

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 2008-154
 :
 v. : On Appeal from the Athens County
 : Court of Appeals, Fourth Appellate
 RONALD CLARK, : District, Case No. 07CA9
 :
 Defendant-Appellant. :

**APPELLANT RONALD CLARK'S MOTION FOR RECONSIDERATION OF
DENIAL OF JURISDICTION OF PROPOSITIONS OF LAW NOS. I AND II**

Office of the Ohio Public Defender

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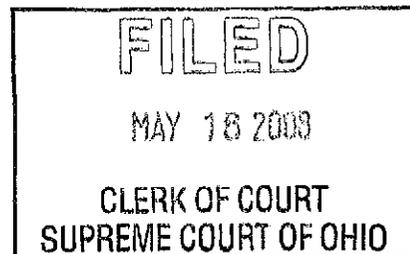
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APPELLANT RONALD CLARK'S MOTION FOR RECONSIDERATION OF DENIAL OF JURISDICTION OF PROPOSITIONS OF LAW NOS. I AND II

This Court should reconsider its 5-2 decision to deny jurisdiction on Propositions of Law Nos. I and II because the decision may have been based on objectively incorrect allegations contained in the State's memorandum opposing jurisdiction. State v. Clark, 2008-Ohio-2028, Lundberg Stratton and O'Connor, JJ., dissenting from denial of jurisdiction on Propositions of Law Nos. I and II. Exhibits one and Two.

This cases involves a conflict between the First and Fourth Appellate Districts. The conflict concerns whether the syllabus of State v. Deal (1969), 17 Ohio St.2d 17, applies to cases in which the defendant has retained counsel. The Deal syllabus requires a trial court to inquire into any allegation that appointed counsel has failed to subpoena alibi witnesses:

Where, during the course of his trial for a serious crime, an indigent accused questions the effectiveness and adequacy of assigned counsel, by stating that such counsel failed to file seasonably a notice of alibi or to subpoena witnesses in support thereof even though requested to do so by accused, it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of the record. The trial judge may then require the trial to proceed with assigned counsel participating if the complaint is not substantiated or is unreasonable.

Mr. Clark's two propositions of law ask this Court to adopt the First District's reasoning and to extend the protections of Deal to retained counsel cases:

Proposition of Law No. I: Where, during the course of his trial for a serious crime, an accused questions the effectiveness and adequacy of counsel, by stating that such counsel failed to file seasonably a notice of alibi or to subpoena witnesses in support thereof even though requested to do so by accused, it is the duty of the trial judge to inquire into the complaint and make such inquiry

a part of the record. The trial judge may then require the trial to proceed with counsel participating if the complaint is not substantiated or is unreasonable. State v. Deal (1969), 17 Ohio St.2d 17, explained.

Proposition of Law No. II: Where, during the course of his trial for a serious crime, an accused questions the effectiveness and adequacy of counsel, it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of the record. The trial judge may then require the trial to proceed with the current counsel participating if the complaint is not substantiated or is unreasonable. State v. Deal (1969), 17 Ohio St.2d 17, explained.

In its response to Mr. Clark's jurisdictional memorandum, the State denied that there was a conflict between the First and Fourth Districts judgments by incorrectly describing the First District's holding:

The third case that appellant misrepresents is the fourth (sic) district (sic) appellate case of State v. Jarvis (Feb. 5, 1999), Hamilton app. (sic) No. C-980210, 1999 Ohio Spp. (sic) LEXIS 294. Appellant claims that case is in conflict with the instant case, because, according to appellant, that case "held" that Deal applies whether counsel is retained or appointed. On the contrary, the difference, if any, between appointed and retained counsel was never at issue in Jarvis. *That case involved appointed counsel and every case upon which it relied, including State v. Deal, involved appointed counsel.*

State's response at 2-3, emphasis supplied. The Fourth District's decision in this case is attached as Exhibit 4. The First District's decision in Jarvis is attached as Exhibit 5.

The italicized portion is just plain wrong, and it involves a central issue to this case—whether an Ohio court of appeals held that Deal applies to retained counsel. But, contrary to what the State alleged, the First District made it clear that Jarvis concerns retained counsel. The opinion quotes trial counsel as saying, "Your Honor, Mr. Jarvis has just informed me that he no longer wishes to retain me as counsel." Id. at *19. Then, the opinion states

that “the [trial] court determined counsel had been retained rather than appointed. . . .” Id. at *20.¹

Accordingly, the First District applied the Deal rule to a case which, like Mr. Clark’s, involved retained counsel. By contrast, the Fourth District expressly refused to apply the Deal rule to a retained-counsel case. The Fourth District denied a motion to certify a conflict reasoning that the First District did not make a point of the distinction, Exhibit 3, but the fact remains that trial judges in the First District will be bound to apply the Deal rule to retained-counsel cases while trial courts in Fourth District will apply Deal only to appointed-counsel cases.

Reconsideration is needed because trial courts need clear guidance. When a defendant claims that his attorney has not called alibi witnesses, the trial court faces a dilemma. As the court in this case noted, it can be improper for judges to intervene in the attorney-client relationship:

As in Deal, the trial court did not inquire as to “why no witnesses were called or why no alibi defense was prepared.” Worse, the trial court

¹ Undersigned counsel acknowledges that in Proposition of Law No. III, which is not part of this reconsideration motion, counsel incorrectly asserted the following statement was the holding of the United States Supreme Court: “It is settled that, if evidence available to a trial judge raises a bona fide doubt regarding a defendant’s ability to understand and participate in the proceedings against him, the judge has an obligation to order an examination to assess his competency. . . .” Porter v. McKaskle (1984), 466 U.S. 984, 985 citing Drope v. Missouri (1975), 420 U.S. 162, and Pate v. Robinson (1966), 383 U.S. 375. As the State correctly pointed out, the Porter language was from a dissent from the denial of certiorari, not a holding. However, the quotation accurately describes the law as decided in Drope and Pate. Even though the error was rhetorical and not substantive, counsel apologizes to the Court for the oversight.

acknowledged it did not know and that it would inquire into Mr. Clark's allegations about his attorney:

I don't know who your alibi witnesses are, but I can tell you I just explained to your counsel here at the table just a few minutes ago that the three witnesses he subpoenaed I'm going to allow him to call. Those witnesses. I don't know whether that's all the witnesses you're talking about, or of those are the people that you're calling alibi witnesses or not.

* * *

You're asking me to pass judgment on the status of your representation. I cannot do that.

T.p. 90, 93-4. On the other hand, if the court remains silent, it could fail in its duty under Deal to see that counsel is providing constitutionally sufficient representation. A decision from this court will instruct trial courts how to navigate between these sometimes conflicting obligations in retained-counsel cases.

The First District's view better comports with the policy behind Deal and with this Court's edict to "avoid[] the anomaly that one who employs his own counsel may have a lower standard applied to measure his constitutional right to assistance of counsel than one who at state expense had appointed counsel."

State v. Hester (1976), 45 Ohio St.2d 71, 80.

This case is an ideal case to test the holding of Deal because it is nearly identical to the facts of Deal, except that Mr. Clark's family retained counsel for him.

Mr. Clark's family retained counsel for him, and his case is factually very similar to the facts of Deal, so this is an ideal case to test whether the Deal syllabus applies to retained counsel. In Deal, this Court remanded a case for a hearing because:

From the record, it is impossible to determine whether appellant was adequately represented, because it contains nothing indicating why no witnesses were called or why no alibi defense was prepared. It is entirely possible that appointed counsel talked to those witnesses and concluded that there was no worthwhile alibi defense. The Court of Appeals affirmed appellant's conviction on the ground that he had not established error because the record did not refute this possibility that counsel had investigated appellant's alibi defense and found it wanting. We reverse because, in the circumstances of this case, it was the duty of the trial court to see that the record contained an adequate investigation of appellant's complaint.

Like Mr. Deal, Mr. Clark complained that his counsel had not presented alibi witnesses:

Mr. Gardner refuses to represent me. I asked him two months ago to have my witnesses locked in. Now my witnesses, my alibis, are denied. How could you deny my alibis when that's where I was? I can prove where I was. The State cannot prove where I was. I can prove where I was. Mr. Gardner refused to get my witnesses in. He refused to represent me period.

T.p. 3-4. Mr. Clark later specified that his three alibi witnesses were Joanne Wolfe, his mother, and his brother. T.p. 90. The trial court did allow the testimony of Ms. Wolfe Clark's lawyer had disclosed her as a witness. T.p. 90. Mr. Clark's lawyer did not call either his brother or mother as alibi witnesses.

Conclusion

Trial courts must have a clear, uniform rule to apply when defendants complain that their counsel—retained or appointed—are not prepared for trial. With a clear rule, trial courts can confidently exercise their discretion to resolve one of the most difficult quandaries they face, when to intercede in the attorney client relationship to head off future claims of ineffective assistance of counsel.

This Court should accept jurisdiction on Propositions of Law One and Two, resolve the conflict between the First and Fourth Districts, and reverse the decision of the court of appeals.

Respectfully submitted,

Office of the Ohio Public Defender

Stephen P. Hardwick by Kenneth R. Spriet
By Stephen P. Hardwick, 0062932
Assistant Public Defender *Rel auth.*

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Counsel for Appellant Ronald Clark

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing has been sent by regular U.S. mail, postage prepaid upon Patrick J. Lang, Assistant Athens County Prosecutor, Courthouse, One S. Court Street, Athens, Ohio 45701 on this 16th day of May, 2008.

Stephen P. Hardwick by Kenneth R. Spriet
Stephen P. Hardwick, 0062932
Assistant Public Defender *Rel auth.*

Counsel for Appellant Ronald Clark

#270733

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 2008-154
 :
 v. : On Appeal from the Athens County
 : Court of Appeals, Fourth Appellate
 RONALD CLARK, : District, Case No. 07CA9
 :
 Defendant-Appellant. :

APPENDIX TO

APPELLANT RONALD CLARK'S MOTION FOR RECONSIDERATION OF DENIAL OF JURISDICTION OF PROPOSITIONS OF LAW NOS. I AND II

Entry Denying Jurisdiction Exhibit 1

Announcement..... Exhibit 2

Entry Denying Motion to Certify Record, Athens County Court of Appeals
Case No. 07CA9 (Journalized Feb. 19, 2008) Exhibit 3

Judgment Entry and Opinion, Athens County Court of Appeals Case No.
07CA9 (Dec. 5, 2007) Exhibit 4

State v. Jarvis (Feb. 5, 1999), Hamilton App. No. C-980210, 1999 Ohio
App. LEXIS 294..... Exhibit 5

The Supreme Court of Ohio

FILED

MAY 07 2008

State of Ohio

Case No. 2008-0154

CLERK OF COURT
SUPREME COURT OF OHIO

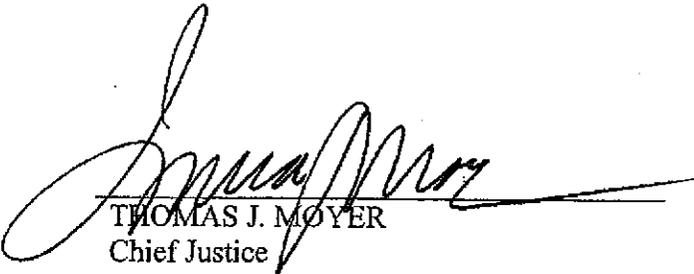
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ENTRY

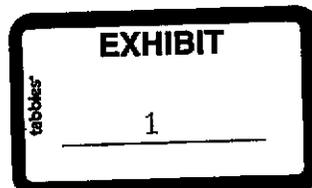
Ronald Clark

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

(Athens County Court of Appeals; No. 07CA9)



THOMAS J. MOYER
Chief Justice



The Supreme Court of Ohio

CASE ANNOUNCEMENTS

May 7, 2008

[Cite as *05/07/2008 Case Announcements, 2008-Ohio-2028.*]

* * *

APPEALS NOT ACCEPTED FOR REVIEW

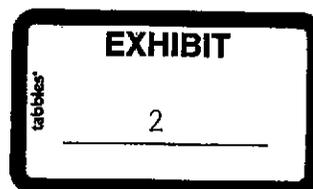
* * *

2008-0154. State v. Clark.

Athens App. No. 07CA9, 2007-Ohio-6621.

Lundberg Stratton and O'Connor, JJ., dissent and would accept the appeal on Proposition of Law Nos. I and II.

* * *



claim that the trial court failed to conduct an adequate hearing regarding his complaint about his retained counsel." *Clark*, supra, at ¶13. We found that "*Deal* and its progeny only impose a duty upon a trial court to inquire on the record about complaints a defendant has raised regarding his *appointed* counsel[,] not retained counsel." (Cites omitted.) *Id.*

{¶2} Article IV, Section 3(B)(4) of the Ohio Constitution provides: "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." The court in *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596 interpreted this provision to require at least three conditions to exist before and during certification: (1) the certifying court must find a conflict on the same question between its judgment and the judgment of another appellate district; (2) the conflict must be on a rule of law, instead of facts; and (3) the certifying court's entry or opinion must clearly set forth the rule of law in conflict.

{¶3} Here, we find that our decision and judgment entry in *Clark*, supra, does not present a conflict on the same question of law involved in *Jarvis*, supra. The *Jarvis* court upheld the trial court's decision to deny the defendant's substitution of counsel request and required retained counsel to remain on the case. *Id.* at 6. The *Jarvis* court determined that the defendant failed to show good cause for substitution of counsel. *Id.* at 7.

{¶4} The *Jarvis* court did cite to the *Deal* case, which perhaps suggests that it believed that the *Deal* standard applies to both retained and appointed counsel. However, unlike this case, the *Jarvis* court did not directly address that specific legal question. It appears that the *Jarvis* court assumed without deciding that *Deal* applied to instances of retained counsel, as well as appointed counsel. However, it determined that, even applying the *Deal* standard, the defendant's claim was unsuccessful. (Stated differently, it did nothing more than cite the rule and conclude that the defendant could not meet the standard.) As such, it did not directly rule on whether *Deal* applied in such situations. In addition, after reviewing *Jarvis*, there simply is no evidence that the parties ever directly presented the court with the question of whether *Deal* applies to retained counsel.

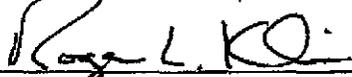
{¶5} Therefore, we find that our decision in *Clark* does not conflict with *Jarvis*.

{¶6} Accordingly, we deny Clark's motion to certify a conflict.

MOTION DENIED.

Abele, P. J. and McFarland, J.: Concur.

FOR THE COURT,



Roger L. Kline, Judge

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

ATHENS COUNTY, OHIO

DEC 05 2007

A. M. M., CLERK
APPEALS

State of Ohio,

Plaintiff-Appellee,

v.

Ronald Clark,

Defendant-Appellant.

Case No. 07CA9

DECISION AND
JUDGMENT ENTRY

APPEARANCES:

David H. Bodiker, State Public Defender, and Stephen P. Hardwick, Assistant State Public Defender, Columbus, Ohio, for appellant.

C. David Warren, Athens County Prosecutor, and Patrick J. Lang, Assistant Athens County Prosecutor, Athens, Ohio, for appellee.

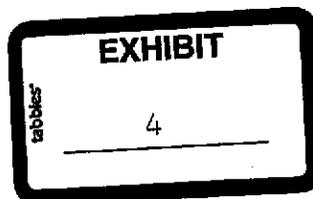
Kline, J.:

{11} Ronald Clark appeals his convictions and sentences for three counts of unlawful sexual conduct with a minor from the Athens County Common Pleas Court. On appeal, Clark contends that the trial court abused its discretion when it denied, without an adequate hearing, his request to discharge his attorney and retain new counsel. Because Clark, inter alia, waited until the morning of his jury trial to make his request, we disagree. Clark next contends that the court abused its discretion when it failed to order a competency evaluation. Because we find that the evidence of Clark ranting and raving is insufficient to order the evaluation, we disagree. Clark next contends that his non-minimum sentence violates the Due Process Clause of the United States Constitution. Because we have addressed this issue in the past, we disagree.

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DEC 05 2007

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Finally, Clark contends that H.B. 137 violates the separation of powers because the executive branch now has the authority to impose post-release control without a court order. Because Clark has waived this issue by not raising it in the trial court, and because he does not have standing to raise this issue, we do not address it.

Accordingly, we affirm the judgment of the trial court.

I.

{12} The Athens County Grand Jury indicted Clark for three counts of unlawful sexual conduct with a minor. Clark entered not guilty pleas and eventually his cases were set for a jury trial. Clark fired his first retained attorney. Two days before his scheduled jury trial, Clark's second retained attorney filed a motion for a competency evaluation. The court continued the jury trial so that it could hold a competency hearing.

{13} At the hearing, the court considered the affidavits of two witnesses and a statement by Clark's counsel. All three indicated that Clark recently ranted and raved about his case and thought that everyone was out to get him. The court gave Clark time to respond to the two witnesses and his attorney. Clark agreed with the witnesses and his attorney. The court denied Clark's request for a competency evaluation.

{14} On the morning of Clark's jury trial, Clark asked the court to discharge his second attorney and grant him a continuance so that he could hire a third attorney for the trial. Clark explained on the record his reasons for the request. The court denied Clark's request.

{15} The jury found Clark guilty of all three counts of unlawful sexual conduct with a minor. The court sentenced Clark to a non-minimum prison term.

{16} Clark appeals and asserts the following four assignments of error: I. "The trial court erred by denying Mr. Clark's request to discharge his attorney and to retain new counsel without an adequate hearing." II. "The trial court abused its discretion by not referring Mr. Clark for a competency evaluation." III. "The trial court erred by imposing a non-minimum prison term in violation of the Due Process Clause of the Fourteenth Amendment [to the] United States Constitution." And, IV. "The trial court erred by imposing post-release control."

II.

{17} Clark contends in his first assignment of error that the trial court erred in denying his request for a continuance to enable him to retain other private counsel. Clark asserts that the court failed to conduct an adequate hearing to investigate his complaint against his current counsel, i.e., his counsel did not, inter alia, present alibi witnesses.

{18} The trial court has discretion to grant or deny a request for a continuance. *State v. Unger* (1981), 67 Ohio St.2d 65, syllabus. Likewise, it has the same discretion to grant or deny a substitution of counsel. "An abuse of discretion connotes more than an error of judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In applying the abuse of discretion standard of review, we are not free to merely substitute our judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶9} "In evaluating a motion for a continuance, a court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." *Unger, supra*, at 67-68.

{¶10} Here, the trial court did not abuse its discretion when it refused to continue the trial. First, Clark did not ask for a specific amount of time to obtain other counsel. However, even if he obtained different counsel right away, it would take his counsel at least a week or two to familiarize himself with the case. Second, Clark filed a motion for a competency evaluation two days before his first scheduled jury trial. The court granted his request for a hearing and continued the jury trial. So, the court already continued the trial once. Third, Clark waited until the morning of his second scheduled jury trial to request the continuance. The jurors, witnesses, opposing counsel, and the court were present and ready to proceed.

{¶11} Fourth, the court by implication determined that the requested delay was not for a legitimate reason. Clark told the court that he was not receiving adequate representation. However, the court informed Clark that "[w]e've been through this once before. You terminated the services of another attorney, if you recall that. And now you have [an attorney] who, despite what you think, has vigorously represented you."

{¶15} Clark further contends that the court should have at least allowed him to substitute counsel without a continuance. Clark does not cite to a single authority that would allow the court to make such a decision. Further, we can find no authority that would permit a trial court to allow newly retained counsel, without any knowledge of the case, to proceed.

{¶16} Accordingly, we overrule Clark's first assignment of error.

III.

{¶17} Clark contends in his second assignment of error that the trial court erred when it denied his request for a competency evaluation. Our review is for abuse of discretion. See, e.g., *State v. Smith*, Montgomery App. No. 21-58, 2006-Ohio-2365, ¶21.

{¶18} "It has long been recognized that 'a person [who] lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. (Cites omitted)." *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, ¶36. "Fundamental principles of due process require that a criminal defendant who is legally incompetent may not be tried. (Cite omitted.)" *Id.*

{¶19} All defendants are presumed competent to stand trial. *State v. Bomar*, Scioto App. No. 00CA2703, 2000-Ohio-1974, citing R.C. 2945.37(G). See, also, *State v. McGrath*, Meigs App. No. 02CA7, 2003-Ohio-1811, ¶11. "In order to rebut this presumption, the defendant must request a competency hearing and at a subsequent hearing, a preponderance of the evidence must show that the defendant, as a result of

{¶12} Fifth, the record shows that Clark contributed to the circumstance that gave rise to his request for a continuance. Part of what Clark said shows that he does not understand the law. For example, he said, "I never had a preliminary hearing. That's a dismissal right there. My indictments wasn't (sic) certified. That's a dismissal. The Bill of Particulars ain't certified. That a dismissal straight out of the law book." Clark was not willing to listen to his attorney. Clark wanted his attorney to do the impossible and get the case dismissed. Thus, Clark's attitude contributed to any conflict he had with his attorney. In addition, a third attorney could not get the case dismissed if he pursued Clark's reasoning as outlined above.

{¶13} Clark relies on *State v. Deal* (1969), 17 Ohio St.2d 17 to support his claim that the trial court failed to conduct an adequate hearing regarding his complaint about his retained counsel. "However, *Deal* and its progeny only impose a duty upon a trial court to inquire on the record about complaints a defendant has raised regarding his *appointed counsel*[,] not retained counsel. (Cites omitted.) *State v. Downing*, Greene App. No. 01-CA-78, 2002-Ohio-1302. See, also, *State v. King* (1995), 104 Ohio App.3d 434, 437; *State v. Bowshier*, Clark App. No. 06-CA-41, 2007-Ohio-5364, ¶54.

Moreover, the trial court patiently listened to Clark before and after the jury selection to explain the problems he had with his counsel as indicated by several exchanges between the court and Clark regarding Clark's counsel.

{¶14} Therefore, based on these circumstances, we find that the trial court did not abuse its discretion in denying Clark's request to continue the trial to substitute retained counsel.

his present mental condition, is not capable of understanding the proceedings and is unable to assist in his defense." *Smith, supra*, at ¶21; R.C. 2945.37(G). A court has discretion to order a competency evaluation. R.C. 2945.371(A).

{¶20} Here, the hearing occurred before trial. At the hearing, the evidence showed only that Clark ranted and raved on at least two occasions. The fact that Clark ranted and raved outside the courtroom in front of two witnesses and over the phone with his counsel, by itself, is simply not enough evidence to require a competency evaluation. Clark failed to affirmatively demonstrate that he could not assist in his own defense.

{¶21} In addition, the pre-trial record fails to indicate that Clark had difficulty understanding the proceedings or that he was incapable of assisting his counsel in his defense. For example, Clark explained to the court why he fired his first attorney and later why he wanted to fire his second attorney. His explanations showed that, even though he held incorrect legal ideas, he was familiar with court procedure. For example, he knew about discovery and alibi witnesses. During these pre-trial hearings, the court asked Clark other questions. Clark meaningfully responded to each question.

{¶22} Therefore, based on this evidence, we find that the trial court did not abuse its discretion when it refused to refer Clark for a competency evaluation.

{¶23} Accordingly, we overrule Clark's second assignment of error.

IV.

{¶24} Clark contends in his third assignment of error that the trial court erred by imposing a non-minimum sentence. He maintains that the sentence violates the Due Process Clause of the United States Constitution. Specifically, he claims that the

Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, which followed the reasoning in *Blakely v. Washington* (2004), 542 U.S. 296, deprived him of a statutory liberty interest when it removes procedural safeguards in a statute.

{¶25} Clark did not raise his due process argument in the trial court. He received his sentence after *Blakely*, supra, was decided on June 24, 2004. Thus, he has forfeited all but plain error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶31 ("we hold that a lack of an objection in the trial court forfeits the *Blakely* issue for purposes of appeal when the sentencing occurred after the announcement of *Blakely*.").

{¶26} Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights, although a defendant did not bring them to the attention of the court. The Supreme Court of Ohio has found that "[b]y its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 2002-Ohio-68. See *Payne*, supra. First, an error must exist. *Id.*, citing *State v. Hill* (2001), 92 Ohio St.3d 191, 200, citing *United States v. Olano* (1993), 507 U.S. 725, 732 (interpreting Crim.R. 52[B]'s identical federal counterpart, Fed.R.Crim.P. 52[b]). Second, the error must be plain, obvious, or clear. *Id.* (Citations omitted.) Third, the error must affect "substantial rights," which the court has interpreted to mean "but for the error, the outcome of the trial clearly would have been otherwise." *Id.* citing *Hill* at 205; *State v. Moreland* (1990), 50 Ohio St.3d 58, 62; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus.

{¶27} “The burden of demonstrating plain error is on the party asserting it. (Cite omitted.) A reversal is warranted if the party can prove that the outcome ‘would have been different absent the error.’” (Cite omitted.) *Payne* at ¶17. A reviewing court should use its discretion under Crim.R. 52(B) to notice plain error “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Long*, supra, at paragraph three of the syllabus.

{¶28} In *State v. Grimes*, Washington App. No. 06CA17, 2006-Ohio-6360, this court considered and rejected a due process challenge to a sentence imposed in accordance with the Supreme Court of Ohio's holding in *Foster*. There, we agreed with the observations of the Ninth and Second Districts, which rejected such challenges outright. In doing so, those courts expressed that it is unlikely that the Supreme Court of Ohio would have directed lower level courts to violate the Constitution; and, in any event, the appellate courts are bound by directives of the Supreme Court of Ohio. *Id.* at ¶8, citing *State v. Hildreth*, Lorain App. No. 06CA8879, 2006-Ohio-5058, at ¶10; *State v. Durbin*, Greene App. No. 2005-CA-134, 2006-Ohio-5125, at ¶¶41-42.

{¶29} In finding that the Supreme Court of Ohio's remedy in *Foster* does not violate the Due Process Clause of the United States Constitution, we also expressed our approval of the reasoning set forth by the Third District in *State v. McGhee*, Shelby App. No. 17-06-05, 2006-Ohio-5162. *Grimes* at ¶9, citing with approval *McGhee* at ¶¶11 & 13-20. Because the range of prison terms for the defendant's offense remained the same both before and after *Foster*, we concluded, “it is difficult to understand how appellant could maintain that an enlargement of the criminal statute occurred, generally,

or available punishments, in particular." *Id.* at ¶10. Further, we noted that the appellant did not attempt to explain how he would have acted differently had he known that the Supreme Court of Ohio would strike down parts of R.C. 2929.14. *Id.* Accordingly, we found that the court did not err in imposing the maximum sentence for the offense. *Id.* at ¶11.

¶30 Based upon our holding in *Grimes* (and numerous decisions following *Grimes*), we find that the trial court did not err in imposing non-minimum sentences for Clark's offenses. See, also, *State v. Miller*, Auglaize App. No. 2-07-02, 2007-Ohio-4744 (*Foster* does not violate the Due Process Clause of the United States Constitution). We do not accept Clark's implied invitation to revisit these issues. Therefore, we do not find any error, let alone plain error.

¶31 Accordingly, we overrule Clark's third assignment of error.

V.

¶32 Clark contends in his fourth assignment of error that H.B. 137 violates the separation of powers because the executive branch of government now has the authority to impose post-release control without a court order. We do not address this issue for two reasons.

¶33 First, we find that Clark has waived this argument. He did not raise the separation of powers argument in the trial court. He now raises it for the first time on appeal. However, a reviewing court should not review constitutional claims for the first time on appeal. See, e.g., *Logan v. McKinney* (Aug. 23, 1996), Hocking App. No. 95CA12; *State v. Shepherd* (Nov. 2, 1995), Scioto App. No. 94CA2322.

{¶34} In addition, we find that Clark does not have standing to make this argument. Our colleagues in the Twelfth District Court of Appeals have addressed this same issue in *State v. Rogers*, Fayette App. No. CA2006-09-036, 2007-Ohio-3720 and *State v. Calhoun*, Butler App. No. CA2006-08-190, 2007-Ohio-3612. The *Rogers* and *Calhoun* courts found that when the judicial branch actually imposes the post-release control, instead of the executive branch, a defendant does not have standing to challenge the constitutionality of the provisions of the statutes affected by H.B. 137. See, also, *State v. Morris*, Pickaway App. No. 06CA28, 2007-Ohio-5291.

{¶35} Here, Clark received notice of the imposition of the optional post-release control from the trial court. Therefore, he does not have standing to challenge the constitutionality of the statutes affected by H.B. 137.

{¶36} Accordingly, we overrule Clark's fourth assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

McFarland, P.J., dissenting.

{137} I respectfully dissent because the record below is very troublesome. This is readily apparent after reviewing and considering the dialogue between the Appellant, his counsel and the court regarding the legal representation of the Appellant. The record reveals the Appellant told the court about his displeasure with his retained counsel and his desire to fire him. He specifically stated that "Counsel has failed to represent me." He went on to say "I'm asking you to let me hire another counsel." The Court responded by saying, among other things, "you're not going to have a right to hire other counsel."

{138} After this exchange between the Appellant and the Court, his retained counsel stated: "Your Honor, I can't, I cannot represent him when he's saying this. What's quite clear here is I am representing him and I have been trying to do a good job. And after he makes a statement like that I don't even want to help him. Alright ?" (Emphasis added.)

{139} In my view, it was an abuse of discretion for the trial court to proceed with the jury trial after this alarming statement from counsel. Any jurist hearing such a statement should be very concerned about the impact it has on the Appellant's subjective belief about his legal representation and the fairness of the proceedings. The record, at a minimum, shows a significant conflict between counsel and the Appellant that was left unresolved.

{140} As such, the trial court should have continued the trial and permitted Appellant the opportunity to seek other counsel or proceed pro se. In hearing these

statements by counsel, yet requiring the same counsel to remain at the trial, the court below tainted the process and acted unreasonably.

{¶41} I realize it can be very frustrating to a trial court when an accused acts the way the Appellant did in the proceeding below. However, that frustration should yield to the greater interest of providing equal justice under the law, particularly when an accused hears his attorney does not want to help him.

{¶42} Accordingly, I dissent.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

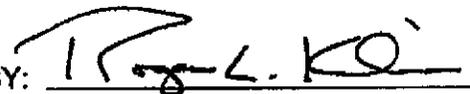
If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. The stay as herein continued will terminate in any event at the expiration of the sixty day period.

The stay shall terminate earlier if the appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec.2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J.: Dissents with Dissenting Opinion.
Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: 
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

1 of 1 DOCUMENT

**STATE OF OHIO, Plaintiff-Appellee, v. ROBERT NEIL JARVIS,
Defendant-Appellant.**

APPEAL No. C-980210

**COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT,
HAMILTON COUNTY**

1999 Ohio App. LEXIS 294

February 5, 1999, Date of Judgment Entry on Appeal

NOTICE:

[*1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Criminal Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. B-974727.

DISPOSITION: Judgment Appealed From Is: Affirmed.

HEADNOTES

EVIDENCE - PROSECUTOR - COUNSEL

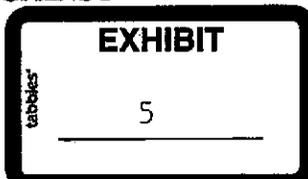
SYLLABUS

IN A PROSECUTION FOR RAPE, THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE, FOR IMPEACHMENT PURPOSES, TESTIMONY REGARDING THE DEFENDANT'S PREVIOUS MURDER CONVICTIONS, WHERE THE DEFENDANT'S ACCOUNT OF THE FACTS GIVING RISE TO THE CHARGES AGAINST

HIM CONFLICTED IN VARIOUS MATERIAL RESPECTS WITH THAT GIVEN BY THE VICTIM, THUS MAKING THE CREDIBILITY OF THE DIVERGENT ACCOUNTS A CENTRAL ISSUE TO BE RESOLVED BY THE JURY AT TRIAL.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO DECLARE A MISTRIAL ON THE BASIS OF ALLEGATIONS BY DEFENSE COUNSEL THAT THE PROSECUTOR'S ACKNOWLEDGED GESTURING DURING CROSS-EXAMINATION OF THE VICTIM AMOUNTED TO IMPROPER COACHING OF THE WITNESS; ALTHOUGH SUCH GESTURING WAS INAPPROPRIATE REGARDLESS OF THE PROSECUTOR'S MOTIVE, IT DID NOT DEMONSTRABLY AFFECT THE OUTCOME OF THE TRIAL AND THEREFORE DID NOT GIVE RISE TO PREJUDICE.

TO WHATEVER DEGREE THE VICTIM OF A RAPE MAY HAVE SUFFERED FROM [*2] MENTAL HANDICAPS ARISING FROM THE HEAD INJURIES SHE HAD RECEIVED AS A CHILD, THOSE HANDICAPS DID NOT *PER SE* DISQUALIFY HER AS A WITNESS, EVEN THOUGH THEY



MAY HAVE ARGUABLY AFFECTED HER CREDIBILITY; THE DEFENDANT WAS NOT, THEREFORE, DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF ALLEGED DEFICIENCIES IN HIS INQUIRY INTO THE VICTIM'S COMPETENCY, WHEN COUNSEL EFFECTIVELY CROSS-EXAMINED THE VICTIM IN A MANNER THAT WAS AGGRESSIVE, PROBING, AND EXTENDED, AND THAT WAS DESIGNED TO AFFORD THE JURY A BASIS FOR DOUBTING THE ACCURACY OF HER ACCOUNT OF THE EVENTS IN QUESTION.

COUNSEL: Joseph T. Deters and Philip R. Cummings, for Plaintiff-Appellee.

Martin S. Pinales and John P. Feldmeier, for Defendant-Appellant.

JUDGES: HILDEBRANDT, P.J., DOAN and SHANNON, JJ. RAYMOND E. SHANNON, retired, of the First Appellate District, sitting by assignment.

OPINION

DECISION.

Per Curiam.

This is an appeal from the judgment of the Hamilton County Court of Common Pleas convicting the defendant-appellant, Robert Jarvis, of two counts of rape pursuant to the guilty verdicts returned by a jury and the court's independent finding, on the specification attached to each count, that [*3] Jarvis had a prior conviction for murder.¹

¹ Jarvis was sentenced to imprisonment for eight years on each rape and for five years on each specification, with the terms to be served consecutively.

The allegations of rape were drawn pursuant to *R.C. 2907.02(A)(1)(c)*, and contained, inter alia, the following declaration with respect to the victim:

Karen Carter's [a female not the spouse of the accused] ability to resist or consent was substantially impaired because of a mental or physical condition ***, and the defendant knew or had reasonable cause to believe that Karen Carter's ability to resist or consent was substantially impaired ***.

On June 30, 1997, the date specified in the indictment, Carter was some thirty-four years of age. It is uncontroverted that when she was less than a year old, she had an accident which resulted in injuries to her head, and that, in time, she began to demonstrate symptoms of epilepsy. Ultimately, her seizures were diagnosed by physicians in these terms:

[They are] of [*4] the type we call grand mal seizures, meaning that she would have a sudden loss of consciousness without warning, fall to the ground and shake violently, and the seizures occurred at one time almost on a daily basis.

Carter was taken into the home of her maternal grandmother, Sophia Napier, when she was about nine months of age, was reared by Mrs. Napier and was living with her on June 30, 1997, in a multi-building apartment complex in Hamilton County. Mrs. Napier testified that when Karen Carter was in the first grade of elementary school, the severity of her epilepsy was such that she was unable to benefit from the efforts to educate her and she was removed from school. A tutor was obtained to attempt to educate her in her home, but after several months that effort was abandoned because, her grandmother testified, Karen "got so bad that she couldn't remember what she learned that day." Carter has never been employed or married and has spent her days reading simple, primary-grade books, coloring pictures and playing a child's game of cards by herself. Her

grandmother permitted her to take walks through the apartment complex alone for no longer than thirty to forty-five minutes, with [*5] firm instructions to return home directly.

At about noon on June 30, 1997, Karen Carter was taking one of those walks when she met Jarvis as he was sitting near the complex's swimming pool. Although she had not previously seen Jarvis, a relatively new tenant there, the two began a conversation after Jarvis introduced himself. At that time, Jarvis was a fifty-two-year-old man who had established residence in the Cincinnati area sometime in February 1992. He was unemployed and suffered from post-traumatic stress disorder as a consequence of his military service in Vietnam between 1965 and 1970. When Jarvis testified in his own defense, he claimed that his stress disorder affected his ability to make judgments and to conform his behavior to the expected norms of society.

During their conversation, Carter accepted Jarvis's invitation to accompany him to his apartment to assist him in hanging pictures there. According to Carter's testimony, as the two were dancing to music from a radio inside the apartment, Jarvis suddenly threw her onto his bed and placed his body on top of hers. She stated that she panicked and lost consciousness, and that when she recovered her senses, her undergarments [*6] were wrapped around her ankles, and the bed linen was blood-soaked because she was in the course of her menstrual cycle. Jarvis allowed Carter to stand up and then cleanse herself with towels from his bathroom. As she returned to her home, she discarded the soiled towels in a trash receptacle.

Jarvis's version of the episode was that after some thirty minutes of conversation with Carter he went to his apartment, alone, to prepare for a visit from his "case manager" from the "Central Clinic," who had responsibility for monitoring his progress in recovery from his stress disorder. At times between 1994 and 1996, Jarvis was a patient at several facilities for treatment

of his condition, and, apparently, he was being treated on an outpatient basis under the auspices of the Central Clinic.

Jarvis claimed that after he parted company with Carter she came to his apartment and knocked on his door. When he let her inside, they began kissing, touching each other and engaging in other forms of "sexual foreplay." Carter then left to return home without any sexual intercourse having occurred.

According to Jarvis, at approximately 5:00 p.m., Carter was again in the vicinity of Jarvis's apartment. [*7] She testified that he motioned for her to come inside again because the pictures had not yet been hung, but the versions of what occurred next differed markedly. Karen Carter testified that Jarvis threatened to carry her inside if she did not go voluntarily, and that once she went into the apartment, Jarvis took her into a large closet, raped her vaginally, and then would not permit her to leave. She testified further that Jarvis told her that he had already killed a man, and that if he (Jarvis) killed her (Carter), she would be the third person he had killed. By his own admission, Jarvis had murdered a man in West Virginia, and while imprisoned for that homicide, he murdered a guard during a prison riot in 1973.

Carter stated that after Jarvis told her that the only way she could leave his apartment was to engage in fellatio, she submitted to his demand. She testified that Jarvis raped her vaginally again before permitting her to leave. She arrived at her home at approximately 7:00 p.m. and, according to Mrs. Napier's testimony, was emotionally distraught and tearful and refused to speak. Finally, as her cries came louder and louder, Karen told her grandmother that she had been raped. [*8] Police were summoned and they attempted to interview Karen Carter. Ultimately, she was taken to a hospital to undergo a physical examination, which, *inter alia*, revealed evidence of bruising to her inner labia and vaginal area.

In contrast, Jarvis testified that Carter had entered his home willingly, that they engaged in various forms of conduct he characterized as sexual foreplay without sexual penetration of any kind, and that she left without interference.

Trial to the jury began on October 9, 1997, and concluded with the verdicts the following day. Antecedently, the court had granted Jarvis's motion to have the prior-conviction specifications tried to it rather than to the jury.

We are given these six assignments of error through the counsel Jarvis has retained to replace the counsel he had retained to represent him at trial:

The trial court erred to the prejudice of Mr. Jarvis by admitting evidence of his prior murder convictions.

The trial court erred to the prejudice of Mr. Jarvis by failing to declare a mistrial or strike the testimony of Karen Carter, after the prosecutor gave Ms. Carter signals during her cross-examination.

The trial court erred to the prejudice [*9] of Mr. Jarvis by publishing Karen Carter's hospital records to the jury.

Mr. Jarvis was denied the effective assistance of counsel in violation of his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process.

The trial court erred to the prejudice of Mr. Jarvis by overruling his repeated requests for a new attorney.

The trial court erred resulting in prejudice to Mr. Jarvis when it imposed separate and consecutive sentences for the two counts of rape and attached specifications.

To support his first assignment, Jarvis submits that *Evid.R. 609(A)(2)* should have prevented the prosecution from adducing evidence of his prior convictions to impeach his testimony when the probative value of that evi-

dence was outweighed by the danger of unfair prejudice to him.

The prosecution argues that a trial court possesses a broad range of discretion within the rule when determining the admissibility of prior convictions for impeachment purposes, and that the following factors set forth in *State v. Goney (1993)*, 87 Ohio App. 3d 497, 501-502, 622 N.E.2d 688, 691, must be considered in that process:

(1) the nature of the crime, (2) recency of the prior conviction, [*10] (3) similarity between the crime for which there was a prior conviction and the crime charged, (4) importance of the defendant's testimony, and (5) centrality of the credibility issue. [Emphasis added.]

We emphasize the fifth component because in the context of this case the prime consideration for the jury was the credibility of Jarvis and, in tandem, Carter. The prosecution agrees that it bore the burden to demonstrate that the probative value of the evidence of prior convictions outweighed the arguable prejudicial effect of them upon the minds of the trier of fact.

As we see the record, the evidence of the previous convictions served a purpose beyond that contemplated by *Evid.R. 609*, i.e., to attack Jarvis's credibility alone. Here, such evidence bolstered Carter's credibility, i.e., the obverse of the purposes of the rule. As this record stands, the only way Carter could have known of Jarvis's past criminal behavior was to have heard of it from him. She testified that he had told her that he had killed twice, a statement Jarvis denied categorically having made. Clearly, the members of the jury were entitled to consider those diametrically opposed statements [*11] when deciding whether to believe Carter's accounts of the events of June 30, 1997, or those espoused by Jarvis.

We are convinced that the court fully and fairly resolved the question whether the state had maintained its burden and that the court did

not abuse its discretion in admitting the testimony touching upon the antecedent murders committed by Jarvis. ² Resultantly, the first assignment is without merit and is overruled.

2 The court properly instructed the jury:

There was evidence that the defendant was previously convicted of a crime. You may consider this evidence insofar as it may help you to determine the credibility of the defendant.

You may not consider it for any other purpose.

The second assignment of error, that the court improperly failed to declare a mistrial or to strike certain testimony, rests upon the assertion that the prosecutor "signalled answers to a mentally-challenged alleged rape victim [Carter]" and thereby restricted the cross-examination of her.

On the second day of trial, [*12] the court entertained argument, in the absence of the jury, on the motion for a mistrial that had been filed by defense counsel in writing that same morning. Counsel declared:

As grounds for this motion, the Defendant states that the actions of Hamilton County Assistant Prosecutor Chris McEvelley in signalling answers to the chief prosecuting witness during the Defendant's cross-examination of that witness were actions that constituted suborning perjury. In addition, those actions worked to restrict the right of the Defendant to cross-examine a principal witness against him.

In his argument, defense counsel expanded his written allegation by stating:

During the course of my cross-examination of that witness, I noticed several answers changed midstream. Based on that, I began to grow a little suspicious as to what was happening, and I began observing the prosecuting attorney at that time, and noticed a number of times [that she was] shaking her head no or

nodding yes prior to the defendant answering questions, and the - or prior to the prosecuting witness answering the questions, and each time the prosecuting witness' answer then corresponded with either the no or yes signal by [*13] the prosecutor.

In response, the prosecutor said:

Judge, when I was trying to prepare Karen Carter for cross-examination, and actually all of her family at the same time, I instructed Karen and the other members of her family to pause momentarily after the defense asks a question to give me the opportunity to object, and that if I did not object, to go ahead and answer the question.

Karen being, in her own words, a slow thinker, would pause, I noticed, and look to me as to whether or not she should answer the question, and not what the answers to the questions were. I never once shook my head no. I may have nodded yes, only to indicate to Karen that she could go ahead and answer the question, not that the answer to the question was yes. She is mentally challenged, we would submit, and she didn't understand when she was supposed to answer and how long she was supposed to wait. She was merely looking to me for encouragement. When the defendant pointed out that I was, in fact, nodding, which I really didn't realize I was doing, I, at that minute and then from then on through the rest of her testimony, made a conscious effort not to nod, even though Karen would at times stare at me [*14] for several seconds, simply waiting for encouragement to answer.

In *State v. Evans* (1992), 63 Ohio St. 3d 231, 240, 586 N.E.2d 1042, 1051, a case in which the appellant had been found guilty of a capital murder by a jury and sentenced to death, the court wrote in its rejection of the appellant's claim that the conduct of the prosecutor deprived him of a fair trial:

"In general terms, the conduct of a prosecuting attorney during trial cannot be made a

ground of error unless that conduct deprives the defendant of a fair trial. * * * " *State v. Maurer* (1984), 15 Ohio St. 3d 239, 266, 15 Ohio B. Rep. 379, 402, 473 N.E.2d 768, 793. See, also, *State v. Smith* (1984), 14 Ohio St. 3d 13, 14 Ohio B. Rep. 317, 470 N.E.2d 883.

However disarming may be the prosecutor's declarations of her motive in nodding her head toward Carter during her responses under cross-examination, we do not and cannot condone her technique. Such a device invites needless risks, both at trial and upon appeal. Still, our disapproval does not resolve the essential question whether Jarvis's substantial rights were affected prejudicially. That resolution demands a determination whether, as the supreme court noted in *State v. Evans*, [*15] *supra*, the record demonstrates that the outcome of the case clearly would have been different but for the conduct of the prosecutor.

There is nothing substantive in the record to indicate that any member of the jury observed the conduct of the prosecutor as described by defense counsel, or that the court, itself, saw anything out of the ordinary. From all that can be derived, the jury was unaffected and uninfluenced by any behavior on the floor or from the witness stand in response to it. The inquiry by the court into the matters broached by the motion for a mistrial was adequate to establish a factual basis upon which to proceed. The standard which we must apply in evaluating whether the court acted properly in denying the motion for a mistrial is whether there was an abuse of the sound discretion of the court. In *State v. Widner* (1981), 68 Ohio St. 2d 188, 190, 429 N.E.2d 1065, 1066, Chief Justice Celebrezze noted the reluctance of the United State Supreme Court to formulate precise, inflexible standards in evaluating whether a trial court has acted properly in ruling on a mistrial, and further indicated that deference should be given to the trial court's exercise of discretion [*16] in declaring mistrials by quoting the following language from *United States v. Perez*

(1824), 22 U.S. 579, 9 Wheat. 579, 580, 6 L. Ed. 165:

We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is *impossible to define all the circumstances*, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.

Finding no abuse of discretion evidenced by the record, we overrule the second assignment.

The third assignment questions the admission of the hospital records reflecting the examination of Carter on June 30, 1997, because, Jarvis argues, the prosecution failed to lay a proper foundation for their introduction.

When the exhibits in question were proffered to the court to be admitted, the prosecutor said:

We would offer State's Exhibits [*17] 1 and 2, which were testified about, and Exhibit 3, which is Karen Carter's University Hospital medical records, copies of which were provided to the defense. We'd ask that those be admitted under the rule that allows records in the ordinary course of business.

The only part of the hospital record which defense counsel elected to question and ultimately asked to have stricken was a reference to "PT [patient] who is mentally challenged," because no "expert" had made such a diagnosis.

In response, the prosecutor advised the court that she intended to call two doctors to testify with respect to Carter's mental limita-

tions, but had no objection to the "four words" to which counsel objected being redacted.

In its brief, the prosecution concedes that *Evid.R. 803(6)* required it to lay a foundation for the admission of the records and that they should have been authenticated as business records under *Evid.R. 901*. The basic authenticity of the records, however, was not challenged, and the reference to "mentally challenged" was redacted to obliterate that part of the exhibit before it reached the hands of the jury. That being so, we find neither an abuse of discretion by the court in receiving [*18] the exhibit as evidence to be submitted to the trier of fact, nor any form of prejudice to Jarvis. Therefore, we overrule the third assignment of error.

The fourth assignment of error, that Jarvis was denied effective assistance of counsel, is grounded on this proposition:

A defendant is denied effective assistance of counsel when his trial counsel does not: (1) investigate an insanity defense or evaluate defendant's competence to stand trial, (2) investigate the competency of the state's primary witness who is mentally retarded, (3) obtain pre-trial ruling on the admissibility of the defendant's prior murder convictions, and (4) inform the defendant that, if he testifies, his prior convictions could be used to impeach him.

Jarvis recognizes that the standard of review this court must apply in evaluating his claims of lack of effective assistance from his trial counsel is that established in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Therefore, Jarvis concedes that he must demonstrate that the representation afforded him upon trial was deficient because it fell below an objective standard of reasonableness, and, that in turn, it resulted [*19] in prejudice to him.

As we held in *State v. Kemp*, 1997 Ohio App. LEXIS 4766 (Oct. 31, 1997), Hamilton App. No. C-960478, unreported:

In *Lockhart v. Fretwell* (1993), 506 U.S. 364, 371, 113 S. Ct. 838, 843, 122 L. Ed. 2d 180, the United States Supreme Court held that a showing of prejudice does not depend solely on whether the outcome of the trial would have been different but for counsel's error. It is rather an inquiry into whether "counsel's performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Id.* at 371, 113 S. Ct. at 844. When reviewing trial counsel's performance, courts must indulge "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * * ." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. See, also, *State v. Bradley* (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373.

Jarvis's primary complaint is that his counsel upon trial failed to investigate or prepare a defense based upon insanity. The record shows that immediately after court was convened on October 9, 1997, his counsel said:

Your Honor, Mr. Jarvis has just informed me that he no longer wishes to retain me as counsel. He wishes to change [*20] his plea to that of not guilty by reason of insanity plea, and wishes to hire another attorney to represent him in this matter, hire alternate counsel.

After the court determined counsel had been retained rather than appointed, counsel continued:

Mr. Jarvis no longer believes that the defense that has been prepared over the last two months is what he wants to pursue. I'm clearly not ready to switch to NGRI in this situation, and if Mr. Jarvis wishes to hire alternate counsel, I will not stand in his way.

The prosecutor then informed the court of the somewhat halting progress of the case, the desire of the Carter-Napier family to go to trial on the date set months before, and the state of readiness of the prosecution to go forward, adding this:

It was my understanding that his prior attorney tried to file an NGRI defense and the defendant did not wish him to pursue that. Now, at the 11th hour, he is seeking to do that, and we would object and ask that we go forward with trial.

The court denied Jarvis's request for a continuance, saying, cryptically to us, "I would allow him to enter that plea and we will go forward with trial today." As far as the record stands, however, no plea [*21] of not guilty by reason of insanity was made and the defense proceeded instead on the theory that Jarvis neither knew nor had reason to know of Karen Carter's lack of ability to resist or consent to any sexual encounter.

At this juncture, we believe it appropriate to note that Jarvis has appended to his brief his personal affidavit detailing communications with his trial counsel about his mental condition and hospitalizations, and the affidavit of one of his current counsel in this appeal regarding communications with that same attorney. In law, these affidavits can be given neither credence nor effect because they are not properly part of the record. A reviewing court cannot add matter to the record that was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter. *State v. Ishmail (1978)*, 54 Ohio St. 2d 402, 377 N.E.2d 500.

The remaining particulars of the fourth assignment, viz., the competency of Carter, the admissibility of the convictions and their potential as evidence to impeach, do not serve to demonstrate professional conduct that did not satisfy an objective standard of reasonableness and that prejudiced Jarvis. The [*22] competency of Carter to testify as a witness, i.e., whether she had sufficient understanding to receive, remember and narrate impressions and comprehended the significance of the oath administered to her, was never challenged, nor, as we see the record, should it have been. Whatever may have been her handicap, it did not

disqualify her, *per se*, as a witness, although it arguably may have affected the credibility of her testimony. Counsel's cross-examination of Carter was aggressive, probing, extended and designed to afford the jury the basis for doubting the accuracy of her recollections of the events of June 30, 1997.

The fact of the previous convictions was, and could not be, questioned. Given the facts of this case, counsel for Jarvis was faced with an invidious choice: either to keep Jarvis off the stand, which would have then left the state's version of events as the more forceful evidence, or to have Jarvis testify to give the jury a basis upon which to conclude that he was unaware, directly or indirectly, of any inability of Carter to consent or resist sexual advances. When all is considered, we see no derelictions of duty toward Jarvis by defense counsel. Therefore, [*23] the fourth assignment is overruled.

The fifth assignment of error, which asserts that Jarvis was prejudiced by the court's refusal to permit him to discharge his retained counsel and to obtain a new one, dovetails to some degree with the fourth assignment. Jarvis argues that:

A defendant is denied his right to counsel and his right to a fair trial when the trial court denies the defendant's repeated requests for a new attorney, which are made due to obvious and prejudicial breakdowns in communications between current counsel and the defendant.

Jarvis, in support of his thesis, cites primarily *State v. Prater (1990)*, 71 Ohio App. 3d 78, 82, 593 N.E.2d 44, 46, in which the Court of Appeals for Franklin County cited the syllabus in *State v. Deal (1969)*, 17 Ohio St. 2d 17, 244 N.E.2d 742:

Where, during the course of his trial for a serious crime, an indigent accused questions the effectiveness and adequacy of assigned counsel, by stating that such counsel failed to file seasonably a notice of alibi or to subpoena witnesses in support thereof even though re-

requested to do so by [the] accused, it is the duty of the trial judge to inquire into the complaint and make such inquiry [*24] a part of the record. The trial judge may then require the trial to proceed with assigned counsel participating if the complaint is not substantiated or is unreasonable.

The precept with which we must begin our analysis of the merits of the fifth assignment is set forth in *State v. Pruitt* (1984), 18 Ohio App. 3d 50, 57, 480 N.E.2d 499, 507, quoting *United States v. Calabro* (C.A.2, 1972), 467 F.2d 973, 986:

In order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict, which leads to an apparently unjust verdict.

The court in *Calabro*, *supra*, 467 F.2d at 986, went on to give the appropriate standard of review to be applied in these words:

If a court refuses to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant, or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right. * * * In the absence of a conflict which presents such a Sixth Amendment problem, the trial court has [*25] discretion to decide whether to grant a continuance during the course of trial for the substitution of counsel, and that decision will be reversed only if the court has abused its discretion.

See, also, *State v. Grant* (1993), 67 Ohio St. 3d 465, 479, 620 N.E.2d 50, 67; *State v. Coleman* (1988), 37 Ohio St. 3d 286, 525 N.E.2d 792, certiorari denied (1988), 488 U.S. 900, 109 S. Ct. 250, 102 L. Ed. 2d 238.

In order to demonstrate that the court abused its discretion when it denied his re-

quests for the opportunity to retain new counsel, Jarvis must have shown with specificity that there existed no trust, communication or cooperation between his attorney and himself. *State v. Warren* (1990), 67 Ohio App. 3d 789, 798, 588 N.E.2d 905, 912; *State v. Walker* (1993), 90 Ohio App. 3d 352, 361-362, 629 N.E.2d 471, 477.

It must be said at the outset that the methodology employed below by the trial court in its disposition of Jarvis's "wishes" to change his plea and to hire another attorney is not a model to be followed by others and gives us little of substance from which to determine whether, in proceeding forthwith to trial, the court abused its discretion. What is clear from [*26] the record, however, is that Jarvis was mercurial, subject to mood swings, in his own words "paranoid," and prone to make rash, unfounded "accusations," had summarily discharged his original attorney, and had broached his dissatisfaction with his trial counsel through that individual himself without seeking or attempting to address the court personally only when the trial was imminent, *i.e.*, when the jury was about to enter the courtroom. From this record, it is possible to infer that the trial court saw Jarvis's wishes as nothing more than a last-minute ploy to avoid the inevitable trial and not bona fide, justifiable dissatisfaction.

Coupling all of this with our holding that Jarvis was not denied effective assistance of counsel, we hold that Jarvis failed to meet his burden to show good cause for a substitution of counsel, such as a complete breakdown in communication or an immediate conflict between himself and his chosen counsel which led to an unjust verdict. Resultantly, we hold that he has failed to convince us that there exists an abuse of discretion below, and his fifth assignment is overruled for that reason.

The sixth assignment of error, that the court erred by imposing [*27] consecutive sentences for the separate convictions for the rapes in their disparate forms, is not well taken and is

overruled. Upon the evidence which the jury was entitled to accept as credible, the two rapes were committed separately both spatially and temporarily. They were clearly committed under circumstances which bring the sentences within the ambit of *State v. Jones (1997)*, 78 Ohio St. 3d 12, 676 N.E.2d 80, which, as Jarvis concedes, is applicable. We decline his submission that *Jones* should be overruled.

Since none of the six assignments of error are well taken, the judgment of the Hamilton County Court of Common Pleas is affirmed.

Judgment affirmed.

HILDEBRANDT, P.J., DOAN and SHANNON, JJ.

RAYMOND E. SHANNON, retired, of the First Appellate District, sitting by assignment.