May 4, 2006 the Court again without hearing issued another order, rescheduling the matter for jury trial, this time for September 7, 2006. This new trial order again contained sua sponte language that required the Defendant to waive his right to a speedy trial if the Defendant desired to continue this trial date. On June 27, 2006 the Defendant moved the Court to dismiss the case due to the State's failure to provide the Defendant a speedy trial, 291 days after the arraignment excluding the delay caused by the continuance above. The trial Court without a hearing overruled Defendant's motion via order of June 30, 2006 and did not alter the trial date of September 7, 2006. The matter came on for bench trial on September 7,

2006, 126 days after the trial date of May 4, 2006 and 72 days after the motion to dismiss had been filed. At the conclusion of the State's case the Defendant moved to dismiss pursuant to Rule 29 due to the evidentiary matters below described, the Trial Court overruled said motion. The Defendant was then convicted for felonious assault in violation of Section 2903.11 of the Ohio Revised Code. Defendant was then sentenced on the 23rd day of October 2006 to a two year prison term. Defendant appealed the conviction with five assignments of error, the first of which was the speedy trial issue. The remaining four assignments of error involved the evidentiary issues that were never addressed as the Appellate Court reversed the Trial Court's conviction on the first assignment of error upon the grounds that the Defendant was not afforded his right to a speedy trial as required by Sections 2945.71 ORC and 2945.73 ORC.

Substantive Facts

On or about April 20, 2005 the Defendant, Scott Masters, was approximately 41 years of age and had been married to the same woman, Vicki Masters, for approximately 22 years. (P60 L14-17) At that time, Scott Masters had a life long friend to-wit: Larry Whittington who was 38 years of age. (P61 L4, P32 L21, P33 L9, P34, L21) On or about April 20, 2005 both Larry Whittington and Scott Masters were approximately the same size. (P38 L13) On said date Vicki Masters told her husband that while he was in the armed forces serving in desert storm in Iraq she had an affair with his life long friend, Larry Whittington. (P61 L23) In addition, Vicki Masters advised her husband that the party's 19 year old son, Eric Masters, may not be Mr. Masters' son but may in fact be Mr. Whittington's. (P62 L1 & 22) Mr. Masters drove over to the residence of Mr. Whittington to discuss this matter, however when he saw Mr. Whittington he lost his composure and struck Mr. Whittington three times with his fist. Mr. Masters then stopped and left the premises. (P62 L15, P63 L4, P67 L15, P63 L13-19, P16 L17-20, P18 L11) As a result of the above, Mr. Whittington was not hospitalized and sustained a bloody nose and a swollen eye. No other competent evidence exists as to any other injuries serious or otherwise. However, Mr. Whittington and his wife, over objection were allowed to testify to medical diagnosis, prognosis and the nature of the internal injuries without any foundation, medical

records or medical expertise. Furthermore, no medical records were submitted and no medical providers testified (P12 L10-25; P12 L12-25; P29 LL16-22). These issues were raised on appeal however were never addressed and declared moot by the Appellate Court.

ARGUMENT

Defendant-Appellee respectfully submits that this Honorable Court should affirm the ruling of the Appellate Court as said court correctly found that the Appellee was denied his right to a speedy trial as guaranteed by Article I Section 10 of the Ohio Constitution and Sixth Amendment and Fourteenth Amendment of the United States Constitution and as set forth in sections 2945.71-2945.73 of the Ohio Revised Code. Section 2945.71 of the Ohio Revised Code clearly requires the Defendant to be tried within 270 days of his arraignment. Section 2945.73 clearly requires dismissal of all charges if the mandates set forth with in 2945.71 are not afforded the Defendant-Appellee.

PROPOSITION OF LAW NO. 1

THE FILING OF AN EXPRESS TIME WAIVER OF UNLIMITED DURATION BY AN ACCUSED WAIVED THE TIME PERIOD SPECIFIED FOR SPEEDY TRIAL CONTAINED WITHIN THE OHIO REVISED CODE SECTION 2945.71. TO REVOKE THIS TIME WAIVER, AN ACCUSED MUST EXPRESSLY RETRACT THE WAIVER AND MUST EXPRESSLY DEMAND A TRIAL. SUCH TRIAL MUST THEN OCCUR WITHIN A REASONABLE TIME FRAME WITHOUT DEFERENCE TO R.C. 2945.71.

Appellee concurs with the Appellants argument that a right to a speedy trial is guaranteed to the Defendant by the Sixth and Fourteenth Amendments to the United States Constitution. Klopfler v. North Carolina (1967), 386 U. S. 213; 87 S. Ct. 988, 18 L. Ed. 2d 1.; State v. Baker (1997), 70 Ohio St. 3d 108, 110, 676 N.E. 2d 883 and by Section 10, Article 1, Ohio Constitution. State v. O'Brien (1987), 34 Ohio St. 3d 7, 8 and by Sections 2945.71-73 O.R.C. Appellee further agrees that the 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. Said waiver must also be expressed in writing or be made in open court on the record. State v. King (1994), 70 Ohio St. 3d 158, Syllabus. Section 2945.71 Seq. of the Ohio Revised Code is an enforcement mechanism to make sure that the constitutional rights to a speedy trial are upheld. State v. Pachay (1980), 64 Ohio St. 2d 218, Syllabus. More specifically Section 2945.71 (C)(2) provides that "a person against whom a charge of felony is pending ... shall be brought to trial within 270 days after the person's arrest". Section 2945.73(B) of the Ohio Revised Code clearly requires the dismissal of all charges against the Defendant if the Defendant is not brought to trial within the time specified pursuant to Section 2945.71 of the Ohio Revised Code.

Appellee further concurs with the merit brief of Appellant that Section 2945.73(H) provides that a speedy trial may be lengthened by any period of continuance granted on the accused motion or by any reasonable period granted other than on the accused motion. However, the state never argued nor raised any issue that the Defendant Appellee caused a delay by failure to respond to discovery to the Trial Court nor the Appellate Court and now argues this claimed issue for the first time before this Honorable Court. This court has previously ruled that one cannot raise an issue for the first time on appeal that which was not raised at the lower court level. State vs. Moreland (1990) 50 Ohio St. 3d 58, 62 citing the case of State vs. Broom (1988) 40 Ohio St. 3d 277-288-289. See also the case of State vs. Williams (1977) 51 Ohio St. 2d 112. In addition, it should be noted that the State also is arguing facts that are not of record nor accurate. The State was aware and advised from the arraignment that the Defendant had no discovery to provide, he had no witnesses nor exhibits. This can be confirmed by review of the trial transcript. The Defendant had no exhibits or witnesses save and except himself. Therefore with all due respect to the State, it is respectfully submitted that any argument now raised that the Defendant-Appellee via neglect or improper acts caused a delay should not be considered in this case.

The Appellant in its proposition of law states that if the Defendant-Appellee filed an express waiver of his right to a speedy trial of unlimited duration he must then revoke it by

written objection to further continuances along with written demand for a trial. However, if in fact the Appellees waiver of right to a speedy trial was not of unlimited duration but rather one of limited duration or limited purpose then in that case it is submitted that the proposition of law furthered by the Appellant is of no consequence to the matter before this Honorable Court. In this regard the State's argument is solely based on the premise that the Appellate Court chose to ignore the ruling set forth in State v. O'Brien (1987), 34 Ohio St. 3d. 7, 9 516 N.E. 2d 218. The argument furthered by the state claims that the Appellate Court established a new standard allowing the revocation of a previous waiver by implication rather than by written objection, the Appellee respectfully disagrees.

The Appellate Court cited the case of State vs. Singer (1997) 50 Ohio St. 2d 103 wherein the court held that the Ohio speedy trial statute is mandatory, constitutional and must be strictly construed against the state. The Appellate Court also cited this court's opinion in State vs. Butcher (1986) 27 Ohio St. 3d 28, 31, 500 N.E. 2d 1368 wherein this Court found that once a prima facie case has been made on the issue of whether or not the Defendant was afforded the right to a speedy trial, the burden shifts onto the State to demonstrate that the mandates found in Sections2945.71-73 are followed.

The state realizing that it's only argument is based on the threshold premise that the subject waiver was of unlimited duration boldly claims in the footnote of page one of its merit brief that the Appellate Court "correctly ruled that the Appellee's filing constituted an express waiver of unlimited duration". The problem however with the States argument, is that nowhere in the opinion of the Appellate Court is there such a ruling; in fact quite the opposite is true. Upon close reading of the opinion of the Court of Appeals it is clear that the Court took great interest in the language of the waiver itself, the purpose of the waiver, and the fact that the Trial Court itself on two separate occasions via its trial orders of February 15, 2006 and May 4, 2006 (appendix) required the Defendant-Appellee to file a waiver of time should the Defendant-Appellee desire any future continuances. This treatment by the trial Court is counter intuitive that the waiver was one of unlimited duration. Also it is of the utmost importance to note that these two scheduling trial orders were issued after the subject waiver of the Defendant-

Appellee. The terminology of the waiver should also be taken into consideration. In the joint motion to continue the trial of January 12, 2006 filed January 5, 2006 the Defendant stated "time is waived herein". What is the meaning of the word "herein", what does it refer too? It is respectfully submitted the word "herein" refers simply to the motion in which it is found. Furthermore, what was the purpose of the motion? It is respectfully submitted that the sole purpose of the motion was to allow the parties more time to negotiate an agreement before the matter was tried. In its discussion the Appellate Court highlighted this issue by citing the words of the Trial Court, found in the Trial Court's orders of February 15, 2006 and May 4, 2006 by placing the language so employed in *italics* with the phrase "emphasis added". The Appellate Court then correctly cited this Honorable Court's decision in the case of State Ex Rel Worchester vs. Donnelon (1990) 49 Ohio St. 3d 117, 118 pointing to the fact that the Trial Court only speaks through its journal. The Appellate Court correctly noted as a result, that it is apparent from the language of the court's own order of continuance that the Trial Court did not consider Mr. Masters time waiver to be a waiver of unlimited duration and the Appellate Court went on to state that it would not be appropriate for the Appellate Court to now so construe the Trial Court's order any differently. (See line 2-3 of page 10 of the opinion) Thus the Appellate Court in fact took into consideration the nature of the waiver, the Court's treatment of same and did not conclude that the waiver was of unlimited duration as argued by the State.

Therefore, one of the threshold questions this court should determine is the true nature and extent of the waiver that was made in this case keeping in mind that this issue should be strictly construed against the State as above discussed.

In addition, it is respectfully submitted that the Trial Court's order of February 15, 2006 containing the language that clearly requires the Defendant-Appellee to again waive his right to a speedy trial in order to continue the trial scheduled for May 4, 2006 is a clear acknowledgment that the waiver only extended to the new trial date of May 4, 2006. Furthermore said orders could be considered a sua sponte reinstatement of Defendant-Appellees's right to a speedy trial.

The State argues that the Appellate Court ignored this Court's opinion in the case of State vs. O'Brien (1987), 34 Ohio St. 3d 7, 9 516 N.E. 2d 218 wherein the O'Brien decision held

that when there is a waiver of unlimited duration by the accused of the speedy trial rights the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a written objection to any further continuances and makes a demand for trial. However, it is respectfully submitted that the Appellate Court did take into consideration the ruling set forth within O'Brien as it specifically discussed the O'Brien case on page 12 of its opinion. It is true that the Appellate Court determined that the motion to dismiss filed by Mr. Masters on June 27, 2006 at the very least put the Trial Court and State on notice that Mr. Masters at that time is no longer willing to waive his right to a speedy trial. This does not mean however that the former argument that the waiver was of limited duration and limited purpose is without merit. Nor does it suggest that the argument that the trial court sua sponte revoked the waiver via the language of the Trial Court's own journal is of no consequence. The Appellate Court simply stated that at the "very latest" Mr. Masters right to a speedy trial should have been reinstated as of June 27, 2006. It is obvious that the Appellate Court's opinion clearly is holding that in either case the Appellees right to a speedy trial has been violated. The State in addition to O'Brien cites the cases of City of Eastlake vs. Haywood, (11th District), 1994 Ohio App. No. 93-L-076; Richmond Heights vs. Abriana (8th District), 2000 Ohio App. Lexus 3810; Village of Glenwillow vs. Tomsick (1996), 111 Ohio App. 3d 718 however it is with all due respect that these cases including O'Brien are simply not on point. The waivers contain different language and there is no post waiver orders by the Trial Court that sua sponte revokes the waiver of the Defendant or treats the waiver as a waiver of limited duration. These cases simply stand for the rule of law that when there is a clear expressed time waiver of unlimited duration and the Trial Court treats them as such the Defendant cannot then seek dismissal of the charges against him for want of a speedy trial unless the Defendant in writing demands a trial and objects to further continuances. It is respectfully submitted that the State simply ignores the facts of this case. It is uncontested and not even discussed in the State's merit brief that the Trial Court on February 15, 2006 and again on May 4, 2006 required the Defendant to again waive his right to a speedy trial if the Defendant desired to have yet another continuance. Why then would it be required of the Defendant to re-demand his rights to a speedy trial in light of the Trial Court's own language? Query: Isn't the

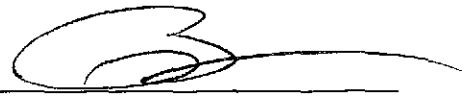
Defendant-Appellee entitled to rely upon what the Trial Court states in its journal? It is respectfully submitted that the only reason that a Defendant would have to revoke his waiver and demand a jury trial in writing is to place the State and the Trial Court on notice that he again wishes to have his right to a speedy trial. However in this case, the state was on notice that Defendant-Appellee's right to a speedy trial was again in play as of May 4, 2006. Query: What other purpose is there for the language found in the Trial Courts orders? Either the Trial Court's orders in effect reinstated the Defendant rights sua sponte or the Trial Court considered that waiver only to have extended to May 4, 2006. Clearly if the Defendant had wanted another continuance beyond May 4, 2006 he would have had to again waive his right to a speedy trial.

It should also be noted that O'Brien does not set forth any specific language a Defendant has to employ to reinstate his right to a speedy trial after a waiver other than it must be in written form. Nor does O'Brien address what occurs when the Trial Court sua sponte treats the waiver as one of limited duration and or reinstates the right via judgment. Therefore, taking into consideration the that the burden is on the state and these matters must be strictly construed against the state as required in State v. Singer (1997), 50 Ohio St. 2d 103 and State v. Butcher (1986), 27 Ohio State 3d 28,31 and given the facts of this case, the Appellate Court correctly ruled that the written motion by itself was sufficient and at the very latest placed the Court and the State on notice that Mr. Masters as of June 27,2006 wanted his right to a speedy trial reinstated. Thereafter, nothing was done and no explanation was ever set forth on the record why Mr. Masters case was not expedited at least from that point in time.

CONCLUSION

Therefore, in light of the totality of circumstances in this case which are unique to this case, the Appellate Court arrived at the correct decision in finding that the Defendant-Appellee was denied his right to a speedy trial as guaranteed by the United States Constitution, the Ohio Constitution and by Sections 2945.71-73 of the Ohio Revised Code. The Appellee therefore respectfully requests this Court affirm the Appellate Court's decision below.

Respectfully Submitted,



PATRICK T. MURPHY #0007722
(COUNSEL OF RECORD)
COUNSEL FOR APPELLEE,
SCOTT MASTERS

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Merit Brief of Appellee was served upon Clifford Murphy, Prosecuting Attorney, 112 E. Mansfield Street, Suite 305, Bucyrus, Ohio 44820 by regular U.S. Mail this 22 day of February 2008.

PATRICK T. MURPHY
COUNSEL FOR APPELLEE,
SCOTT MASTERS

Murphy

FILED CLERKS OFFICE
05 FEB 15 AM 9:01
SUE SEVERS
CRAWFORD COUNTY

IN THE COMMON PLEAS COURT OF CRAWFORD COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	Case No.: 05-CR-0075
- vs. -	:	
		PRETRIAL SCHEDULING ORDER
SCOTT MASTERS,	:	
Defendant.	:	

It is hereby ORDERED that the following pretrial order is in effect for this case.

1. The above matter is hereby assigned for a **trial by jury** commencing at **8:30 a.m.** on the **4th** day of **May 2006**. **Two days** have been allowed for trial.

2. The Court shall be advised of **negotiated pleas** no later than three (3) weeks prior to the trial date. If the Court is not so advised, only pleas to the indictment will be allowed by the Court.

3. **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.

4. **Defendant's presence** at required Court appearances will be the **responsibility of Defense Counsel**. If the Defendant is incarcerated other than in the Crawford County Jail, or if the Defendant is in prison, the Defense Counsel shall

prepare an entry of conveyance for the Court's signature five (5) days prior to the scheduled date.

5. Complete **trial briefs, witness lists, and proposed jury instructions** on key issues in the case shall be filed, with a copy submitted directly to the Court, at least two (2) weeks before the scheduled trial date. Counsel are required to serve these filings on each other at that time.

6. **Stipulations**, if any, agreed to by all counsel, shall be reduced to written form and submitted to the Court no later than seven (7) days before the scheduled trial.

7. All **exhibits** that the parties intend to offer at trial shall be marked for identification purposes prior to trial and a list of those exhibits shall be given to opposing counsel at least seven (7) days prior to the scheduled trial date. This list of all exhibits shall be given directly to the Court (not filed) two (2) working days prior to the scheduled trial date.

Russell B. Wiseman, Judge

A copy of the above was sent this date of filing to:

CLIFFORD J. MURPHY, ESQ., Crawford County Prosecutor's Office, 112 East Mansfield Street, Suite 305, Bucyrus, OH 44820
PATRICK T. MURPHY, ESQ., Attorney at Law, 153 Washington Square, Bucyrus, OH 44820

FILED CLERKS OFFICE
05 MAY -4 PM 2:26
SUE SEEVERS
CRAWFORD COUNTY

IN THE COMMON PLEAS COURT OF CRAWFORD COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	Case No.: 05-CR-0075
- vs. -	:	
SCOTT MASTERS,	:	ORDER OF CONTINUANCE AND PRETRIAL SCHEDULING ORDER
Defendant.	:	

This case came before the Court for Change of Plea on the 4th day of May 2006.

Whereupon, before court was called into session, counsel for the parties advised the Court of the proposed negotiated plea and recommended sentence. The Court, after hearing the proposed settlement, advised the parties that it would not approve it.

Therefore, the Court hereby orders this matter continued and rescheduled as set forth below.

1. The above matter is hereby assigned for a **trial by jury** commencing at **8:30 a.m.** on the **7th** day of **September 2006**. **Two days** have been allowed for trial.

2. The Court shall be advised of **negotiated pleas** no later than three (3) weeks prior to the trial date. If the Court is not so advised, only pleas to the indictment will be allowed by the Court.

3. **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.

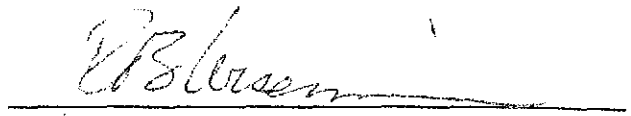
4. **Defendant's presence** at required Court appearances will be the **responsibility of Defense Counsel.** If the Defendant is incarcerated other than in the Crawford County Jail, or if the Defendant is in prison, the Defense Counsel shall prepare an entry of conveyance for the Court's signature five (5) days prior to the scheduled date.

5. Complete **trial briefs, witness lists, and proposed jury instructions** on key issues in the case shall be filed, with a copy submitted directly to the Court, at least two (2) weeks before the scheduled trial date. Counsel are required to serve these filings on each other at that time.

6. **Stipulations**, if any, agreed to by all counsel, shall be reduced to written form and submitted to the Court no later than seven (7) days before the scheduled trial.

7. All **exhibits** that the parties intend to offer at trial shall be marked for identification purposes prior to trial and a list of those exhibits shall be given to opposing counsel at least seven (7) days prior to the scheduled trial date. This list of

all exhibits shall be given directly to the Court (not filed) two (2) working days prior to the scheduled trial date.



Russell B. Wiseman, Judge

A copy of the above was sent this date of filing to:

CLIFFORD J. MURPHY, ESQ., Crawford County Prosecutor's Office, 112 East Mansfield Street, Suite 305, Bucyrus, OH 44820

PATRICK T. MURPHY, ESQ., Attorney at Law, 153 Washington Square, Bucyrus, OH 44820

NOTICE OF HEARING

CRAWFORD COUNTY COMMON PLEAS COURT
Court House 112 E. Mansfield
Bucyrus, OH 44820

Donna M. Fox
Civil/Criminal
419-562-5771

Kathleen Crall Kennedy
Domestic Relations
419-562-5771

State of Ohio v MASTERS, SCOTT 05-CR-0075

To: PATRICK T MURPHY
ATTORNEY AT LAW
153 WASHINGTON SQUARE
BUCYRUS OH 44820-0000

Date: 4-12-06

The above case is assigned for hearing on May 4, 2006 at 8:30 A.M.
The Court has allowed 15 minutes.
If you feel this is insufficient, please advise immediately.

CHANGE OF PLEA

Additionally, the Jury Trial set same day is cancelled.

Donna
Assignment Commissioner

Copies of the above notice were sent this day to the parties listed below:

CRAWFORD COUNTY PROSECUTOR
112 E MANSFIELD ST SUITE 305
BUCYRUS OH 44820