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IN THE SUPREME COURT OF OHIO

RAYMOND E. TAYLOR Appellant, vs. STATE OF OHIO, Appellee	:	Supreme Court Case No.: 11-0398 Court of Appeals Case No.: OT-09-018 Trial Court Case No.: 08-CR-092

Appeal from the Ottawa County Common Pleas and
The Sixth District Court of Appeals, County of Ottawa,
State of Ohio

STATE OF OHIO'S MEMORANDUM IN RESPONSE TO RAYMOND E. TAYLOR'S MEMORANDUM IN SUPPORT OF JURISDICTION

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THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSITUTIONAL QUESTION NOR IS IT A CASE PUBLIC OR GREAT GENERAL INTEREST

This case does not involve a substantial constitutional question nor is it a case of public or great general interest because this Court and Ohio courts of appeals have established considerable case law which controls the arguments set forth by Taylor in the instant memorandum in support of jurisdiction. The collective body of law as it stands today effectively and appropriately balances judicial economy and a prejudice or injustice suffered by a criminal defendant. Accordingly, this court should deny jurisdiction to hear the case.

STATEMENT OF THE FACTS

Beginning in 2002, when Katlin was nine, Taylor, Katlin's stepfather, first rapped her by placing his fingers in her vagina, conduct which occurred at least twice a week while she was nine. (Trial Transcript, Day One, Volume One at 173, ln. 19-25, 174, ln. 1-18, 177, ln. 3-25, 190, ln. 1-24.) Katlin testified that Taylor then started to perform cunnilingus on her and would make her "do stuff to him" such as "blow jobs" and "hand jobs," and this conduct also occurred at least twice a week. (*Id.* at 176, ln. 4-8, 177, ln. 3-25.) Taylor began playing pornography for Katlin while they lived in Port Clinton. (*Id.* at 179-180.) During this time, Katlin testified "every once in a while [Taylor] would try to see if his penis could fit inside of me." (*Id.* at 181, ln. 6-9.)

Early during the abuse, Katlin testified Taylor made her pose for nude photos, which Taylor kept in a black microphone box. (*Id.* at 204, ln. 18-19.) Katlin also identified State's Exhibit 29, a magazine of sex toys and clothes labeled "PABO," which Taylor told her to look though and pick something out, but nothing came of it. (*Id.* at 218, ln. 4-10.) Katlin further testified Taylor showed her the DVD, also labeled PABO. (*Id,* ln. 16-17.) Katlin identified

over a dozen nude pictures of Taylor with his genitals exposed, identifying a particular picture of Taylor with his penis exposed, wearing just a hat and holding a guitar, which she said she randomly chose from a stack of photos Taylor instructed her to take and hide somewhere for the purpose of "use[ing]...anytime I masturbated so I would think of him." (*Id.* at 197, ln 2-3.) Katlin stated she "put it in the book and left it there," and it so remained until Katlin instructed her mother to retrieve it and turn it over to authorities. (*Id.* at 197, ln. 9-16.)

According to Katlin, when Taylor felt she was ready he bought condoms and "put his penis inside of me." (Bench Trial Transcript, Day Two, Volume Two, at 184, ln 23-4, 347.) During this time Taylor would play the movies while having actual sex with Katlin. (*Id.* at 212, ln. 1-18.) Katlin testified that Taylor would put the condom on and take it off, and when he was done he "put it in a paper towel in the kitchen trash hidden under stuff so nobody would see it." (Bench Trial Transcript, Day One, Volume One, at 193, ln. 19-20.) Taylor and his wife did not use condoms during their sexual relations, as she had a tubal legation. (Bench Trial Transcript, Day Two, Volume Two, at 253, ln. 2-3, and 335, ln. 7). Katlin's mother testified that around Christmas of 2007 she discovered what she believed looked like semen on Katlin's comforter. (*Id.* at 347, ln. 15-16.) Katlin testified that at one point she and Taylor counted the condoms and by that time there were only 40-43 left, out of a box of 100 brand named condoms, which Detective Amy Harrell of the Ottawa County Sheriff's Office later discovered was a brand that could be ordered in quantities of 100. (Bench Trial Transcript, Day One, Volume One at 186, ln. 16-17, and 558, ln. 8-13.) At that point, Katlin testified Taylor said, "that we are going to have to get more soon," at which point Katlin thought, "I can't live with this much longer." (*Id.* at 186, ln. 23-4.)

Vince Brimmer, a classmate of Katlin's testified that Katlin told him about the abuse on the bus, and the school principal was made aware of the abuse. (*Id.* at 164, ln. 2-9, 166, ln 5-10.) Janet testified that while at work she received a call from Children's Services regarding allegations that Taylor had sexually abused Katlin. (Bench Trial Transcript, Day Two, Volume Two at 355, ln. 3-5.) Deputy Sheriff James Haney of the Ottawa County Sheriff's Office testified that on April 15, 2008, he assisted with executing the search warrant of Taylor's house. (*Id.* at 455, ln. 5-11.) The search warrant team recovered a Polaroid camera, nude photographs of Taylor and Janet, the PABO DVD, the PABO adult toy catalogue and the VHS tape, pornography from Taylor's bottom dresser drawer. (*Id.* at 513, ln. 14-25, 514, ln. 1-24.) Haney testified that they took the garbage to search through the trashcan, and found a condom stuck to a paper towel. (*Id.* at 518, ln. 6-7.)

Jennifer Akbar, a forensic scientist at BCI performed the DNA analysis on the condom. According to Akbar, the DNA profile from the inside of the condom resulted in a single DNA profile consistent with Taylor, and the swab from the outside of the condom was consistent with that of only Katlin and Taylor. (*Id.* at 439, ln. 21-25, 440, ln. 1-2.) Dr. Schlievert, Director of the Child Abuse Program at Mercy Children's Hospital and the Director of the Pediatric Residency Training Program since 2001, concluded Katlin had been sexually abused based on her whole story. (*Id.* at 286, ln. 12-23.) Mary Kay Baumgartner, a forensic psychologist, concluded Katlin had been sexually abused based on the collective signs she exhibited. (*Id.* at 319, ln. 24-25, 320, ln. 1-4.)

Everything Katlin told police would be in the house was found, except by the time the search warrant was executed the supply of unused condoms and naked pictures of Katlin, the only items Taylor would have been unable to explain, were gone. (Bench Trial Transcript,

Day Three, Volume Three at 566, ln. 8-9.) According to Detective Amy Harrell of the Ottawa County Sheriff's Office, the likely reason for which this evidence was not found was that Taylor was able to destroy the evidence after he was inadvertently tipped off when his wife learned of the investigation and confronted him before the search warrant was executed. (Bench Trial Transcript, Day Two, Volume Two at 486-87.) Taylor attempted to explain the spent condom in the trash by stating he had sex with a vacuum cleaner saleswoman on April 10, 2008, whom he originally met at Vanguard High School during a week and a half period in 1990. (*Id.* at 626-30.) Taylor conceded he has never tried to locate this phantom woman who could possibly corroborate his story. (*Id.* at 631, ln. 6-9.)

STATEMENT OF THE CASE

Taylor, "Appellant," was found guilty by a jury of ten counts of disseminating mater harmful to a minor, in violation of R.C. 2907.31 and was sentenced to 18 months in prison for each fourth degree felony and 12 months in prison for each fifth degree felony, with sentences to be served consecutive to each other. Appellant was also found guilty of eight counts of rape in violation of R.C. 2907.02(A)(1)(b), and was sentenced to the mandatory life sentences for each conviction, with sentences to be served consecutive with the fourth and fifth degree felony convictions. Appellant was also found guilty on four counts of rape in violation of R.C. 2907.02(A)(2), and was sentenced to ten years for each conviction, with sentences to be run consecutive with all other sentences. Appellant was additionally found guilty of fifty-nine counts of sexual battery, in violation of R.C. 2907.03, and was sentenced to ten years for each conviction, with sentences to be served consecutive will all other sentences.

Appellant appealed his convictions to the Sixth Appellate District Court and the judgment of the Ottawa County Court of Common Pleas was affirmed and reversed in part

with respect to all maximum sentences imposed pursuant to 2929.14(c) and remanded solely for the purpose of re-sentencing on all convictions but the mandatory life sentences. *State v. Taylor* (Jan. 28, 2011), Ottawa App. No. OT-09-018, unreported, 18.

Appellant now requests this Court's jurisdiction to consider the merits.

ARGUMENT IN RESPONSE TO THE PROPOSITIONS OF LAW

Proposition of Law: Appellant's due process and double jeopardy rights were violated because he was convicted on indictments that were insufficient and defective because they included "carbon copy" offenses, differing only with respect to the date ranges of the alleged offenses.

Response to the Proposition of Law: The indictments were not insufficient or defective, as they tracked statutory language and did not affect the outcome of trial.

Whether the indictments were insufficient or defective are not issues warranting this Court's jurisdiction because the indictments tracked "pertinent" statutory language and any insufficiency or defect did not affect the outcome of the trial. *Taylor* at 7. "Defenses and objections based on defects in the indictment must be raised prior to trial." *Id.* at pg. 6, referencing, Crim. R. 12(H) and citing *State v. Foust*, 105 Ohio St.3d 137, 2004 Ohio 7006, 823 N.E.2d 836. "Any claim of error in the indictment in a case where the defendant failed to raise the alleged defects prior to trial is limited to a plain error review on appeal." *Id.*, citing, *State v. Frazier* (1995), 73 Ohio St.3d 323, 332, 1995 Ohio 235, 652 N.E.2d 1000. "Plain or obvious error occurs when it affects the outcome of a trial." *Id.*, citing, Crim. R. 52(B); *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 2002 Ohio 68, 759 N.E.2d 1240. "An indictment is sufficient if the language used in that indictment tracks the language of the statute that a defendant is alleged to have violated." *Id.* at 7, *State v. Landrum* (1990), 53 Ohio St.3d 107, 119, 559 N.E.2d 710.

In his memorandum, Appellant alleges the indictments were insufficient and defective because they were "carbon copies," differing only with respect to date ranges. (Appellant Brief at 4.) Appellant did not raise any objection to the indictment prior to trial nor did he request a bill of particulars at trial, and there was specific evidence that Appellant sexually abused the victim (e.g., DNA evidence, expert testimony, mother being away from work, school delays, etc.). *Taylor* at 7. Therefore, the indictments were not defective or insufficient so as to warrant this Court's jurisdiction, as the indictments sufficiently tracked pertinent statutory language and any errors did not affect the outcome of the trial.

> Proposition of Law: Appellant's 6th and 14th Amendment rights were violated and the rape shield act misapplied when Appellant was prevented from cross examining Victim or introducing extrinsic evidence of Victim's alleged prior false accusations of sexual abuse.
>
> Response to the Proposition of Law: Appellant's rights were not violated and the rape shield act not misapplied, as the trial court's granting of the State's Motion in Limine was not an abuse of discretion.

The trial court's grant of the State's motion in limine does not warrant this Court's jurisdiction, as the trial court's decision was not an abuse of discretion. The trial court's decision on a motion in limine is reviewed under the abuse of discretion standard. *Taylor* at 8, citing *State v. Graham* (1979), 58 Ohio St.2d 350, 12 Ohio Op. 3d 317, 390 N.E.2d 805. A finding of abuse of discretion "requires a finding that the trial court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable." *Taylor* at 8, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

In his memorandum, Appellant agues the trial court prevented him from introducing two reports made in 1994 and 1995 to the Sandusky County Department of Job and Family Services, which were allegedly made by Victim and were false. (Appellant Brief at 5.) But Appellant never produced evidence of these investigations, even after the trial judge granted

the State's motion in limine stating, "if the Defendant is able to provide evidence of a social service agency report that contains false allegations, the Court would be compelled to reconsider its ruling on the State's motion in limine." *Taylor* at 8. Therefore, the Sixth Appellate District Court's affirmation of the trial court's grant of the State's motion in limine, which found no abuse of discretion, does not warrant this Court's jurisdiction, as Appellant was afforded an opportunity to present evidence substantiating his argument but failed to do so.

> Proposition of Law: Appellant's U.S. and Ohio constitutional rights to a fair trial and due process were violated due to prosecutorial misconduct.
>
> Response to the Proposition of Law: The prosecutor's actions did not rise to misconduct depriving Appellant of his rights to a fair trial and due process.

The prosecutor did not commit misconduct to the point where Appellant was deprived of a fair trial. "In deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a court determines if the prosecutor's actions were improper, and, if so, whether the defendant's substantial rights were actually prejudiced." *Taylor* at pg. 10, citing, *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883, 14 Ohio B. Rep. 317. "...[A] jury verdict can be reversed for prosecutorial misconduct only in that circumstance where it deprives the defendant of a fair trial." *Id.*, citing, *State v. Carter* (1995), 72 Ohio St.3d 545, 557, 1995 Ohio 104, 651 N.E.2d 965.

In his memorandum, Appellant specifically argues prosecutorial misconduct occurred during voir dire, in questioning expert witnesses and during closing arguments. According to Appellant, the prosecutor committed misconduct when he pointed to an article during voir dire saying, "oh my god, big article...," but Appellant's allegation is taken out of context, as the article was referenced in voir dire in an effort to explain to potential jurors not to consider

evidence extrinsic to that offered at trial. (Appellant Brief at 5.) *Taylor* at 10. Appellant also alleges misconduct occurred when the prosecutor questioned experts on redirect, but this questioning was not outside the scope of redirect. (Appellant Brief at 5.) *Taylor* at 14. Finally, Appellant argues the prosecutor committed misconduct in closing by improperly stating Dr. Schlievert testified the victim had been sexually abused and that the DNA from the outside of the condom could not be from someone else, by reminding jurors to fill out all verdict forms, by stating the police could have lied about dropping the condom in the trash after it was retrieved but didn't, and by asking the jury if they would let Appellant baby sit their children. (Appellant Brief at 5,6.) But, all of these statements with the exception of the last were substantiated by evidence produced at trial. *Taylor* at 15. Therefore, this Court's jurisdiction is not warranted on the issue of prosecutorial misconduct because Appellant was not deprived of his right to a fair trial as a result of the prosecutor's conduct.

> Proposition of Law: Appellant's conviction violated the U.S. and Ohio Constitutions because it was against the manifest weight of the evidence and was not supported by the sufficiency of the evidence.
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> Response to the Proposition of Law: Appellant's conviction was not against the manifest weight of the evidence as, based on the entire record, there is no evidence the jury clearly lost its way and created such a miscarriage of justice that Appellant's conviction must be reversed.

Appellant's conviction does not warrant this Court's jurisdiction because Appellant's conviction was not against the manifest weight of the evidence. "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *Taylor* at 15, citing, *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 1997-Ohio-52. "'The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime proven beyond a reasonable doubt.'" *Id.* at 15, citing *State v. Jenks* (1991), 61 Ohio St.3d 259 as stated in paragraph two of the syllabus, 574 N.E.2d 492, following *Jackson v. Virginia* (1979), 443 U.S. 307. "In determining whether a conviction is against the manifest weight of the evidence, a reviewing court examines the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 'whether in resolving the conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 20 Ohio B. Rep. 215. Furthermore, the reviewing court's power "to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. *Martin* at 175.

In his memorandum, Appellant argues his conviction was against the manifest weight of the evidence for various reasons, including (1) the state failed to provide specific and sufficient evidence, (2) the victim admitted to having access to pornographic material, (3) Dr. Schlievert's physical exam did not support a finding of sexual abuse, and (4) the condom was improper evidence for various reasons. (Appellant Brief at 6,7.) But, for all of these allegations the Sixth District Court of Appeals found "based upon the evidence offered at trial...sufficient believable evidence was offered to prove, beyond a reasonable doubt, that appellant committed the offenses set fourth in the indictment." *Taylor* at 16. Further, "upon reviewing all the evidence adduced in this cause and in consideration of the credibility of the witnesses, we cannot say that the jury clearly lost its way and created a miscarriage of justice..." *Id.* Therefore, Appellant's conviction was not against the manifest weight of evidence so as to warrant this Court's jurisdiction because, although there may have been

some evidence weighing against a conviction, sufficient believable evidence was offered at trial to prove Appellant's guilt beyond a reasonable doubt to such an extent that the jury did not clearly lose its way.

> Proposition of Law: Appellant's sentence was contrary to law and also violated the 6th Amendment to the U.S. Constitution because maximum sentences were consecutively imposed.
>
> Response to the Proposition of Law: Appellant's sentence was not contrary to law because maximum sentences were consecutively imposed, but was properly reversed by the Sixth District Appellate Court with respect to those sentences rendered pursuant to the provisions of R.C. 2929.14(C).

Appellant's sentences were only contrary to law with respect to those sentences rendered per R.C. 2929.14(C), but still leave this Court without jurisdiction because the Sixth Appellate District Court properly reversed and remanded these sentences to the trial court. In *State v. Foster*, the Ohio Supreme Court "found portions of Ohio's sentencing scheme unconstitutional and severed those provisions from the sentencing statute...one of these provisions was R.C. 2929.14(C)..." *Taylor* at 17, citing *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470. In his memorandum, Appellant argues his sentence was "clearly and convincingly contrary to law...[and] void." (Appellant Brief at 8.) The Sixth Appellate District Court of Appeals properly recognized and remanded those sentences rendered by the trial court per 2929.14(C), which did not include those sentences imposing mandatory life sentences. Therefore, Appellant's sentences do not warrant this Court's jurisdiction, as those sentences rendered under 2929.14(c) were properly reversed and remanded to the trial court.

Proposition of Law: Trial Counsel rendered ineffective assistance of counsel in violation of the U.S. and Ohio Constitutions.

Response to the Proposition of Law: Trial Counsel did not render ineffective assistance of counsel in violation of the U.S. and Ohio Constitutions, as Appellant does not present how absent any error by his counsel the result of trial would have been different.

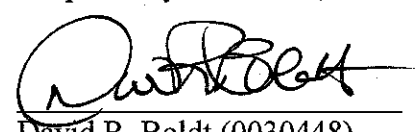
The issue of ineffective assistance of counsel does not warrant this Court's jurisdiction because Appellant does not allege errors so serious that trial counsel was not functioning, or that these errors deprived Appellant of a fair trial. To prove ineffective assistance of counsel, Appellant must show "(1) deficient performance, that is 'errors so serious that counsel was not functioning as counsel' and (2) prejudice; specifically, 'errors...so serious as to deprive [appellant] of a fair trial, a trial whose result is reliable.'" *Taylor* at 17, citing *Strickland v. Washington* (1984), 446 U.S. 668, 68.

In his memorandum, Appellant alleges his trial counsel was ineffective because (1) the prosecutor moved for more experienced counsel, (2) counsel did not ask the victim about her prior false allegations, (3) counsel failed to challenge certain jurors for cause, and (4) counsel did not object to the State's questioning in certain instances. (Appellant Brief at 8.) But, Appellant's allegations merely focus on trial strategy, and do not rise to such serious errors so as to deprive Appellant of a fair trial. Furthermore, as noted by the Ohio Sixth District Court of Appeals Appellant does not demonstrate how absent any errors the result of the trial would have been different. *Taylor* at 18. Therefore, the issue of ineffective assistance of counsel does not warrant this Court's jurisdiction, as any errors by Appellant's counsel did not rise to the level of depriving Appellant of a fair trial.

CONCLUSION

This Court should deny Appellant jurisdiction to hear the case because this case does not involve a substantial constitutional question, is not a case of public or great general interest, and significant case law controls the argument's set forth by Appellant. Specifically, for the aforementioned reasons this Court should deny jurisdiction to hear Appellant's assignments of error.

Respectfully Submitted,



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PROOF OF SERVICE

This is to certify that the foregoing was sent by Regular U.S. mail this 5th day of April, 2011 to Keith O'Korn, 440 Polaris Parkway, Suite 150, Westerville, Ohio 43082 and to the Defendant, Raymond E. Taylor, #570862,Lebanon Correctional Institution, P.O. Box 56, 3791 State Route 63, Lebanon, OH 45036 and Tim Young, Director, Ohio Public Defendant's Office, 8 E. Long Street, 11th Floor, Columbus, Ohio, 43215.

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