UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2518

September Term, 2013

MICHAEL GRIFFIN

v.

STATE OF MARYLAND

Krauser, C.J.,
Zarnoch,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: May 4, 2015

A jury in the Circuit Court for Baltimore City, Maryland convicted appellant, Michael Griffin, of five counts of sexual child abuse. After appellant was sentenced to five consecutive terms of twenty years, he timely appealed, presenting two questions:

> 1. Did the trial court err in failing to comply with the requirements of Md. Rule 4-215(e)?
>
> 2. Did the trial court err in denying the motion to dismiss for lack of a speedy trial?

We agree with appellant's contention that the trial court failed to comply with the requirements of Rule 4-215(e) and that reversal on that ground is required. We conclude, however, that the trial judge did not err in denying appellant's motion to dismiss on speedy trial grounds. This case will therefore be remanded to the Circuit Court for Baltimore City for a new trial.

I.

BACKGROUND

Because appellant does not challenge the sufficiency of the State's evidence, we shall not discuss in detail the underlying facts proven by the State at trial. *See Cure v. State*, 195 Md. App. 557, 561 (2010) (observing that only a brief summary is necessary), *aff'd, on other grounds*, 421 Md. 300 (2011); *see also Teixeira v. State*, 213 Md. App. 664, 666 (2013) ("It is unnecessary to recite the underlying facts in any but a summary fashion because for the most part they [otherwise] do not bear on the issues we are asked to consider") (citations and internal quotation marks omitted).

Appellant was charged in this case with sexually abusing Iesha H., the daughter of his former live-in girlfriend, Judith H. The State proved that the abuse began when Iesha was 13 and continued until she was 17-years-old. The sexual acts between appellant and Iesha included acts of vaginal intercourse, resulting in two pregnancies that resulted in abortions. According to Iesha, appellant was responsible for these pregnancies because she was not having sexual relations with anyone else during the relevant time periods. In addition to Iesha's testimony, the jury heard a tape-recorded statement of a conversation between appellant and Judith H. In that conversation, appellant said "I didn't want to do anything to Iesha," but "the opportunity just overwhelmed me, and I took advantage of it, and I shouldn't have." In the taped conversation, appellant also asked Ms. H. to forgive him.

II.

A. First Issue Presented

Maryland Rule 4-215(e) provides:

> If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court

> permits the defendant to discharge counsel, it shall comply with subsections (a) (1)-(4) of this Rule if the docket or file does not reflect prior compliance.

Appellant contends that he expressed dissatisfaction with his attorney, from which the court should have reasonably concluded was an indication that he wanted to discharge his counsel, and therefore the court erred in not conducting the inquiry mandated by Maryland Rule 4-215(e). The State argues that, because appellant did not expressly state that he wanted to discharge counsel, the requirements of Rule 4-215(e) were never triggered.

In the case *sub judice*, the indictment was filed on February 1, 2011, and Robert Ness, an Assistant Public Defender, entered his appearance for appellant on March 2, 2011. Because Ness was ill, other attorneys from the Public Defender's Office appeared on appellant's behalf at hearings on May 6, 2011, July 18, 2011, and January 25, 2012.

On March 23, 2012, a new attorney from the Public Defender's Office advised the court that Ness was no longer with the public defender's office, and that she needed a postponement because she had just been assigned the case. Good cause was found, and the case was postponed until May 15, 2012. Additional postponements were granted on May 15, 2012, July 16, 2012, and September 11, 2012.

At a November 9, 2012 hearing, which was one week before the date set for trial, appellant expressed his dissatisfaction with his new defense counsel's representation in the following exchange he had with the court and his counsel:

THE DEFENDANT: Can I say something to the Court, please?

THE COURT: You can, but be sure your – you say it to your lawyer first. You don't want to say something here that jeopardizes your situation.

(Pause.)

[DEFENSE COUNSEL]: Okay. That's fine. Why don't you go ahead and tell the judge.

THE DEFENDANT: Your Honor, I had her come over to see me. She said that she would go and talk to the – the witnesses. I gave her several questions to ask them. And she came – she went to see the State and made a deal with her, and then come to me and saying, "Well, this is the deal."

And I asked her what did she say to them. She said they was crying and stuff like that, and a whole lot of papers saying – she read off the first paper – I don't want to say what was on it, but she – I go [sic] so much on my mind – she just lied to me.

I asked her what did she say, what did they talk about, and she couldn't tell me. She just kept saying, "Take the deal. Take the deal. Take the deal."

I told her several times that I had a witness, two witnesses. One passed away, which I told her to go and talk to. She never did. I asked her to check about my Hicks and everything. She says nothing. She says, "Don't worry about it. Don't worry about it."

THE COURT: Yeah. So the question is what are we doing today? Are we going to continue the case?

THE DEFENDANT: I would like to – <u>I just want her to do her job</u>.

THE COURT: Well, --

[DEFENSE COUNSEL]: Well, for the record, I don't plan to do any more investigation over this weekend. But if you want the opportunity to speak with your family, --

THE DEFENDANT: Can we get a postponement? Because she has not properly prepared for my case. I know this is going on for a long time, but –

THE COURT: May I have the file – files?

(Pause.)

THE COURT: You basically got two choices. The case can go to trial or we can continue it to next week so you can have the discussions that counsel indicated that you wish to have with your family.

But it has been postponed and postponed and postponed. And I'm not sure exactly, and I'm not making any findings with regard to your assertion that your attorney is not doing what she would be obligated to in defending you. I'm not making any finding about that.

It's your opinion that she's not.

THE DEFENDANT: She hasn't.

THE COURT: We're not going to have a hearing about that. But it's – you know, we can – we can continue the case – what was it asked for; Tuesday?

[PROSECUTOR]: At two o'clock, yes, Your Honor.

THE COURT: Tuesday at two o'clock, or I can make arrangements to have the case sent to a trial court.

THE DEFENDANT: I don't know what to do. I don't – you know, she didn't do anything I asked her. She didn't do nothing – Ms. [defense counsel].

[DEFENSE COUNSEL]: You can speak to the judge right now, sir.

THE DEFENDANT: I'm talking to you, though. You haven't done anything.

THE COURT: Talk to me. Go ahead. You'd ask – talk to me. The problem is sometimes the things which people ask – because as part of the plea litany, for example, people ask are you generally satisfied with your attorneys.

We don't ask if you are totally satisfied, completely satisfied, or totally happy with the outcome. Because frankly in terms of pleas, and I'm not talking about you, we're not taking any plea, people don't like to admit that they've done something that would result in them being found in violation of the criminal laws regarding what the law may be.

But that doesn't mean that had their attorney done something else, it would be possible for them to have been found not guilty of that same offense to which they are pleading guilty.

But you can have your – if you want to think about it a little bit, we can hold it over until Tuesday at two o'clock.

THE DEFENDANT: I would like to do it.

THE COURT: Is that what you'd like to do?

THE DEFENDANT: Yes.

THE COURT: All right.

The matter will be continued till Tuesday –

(Emphasis added).

The next hearing concerning this case occurred on Friday, November 16, 2012. At that time, appellant rejected a plea offer and, because no courtroom was available, trial was

postponed until January 29, 2013. On January 11, 2013, appellant filed, *pro se*, a pleading entitled "Motion to Dismiss Due Process and Ineffective Assistance of Counsel" (hereafter "the motion to dismiss"). The dismissal motion states, in relevant part, the following:

> Defendant Michael Griffin, pose [sic] se move to dismiss the above captioned charging document(s), (Pursuant to Maryland Rules of Procedure 4-252, the due process clause of the Fifth, Six, and Fourteenth Amendments to the U.S. Constitution of Rights and Article 21 of the Maryland Declaration of Rights and the Attorney(s) Maryland Rules of Professional conduct).
>
> 1. The above captioned has the following violation(s)
>
> (a) My second attorney [name of attorney] has harmed the defendant's defense far more than the first assistant Public Defender Mr. Robert Ness Whom also represented the defendant in the case.
>
> [Defense Counsel] has lied to the defendant repeatedly by holding back critical information pertaining to the defendants defense with false allegations. [Defense Counsel] has not kept defendant abreast with his fundamental rights to a fair and speedy trial according to the U.S. Constitution 6th and 14th Amendments and Md. Rule Art. 5 & 21.
>
> (b) [Defense Counsel] failed to address the court, upon defendants request for these reason(s) as follows:
>
> (1) [Defense Counsel] did not want the court to know that she denied me, the defendant the right to an fair and speedy trial on 11-9-2012. Rule 1.1, 1.2(a), 1.3 and 1.4 are in violation of the Attorneys Maryland Rules of Professional conduct.
>
> (2) [Defense Counsel] did not want the court to know she denied me due process of law, U.S. Const. Amend VI and XIV, Art. 21.

(3) [Defense Counsel] made false allegations repeatedly to the defendant to coerce me into accepting State's plea offer. 3.3(a), 8.4(a), (b) and (c).

(4) [Defense Counsel] made false allegations about contacting ASA to obtain appointments to speak with victims about their allegations 3.3(a).

(5) [Defense Counsel] made false allegations about notifying ASA about my now deceased primary witness 3.3(a).

(6) [Defense Counsel] made false allegations about speaking with witnesses to the defendant 3.3(a).

(7) [Defense Counsel] failed to obtain statement under oath from primary witness who is presently deceased 3.2.

(8) Defendant repeatedly requested to go to trial and requested attorney to assert his rights She failed to do so.

(9) [Defense Counsel] failed to subpoena any of defendants witnesses for trial.

(c) Defendant appeared before Judge John A. Howard in court on 11-9-2012 for trial. Judge Howard granted the defendant the opportunity to address the court in his own defense, which resulted in a postponement because [Defense Counsel] (P.D.) refused to comply with the defendants request to relay the comments made in court off record concerning Public Defenders comments to the defendant while in court off record.

(d) The Defendant wishes to expose the Public Defenders [Defense Counsels] inadequate representation by her scandalous incompetency which was viewed as a travesty of justice, [Defense Counsel] has prejudice the defendant defense to the point that I the defendant could never receive an fair trial.

> (e) If any information is needed concerning the allegations in question are available on court record for your review on the day of Nov. 9th 2012, in courtroom 438m/436m, part 34, Judge John Addison Howard.

The certificate of service accompanying this motion states that a copy of the motion was mailed to the Attorney Grievance Commission. Prior to trial, the court denied this motion as untimely, after concluding that it was a "preliminary filing as to a Post Conviction Petition."

The right to counsel is guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *See Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963); *Walker v. State*, 391 Md. 233, 245 (2006). As part of the implementation and protection of this fundamental right to counsel, the Court of Appeals adopted Maryland Rule 4-215, "which explicates the method by which the right to counsel may be waived by those defendants wishing to represent themselves . . . ." *Breakwater v. State*, 401 Md. 175, 180 (2007). The Court of Appeals has stated that Rule 4-215(e) "is a bright line rule that requires strict compliance in order for there to be a 'knowing and intelligent' waiver of counsel by a defendant." *Johnson v. State*, 355 Md. 420, 452 (1999); *see also We stray v. State*, 217 Md. App. 429, 442 ("'The provisions of the rule are mandatory' and a trial court's departure from them constitutes reversible error") (quoting *State v. Hardy*, 415 Md. 612, 621 (2010)), *cert. granted*, 440 Md. 225 (2014). Our review

of the issue of whether the circuit court complied with Rule 4-215 is *de novo*. *Gutloff v. State*, 207 Md. App. 176, 180 (2012).

For a Rule 4-215(e) inquiry to be triggered, there first must be a request to discharge counsel. *State v. Davis*, 415 Md. 22, 33 (2010). Neither the rule nor its drafting history define "request." *See Gambrill v. State*, 437 Md. 292, 302 (2014). Nonetheless, in interpreting the definition of the term "request," the Court of Appeals has consistently championed substance over form. *Id*. As this Court has recognized, although the rule "'is silent as to what level of discourse is required to discharge counsel[,]' [t]he request does 'not need to be a talismanic phrase or artfully worded to qualify as a request to discharge, so long as a court could reasonably conclude that [a person] sought to discharge his counsel.'" *Henry v. State*, 184 Md. App. 146, 171 (2009) (quoting *State v. Campbell*, 385 Md. 616, 629, 632 (2005)), *aff'd, on other grounds*, 419 Md. 588 (2011).

In considering whether appellant made a "request" to discharge counsel as the word "request" is used in Md. Rule 4-215(e), *Gambrill v. State*, *supra*, is instructive. In that case, on the trial date, counsel for Gambrill asked, on behalf of his client, for a postponement because Gambrill wanted to hire private counsel. 437 Md. at 294. The trial judge denied the request. *Id*. at 296. After he was convicted, Gambrill appealed. In an unreported opinion we held that Rule 4-215(e) was not triggered because Gambrill did not express a clear intent to discharge or replace his lawyer, who was a public defender. *Id*.

The Court of Appeals granted *certiorari* and reversed. It held that the statements made by Gambrill's public defender "implicated Rule 4-215(e) and its attendant duty to permit Gambrill to . . . [explain] his reasons for requesting to discharge his public defender." 437 Md. at 297.

The *Gambrill* Court defined a request to discharge counsel as "any statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel," *id*. at 302 (quoting *Williams v. State*, 435 Md. 474, 486-87) (2013)). The Court noted that the defendant's request to be represented by private counsel was ambiguous but nevertheless "was a statement from which the trial judge could have reasonably concluded that [the defendant] wanted to discharge his public defender, triggering the inquiry and determination by the court under Rule 4-215(e)." *Id*. at 306. The Court also said that a defendant may "request" permission to discharge counsel without making any request at all, but merely by expressing dissatisfaction with current counsel . . . . *id*. 297, 302. The Court concluded: "When an ambiguous statement by a defendant or his or her counsel is made under Rule 4-215(e), the fulcrum tips to the side of requiring a colloquy with the defendant." *Id*. at 306-07.

The request also "need not be made in writing or even formally worded." *Davis*, 415 Md. at 31; *see also Williams v. State*, 435 Md. 474, 488 (2013) (recognizing that a letter may be "sufficient to trigger the requirements" of the Rule). The request "must simply express

to the court that the defendant is dissatisfied with his or her current attorney." *Davis*, 415 Md. at 31. And, the request for permission to discharge counsel need not even emanate from the defendant himself or herself. *State v. Taylor*, 431 Md. 615, 634 (2013) ("It is irrelevant whether it is the defendant, his or her trial counsel, or the State who expresses the defendant's desire to discharge his or her attorney").

Once a request has been made, then:

> the court must provide the defendant an opportunity to explain his or her reasons for seeking the change. *See Gonzales v. State*, 408 Md. 515, 531, 970 A.2d 908, 917 (2009). "Next, the trial court must make a determination about whether the defendant's desire to discharge counsel is meritorious." *Gonzales*, 408 Md. at 531, 970 A.2d at 917; *see also Moore v. State*, 331 Md. 179, 186-87, 626 A.2d 968, 971-72 (1993) (articulating the rule that the record must reflect that the trial court actually considered the merit of the defendant's explanation for wanting to proceed without counsel). "The goals of Rule 4-215(e), and of Rule 4-215, in general, are to protect the defendant's fundamental rights involved, to secure simplicity in procedure and to promote fairness in administration." *Gonzales*, 408 Md. at 532, 970 A.2d at 917-18 (quotation marks and citation omitted). The failure to inquire into a defendant's reasons for seeking new counsel when the proper request has been made to the court is a reversible error. *Snead* [*v. State*], 286 Md. [122,] 131 [(1979)].

State v. Davis, 415 Md. at 31; *accord Pinkney v. State*, 427 Md. 77, 93 (2012).

In the case at hand, although appellant never made an express request to discharge counsel, on two occasions he stated, in the clearest terms, that he was very dissatisfied with his counsel's performance. Those two occasions were on November 9, 2012 and January 13, 2013, when appellant filed his *pro se* motion to dismiss. Based on the holding in *State v.*

Davis, 415 Md. at 31, appellant's expression of dissatisfaction with his lawyer was enough to trigger the further inquiry required by Rule 4-215(e).

In sum, we hold that the circuit court was required to interpret appellant's statements about his dissatisfaction with counsel as a request for permission to discharge counsel. Once that "request" had been made, the trial court was required to inquire as to appellant's reasons for wanting to discharge counsel, evaluate whether those reasons were meritorious, and advise appellant of his options depending on whether his reasons were meritorious or not. Because the circuit court failed to follow the procedures that Md. Rule 4-215(e) requires, we must vacate appellant's convictions and remand the case for a new trial.

B. Second Question Presented

Appellant next contends that the court erred in denying his motion to dismiss for lack of a speedy trial. The State responds that the trial judge, after weighing the relevant factors, did not err when he denied appellant's motion. We agree with the State.

The Sixth Amendment to the United States Constitution, and Article 21 of the Maryland Declaration of Rights, guarantee a criminal defendant the right to a speedy trial. In assessing the issue of whether a defendant has been denied this constitutional right, the reviewing court must makes its own independent examination of the record to determine whether the right has been denied. *Glover v. State*, 368 Md. 211, 220 (2002); *accord Howard v. State*, 440 Md. 427, 446-47 (2014); *Henry v. State*, 204 Md. App. 509, 548-49

(2012). In conducting its independent constitutional appraisal, the appellate court will defer to a lower court's first level findings of fact unless clearly erroneous. *Glover*, 368 Md. at 221 (the *de novo* constitutional appraisal is conducted "in light of the particular facts of the case at hand.").

The following time line is pertinent to appellant's claim that he was denied his right to a speedy trial:

02/06/11	Indictment	
05/06/11	First Trial Date	Defense request for postponement due to illness of defense counsel.
07/18/11	Second Trial Date	Defense request for postponement due to illness of defense counsel.
09/16/11	Third Trial Date	State request for postponement due to prosecutor's illness.
11/16/11	Fourth Trial Date	Defense request for postponement to allow for additional preparation time.
01/25/12	Fifth Trial Date	Defense request for postponement due to illness of defense counsel.
03/23/12	Sixth Trial Date	Defense request for postponement due to the fact that new counsel has been appointed, which created the need for additional time to prepare.
05/15/12	Seventh Trial Date	Defense request for postponement as his counsel has trial date conflict.

07/16/12	Eighth Trial Date	Mutual request for postponement in order for additional investigating to be conducted.
09/11/12	Ninth Trial Date	State request for postponement due to unavailability of a State witness.
11/09/12	Tenth Trial Date	Defense request for postponement to allow Griffin to consider plea offer.
11/16/12	Eleventh Trial Date	Griffin rejects plea offer; trial postponed because no available courtroom is available.
01/29/13	Twelfth Trial Date	Defense request for postponement due to attorney grievance filed by Griffin against defense attorney.
03/28/13	Thirteenth Trial Date	State request for postponement due to unavailability of prosecutor.
06/06/13	Trial	Court hears and denies speedy trial motion. Trial commences.

Claims that the Sixth Amendment guarantee has been violated are assessed under the balancing test announced by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See State v. Kanneh*, 403 Md. 678, 687 (2008); *Divver v. State*, 356 Md. 379, 388 (1999). In *Barker*, the Supreme Court "rejected a bright-line rule to determine whether a defendant's right to a speedy trial had been violated, and instead adopted 'a balancing test, in which the conduct of both the prosecution and the defendant are weighed.'" *State v. Kanneh*, 403 Md. at 687-88 (citing *Barker*, 407 U.S. at 530). Accordingly, there are four factors to be used in determining whether a defendant's right to a speedy trial has been

violated: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *State v. Kanneh*, 403 Md. at 688 (citing *Barker*, 407 U.S. at 530). None of these factors are "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *State v. Kanneh*, 403 Md. at 688 (quoting *State v. Bailey*, 319 Md. 392, 413-14 (1990), in turn quoting *Barker*, 407 U.S. at 533).

Length of Delay:

"This Court has noted that the first factor, the length of the delay, is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *State v. Kanneh*, 403 Md. at 688 (citation omitted). "For speedy trial purposes the length of delay is measured from the date of arrest or filing of indictment, information, or other formal charges to the date of trial." *Diver*, 356 Md. at 388-389 (citation omitted). "However, 'the length of the delay is the least determinative of the four factors that [a court] confider] in' determining whether a defendant's right to a speedy trial was violated." *Howard*, 440 Md. at 447-48 (quoting *State v. Kanneh*, 403 Md. at 690). Here, appellant was indicted on February 2, 2011 and tried on June 6, 2013. This delay of 2 years, 4 months, and 4 days is of sufficient length to trigger the speedy trial analysis.

Reasons for the Delay:

All reasons for delay are not considered the same. Some carry greater weight than others:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

Barker v. Wingo, 407 U.S. at 531 (footnote omitted); *see also Doggett v. United States*, 505 U.S. 647, 652 (1992) (according "considerable deference" to trial court's findings regarding reasons for delay); *State v. Kanneh*, 403 Md. at 690 ("In considering this factor, we . . . address each postponement of the trial date in turn").

The initial delay from the February 6th indictment to the May 6, 2011 trial date comprises three months and four days that is accorded neutral status, and is not charged to the State. *See Howell v. State*, 87 Md. App. 57, 82 ("The span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status"), *cert. denied*, 324 Md. 324 (1991); *accord Henry*, 204 Md. App. at 551.

Thereafter, the delay from May 6th to September 16, 2011, or approximately four months and ten days, is attributable to the defense because defense counsel was unavailable.

See Howell, 87 Md. App. at 83-84 (defendant's request for continuance charged to defendant); *Marks v. State*, 84 Md. App. 269, 283 (1990) (over four-month delay attributable to defendant since he was not ready to proceed), *cert. denied*, 321 Md. 502 (1991); *see also Vermont v. Brillon*, 556 U.S. 81, 90 (2009) ("delay caused by the defense weighs against the defendant").

The next delay of two months, from September 16th to November 16th, 2011, is chargeable to the State because of the unavailability of the prosecutor. However, that delay is not weighed heavily in the overall analysis. *See Farrell v. State*, 67 Md. App. 459, 464 (1986) (the State is less culpable when the delay is due to the illness of prosecutor).

The next four postponements, resulting in an approximately eight month delay from November 16, 2011 to July 16, 2012, are attributable to the defense due to illness of defense counsel or requests for additional preparation time because a new attorney entered her appearance as counsel for defendant. *See Ratchford v. State*, 141 Md. App. 354, 362 (2001) (defendant can not complain about a postponement that he/she requested).

On July 16, 2012, there was a mutual request for a postponement to give both parties additional time for investigation. This joint request is not counted against either party. *See Marks*, 84 Md. App. at 283 (request for joint continuance is neutral and not chargeable to either party); *accord Henry*, 204 Md. App. at 552.

Thereafter, from September 11, 2012, until trial commenced, there were alternating requests for postponements by either side, as well as one continuance due to court unavailability. The approximate two-month delay from September 11th to November 9, 2012, is attributable to the State because of unavailability of a State's witness, but is considered a neutral reason. *See Matthews v. State*, 23 Md. App. 59, 66 (1974). The State is also responsible for the two month and one-week delay from March 28, 2013 to the trial date due to prosecutor unavailability.

The defendant, however, is responsible for the one-week delay from November 9, 2012 to November 16, 2012 because of his request for a postponement, and for the two month delay from January 29, 2013 to March 28, 2013 because of his request for a postponement after appellant filed his attorney grievance against defense counsel. Finally, the delay from November 16, 2012 to January 29, 2013, or approximately two months and thirteen days, while technically chargeable to the State, is not weighed heavily against it because the reason for the delay was courtroom unavailability. *See State v. Kanneh*, 403 Md. at 691 (The "problem of overcrowded courts . . . is a 'more neutral reason' that should be 'weighted less heavily' [against the State] but considered nonetheless").

Accordingly, it appears that the State was responsible for approximately seven months of the delay from indictment to trial. Most, if not all, of those delays, however, are accorded slight weight in the overall analysis because there is no indication that any of these

delays were intentional or were designed to impair the defense. The appellant was responsible for delay of approximately fourteen months and seventeen days.

Assertion of the Right:

The third *Barker* factor examines the "defendant's responsibility to assert his right." *Barker*, 407 U.S. at 531. This factor is "closely related" to the other three, and "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id*. at 532.

Here, on March 3, 2011, appellant filed an omnibus motion requesting a speedy trial. On January 11, 2013, as part of "the motion to dismiss," appellant, *pro se*, asserted that his defense counsel and the State's Attorney were denying him the right to a speedy trial. He also separately filed a Demand for Speedy Trial on that same date. The parties, as well as the trial court, all agreed that appellant timely and repeatedly asserted his right to a speedy trial.

Prejudice:

Finally, this Court has stated that the fourth, final, and "most important factor in the Barker analysis is whether the defendant has suffered actual prejudice." *Henry*, 204 Md. App. at 554. In regard to this factor, the *Barker* Court itself identified three interests to be protected:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker v. Wingo, 407 at 532 (footnote omitted).

During argument in the trial court concerning the motion to dismiss for lack of speedy trial, defense counsel informed the court that there was a defense witness, one Jeanette Taylor, who died prior to the hearing. Counsel admitted that this witness was never summonsed and counsel acknowledged that she did not know if the witness had ever been contacted by appellant's prior counsel. There was no proffer as to when Ms. Taylor died or what she would have testified to if she had been called as a witness.

Counsel also informed the court that appellant had lost his job since this case began and that "[h]e obviously is anxious a great deal over this matter." And, due to his incarceration, appellant's personal life basically has fallen apart.

Addressing the prejudice factor in its ruling, the circuit court acknowledged that appellant had been incarcerated for a "substantial" time. But the court then gave very little credit to appellant's allegation that a witness was now missing due to delay:

> The fact that the Defendant alleges a witness is no longer available – without specifics about what that witness would say, and without specifics about whether the witness ever was available to actually testify – add very little

> to the weight of this consideration. But on the consideration of prejudice, the Defendant is given that consideration.

As the trial court did, we shall consider this last factor in appellant's favor, but will not give it substantial weight because there is no showing of actual impairment of the defense. *See Jones v. State*, 279 Md. 1, 17 (1976) (where "it is not clear from the record what testimony [a perspective defense witness] might have offered, . . . we cannot determine whether [the defendant] suffered an actual impairment of his defense"), *cert. denied*, 431 U.S. 915 (1977). Moreover, there is no indication that the delay prevented appellant from receiving a fair trial.

Balancing and Conclusion:

After setting forth details relevant to each of the *Barker* factors, a balancing is required. The Supreme Court explained:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Barker, 407 U.S. at 533 (footnote omitted).

Although it took over two years and four months to bring this case to trial, the charges at issue were serious and tolerate more delay than that attributable to less serious allegations.

See Barker, 407 U.S. at 530-531 (explaining that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge"); *Glover*, 368 Md. at 224 ("the delay that can be tolerated is dependent, at least to some degree, on the crime for which the defendant has been indicted"). Further, on balance, the reasons for the vast majority of the delay in this case is not chargeable to the State, and to the extent that they were, those reasons are not weighed heavily in the analysis. Finally, while appellant steadfastly maintained his demand for a speedy trial during the entire time the case was pending, he or his attorney frequently asked for postponements. Based on all four *Barker* factors, we hold that the circuit court did not err when it balanced the four *Barker* factors and denied appellant's motion to dismiss.

JUDGMENTS VACATED; CASE REMANDED FOR A NEW TRIAL; 75% OF COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE; 25% OF COSTS TO BE PAID BY APPELLANT.