

IN THE SUPREME COURT OF OHIO

State of Ohio,

Appellee

vs.

Denarea Swain,

Appellant

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S. Ct. Case No. 14-1049

C.A. Case Nos. E-11-087; E-11-088

C.P. Case Nos. 2010-CR-282
2011-CR-174

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APPEAL FROM THE SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO

MEMORANDUM IN OPPOSITION OF JURISDICTION

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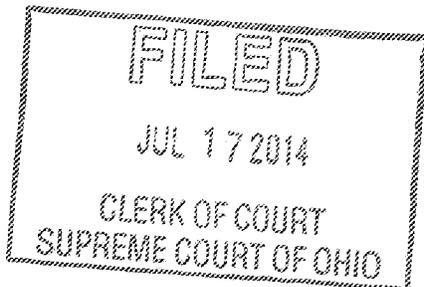
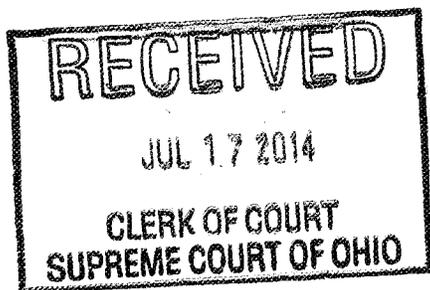


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Authorities Cited in Support of Propositions of Law

Ohio Rules of Appellate Procedure, Rule 26

Strickland v. Washington (1984), 466 U.S. 668, 687

State v. Were, 120 Ohio St. 3d 85, 2008-Ohio-5277

State v. Mitchell, 2012-Ohio-5262, 2012 Ohio App. LEXIS 4601, (Ohio App. 6 Dist.)

State v. Williams, 2013 Ohio App. LEXIS 2241, 2013-Ohio-2314, (Ohio App. 7 Dist.)

State v. Lott (1990), 51 Ohio St.3d 160.

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Authorities Cited in Support of Propositions of Law

State v. Jones (2000), 91 Ohio St.3d 335, 342.

Wheat v. United States (1988), 486 U.S. 153

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Authorities Cited in Support of Propositions of Law

State v. Jones (2001), 91 Ohio St.3d 335

Blakemore v. Blakemore, (1983) 5 Ohio St. 3d 217

State v. Unger (1981), 67 Ohio St. 2d 65

State v. Christian, 2014-Ohio-2590, 2014 Ohio App. LEXIS 2540,
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State v. Adams, 2012-Ohio- 5979, 2012 Ohio App. LEXIS 5149,
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State v. Sedlak, 2011-Ohio-970, 2011 Ohio App. LEXIS 761
(Ohio App. 11 Dist)

Ohio Rev. Code Ann §2945.72

State v. Fisher, 2012-Ohio-6144. 2012 Ohio App. LEXIS 5310,
(Ohio App. 4 Dist.).

State v. Swain, Case Nos. E-11-087, E-11-088,
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**PROPOSITION OF LAW NO. SIX: A FOUR-PART BALANCING TEST
IS TO BE APPLIED ON AN AD HOC BASIS IN DETERIMING
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FOR THE DELAY, DEFENDANT’S ASSERTION OF HIS RIGHT AND
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Authorities Cited in Support of Propositions of Law

Cleveland v. White, 2013 Ohio App. LEXIS 5665, 2013-Ohio-5423,
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WHY LEAVE TO APPEAL SHOULD BE DENIED.

Appellant has failed to demonstrate in his Memorandum in Support of Jurisdiction that this case involves a substantial constitutional question or is one of public or great general interest. The Sixth District Court of Appeals properly denied Appellant's motion to reopen his direct appeal. The court found that Appellant failed to establish a "colorable claim of ineffective assistance of counsel on appeal as required by Rule 26 of the Ohio Rules of Appellate Procedure.

By reviewing the record, the Sixth District determined that the trial court's decision to allow Attorney Kirwan to withdraw in Case No. 2010-CR-282 was not structural error or that Appellant was prejudiced by the decision. The record demonstrates that the trial court allowed Attorney Kirwan to withdraw, for good cause in that Attorney Kirwan was to testify at the grand jury against appellant. Attorney Kirwan was allowed to withdraw after the trial court ascertained that Appellant qualified for appointed counsel and on the condition that the Public Defender would appoint counsel. The Public Defender's Office did provide representation for Appellant in Case No. 2010-CR-282. In Case No. 2011-CR-174, appellant was represented by retained counsel, Attorney Riddle. The record was void in that Appellant never moved the trial court to allow Attorney Riddle to represent Appellant at trial in Case No. 2010-CR-282, nor did Attorney Riddle file a notice of appearance in Case No. 2010-CR-282 nor offer to represent Appellant in both cases. Thus, the trial court properly appointed counsel because Appellant was not represented by counsel in Case No. 2010-CR-282.

The Sixth District Court of Appeals properly found that the trial court did not abuse its discretion in granting a continuance of the trial. The Sixth District, after reviewing the record, noted that a motion to continue the trial was filed on April 22, 2011. The basis for the motion was that Attorney Kirwan was withdrawing as counsel because Attorney Kirwan may become a

witness against Appellant. Further, Appellee represented that the Appellee's critical witness was being uncooperative and unavailable. Appellee required time to secure the witness' appearance. Consequently, the continuance was not a benevolent continuance to further Appellee's efforts in bringing more charges against Appellant. Therefore, Appellant's appellate counsel was not deficient for failing to raise the issue of the continuance on the direct appeal as there was no reasonable probability of success had the issue been raised in the direct appeal.

The Sixth District Court of Appeals properly denied the reopening of the appeal on the grounds of speedy trial violations. The court noted that Appellant did not raise the statutory right to speedy trial pursuant to Ohio Rev. Code §2945.71(C)(2), but did argue **Barker v. Wingo** (1972), 407 U.S. 514. The Sixth District properly applied the four-part balancing test as set forth in **Barker** to the facts of the case at bar: "Length of delay, the reason for delay, the defendant's assertion of his right and prejudice to the defendant." **Id.** at 530.

The court found that the delay of the case was seven months. The reasons for the continuance was that Attorney Kirwan withdrew as counsel and Appellee's difficulty is securing a critical witness. The court further noted that the Appellee did indicate that obstruction of justice and witness tampering charges could be brought; however, no such charges were charged. Also, Appellant never asserted his right to a speedy trial. Consequently, Appellant failed to demonstrate actual prejudice due to the continuance and appellate counsel was not ineffective for failing to raise the issue of speedy trial or that there was a probability of success had the issue been raised.

STATEMENT OF THE CASE

On or about August 9, 2010, Appellant, Denaria L. Swain, was indicted by the Erie County Grand Jury in a Seven Count indictment in Case No. 2010-CR-282.

On November 8, 2010, Appellant was arraigned on Case No. 2010-CR-282, and a probable cause hearing was held in Case No 2006-CR-750, whereby Appellant was on community control. The court noted that Appellant had been assigned Robert Dixon as defense attorney. However, Appellant had retained private counsel by the name of Shondra Longino.

A pretrial was scheduled on November 29, 2010, in Case No. 2010-CR-282. Appellant's retained counsel failed to appear. The trial court indicated that it had been informed that Attorney Longino was no longer attorney of record and that Attorney Robert Dixon was present and had been appointed by the Public Defender's Office. In regards to the Case No. 2006-CR-750, probation violation case, the court indicated to Appellant that the case was going to be scheduled for December 13, 2010, for a hearing, whether Appellant has Attorney Dixon, retained counsel, or if he has no counsel, Appellant would be representing himself at the probation violation hearing. Appellant then filed for a continuance.

Appellant subsequently retained Attorney Kirwan. Attorney Kirwan filed a Motion to Continue the December 13, 2010, pretrial on behalf of Appellant, which motion was granted. On January 24, 2011, another pretrial was held. At this pretrial, the court set another pretrial for March 21, 2011, a final pretrial on April 18, 2011, and a jury trial date of April 26, 2011 on Case No. 2010-CR-282.

On March 18, 2011, Appellant filed a Motion to Suppress with the trial court. An evidentiary hearing on said motion was conducted on April 14, 2011, in which the trial court denied Appellant's Motion to Suppress. A final plea was held on the scheduled date of April 18, 2011. Appellee indicated to the court that Appellee would be moving to continue the trial because Appellee had been made aware of facts relating to obstruction of justice and intimidation of witnesses in the case.

On April 22, 2011, Appellee moved to continue the trial for the reason that “a.) counsel for defendant has advised the State that he is withdrawing as counsel in so far as he may be called as a witness in this matter; and b.) a critical State witness has been uncooperative and unavailable since her witness statement has been provided to the defense and the State needs additional time to secure her appearance.” As indicated by its judgment entry filed April 26, 2011, the trial court granted Appellee’s Motion to Continue.

On May 11, 2011, Attorney Kirwan filed a Motion to Withdraw as counsel. On May 16, 2011, the trial court held Attorney Kirwan’s Motion to Withdraw in abeyance until a new attorney appeared on Appellant’s behalf. On June 22, 2011, the trial court granted defense counsel’s Motion to Withdraw based on the fact that the Public Defender’s Office agreed to represent Appellant.

On or about May 12, 2011, Appellant was indicted by the Erie County Grand Jury in a Three Count indictment in Case No. 2011-CR-174. Appellant was charged with one count of Engaging in a Pattern of Corrupt Activities, with 13 specified predicate offenses; one count of Participating in a Criminal Gang; and one count of Preparation of Marijuana for Sale. The indictment also contained a firearm specification. **See Indictment filed May 12, 2011.**

On June 27, 2011, a pretrial was held on Case No. 2011-CR-174. Appellant was represented by retained counsel, Attorney Riddle. The Court advised Appellant that, as to Case No. 2010-CR-282, Scott Ballou was assigned by the Public Defender to represent Appellant. There was no objection by Appellant or Attorney Riddle as to Scott Ballou representing Appellant.

The cases were consolidated and proceeded to a jury trial held on November 1, 2, 3, 4, 7, 8, and 9, 2011. At the conclusion of the trial, the jury found Appellant Guilty of two counts of

Having a Weapon While Under Disability, one count of Preparation of Crack Cocaine for Sale, one count of Possession of Crack Cocaine, one count of Engaging in a Pattern of Corrupt Activity, one count of Participating in a Criminal Gang, with a firearm specification, and one count of Preparation of Marijuana for Sale. Appellant was found Not Guilty on all remaining counts found in both indictments.

Appellant was sentenced to a total of 25 years in prison, \$10,000 in fines, and a two year driver's license suspension. Appellant subsequently filed a Notice of Appeal in the Sixth District Court of Appeals. The Sixth District affirmed the judgment of the trial court by entry and decision filed December 30, 2013. See State v Swain, 2013-Ohio-5900, 2013 Ohio App. LEXIS 6212, (Ohio App. 6 Dist.), **discretionary appeal not allowed** 138 Ohio St. 3d 1496, 2014-Ohio-2021.

Appellant filed a motion to reopen the direct appeal of his conviction on March 13, 2014, in the Sixth District Court of Appeal. The Sixth District found that Appellant failed to establish a "colorable claim of ineffective assistance of counsel on appeal" as required by Rule 26 of the Ohio Rules of Appellate Procedure (hereinafter "App.R") , and accordingly denied appellant's motion to reopen. State v. Swain, Case Nos. E-11-087, E-11-088, decision and judgment filed May 8, 2014.

Appellant filed a Notice of Appeal and Jurisdictional Memorandum in the Ohio Supreme Court on the decision of the Sixth District Court of Appeals filed May 8, 2014.

STATEMENT OF THE FACTS

On November 29, 2006, Sergeant Lewis of the Sandusky Police Department had obtained information that there was a warrant for Appellant from the University of Toledo Police Department, stemming from a concealed carry charge. Sergeant Lewis and his partner, Detective

Austin, observed Appellant on Hayes Avenue. Upon making contact with Appellant, Detective Austin advised Appellant he was under arrest. Appellant broke away from Detective Austin and began reaching for something in his waistband. The officers tackled Appellant and located a loaded handgun inside Appellant's waistband. Sergeant Lewis also recovered a black bandana from Appellant's person. Sergeant Lewis was aware that these black bandanas represented members of the criminal gang, Black Point Mafia (hereinafter "BPM"). Appellant stated that he "should have shot [them]" and began lunging at the officers. Appellant was subsequently convicted of two counts of Intimidation and Carrying a Concealed Weapon.

On February 21, 2010, Officer Figula of the Elyria Police Department was on patrol in the downtown area of Elyria when he heard gunshots to the west of him. Officer Figula noticed a red Cadillac leaving the parking lot. The Cadillac was subsequently stopped. In the car were Appellant and four other occupants known to be members of BPM. Officer Figula began searching the area and discovered a semi-automatic pistol and a revolver pistol. On the ground, near the Cadillac, a black bandana was also found. Gunshot residue tests were conducted on all five occupants, including Appellant. The tests came back positive. As a result of the shooting, two individuals had been shot and taken to local hospitals.

On June 12, 2010, the Sandusky Police Department received complaints that there had been shots fired in the 900 block of Hancock Street. Evelyn Irby (hereinafter "Irby") stated that on the night of the shooting, she witnessed Appellant shooting a handgun on Hancock Street.

On July 30, 2010, based on their investigation, the Sandusky Police Department obtained a search warrant to search for weapons in Appellant's home. During the execution of the search warrant, a handgun was found in the cushions of the couch, wrapped in a black bandana. Sergeant Graybill located an orange Sunkist bottle that looked as though it could hide weapons.

The bottle was found to have a hidden compartment which housed what looked to be crack cocaine. When the police continued their search, based on a new search warrant, further items were found: A shirt which contained Appellant's name and the acronym BPM, a digital scale, several photographs, and mail from documented gang members.

Appellant subsequently went into hiding. In order to locate Appellant, a pen register was issued on Appellant's phone. Appellant was located in a friend's home and was taken into custody. Based on the observations of marijuana made during the arrest, a search warrant was then prepared. As a result of that warrant, officers recovered 31 small plastic baggies, 29 of which contained marijuana.

BPM was first brought to the attention of the Sandusky Police Department as early as 2001, when the high schools began having problems with the gang. The group began with simple assaults perpetrated upon other high school students. Over the years, the crimes grew more serious. BPM eventually adopted the color black as their trademark. Some gang members have gone so far as tattooing "BPM" on their bodies, with Appellant being one. Along with Appellant, many of the members of the gang have serious criminal backgrounds.

ARGUMENT

PROPOSITION OF LAW NO. ONE: AN APPLICATION FOR REOPENING AN APPEAL SHALL NOT BE GRANTED IF AN APPLICANT FAILS TO DEMONSTRATE A GENUINE ISSUE AS TO WHETHER THE APPLICANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANT OF COUNSEL ON APPEAL. App.R. 26(B)(5)

A. STANDARD FOR REOPENING

The Ohio Rules of Appellate Procedure, Rule 26(B) (hereinafter "App.R.") allows for a defendant in a criminal case to apply for a reopening of their appeal based on ineffective assistance of appellate counsel. "An application for reopening shall be granted if there is a

genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.” App.R. 26(B)(5). The two-pronged analysis set forth in Strickland v. Washington (1984), 466 U.S. 668, 687, is the appropriate standard to be applied when determining whether a defendant has received ineffective assistance of appellate counsel. State v. Were, 120 Ohio St. 3d 85, 2008-Ohio-5277, ¶10. Thus, “In order to show ineffective assistance, appellant ‘must prove that his counsel was deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal.’” Id. at ¶11.

Deficient performance has been defined as performance that falls “below an objective standard of reasonable representation or assistance ‘under prevailing professional norms.’” Strickland at 688. ‘Prejudice,’ in this context, is defined as errors by appellate counsel that were so serious there is a reasonable probability that, but for the errors, the result of the appeal would have been different. Id. at 687-688, 694,” State v. Mitchell, 2012-Ohio-5262, 2012 Ohio App. LEXIS 4601, ¶6 (Ohio App. 6 Dist.). In order for an appeal to be reopened, Appellant bears the burden to demonstrate a genuine issue as to whether Appellant has a “colorable claim” of ineffective assistance of appellate counsel. State v. Williams, 2013 Ohio App. LEXIS 2241, 2013-Ohio-2314, ¶4 (Ohio App. 7 Dist.). Under Ohio law, a properly licensed attorney is presumed competent at both the trial and appellate levels. Id., citing State v. Lott (1990), 51 Ohio St.3d 160.

In the case at bar, the Sixth District Court of Appeals properly applied that standard set forth in Strickland, Mitchell, and Willaims, when denying Appellant’s motion to reopen

PROPOSITION OF LAW NO. TWO: THE SIXTH AMENDMENT PROVIDES THAT IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE. AN ELEMENT OF THIS RIGHT OF A DEFENDANT, WHO DOES NOT REQUIRE APPOINTED COUNSEL, IS TO CHOOSE AND RETAIN WHO WILL REPRESENT HIM. THE SIXTH AMENDMENT GUARANTEES A DEFENDANT THE RIGHT TO BE

REPRESENTED BY AN OTHERWISE QUALIFIED ATTORNEY WHOM THAT DEFENDANT CAN AFFORD TO HIRE, OR WHO IS WILLING TO REPRESENT THE DEFENDANT, EVEN THOUGH HE IS WITHOUT FUNDS. TO BE SURE, THE RIGHT TO OF CHOICE IS CIRCUMSCRIBED IN SEVERAL IMPORTANT RESPECTS.
United States v. Gonzalez-Lopez (2006), 548 U.S. 140, Headnote One.

PROPOSITION OF LAW NO. THREE: WHERE A DEFENDANT CHARGED WITH A SERIOUS OFFENSE IS UNABLE TO OBTAIN COUNSEL, COUNSEL SHALL BE ASSIGNED TO REPRESENT HIM AT EVERY STAGE OF THE PROCEEDINGS FROM HIS INITIAL APPEARANCE BEFORE A COURT THROUGH APPEAL AS OF RIGHT, UNLESS DEFENDANT, AFTER BEING FULLY ADVISED OF HIS RIGHT TO ASSIGNED COUNSEL, KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVES HIS RIGHT TO COUNSEL. Crim. R. 44(A)

Appellate counsel was not ineffective for failing to challenge the trial court's appointment of counsel. Appellant incorrectly argues that the trial court erroneously deprived Appellant from counsel of his of choice by allowing Attorney Jack Kirwan to withdraw as counsel of record on the condition that the Public Defender represent him on Case No. 2010-CR-282, even though he had retained counsel on the 2011-CR-174 case.

It must be noted that "a defendant only has a presumptive right to employ counsel of his own choosing." **State v. Jones** (2000), 91 Ohio St.3d 335, 342. "While the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate...rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." **Id.**, citing **Wheat v. United States** (1988), 486 U.S. 153, 159. "The right to counsel of choice does not extend to defendants who require counsel to be appointed for them." **State v. Cobb**, 2014-Ohio-1923, 2014 Ohio App. LEXIS 1871, Headnote 8 (Ohio App. 9 Dist.). Also, the decision as to the substitution of counsel is within the sound discretion of the trial court and should not be disturbed absent an abuse of discretion. **State v. Watson**, 2014-Ohio-2839, 2014 Ohio App. LEXIS 2779, ¶19 (Ohio App. 6 Dist.).

In the case at bar, Attorney Kirwan moved to withdraw as counsel of record on May 11, 2011. On June 22, 2011, the trial court granted that motion on the condition that the Public Defender's office accepted representation. Appellant properly filled out the application for appointed counsel. The reason for granting the motion was because Attorney Kirwan testified before a Grand Jury in the matter involving Appellant and could be called as a witness against Appellant. Consequently, in the interests of justice, removal of Attorney Kirwan as counsel of record was appropriate and in no way erroneously deprived Appellant from counsel of his choosing.

Appellant seems to suggest that assignment of counsel on Case No. 2010-CR-282, when he was presently represented by Attorney Riddle on Case No. 2011-CR-174, was inappropriate and erroneously deprived Appellant of counsel of his choosing. However, there is nothing in the record to suggest that Appellant asked to be represented by Attorney Riddle in Case No. 2010-CR-282. Attorney Riddle did not move to be appointed nor did she file a notice of appearance indicating that she was willing to represent Appellant. Appellant also did not object to assignment of counsel from the Public Defender's Office. In fact, Appellant filled out an application to the Public Defender's Office, seeking representation. **See Judgment Entry filed June 22, 2011.** As such, Appellant can point to no part of the record in which he was erroneously deprived defense counsel of his choosing.

Appellant has failed to demonstrate that had appellate counsel raised this issue on appeal that there would be a reasonable probability of success. Therefore, Appellant has failed demonstrate a genuine issue showing that appellate counsel's failure to raise said issue rendered appellate counsel ineffective.

PROPOSITION OF LAW NO. FOUR: THE GRANTING OR DENYING OF A CONTINUANCE IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

PROPOSITION OF LAW NO. FIVE: WHEN CONSIDERING A MOTION FOR A CONTINUANCE OF A TRIAL, THE TRIAL COURT IS REQUIRED TO CONSIDER THE LENGTH OF THE DELAY; WHETHER OTHER CONTINUANCES HAVE BEEN REQUESTED; THE INCONVENIENCE TO THE PARTIES, WITNESSES, OPPOSING COUNSEL AND THE COURT; WHETHER THE REQUESTED DELAY IS FOR LEGITIMATE REASONS OR WHETHER IT IS DILATORY, PURPOSEFUL OR CONTRIVED; WHETHER DEFENDANT CONTRIBUTED TO THE CIRCUMSTANCE WHICH GIVES RISE TO THE REQUEST; AND OTHER RELEVANT FACTORS, DEPENDING ON THE UNIQUE FACTS OF EACH CASE. State v. Unger (1981), 67 Ohio St. 2d 65

“The grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.” State v. Jones (2001), 91 Ohio St.3d 335, 342.

“The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” Blakemore v. Blakemore, (1983) 5 Ohio St. 3d 217, 219. When evaluating a motion for a continuance the trial court should take into consideration, depending on the facts of the case, the following:

[T]he 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.

State v. Unger (1981), 67 Ohio St. 2d 65, 67-68.

In the case at bar, on April 22, 2011, Appellee moved to continue the scheduled jury trial for the reasons that “a.) counsel for defendant has advised the State that he is withdrawing as counsel in so far as he may be called as a witness in this matter; and b.) a critical State witness has been uncooperative and unavailable since her witness statement has been provided to the defense and the State needs additional time to secure her appearance.” **See Motion to Continue filed April 22, 2011.** Furthermore, at the final pretrial held April 18, 2011, Appellee also

indicated to the trial court that Appellee would be moving for a continuance because Appellee believed that there had been intimidation of witnesses in the instant case, and Appellee intended on investigating the allegations and seeking indictments on those matters as well. As indicated by its judgment entry filed April 26, 2011, the trial court granted Appellee's Motion to Continue for the reasons stated in Appellee's Motion.

The record demonstrates that Appellee's Motion to Continue was not limited to just seeking "obstruction" and "intimidation" charges on Appellant. A critical witness for Appellee was unavailable to Appellee at the time. The unavailability of a State's witness is considered a reasonable basis for a continuance and will toll the speedy trial time. State v. Christian, 2014-Ohio-2590, 2014 Ohio App. LEXIS 2540 (Ohio App. 7 Dist.); State v. Adams, 2012-Ohio-5979, 2012 Ohio App. LEXIS 5149, (Ohio App. 7 Dist.); State v. Sedlak, 2011-Ohio-970, 2011 Ohio App. LEXIS 761 (Ohio App. 11 Dist). Furthermore, and probably more troubling, Appellant's trial counsel had indicated to Appellee that he would be withdrawing as Appellant's counsel of record. "O.R.C. 2945.72(C) provides that time for trial may be extended in the circumstance wherein an accused is without counsel as follows: any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law." State v. Fisher, 2012-Ohio-6144. 2012 Ohio App. LEXIS 5310, Headnote 9 (Ohio App. 4 Dist.).

While each of these reasons would have been sufficient to justify the grant of a continuance, the latter would have been detrimental to Appellant had a continuance not been granted. The trial court determined that these reasons were legitimate, and a continuance was in the best interests of justice.

The Sixth District properly found that the trial court did not abuse its discretion in granting the continuance and that appellate counsel was not deficient for failing to raise this issue on appeal. There was no demonstration that there was a reasonable probability of success on appeal had the issue been raised. The court found that the trial court's judgment entry stated that "while it was reluctant to delay a schedule jury trial, the state's reasons for requesting a continuance made such an action necessary 'in order to ensure that the Defendant's rights are protected and Interests of Justice are being served.' An additional specification was added to the indictment in Case No. 2010-CR-282 in May 2011, and attorney Kirwan was allowed to withdraw as counsel on June 22, 2011, after which the jury trial was continued until such time as new counsel could be appointed." Swain, Case Nos. E-11-087, E-11-088, decision and judgment filed May 8, 2014 at 8-9.

Therefore, the record demonstrates that the trial court did not abuse its discretion in granting the continuance. Ergo, appellate counsel was not ineffective for failing to raise this issue.

PROPOSITION OF LAW NO. SIX: A FOUR-PART BALANCING TEST IS TO BE APPLIED ON AN AD HOC BASIS IN DETERMINING WHETHER A DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY HAS BEEN VIOLATED: LENGTH OF DELAY, THE REASON FOR THE DELAY, DEFENDANT'S ASSERTION OF HIS RIGHT AND PREJUDICE TO DEFENDANT. Barker v. Wingo (1972), 407 U.S. 517.

No issues existed as to the issue of speedy trial in the case at bar. Therefore, Appellate counsel was not ineffective for failing to raise a speedy trial issue.

The Sixth Amendment to the United States Constitution grants the accused in a criminal case with the right to a speedy trial. "In determining whether an accused was denied the right to a speedy trial as guaranteed by the Sixth Amendment, the court must consider four factors: (1) length of delay, (2) reason for the delay, (3) the accused's assertion of his right, and (4) prejudice

to the accused.” **Cleveland v. White**, 2013 Ohio App. LEXIS 5665, 2013-Ohio-5423, ¶11 (Ohio App. 8 Dist.), citing **Barker v. Wingo**, 407 U.S. 514, 530 (1972).

It must first be noted that Appellant never objected to said continuance on speedy trial grounds. The focus of Appellant’s instant argument, instead, rests on his assertion that the sole reason that Appellee moved to continue the jury trial date, and the Court granting it, was to add more charges against Appellant. However, there were multiple reasons that led to the continuance of the April 26, 2011 jury trial; reason being that Appellant’s trial counsel had advised Appellee that he would be moving to withdraw as counsel of record, and one of the Appellee’s trial witnesses was being uncooperative and Appellee needed more time to secure her appearance. There was nothing improper about the trial court’s decision to grant Appellee’s Motion to Continue the trial.

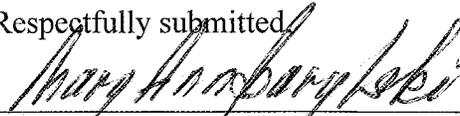
It should also be noted that in order to protect a defendant’s right to a speedy trial as found in the Sixth Amendment of the United States, Ohio has codified said protections as found in O.R.C. §2945.71. Under said statute, a person accused of a felony must be brought to trial within two-hundred and seventy (270) days of arrest. O.R.C. §2945.71(C)(2). However, under certain circumstances, time will be tolled when computing speedy trial under the statutory provisions; such as motions for continuances filed by a defendant. O.R.C. §2945.72(H). Furthermore, time may be tolled upon a defendant’s filing of a Motion to Suppress and the time it takes the trial court to rule on said motion. **State v. Conner**, 2010-Ohio-6500, 2010 Ohio App. LEXIS 5453, ¶33 (Ohio App. 6 Dist.) Appellant filed multiple motions to continue as well as a motion to suppress, which effectively tolled the statutory speedy trial time. As the Sixth District Court of Appeals recognized, Appellant did not raise a violation of his statutory speedy trial time, but argues “unjustifiable delay” under **Barker**.

When balancing the factors set forth in Barker, Appellant's rights were not violated. There was a length of delay of seven months due to Appellee's continuance. However, Appellant's counsel was permitted to withdraw and new counsel needed to be appointed because there was no representation that retained counsel, Attorney Riddle, was going to represent Appellant in Case No 2010-CR-282, or that Attorney Riddle even wanted to represent Appellant. Therefore, new counsel needed to be appointed. Furthermore, as the Court of Appeals recognized at no time did Appellant assert his right to speedy trial. Even though Appellant asserts that the motion to continue was not usual or proper, Appellant has failed to demonstrate actual prejudice requiring a finding that appellate counsel was ineffective and the direct appeal should have been reopened.

CONCLUSION

Appellant has failed to demonstrate in his Memorandum in Support of Jurisdiction that this case involves a substantial constitutional question or is one of public or great general interest. The Sixth District Court of Appeals properly denied Appellant's motion to reopen his direct appeal. The court found that Appellant failed to establish a "colorable claim of ineffective assistance of counsel on appeal as required by App. R. 26. Therefore, Appellee respectfully moves this Honorable Court to deny Appellant jurisdiction and to dismiss this appeal.

Respectfully submitted,

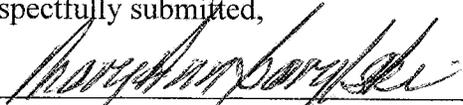


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CERTIFICATION

I certify that a copy of the Memorandum in Opposition to Jurisdiction was mailed to Attorney for Appellee, Geoffrey L. Oglesby, 618 W. Washington Street, Sandusky, Ohio 44870 this _____, July, 2014 by US regular mail.

Respectfully submitted,



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