

NO. 2015-1184

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IN THE SUPREME COURT OF OHIO

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STATE OF OHIO

Plaintiff-Appellant

vs.

MICHAEL LOUIS MARNEROS

Defendant-Appellee

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**MEMORANDUM IN RESPONSE AND IN SUPPORT OF CROSS APPEAL**

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APPELLANT’S PROPOSITION OF LAW NO. I: When a defendant moves a trial court to withdraw a guilty plea prior to sentencing, the defendant must be afforded counsel for the purpose of making that argument; if trial counsel fails to argue in this regard, the defendant is denied the effective assistance of counsel

APPELLANT’S PROPOSITION OF LAW NO. II: In determining whether to allow a defendant to withdraw a guilty prior to sentencing, a trial court should consider nine facts: “ (1) whether the prosecution would be prejudice if the plea were vacated; (2) whether the offender was represented by highly competent counsel; (3) the extent of the Crim.R.11 hearing; (4) whether there was a full hearing on the motion to withdraw the offender’s guilty plea; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the motion was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused understood the nature of the charges and possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime.” [quoting *State v. Zimmermann*, 10th Dist. No. 09AP-866, 2010-Ohio-4087, 2010 WL 3405746]

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**I. Appellant Does not Raise a Substantial Constitutional Question or Matter of Great General Interest with Respect to Appellant's Propositions of Law**

Appellant has raised three propositions of law. This Court should decline to accept all three propositions of law.

Appellant essentially argues the following points in his memorandum: that (1) the trial court abused its discretion in denying his motion to withdraw plea; (2) that Appellant's counsel was ineffective for not providing more support of Appellant's motion to withdraw plea; and (3) Appellant was denied his right to allocution at sentencing.

Law established by this Court firmly resolves each of these issues. For reasons more fully developed in the remainder of this memorandum: (1) the trial court did not abuse its discretion in denying Appellant's motion because Appellant did not raise any arguments that required the trial court to grant his motion; (2) Appellant's counsel was not ineffective when he did not provide more support for the motion to withdraw because the motion lacked merit and Appellant had failed to articulate grounds that his counsel should have raised at sentencing; and (3) the facts in this case demonstrate that Appellant exercise his right of allocutions.

Moreover, the principles of laws in resolving each of these three issues are well-settled. Appellant has failed to present grounds to further consider the rules of law governing his case. As such, this Court should decline to accept this appeal.

**II. Cross Appellee's Propositions of Law Raise a Substantial Constitutional Question and Concern Matters of Great General Interest.**

This Court recently held that compliance with R.C. 2929.14(C)(4) requires the trial court to make the statutory findings as part of the sentencing hearing. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. In *State v. Marneros*, 8th Dist. Nos. 101872 and 101873, 2015-Ohio-2156, the Eighth District placed strict requirements upon when a trial court

makes a finding that consecutive sentences are not disproportionate to the seriousness of an offender's conduct and the danger that offender poses to the public. The State submits those the requirements enacted by the Eighth District in this case exceed those required by this Court. In particular, in *Marneros*, a consecutive sentence was vacated because the trial court did not use the exact statutory language provided in R.C. 2929.14.

The requirement in *Marneros* that a trial court use exact statutory language contradicts the recent precedent established by this Court. "A word-for-word recitation of the language of the statute is not required. As long as the reviewing court can discern that the trial court engage in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell* at ¶ 29. The Eighth District Court of Appeals, however, vacated a sentence and remanded it when the trial court engaged in the correct analysis supported by evidence, but used the phrase "does not adequately reflect" instead of the phrase "is disproportionate to." These phrases are the functional equivalent of each other, and can be used interchangeably to arrive at the same meaning. Therefore, the Eighth District Court of Appeals wrongfully vacated and remanded Defendant-Appellant Michael Marneros's consecutive sentence when it found that the trial court failed to address the proportionality of consecutive sentences to the seriousness of Marneros conduct and the danger he posed to the public. *State v. Marneros*, 8th Dist. No. 101872, and 101873, 2015-Ohio-2156

This case goes beyond mere error correction because it presents a clear opportunity for this Court to clear up any confusion regarding the language required when a trial court issues consecutive sentences. Although this Court has stated in *Bonnell* that the language does not have to be a word-for-word recitation, the Eighth District has seemingly required a word-for-word recitation by vacating Marneros's sentence and remanding in this case.

This case raises a matter of great general interest because it will tremendously impact consecutive sentences issued by trial courts. In any criminal case involving multiple convictions, a judge can consider whether the requirements of R.C. 2929.14 are met for the purpose of imposing consecutive sentences. The State submits that in cases such as this, where a trial court states the functional equivalent of a required factual finding under R.C. 2929.14, the imposition of consecutive sentences should be affirmed on appeal. Therefore, this case is important to provide clarity to trial courts, defense attorneys, and prosecutors, in terms of what specifically a trial court needs to state on the record to impose a consecutive sentence. In cases where a trial court engages in the correct analysis and considers the relevant statutory findings under R.C. 2929.14, consecutive are properly imposed. This is not only an issue that requires clarifying the law, this a matter of judicial economy. It is an inefficient use of the court's time and resources when it engages in the proper analysis by considering the appropriate statutory factors, yet later the court finds that the sentence is remanded on appeal so that the trial court can again impose consecutive sentences using the exact words required by statute.

### **III. Statement of the Case and Facts**

#### **A. Facts Relevant to Cross Appellee's Memorandum in Response**

In CR-583992, Appellant was charged with receiving stolen property, a felony of the fourth degree, and failure to comply with an order or signal of a police officer. (Tr. 3). In CR-584351, Appellant was charged with two counts of theft, one count of stolen property and seven counts of forgery.

On July 1, 2014, the State of Ohio placed the plea offer on the record; however, Appellant, at that time, decline to accept the plea offer made by the State of Ohio. With trial quickly approaching and due to the victim being elderly with medical problems, the State of Ohio indicated

that the plea offer would no longer be available. Later that day, however, Appellant changed his mind and indicated that he wished to plead guilty in accordance with the plea offer made by the State of Ohio. Prior to the plea, Appellant indicated that he was satisfied with the performance of this attorney. (Tr. 14).

Appellant pled guilty in CR-583992 to Receiving Stolen Property, a felony of the fourth degree, and Attempted Failure to Comply, a felony of the fifth degree. (Tr. 18). In CR-584351, Appellant pled guilty to theft, a felony of the third degree, and forgery, a felony of the fourth degree. (Tr. 18 – 19). Appellant was ordered to pay restitution to both Leonora Glenn, in the amount of \$728.39 and Charter One Bank in the amount of \$7,685. Sentencing was set for July 29, 2014 at 9:00 a.m. Counsel requested that the court order a TASC assessment to be performed due to Appellant’s drug use; however, the court noted that it did not believe the TASC assessment would make any difference as to Appellant’s sentence. (Tr. 20).

Sentencing proceeded on August 4, 2014. The court inquired of counsel if there was anything he would like to know about his client. (Tr. 23 – 24). Counsel specifically stated: “Your Honor, I’ll be brief, *because my client asked me not to address the Court, because he has something prepared that he wants to read to the Court . . .*” (Tr. 24) (emphasis added). Counsel further indicated that the court had not prepared a TASC assessment as he had requested, but he was not going to address the court further because Appellant wanted to *take the full time for himself*. (Tr. 24) (Emphasis added).

Appellant then advised the court that he had been reading from Exhibit A, Senate Bill 86, which, to him, indicated that the Court must allow and accept a guilty plea of a defendant’s request to participate in an intervention in lieu of conviction program, pursuant to R.C. 2951.041. Appellant then advised the court of his alleged mental health and substance abuse issues and

declared that his counsel “violated [his] organic right of the constitution of the State of Ohio, Article 1 and 16, which states redress for injury.” (Tr. 26). Appellant continued to make faulty legal arguments regarding his due process, the sufficiency of the indictment, and his eligibility for intervention in lieu of conviction. (Tr. 26 – 28). Ultimately, he declared, “I retract my plea. I wish to take my plea back. I’m not guilty. I make my plea of not guilty.” (Tr. 28). Appellant indicated his reasons for withdrawing his guilty plea, beyond those just stated, were that he should be on the mental health case load and that he should have been placed in intervention in lieu of conviction.

Appellant indicated to the court that his counsel advised him that he was not eligible for intervention in lieu of conviction on July 23, 2014. (Tr. 27). Further, the Court told him that, with his prior criminal history, “no Judge in America would put him on treatment in lieu of conviction.” (Tr. 29). Appellant acknowledged that he had been to prison multiple times in the past and that he had never been eligible for treatment in the past. (Tr. 29). Ultimately, the court denied Appellant’s motion to withdraw his guilty plea. (Tr. 29 – 30).

The Court then proceeded to sentence Appellant. In CR-583992, he was sentenced to 18 months imprisonment for Receiving Stolen Property and 12 months for the Attempted Failure to Comply. In CR-584351, he received a 36 month sentence for theft and a 12 month sentence for forgery. Throughout the record, the court noted Appellant’s substantial criminal history. (Passim). The court indicated, “given [Appellant’s] prior criminal history and the harm in this case done to a 71-year old woman, I find the harm was so great or unusual that a single term does not adequately reflect the seriousness of [Appellant’s] conduct, and clearly [Appellant’s] criminal history shows that consecutive terms are need to protect the public.” All counts were run consecutively with the exception of the forgery count that was ordered to be served concurrently to the theft count.

Appellant's convictions were affirmed in the Eighth District Court of Appeals. However, his case was remanded based on claims of allied offenses of similar import and a claim that the trial court failed to make the appropriate findings to impose consecutive sentences. Appellant now challenges his convictions on appeal.

### **B. Facts Relevant to Cross Appellee's Memorandum in Support**

The Eighth District Court of Appeals found that the trial court did not engage in the appropriate analysis to impose consecutive sentences pursuant to R.C. 2929.14 (C)(4) when it used the phrase "does not adequately reflect" instead of "is disproportionate to" when addressing the proportionality of consecutive sentences. *State v. Marneros*, 8th Dist. No. 101872 and 101873, 2015-Ohio-2156, ¶ 36. Although the Eighth District Court of Appeals vacated Defendant-Appellant Michael Marneros's consecutive sentences and remanded the matter to the trial court for resentencing, the record clearly shows that the trial court engaged in the appropriate analysis and consider the proportionality finding when it stated, "a single term *does not adequately reflect* the seriousness of your conduct, and clearly your criminal history shows that consecutive terms are needed to protect the public." (Sentencing Tr. 33 -34) (Emphasis added). The proportionality finding was made because "does not adequately reflect" is the functional equivalent of "is disproportionate to."

This appeal involves two criminal cases. In CR-583992, Defendant-Appellant Michael Marneros was charged with receiving stolen property, a felony of the fourth degree, and failure to comply with an order or signal of a police officer. (Tr. 3). In CR-584351, he was charged with two counts of theft, one count of receiving stolen property and seven counts of forgery.

On July 1, 2014, the State of Ohio placed the plea offer on the record. However, appellant, at that time, declined to accept the plea offer made by the State of Ohio. With trial quickly

approaching and due to the victim being elderly with medical problems, the State of Ohio indicated that the plea offer would no longer be available. Later that day, however, appellant changed his mind and indicated that he wished to plead guilty in accordance with the plea offer made by the State of Ohio.

Appellant pled guilty in CR-583992, to receiving Stolen Property, a felony of the fourth degree, and Attempted Failure to Comply, a felony of the fifth degree. (Tr. 18). In CR-584351, appellant pled guilty to theft, a felony of the third degree, and forgery, a felony of the fourth degree. (Tr. 18-19). Appellant was ordered to pay restitution to both Leonora Glenn, in the amount of \$728.39, and Charter One Bank, in the amount of \$7,685.

At sentencing, appellant was sentenced in CR-583992 to 18 months imprisonment for Receiving Stolen Property and 12 months for the Attempted Failure to Comply; the sentences for these convictions were ordered to be served concurrently. In CR-584351, he received a 36-month sentence for theft and a 12-month sentence for forgery. The sentences in CR-538922 and CR-584351 were ordered to be served consecutively.

Prior to imposing consecutive sentences, the trial court noted appellant’s substantial criminal history. More importantly, the record is clear that the court conducted a thorough analysis that encompassed all of the findings specified in R.C. 2929.14(C)(4):

	<b>Required Finding</b>	<b>Authority</b>	<b>Finding by the Trial Court</b>
	The consecutive sentence is necessary to protect the public from future crime	R.C. 2929.14(C)(4)	“You continue to take advantage of people, and that’s why the law has created such a thing as consecutive time. It is necessary to protect the public and punish the offender.” (Tr. 32)
OR	The consecutive sentence is necessary to punish the offender	R.C. 2929.14(C)(4)	The trial court found that consecutive time is necessary to protect the public and punish the offender. (Tr. 32).

AND	That consecutive sentences are not disproportionate to the seriousness of the offender’s conduct	R.C. 2929.14(C)(4)	<p>The trial court stated, “given your prior criminal history and the harm in this case one to a 71-year old woman, I find the harm was so great or unusual that a single term does not adequately reflect the seriousness of your conduct.” (Tr. 33-34).</p> <p><b>and</b></p> <p>Both cases involve a 71-year old, elderly victim. (Tr. 30). The court noted the harm done to a 71-year old woman. (Tr. 33).</p>
AND	The consecutive sentences are not disproportionate to the danger the offender poses to the public	R.C. 2929.14(C)(4)	<p>The trial court stated, “given your prior criminal history and the harm in this case one to a 71-year old woman, I find the harm was so great or unusual that a single term does not adequately reflect the seriousness of your conduct.” (Tr. 33-34).</p> <p><b>and</b></p> <p>The trial court stated, “clearly your criminal history shows that consecutive terms are needed to protect the public. It’s not a question of, if you commit another crime. It’s only a question of when, and that’s why I’m imposing consecutive sentences.” (Tr. 35).</p>
AND (a), (b), OR (C)	The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender’s conduct.	R.C. 2929.14(C)(4)(b)	<p>The trial court stated, “given your prior criminal history and the harm in this case one to a 71-year old woman, I find the harm was so great or unusual that a single term does not adequately reflect the seriousness of your conduct.” (Tr. 33-34).</p>
AND (a), (b), OR (C)	The offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.	R.C. 2929.14(C)(4)(c)	<p>The Trial court extensively reviewed Appellant’s criminal history, dating back to 1991 in Melbourne, Fl. (Tr. 31). The two cases for which Appellant was convicted were at least his eighth and ninth felony criminal convictions in Cuyahoga County, convictions that include offenses of violence. (Tr. 31). The court noted that the Appellant was no stranger to the criminal justice system. (Tr. 32). Additionally, the court noted that “consecutive terms are needed to protect the public.” (Tr. 34).</p>

Accordingly, the trial court ordered both sentences to run consecutively, for a total period of incarceration of four and one-half years. On appeal, the Eighth District reversed after finding that the trial court did not consider whether the sentence was disproportionate to the danger the offender poses to the public and the seriousness of the offender's conduct.

#### **IV. Law and Argument**

**CROSS APPELLEE'S PROPOSITION OF LAW NO. 1:** A sentencing court satisfies the requirements for imposing consecutive sentences pursuant to R.C. 2929.14(C)(4) when the reviewing court can substitute the prescribed language of R.C. 2929.14(C)(4) with a functional equivalent.

Appellant Michael Louis Marneros argued that the trial court erred in imposing consecutive sentences because the trial court failed to address whether consecutive sentences were proportional to the seriousness of his conduct and the danger he poses to the public. On appeal, the Eighth District Court of Appeals agreed with appellant's argument. Nevertheless, the record clearly shows that the trial court considered and made the proportionality finding at sentencing. The State asks this Court to accept jurisdiction of this appeal in order to clarify what language is required when issuing a consecutive sentence.

This Court has already held that a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659. A reviewing court should always find compliance with R.C.2929.14(C)(4) when functionally equivalent language is used because although the words may be different, such words

demonstrate that the trial court engaged in the appropriate analysis and considered the appropriate findings in imposing consecutive sentences.

For instance, consider if the trial court had instead used the phrase “is not disproportionate to” in place of the phrase “does not adequately reflect”:

Given your prior criminal history and the harm in this case done to a 71 year old woman, I find the harm was so great or unusual that a single term is **disproportionate to** the seriousness of your conduct, and clearly your criminal history shows that consecutive terms are needed to protect the public.

Here, although the word “disproportionate” is absent from the sentencing proceedings in this case, it is clear that the trial court considered whether consecutive sentences would be proportionate to the sentence imposed in this case and concluded that they were proportional based on (1) “the harm in this case done to a 71 year old woman” and (2) clear “criminal history [that] shows that consecutive terms are needed to protect the public.”

Further, Ohio’s jurisprudence has consistently held that “magic words” are not necessary in order to comply with sentencing statutes. While a trial court must articulate its analysis verbally at the sentencing hearing<sup>1</sup>, the focus should be on the substance of the trial court’s analysis, not on the precise words it uses. Accordingly, a trial court makes a valid finding when its statements are functionally equivalent to the statutory language. Courts have repeatedly held that a trial court need not recite any “magic” or “talismanic” words when imposing consecutive sentences. *See State v. Davis*, 8th Dist. No 97689, 97691, and 97692, 2012-Ohio-3951, ¶ 8; *State v. Gus*, 8th Dist. No. 85591, 2005-Ohio-6717, ¶30 (“We do not require the court to use ‘magic words’ for imposing consecutive sentences, but it must be clear from the context that the court’s statements were intended to encompass the relevant provisions of the sentencing statutes.”); *State v. Beard*, 8th Dist. Nos. 84779, 84780, 2005-Ohio-3417, ¶5; *State v. Ames*, 6th Dist. No. L-02-1358, 2003-Ohio-

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<sup>1</sup> *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, ¶ 12.

6369, ¶ 20 (citing *State v. Kelly*, 145 Ohio St.3d 277 (2001)); *State v. White*, 135 Ohio App.3d 481, 486 (1999).

If magic words are not necessary in order to comply with sentencing statutes, then using functionally equivalent words or phrases should almost always satisfy the requirements of R.C. 2929.14 (C)(4). Therefore, the State asks that this Court accept jurisdiction of this matter to clarify the application of *Bonnell*.

**CROSS APPELLEE’S PROPOSITION OF LAW NO. 2:** A single statement made during a sentencing hearing can satisfy more than one of the findings required by R.C. 2929.14(E)(4) for imposing consecutive sentences.

The State submits that a single statement can satisfy more than one statutory finding. R.C. 2929.14 does not require that each finding for imposing consecutive sentences be supported by separate statements. Additionally, there is no requirement under case precedent that requires separate statutory findings to be supported by separate statements. To the contrary, there is persuasive authority that indicates that there is some inherent overlap in the statutory findings. For instance, the Seventh District has previously addressed the significant overlap in several of the findings in R.C. 2929.14(C)(4):

In some sense, the findings required by R.C. 2929.14(E)(4) overlap with the others are redundant. For example, if the court finds that “consecutive sentences are necessary to protect the public from future crime by the offender,” then it has also necessarily found that consecutive sentences are “necessary to protect the public from future crime or to punish the offender.” The statute lists these as two separate findings, when one finding clearly encompasses the other.

There is also significant overlap between the finding that “consecutive sentences are not disproportionate to seriousness of the offender’s conduct” and the finding that “no single prison term . . . adequately reflects the seriousness of the offender’s conduct.”

*State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, ¶ 80.

In *Moore*, the Seventh District recognized the overlap between the proportionality finding and the finding that “no single prison term . . . adequately reflects the seriousness of the offender’s

conduct.” It follows that under some circumstances, a court that satisfies one of these factual findings may also satisfy the other. Here, the trial court stated “a single term *does not adequately reflect* the seriousness of your conduct, and clearly your criminal history shows that consecutive terms are needed to protect the public.” (Sentencing Tr. 33 -34) (Emphasis added). The State submits that in a case such as this, the trial court has also satisfied the proportionality requirement.

**APPELLANT’S PROPOSITION OF LAW NO. I:** When a defendant moves a trial court to withdraw a guilty plea prior to sentencing, the defendant must be afforded counsel for the purpose of making that argument; if trial counsel fails to argue in this regard, the defendant is denied the effective assistance of counsel.

This Court should reject Appellant’s first proposition of law.

As an initial matter, Appellant’s first proposition of law is simply too broad and does not accurately fit the facts of this case. Appellant is asking that this Court find that a defendant suffers ineffective assistance of counsel any time a defendant moves the court to withdraw a plea yet counsel does not speak on defendant’s behalf. In a case where a defendant has a meritorious argument that his counsel fails to raise, then counsel is ineffective. However, in a case such as this, where it is unclear what counsel could have argued on behalf of a defendant, this Court should not create a presumption that defense counsel was ineffective. Counsel may have determined that Appellant was simply having a change of heart to enter his plea based on his expected sentence, however this Court has already held that such an argument by itself is insufficient a reason to grant a presentence motion to withdraw a plea. *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 178.

Appellant’s counsel was in the best position to know whether Appellant had valid grounds to move for a withdrawal of plea. Therefore, it is also possible that counsel refrained from arguing on Appellant’s behalf because counsel was aware that Appellant lacked valid grounds to withdraw the plea beyond a mere change of a heart. In such a scenario, counsel’s decision to refrain from supporting the motion to withdraw may have been strategy. Counsel could have decided that the

court was likely to deny a request to withdraw a plea without a valid basis. When evaluating a claim of ineffective assistance of counsel, there is a presumption that an attorney executes his duty in an ethical and competent manner. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). Furthermore, trial strategies do not constitute a denial of effective assistance of counsel. *State v. Clayton*, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980). However, debatable strategic and tactical decision may not form the basis of a claim for ineffective assistance of counsel, even if, hindsight, it looks as if a better strategy had been available. *State v. Cook*, 65 Ohio St.3d 516, 524, 605 N.E.2d 70 (1992). For this reason, this Court should not grant jurisdiction based on Appellant's allegation that his trial counsel was ineffective for failing to speak on behalf of Appellant when he moved to withdraw.

Moreover, the State highlights the fact that Appellant is responsible for his so-called lack of counsel at the sentencing hearing. Appellant specifically advised counsel not to speak during sentencing, instead reserving the opportunity to speak for himself. It is not as though counsel stood idly by during the sentencing hearing – he addressed the court with respect to the TASC assessment that was requested. Appellant cannot now show that his counsel's performance fell below the objective standard of reasonableness when he himself asked counsel to stay silent so that he could read a document he had prepared for the court.

Additionally, Appellant cannot show that he was prejudiced by counsel's performance. A defendant asserting a claim of ineffective assistance of counsel must establish (1) that counsel substantially violated an essential duty to the client, and (2) that said violation prejudiced the defense. *State v. Bradley*, 42 Ohio St.3d 136 at 141 (1989). The prejudice element requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* The failure to prove either prong of the

Strickland test makes it unnecessary for a court to consider the other prong. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389.

Here, it is unclear that Appellant's counsel was deficient or prejudiced Appellant. As the Eighth District correctly noted in its opinion, "[i]n determining a claim of ineffective assistance of counsel, our review is limited to the record before this court." *State v. Marneros*, 8th Dist. Nos. 101872 and 101873, 2015-Ohio-2156, ¶ 26. The record in this case does not support a claim that there is a reasonable probability that if Appellant's counsel had spoken that Appellant's motion would have been granted. "Based on the record, it is just as possible that there nothing else to say on Marneros's behalf." *Id.* As such, this Court should decline from considering Appellant's proposition that there should be a presumption that counsel is ineffective in situations such as this case.

**APPELLANT'S PROPOSITION OF LAW NO. II:** In determining whether to allow a defendant to withdraw a guilty prior to sentencing, a trial court should consider nine facts: "(1) whether the prosecution would be prejudice if the plea were vacated; (2) **whether the offender was represented by highly competent counsel;** (3) **the extent of the Crim.R.11 hearing;** (4) whether there was a full hearing on the motion to withdraw the offender's guilty plea; (5) **whether the trial court gave full and fair consideration to the motion;** (6) whether the motion was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused understood the nature of the charges and possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime." [quoting *State v. Zimmermann*, 10th Dist. No. 09AP-866, 2010-Ohio-4087, 2010 WL 3405746]

In his second proposition of law, Appellant invites this Court to adopt a standard of review for motions to withdraw guilty pleas that has already been applied by the Tenth District Court of Appeals. Appellant contends that the majority of the above-listed factors weight in his favor, and accordingly, the trial court should have been required to grant his motion. *See* Appellant's Memorandum in Support, 7 ("In that the first seven factors inure to Mr. Marneros' benefit, the trial

court erred in not granting the motion.”). This case does not present the appropriate opportunity for this Court to consider the adoption of such a rule.

The decision to grant or deny a presentence motion to withdraw falls within a trial court’s discretion. *State v. Xie*, 62 Ohio St.3d 521, 527 (1994). An abuse of discretion requires a finding that the trial court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Absent an abuse of discretion, the trial court’s decision must be affirmed. *Xie, supra*. Here, the trial court did not abuse its discretion in denying Appellant’s motion. Appellant raised legal claims for withdrawing his plea that lacked merit. Accordingly, the trial court acted within its discretion in denying Appellant’s motion.

The trial court reviewed all of Appellant’s legally deficient arguments for withdrawing his plea: that Appellant should have received Intervention in Lieu of Conviction, that he should have been on the mental health docket, and that his indictment was defective. Upon reviewing his arguments, the trial court denied his motion. It should be noted that the decision to place a criminal defendant onto a specialized docket in Cuyahoga County lies within the discretion of the court. *See Cuyahoga County Local R. 30*. Appellant was not entitled to any of the forms of relief that he sought. As such, the trial court acted within its discretion in denying his motion.

Furthermore, the Eighth District found that the trial court had complied with many of the factors that Appellant argues support the withdrawal of his plea: the appellate court found that (1) Appellant was represented by highly competent counsel; (2) the accused was afforded a full hearing; (3) the accused was given a complete and impartial hearing; and the trial court gave full and fair consideration to the plea withdrawal request. *State v. Marneros*, 8th Dist. Nos. 101872 and 101873, 2015-Ohio-2156, ¶ 12.

The Eighth District's finding was well supported by the recorded. At the time of Appellant's oral motion, he was represented by highly competent who has been practicing law in the State of Ohio since 1975. See Supreme Court of Ohio Attorney Directory, [http://www.sconet.state.oh.us/AttySvcs/AttyReg/Public\\_AtorneyDetails.asp?ID=0006584](http://www.sconet.state.oh.us/AttySvcs/AttyReg/Public_AtorneyDetails.asp?ID=0006584) . His counsel addressed the court at sentencing; however, Appellant wanted to reserve time for himself, making incorrect legal declarations in support of his motion to withdraw his guilty plea. (Tr. 22 – 30).

Furthermore, Appellant was afforded a full hearing pursuant to Crim.R.11 prior to entering his plea. (Tr. 10 – 20). During the Crim.R. 11 plea hearing, the trial court conducted an extensive inquiry of Appellant's constitutional and non-constitutional rights. The court ensured that Appellant understood the charges against him and the maximum penalties involved, the effect of his guilty plea, and the rights he was waiving by pleading guilty. (Tr. 14 – 18). In fact, the charges, penalties, and rights at trial had been previously communicated to him that morning when the State of Ohio initially placed the plea offer on the record. (Tr. 4 – 10). Contrary to Appellant's assertions, the trial court did inquire of Appellant as to whether he was satisfied with his counsel's representations of him. Appellant answered yes. (Tr. 14).

Although Appellant's motion to withdraw his plea was not filed since it was orally made, Appellant was provided with a complete and impartial hearing on the motion. The court listened to all of Appellant's explanations and found that no had merit.

Appellant failed to demonstrate the trial court abused its discretion when it denied his motion to withdraw his guilty plea. Accordingly, this Court should not accept Appellant's second proposition of law.

**APPELLANT’S PROPOSITION OF LAW NO. III:** A defendant must be given the opportunity to allocute with respect to the specific issue of sentencing. Statements made in support of a motion to withdraw a guilty plea are not the functional equivalent of a sentencing allocution.

Appellant argues that although the “trial court allowed Mr. Marneros to address the court with respect to his motion to withdraw his guilty plea, the trial court never allowed Mr. Marneros to speak with respect to sentencing.” (Appellant’s Memorandum in Support, 8 – 9). However, the State submits that the sentencing record belies such an argument. To the contrary, the record indicates that Appellant had an opportunity to address matters that were relevant to his motion to withdraw and mitigating factors related to sentencing. (Tr. 25 – 30). For this reason, this Court should decline to accept Appellant’s third proposition of law.

Crim.R. 32 (A)(1) does requires courts to afford an opportunity for a court to personally address a defendant and ask if he or she wishes to make a statement on his or her behalf and present any information in mitigation of punishment. The language of Crim.R. 32 imposes an affirmative duty of the trial court. In *State v. Green*, 90 Ohio St.3d 352, 359-60, this Court determined “a Crim.R. 32 inquiry is much more than an empty ritual: it represents a defendant’s last opportunity to plead his case or express remorse.” A defendant has an absolute right to allocution, which is not subject to waiver due to his failure to object. *Id.* at 358. “In a case in which the trial court has imposed sentence without first asking the defendant whether he or she wishes to exercise the right of allocution created by Crim.R. 32(A), resentencing is required unless the error is invited error or harmless error.” *State v. Campbell*, 90 Ohio St.3d 220, paragraph three of the syllabus.

Here, Appellant and his counsel were provided ample opportunities to speak. Six pages of the transcript are devoted to Appellant’s discussion with the court. The court proceeded with sentencing, and Appellant had ample opportunity to express his remorse and provide evidence in mitigation. He used his time to allocate to try to get the court to allow him to withdraw his guilty

plea because he incorrectly believed he would be entitled to either Intervention in Lieu of Conviction or the mental health docket. During his allocution to the court, he presented mitigating evidence, including information about his state of mental health and his alleged substance abuse problems. (Tr. 25, 28).

This is not a case where the trial court neglected to ask Appellant to allocute at sentencing. To the contrary, Appellant was afforded an opportunity to do so, of which he took full advantage. Accordingly, this case does not present an opportunity for this Court to consider Appellant's third proposition of law. Just as importantly, under the precedent of *Green* and *Campbell*, this Court has already effectively incorporated Appellant's proposition of law into current legal precedent.

As a final point, even if this Court were to find that Appellant was denied the right to allocute, the denial of the rights was due to error that Appellant invited. The doctrine of invited error prevents a party from taking advantage of an error that he or she created. *State v. Bey* (1999), 85 Ohio St.3d 487, 709 N.E.2d 484. Here, it was Appellant who indicated that he wished to speak exclusively during his hearing. It follows that any failure by his counsel to allocate more fully on his behalf falls under the doctrine of invited error.

In short, Appellant's proposition does not present a legal matter or issue that has not previously been addressed. This Court should decline Appellant's third proposition of law.

## **V. Conclusion**

This Court should decline to accept Appellant's propositions of law. As previously explained, each matter has been addressed by this Court and Appellant has not demonstrated why this Court should revisit these issues. As such, Appellant has not presented matters of great general interest or substantial constitutional questions. Accordingly, the State asks that this Court decline to accept Appellant's propositions of law as the appellate court properly resolved these issues.

The State respectfully asks this Court to accept Appellee's propositions of law to clarify what language is required to impose consecutive sentences. If appellee opposes jurisdiction by claiming that he was in fact prejudiced when the trial court did not engage in the appropriate analysis to impose consecutive sentences, the State submits that the record does not support his claim. The record as articulated in the opinion of the Eighth District Court Appeals demonstrates the trial court did engage did consider the proportionality finding when it used the phrase "does not adequately reflect" in lieu of the phrase "is disproportionate to." Vacating and remanding Marneros's sentence in this case was error, which resulted in the inefficiency of requiring the trial court to make factual findings that are well supported by the trial court's original sentence. The State has moved for the Eighth District to reconsider its decision in this case. As of the filing date of this memorandum, the Eighth District has not yet ruled on the State's motion for reconsideration. In the event that the State's request for reconsideration is not granted, it is important to point out that the issues inherent in this case extend far beyond a mere claim of error correction. This Court should accept jurisdiction of this appeal and clarify what language trial courts are required to use to issue a consecutive sentence. If this Court does accept jurisdiction of this matter, the propositions of law that State presents before this Court follows as a logical extension of the principles articulated by this Court in *Bonnell*.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Response and in Support of Cross Appeal was sent by regular U.S. mail or electronic service this 19<sup>th</sup> day of August, 2015 to:

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