

ORIGINAL

Case No. 2013-1731

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

v.

THOMAS M. KEENAN,

Defendant-Appellee.

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On Appeal from the Cuyahoga County Court
of Appeals, Eighth Appellate District
Court of Appeals Case No. 99025

**MEMORANDUM OF APPELLEE THOMAS M. KEENAN
IN RESPONSE TO APPELLANT'S MEMORANDUM
IN SUPPORT OF JURISDICTION**

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**THIS CASE DOES NOT PRESENT A QUESTION
OF PUBLIC OR GREAT GENERAL INTEREST**

This case involves a narrow question of whether the trial court abused its discretion in dismissing the subject indictment with prejudice due to the State's egregious and prolonged violations of the appellee, Thomas M. Keenan's, constitutional rights including his right to be provided in discovery with all exculpatory and impeachment information in the State's possession. Brady v. Maryland, 373 U.S. 83 (1963). The trial court wisely and properly exercised its discretion, and the appellate court correctly affirmed on that basis. Not a single question of public or great general interest is presented by the State's appeal. The only real question is why the State continues to defiantly cling to this prosecution when its own repeated misconduct has plagued it from the start to the extreme prejudice of Keenan and co-defendant Joe D'Ambrosio.

There is no dispute in this case that the State willfully violated its Brady obligations to Keenan **repeatedly** since 1988, thereby denying Keenan fair trials in **two** previous prosecutions (in 1989 and 1994) for his alleged role in the 1988 murder of Anthony Klann. These prolonged Brady violations ultimately resulted in a federal court in 2012 granting habeas corpus relief in Keenan's favor and invalidating his aggravated murder and related convictions as having been obtained in violation of his federal constitutional rights. The federal court's conditional writ ordered the State to release or retry Keenan. Having chosen a retrial, the State subjected itself to Keenan's pretrial motion to dismiss the indictment with prejudice on the grounds that, among other reasons, Keenan would be unable to receive a fair trial in 2012, including because the State's principal witness against Keenan, co-defendant Edward Espinoza, had died in April 2009 and was thus unavailable to be cross-examined with any of the seven categories of Brady material that had been unlawfully suppressed by the State since 1988.

The State opposed Keenan's motion to dismiss on its merits. Yet, all the while the State

conceded that the trial court had the discretion to dismiss the indictment with prejudice if the court found it necessary to do so. And, the State never once claimed, as it did for the first time on appeal **and which is now belatedly the centerpiece of its request that this Court take jurisdiction**, that the trial court should have imposed some lesser “sanction,” such as dismissing only the aggravated murder charge but allowing the State to proceed to trial on the lesser charges of kidnapping and aggravated burglary.

Exercising the discretion the State conceded the trial court possessed, the trial court dismissed the indictment with prejudice and allowed for Keenan’s release after some two decades on death row. The trial court carefully and eloquently explained its decision on the record, and in doing so it relied upon the very factors identified in this Court’s cases for evaluating sanctions for discovery violations in criminal cases, including in State v. Wiles, 59 Ohio St. 3d 71 (1991), which the State now incorrectly claims the trial court disregarded: **(1)** whether the discovery violation was willful; **(2)** whether foreknowledge would have benefitted the defendant; and **(3)** whether the defendant suffered prejudice. See also State v. Parsons, 6 Ohio St. 3d 442 (1983); City of Lakewood v. Papadelis, 32 Ohio St. 3d 1 (1987).

Thus, not only has the State invited the “error” it chastises and/or it has waived any such issue for purposes of appeal by not raising in the trial court its claim that the trial court was somehow required to impose a “lesser sanction,” but the trial court did not commit any “error” much less the error the State claims. Indeed, the trial court’s exercise of its discretion was **fully** in accord with this Court’s cases on discovery sanctions, see, e.g., Parsons, Lakewood, Wiles, and is **fully** consistent with the later issued State v. Darmond, 135 Ohio St. 3d 343 (2103), just as the appellate court found in affirming the trial court’s decision.

Indeed, rather than disregard any requirement to consider lesser sanctions, as the State

contends it did, the trial court **expressly acknowledged** its obligation to do so and did do so: “Therefore, while the Court is aware that it has an obligation to impose the least severe sanction that is consistent with the purposes of the rules of discovery, I find that Keenan’s case is the unique and extraordinary case where the prejudice created cannot be cured by a new trial.” State v. Keenan, 2013 Ohio 4029, ¶ 27 (Cuyahoga App. 2013) (quoting trial court’s on-the-record findings).

The trial court’s conclusion in this respect is eminently sound and is not an abuse of discretion. Keenan could not receive a fair trial in 2012, after so much time had passed, and especially after the 2009 death of Espinoza made it impossible for Keenan, in 2012, to make any use of the suppressed Brady material with Espinoza, the sole witness who claimed Keenan participated in Klann’s murder. Keenan, 2013 Ohio 4029 at ¶ 31.

Typical of the State’s defiance of and lack of contrition for its own prolonged and egregious misconduct is its contention now that it was already twice “sanctioned” for its “discovery violations,” once by the federal court in granting habeas relief to Keenan and again when the state trial court denied the State’s motions to be allowed to use at the 2012 trial the prior testimony of Espinoza, Keenan, and D’Ambrosio. The State just does not get it! **None of these rulings are “discovery sanctions,” as the State falsely suggests.** Instead, all such rulings in Keenan’s favor were compelled by relevant principles of constitutional and/or evidence law to protect Keenan’s fundamental rights including his rights to due process and a fair trial. It is not surprising that the State, in this shameful prosecution, fails to understand the difference.

STATEMENT OF THE CASE AND FACTS

The trial in 2012 would have been the third time the State had tried Keenan for Klann’s 1988 death. Both previous trials, in 1989 and 1994, were infected with serious constitutional errors prejudicial to Keenan. Those constitutional errors were all due to the State’s misconduct.

Keenan's convictions and death sentence in the 1989 trial were ultimately reversed by this Court based upon prosecutorial misconduct by prosecutor Carmen Marino. State v. Keenan, 66 Ohio St. 3d 402 (1993). In reversing the convictions, the Court noted that the State's case was weak to begin with and was heavily reliant on the flawed Espinoza. Keenan, 66 Ohio St. 3d at 411.

Keenan was tried a second time on the original indictment in April 1994, **still without the benefit of any of the Brady evidence that was still being unlawfully suppressed by the State.** And, as with the 1989 trial, the 1994 trial was again based almost entirely on Espinoza's alleged eyewitness testimony. Keenan was convicted on all counts and sentenced to death.

Keenan's aggravated murder conviction and death sentence were later found by the federal habeas court to have been obtained in violation of Keenan's federal constitutional rights due to the State's wrongful suppression of evidence required to be disclosed under Brady v. Maryland. Keenan v. Bagley, 2012 U.S. Dist. LEXIS 57044 (N.D. Ohio Apr. 24, 2012).¹ The suppression included the following seven categories of evidence and/or police reports concerning said matters:

- (1) That Paul Lewis, "one of the State's main witnesses," had been indicted for the rape of Christopher Longenecker, then roommate to Klann, that Klann had some knowledge of this rape, and that Lewis was never prosecuted for it.
- (2) That the police had identified Lewis as the anonymous caller who called the police to identify Klann as the victim and that Klann had information regarding the murder that was not publicly known.
- (3) That Lewis asked the police to help him resolve a DUI charge against him in exchange for his testimony.
- (4) That the initial investigating detectives on the scene at Doan Creek where the body was found, Ernest Hayes and Melvin Goldstein, believed that, because there was no blood or signs of struggle at the Doan Creek location where the body was found, the murder must have occurred someplace else and Klann's body was dumped in Doan Creek.

¹See also D'Ambrosio v. Bagley, 2006 U.S. Dist. LEXIS 12794 (N.D. Ohio Mar. 24, 2006), aff'd, 527 F.3d 489 (6th Cir. 2008).

- (5) That police had a cassette tape containing conversations between a police informant working with officer Horval and a jail inmate named Angelo Crimi – whom the court identified as “an inmate who once lived with Klann” – in which Crimi may have implicated other persons in Klann’s murder.
- (6) That police had evidence that James “Lightfoot” Russell and his girlfriend, Carolyn Rosell, requested assistance from the police in relocating after testifying at the trials, and evidence that Russell called the police on December 10, 1988, before the Keenan and D’Ambrosio trials, to request the relocation because he had been threatened by two men who came to his door looking for him, and he feared for his safety.
- (7) That a neighbor of Lewis’s who lived on Lewis’s street, Fairview Court – Therese Farinacci – reported to police that, after returning home around midnight on Friday evening/Saturday morning, September 23/24, 1988, she noticed a black pickup truck parked on the street, and at 4:10 a.m. that morning, she was awakened by “loud yelling of obscenities” and “loud pounding on a door,” but she did not look out of her windows because she was frightened, and also that Carmon Pinzone, who evidently owned two buildings near Lewis’s apartment, told the police that “an older couple who live at 2026 Murray Hill (up) were heard to have made the comment that they heard someone at about the same time that the truck was on Fairview Ct. say ‘Lets [sic] dump the body in the basement.’”

Keenan, 2012 U.S. Dist. LEXIS 57044 at **87-113.

Judge Katz described the State’s Brady violations in Keenan’s case as “serious and disturbing violations of the State’s constitutional obligation to produce to defendants any and all exculpatory information in their possession.” Id. at *134. And, as with the habeas court in D’Ambrosio, Judge Katz found that the suppression of this evidence was prejudicial and denied Keenan a fair trial. Id. at **123-26. The federal court thus issued a conditional writ of habeas corpus.

The State elected to retry Keenan as permitted under the conditional writ. The state trial court set Keenan’s trial for October 31, 2012, more than 24 years after Klann’s death. This would have been the **fifth** time the State would have gone forward with a trial for Klann’s murder.

In pretrial proceedings the State advised that it would file motions to permit it to use the deceased Espinoza’s prior testimony and other motions concerning evidence from the prior trials.

(PT at 108, 113, 117.) The State filed three such motions on July 16, 2102. In its filings, the State asked the court for permission to allow it to use at Keenan’s third trial: **(1)** the prior testimony and statements of Espinoza pursuant to Evid. R. 804(B)(1); **(2)** the prior testimony and statements of Keenan given in his 1988 and 1994 trials pursuant to Evid. R. 801(D)(2)(a); and **(3)** the prior testimony and statements of D’Ambrosio as those of an alleged “co-conspirator” under Evid. R. 801(D)(2)(e).

Keenan timely opposed each of the State’s motions and asked the trial court to bar all such testimony and evidence that was the subject of the State’s motions. The legal grounds Keenan presented to the trial court for barring the prior testimony were:

(1) As to **Keenan’s prior testimony**, because the prior testimony was compelled and involuntary and its admission would thus violate Keenan’s rights to due process, to an individualized sentencing determination in a capital case, and the privilege against self-incrimination, and citing, among other cases, New Jersey v. Portash, 440 U.S. 450 (1979), Simmons v. United States, 390 U.S. 377 (1968), and Harrison v. United States, 392 U.S. 219, 222 (1968).

(2) As to **Espinoza’s prior testimony**, because admission of the prior testimony would deny Keenan his right to confront the witnesses against him, including to confront Espinoza with the “Brady” evidence the State had in its possession at the time Espinoza testified in 1989 and 1994, and citing, among other cases, Crawford v. Washington, 541 U.S. 36 (2004), and State v. Self, 56 Ohio St. 3d 73, 78 (1990).

(3) As to **D’Ambrosio’s prior testimony**, because the testimony is not a statement of a “co-conspirator” under Evid. R. 801(D)(2)(e), is not admissible as an “adoptive admission” under Evid. R. 801(D)(2)(b), and the admission of any such testimony would deny Keenan his rights to confront the witnesses against him.

The trial court agreed with Keenan and thus barred the State from using the prior testimony and statements of Espinoza, Keenan, and D’Ambrosio (although the court reserved the question of whether Keenan and D’Ambrosio’s testimony could be used for impeachment if either testified). (Journal Entry, August 27, 2012; see also PT at 369-73.) As is clear from even a cursory review of the trial court’s pretrial evidentiary rulings, the court did not make these rulings as “sanctions”

against the State, but, instead, because the rulings were compelled by the law of evidence and by Keenan's constitutional rights including his rights to due process and a fair trial. Moreover, the State did not appeal any of these evidentiary rulings, nor were these rulings challenged by the State in the court of appeals on the State's appeal from the trial court's grant of the motion to dismiss.

Keenan filed his motion to dismiss the indictment with prejudice on August 8, 2012. Keenan sought dismissal under Crim. R. 16, Crim. R. 48(B), the court's inherent power to dismiss with prejudice, and the due process and/or double jeopardy protections under the U.S. and/or Ohio Constitutions. On September 6, 2012, the court granted the motion to dismiss. (PT at 481-96.)

ARGUMENT DISPUTING APPELLANT'S PROPOSITIONS OF LAW

I. RESPONSE TO PROPOSITION OF LAW NO. 1: The Trial Court Properly Applied This Court's Precedent, and Did Not Abuse its Discretion, in Dismissing the Indictment with Prejudice. No "Less Severe Sanction" Was Requested by the State, Nor Was One Required Under the Circumstances.

A. The State Has Waived Its Claims of Alleged Error Because It Invited the Alleged "Error" and/or Failed to Preserve the Issue for Appeal.

In an about-face from the position it took in the trial court, the State argues that the trial court supposedly did not actually have the authority to dismiss the indictment because it was required to impose the "least severe sanction." Yet, in the trial court, the State explicitly conceded that the trial court did indeed have the authority to dismiss the indictment,² and it never once made the "least severe sanction" argument that it has now sought to make the centerpiece of its appeal.

The State's "least severe sanction" argument has been waived both because it was never

²PT at 317, 406; State's Opposition to Motion to Dismiss at 26 ("While this Court plainly has the authority to decide that the status of the current case may not provide a constitutional retrial, Keenan has presented nothing that warrants that decision."); State's FFCL at 9 ("This Court possesses the authority to dismiss a criminal action under the Ohio Rules of Criminal Procedure and the inherent authority to dismiss under the federal and Ohio Constitutions. Crim.R. 16; Crim.R. 48(B).")

raised in the trial court and because the State made concessions to the contrary thereby inducing the alleged (but non-existent) “error” it now complains about.

It is axiomatic that arguments not raised in the trial court are waived for purposes of appeal. State v. Williams, 55 Ohio St. 2d 112 (1977). Moreover, under the invited error doctrine, “a party is not entitled to take advantage of an error that he himself invited or induced.” State v. Doss, 2005 Ohio 775, ¶ 5 (Cuyahoga App. 2005). The doctrine of invited error is a corollary of the principle of equitable estoppel. It precludes an appellant from attacking a judgment “for errors committed by [the appellant]; for errors that the appellant induced the court to commit; or for errors into which the appellant either intentionally or unintentionally misled the court, and for which the appellant is actively responsible.” State v. Minkner, 194 Ohio App. 3d 694, 700-01 (Ohio App. 2011).

For either or both of these reasons, the State’s “least severe sanction” argument is waived on appeal. The State never raised the issue in the trial court. Moreover, it explicitly conceded that the trial court had the discretion to dismiss the case in its entirety. The State instead made the strategic choice to oppose dismissal on the basis of the alleged preclusive effect of the federal court’s writ and on the State’s contention that Keenan could not show the necessary “prejudice” entitling him to dismissal, both of which arguments were properly rejected, PT at 488-96, and the preclusion argument the State has now abandoned. Not only did the State thus not seek or even suggest that a lesser sanction was required, it actively resisted any suggestion that anything less than the entire case (aggravated murder, kidnapping, aggravated burglary) be pursued. (PT at 415-18; State’s FFCL at 10 (“The State, in good faith, avers . . . there is sufficient evidence and available witnesses to proceed on all counts as charged against Keenan.”).)

B. The Trial Court Properly Applied This Court's Precedent, and Did Not Abuse its Discretion, in Dismissing the Indictment with Prejudice.

The appellate court correctly concluded that the dismissal with prejudice was not made in contravention of any of this Court's precedent. The State's reliance on Darmond is a red herring. Darmond, which was decided 6 months after the trial court's ruling, confirms that Lakewood's holding, that "[a] trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery," applies equally to discovery violations committed by the state and to discovery violations committed by a criminal defendant." Darmond, 135 Ohio St. 3d 343, at the syllabus, quoting Lakewood, paragraph two of the syllabus.

The trial court did precisely what the State claims Darmond requires. In fact, the trial court cited, addressed, and evaluated all three of the Parsons factors approved by the Court in Darmond: (1) whether the discovery violation was willful; (2) whether foreknowledge would have benefitted the defendant; and (3) whether the defendant suffered prejudice as a result of the State's failure to disclose the information. Darmond at ¶¶ 36-41 (citing Parsons). And, the trial court expressly recognized its obligation to impose the least severe sanction consistent with the discovery rules, and it then proceeded to impose that sanction: "Therefore, while the Court is aware that it has an obligation to impose the least severe sanction that is consistent with the purposes of the rules of discovery, I find that Keenan's case is the unique and extraordinary case where the prejudice created cannot be cured by a new trial." Keenan, 2013 Ohio 4029, ¶ 27 (quoting trial court's on-the-record findings).

The "least severe sanction" requirement does not exist in a vacuum. It is a case specific requirement that the sanction be the least severe sanction that is consistent with the circumstances

surrounding the discovery violation and the impact of the discovery violation in that case.

Darmond. The sanction thus satisfies Darmond, Lakewood, and related cases if it is reasonably related to the offensive or non-compliant conduct and the impact of that conduct upon the ability of the accused to present a defense and to receive due process.

The dismissal here clearly satisfies those requirements, and is the least severe sanction, given the circumstances of this case and the egregious and prolonged constitutional violations, just as the trial court held. (PT at 488-96.) Dismissing only part of the case, as the State suggested for the first time on appeal (and which it resisted in the trial court), is not required and would not be consistent with the severity and prolonged nature of the State's misconduct or with the extreme prejudice to Keenan which that misconduct caused. Keenan's alleged crimes were part of one continuous course of conduct over several hours, all dependent upon Espinoza's allegations, and they would rise or fall based upon whether a jury believed Espinoza. To now claim that the kidnapping and burglary counts can be parceled off and tried separately, as a less severe sanction, is to ignore the theory the State has pursued for more than two decades, ignore Espinoza's singularly unique role, and would subject Keenan to a third unconstitutional trial. The trial court was well within its discretion in dismissing the entire case.

Finally, to apply Darmond in the manner the State suggests would impair a state trial court's ability, under Crim. Rule 48(B) and its inherent power to ensure due process, to dismiss a felony indictment with prejudice if doing so is in the interest of justice, and would be contrary to State v. Busch, 76 Ohio St. 3d 613 (1996). In Busch, this Court held that Rule 48(B) "does not limit the reasons for which a trial judge might dismiss a case, and we are convinced that a judge may dismiss a case pursuant to Crim. R. 48(B) if a dismissal serves the interests of justice." Id. at 615. The Busch Court explained: "trial courts are on the front lines of administration of justice in our judicial system,

dealing with the realities and practicalities of managing a caseload and responding to the rights and interests of the prosecution, the accused, and victims. A court has the ‘inherent power to regulate the practice before it and protect the integrity of its proceedings.’” Id.

So long as the trial court conducts the analysis required by Parsons and Wiles, something the trial court carefully did in this case (PT at 488-96), any resulting dismissal with prejudice does not constitute an abuse of discretion, and is fully permitted under Busch, Lakewood, and Darmond, even if the State may later conceive of some allegedly “less severe” sanction that might also have been imposed.

C. The Trial Court’s Decision Was Not Only Proper Under Crim. Rule 16, But Can Also Be Affirmed On Other Grounds Too.

The trial court’s dismissal with prejudice was not only a proper exercise of discretion under Crim. R. 16, but it was also expressly premised on Crim. R. 48(B). It can be affirmed on that ground too, and also on the basis of the trial court’s inherent power in the interest of justice to ensure due process and/or protect against double jeopardy, all as guaranteed by the Ohio and U.S. Constitutions. See Ohio Const., Article I, Sections 10, 16; U.S. Const., Fifth and Fourteenth Amendments.

The trial court’s dismissal with prejudice was squarely within the scope of the trial court’s discretion under Rule 48(B) as recognized in State v. Busch, supra. The trial court expressly relied upon Rule 48(B) in dismissing the case.

The due process and/or double jeopardy provisions of the Ohio and/or U.S. Constitutions are also themselves proper bases upon which to dismiss with prejudice in the appropriate case, as here. A court may dismiss an indictment “on the ground of outrageous government conduct if the conduct amounts to a due process violation.” United States v. Chapman, 524 F.3d 1073, 1084 (9th Cir. 2008).

Double jeopardy under the federal constitution will generally not bar retrial, and thus not provide grounds for dismissal with prejudice, unless the prosecutorial misconduct was intended to

cause a mistrial. Oregon v. Kennedy, 456 U.S. 667 (1982). However, at least under the constitutions of states that have interpreted the state constitution to provide greater protection than the federal constitution, double jeopardy can provide for dismissal with prejudice not only when prosecutorial misconduct is intended to cause a mistrial but also when intentional prosecutorial misconduct denies the defendant a fair trial. See, e.g., Commonwealth v. Smith, 615 A.2d 321, 325 (1992); State v. Rogan, 984 P.2d 1231, 1249 (Haw. 1999). Ohio's constitutional protection against double jeopardy should be construed in a similar manner.

All of these grounds, in addition to Crim. R. 16, are independent bases upon which the trial court's decision should be affirmed as a proper exercise of its discretion.

D. The State Has Not Been “Sanctioned Multiple Time for the Same Discovery Violation.”

The State complains that it has already twice been “sanctioned” for its “discovery violations,” supposedly once by the federal court in granting habeas relief to Keenan and again when the state trial court denied the State's motions to be allowed to use at the 2012 retrial the previous trial testimony of Espinoza, Keenan, and D'Ambrosio. The State is mistaken. **None of these rulings in Keenan's favor are “discovery sanctions.”**

In granting habeas relief, the federal court determined that the State's conviction and death sentence of Keenan were obtained in violation of Keenan's **federal constitutional rights**, and what's more, that the federal constitutional violations that occurred, i.e., multiple and prolonged **Brady** violations, were committed **by the State itself**. The federal constitution thus compelled, at the State's election, Keenan's release or his retrial in accordance with the constitution. A federal habeas grant which thus invalidates a state court criminal conviction is not a “discovery sanction,” but results from an exercise of the federal court's co-equal role with the state courts to ensure that a state court criminal conviction and/or death sentence has not been secured in violation of the accused's

federal constitutional rights. The State's mischaracterization of the federal court's order in such quaint terms, as a "discovery sanction," demonstrates that the State still fails to recognize that it committed egregious misconduct over two decades and spanning four trials (including D'Ambrosio's) and in doing so repeatedly violated the constitutional rights of Keenan and D'Ambrosio and sent them to death row for a murder they denied committing. Moreover, the federal court's grant of habeas relief did nothing to preclude the state trial court, once retrial was elected, from making any pretrial rulings deemed necessary or appropriate by the state court including a motion to dismiss the indictment. See, e.g., Civ. R. 33(D); R.C. § 2945.82 ("when a new trial is granted . . . the accused shall stand for trial upon the indictment or information as though there had been no previous trial thereof."); State v. Keenan, 2013 Ohio 4029, at ¶¶ 15-16.

Similarly, the state trial court was not imposing a "discovery sanction" when it barred the State from using in the retrial the prior testimony of Keenan, D'Ambrosio, and Espinoza. The trial court's journal entry and on-the-record explanation of its evidentiary rulings dispel any such false contention the State is now advancing. Instead, the evidentiary rulings in Keenan's favor were all compelled by a proper application of the evidence rules and relevant constitutional principles, all of which confirmed that the State's proposed admission of such prior testimony would, in the circumstances of this case, violate **Keenan's constitutional rights to due process and a fair trial** and, in the case of Espinoza and D'Ambrosio's prior testimony, would also violate Keenan's right under the Confrontation Clause to confront the witnesses against him.

Both rulings – the grant of habeas relief and the disallowance of the prior testimony – are thus not "sanctions" against the State in any way.

II. REPSONSE TO PROPOSITION OF LAW NO. II: Whatever Showing of Prejudice May Be Necessary Before An Indictment Can Be Dismissed With Prejudice on Due Process Grounds Was Easily Met in The Circumstances of this Case.

Keenan easily met whatever requirement of “prejudice” is necessary in order to be entitled to dismissal with prejudice. The prejudice in this case is overwhelming and palpable.

To begin with, Keenan demonstrated that **five** important witnesses were now dead: Espinoza, Russell, Crimi, Oliver, and Horval. Separate and apart from the inability to now confront these witnesses with all the suppressed Brady evidence, Keenan will never have the chance to have his jury see these witnesses and evaluate their credibility. (PT 493.) The State’s entire case hinged on Espinoza. Being able to have the jury see Espinoza and evaluate his demeanor, veracity, and credibility is essential to a fair trial in this particular case, as the trial court clearly realized. (PT at 488-96.) That will now never happen, through no fault of Keenan’s.

The passage of time, some 25 years, has also invariably dimmed, if not totally darkened, in whole or in significant parts relevant to Keenan’s ability to defend, the memories of those witnesses that are still alive. Or, what is just as prejudicial to Keenan, any expressions by any such witnesses of an alleged lack of memory on key points relevant to Keenan’s ability to defend, even if those expressions are false, would likely be considered credible by jurors given the passage of time and the juror’s lack of familiarity with the many factual nuances that undermine the State’s case. Keenan’s ability to effectively cross-examine those State witnesses has been gutted by the State’s prolonged misconduct.

The State’s prolonged misconduct has also denied Keenan any meaningful opportunity to confront the State witnesses with the seven categories of suppressed Brady evidence, found by the federal court, and this is devastatingly prejudicial to Keenan. (PT at 488-96.) This prejudice is especially acute insofar as it pertains to Espinoza. Indeed, because Espinoza is the sole witness that

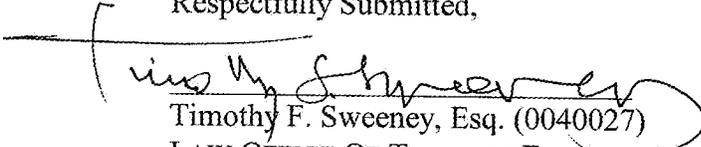
linked Keenan to the murder and kidnapping, the ability to confront him effectively with the suppressed evidence is a prerequisite to a fair trial in a case whose retrial was necessitated because of the constitutional violations resulting from that suppressed evidence. Espinoza's death makes that required confrontation impossible and thus alone fully supports the trial court's decision to dismiss the case.

In sum, the State's prolonged misconduct has denied Keenan's any ability to receive a trial that **fairly engages with the suppressed evidence**, and which is not merely a hollow replay of witness testimony locked into transcripts and statements made more than 20 years ago. And, this result benefits the State because, having prevailed in the earlier trials, the State is content to have a "new" trial that remains locked into these earlier transcripts in which the suppressed evidence played no part. This aspect of prejudice is entirely due to the State's misconduct and its prolonged unlawful suppression of the Brady evidence. In any retrial that proceeded now, under these circumstances and more than two decades after the relevant events, the State would be allowed to unconscionably benefit from its own prolonged unconstitutional misconduct. Such a result is intolerable and unjust.

CONCLUSION

For all of these reasons, and in the interest of justice, this Court should decline to exercise its discretionary jurisdiction over this case.

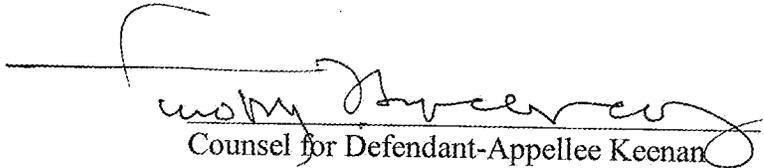
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Counsel for Appellee Thomas M. Keenan

CERTIFICATE OF SERVICE

This is to certify that a copy of the MEMORANDUM OF APPELLEE THOMAS M. KEENAN IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION was served upon Timothy J. McGinty, County Prosecutor, and Katherine Mullin, Assistant Prosecuting Attorney, The Justice Center, 1200 Ontario Street Cleveland, Ohio 44113, COUNSEL FOR APPELLANT STATE OF OHIO on this 2nd day of December 2013, by regular U.S. Mail, first class postage prepaid.


Counsel for Defendant-Appellee Keenan