

ORIGINAL

NO. 2013-1731

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 99025

STATE OF OHIO

Plaintiff-Appellant

-vs-

THOMAS M. KEENAN

Defendants-Appellee

MERIT BRIEF OF PLAINTIFF-APPELLANT

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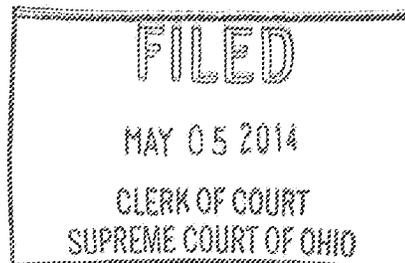


TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF FACTS..... 3

This Court previously affirmed Keenan’s convictions and summarized the facts of Klann’s murder:..... 3

LAW AND ARGUMENT 6

 PROPOSITION OF LAW I: A TRIAL COURT IS REQUIRED TO IMPOSE THE LEAST SEVERE SANCTION THAT IS CONSISTENT WITH THE PURPOSE OF THE RULES OF DISCOVERY AFTER AN INQUIRY INTO THE CIRCUMSTANCES PRODUCING AN ALLEGED VIOLATION OF CRIM. R. 16. A PARTY SHOULD NOT BE SANCTIONED MULTIPLE TIMES FOR THE SAME DISCOVERY VIOLATION. .. 6

 I. Summary of Argument 6

 II. The trial court was required to impose the least severe sanction consistent with the purposes of the discovery rules. 6

 A. The purpose of the discovery rules is to promote fairness..... 6

 III. Application 12

 PROPOSITION OF LAW II: DISMISSAL FOR LACK OF DUE PROCESS IN UNWARRANTED UNLESS A DEFENDANT ESTABLISHES PREJUDICE..... 13

 I. Summary of Argument..... 13

 II. Prejudice should not be presumed when a due process violation is alleged..... 13

 III. Conclusion..... 16

CONCLUSION 16

CERTIFICATE OF SERVICE 17

APPENDIX:

Notice of Appeal to the Ohio Supreme Court, *State v. Keenan*, 2013-1731 (November 4, 2013)..... 1-3

Cuyahoga County Eighth Dist. Court of Appeals No. 99025, *State v. Keenan*, 2013-Ohio-4029 , Journal Entry & Opinion..... 4-32

Criminal Rule 16..... 33-41

TABLE OF AUTHORITIES

Cases

<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194 (1963)	11, 14, 15
<i>State v. Cochenour</i> , 4 th Dist. Ross App. No. 98CA2440, 1999 WL 152127 (March 8, 1999.).....	15
<i>State v. Darmond</i> , 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971. 1, 6, 10, 11, 12	
<i>State v. Hale</i> (2008), 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864	9
<i>State v. Howard</i> (1978), 56 Ohio St.2d 328, 383 N.E.2d 912.....	7
<i>State v. Keenan</i> , 998 N.E.2d 837, 2013-Ohio-4029	10, 11, 12, 13, 14, 15
<i>State v. Larkins</i> , 8 th Dist. Cuyahoga App. No. 85877, 2006-Ohio-90	12
<i>State v. Parson</i> (1983), 6 Ohio St.3d 442, 453 N.E.2d 689.....	7, 8, 9, 12
<i>State v. Wickline</i> , 50 Ohio St.3d 114, 116 (1990).....	14
<i>State v. Wilson</i> , 3 rd Dist. Union App. No. 14-13-04, 2013-Ohio-4643.....	14
<i>Strickler v. Greene</i> , 527 U.S. 263, 281-282 (1999)	14
<i>United States v. Bagley</i> , 473 U.S. 667, 682 (1985).....	2, 14
<i>United States v. Beszborn</i> (C.A.5, 1994), 21 F.3d 62, 67.....	15
<i>United States v. Crouch</i> , 84 F.3d 1497,1515	15
<i>United States v. Greer</i> (D.Vt.1997), 956 F.Supp. 525, 528	15
<i>United States v. Harrison</i> (S.D.N.Y.1991), 764 F.Supp. 29, 32.....	15
<i>United States v. Stierwalt</i> (C.A.8, 1994), 16 F.3d 282, 285	15
<i>Weatherford v. Bursey</i> , 429 U.S. 545, 559 (1977)	14
<i>Westmoreland v. United States</i> , 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 288	15

Rules

Crim. R. 16.....	1, 6, 9, 10, 12
Crim.R. 16(E)(3).....	8
Crim.R. 16(B)(1)(a)(ii).....	9

INTRODUCTION AND SUMMARY OF ARGUMENT

There are two important constitutional questions before this Court: (1) can a trial court dismiss a case with prejudice as a result of a discovery violation without considering less severe sanctions? And (2) whether a defendant must establish prejudice to warrant dismissal as a due process violation? This Court answered the first question in *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971. The answer to the second question is yes.

In *State v. Keenan*, 998 N.E.2d 837, 2013-Ohio-4029, (Gallagher, J. dissenting), the Eighth District upheld the dismissal of a murder case as a Crim. R. 16 discovery violation. The trial court failed to consider the effectiveness of the least severe sanction before precluding prosecution. The Eighth District then erroneously shifted the burden to the state to provide the court with less severe sanction options. Both the trial court and the Eighth District failed to realize that the trial court had already imposed a less severe sanction-precluding the admission of prior testimony of the co-defendants-before dismissing the case based upon the same discovery violations. Without further analysis of the effectiveness of this remedy, the trial court presumed prejudice and dismissed the case against Keenan.

It is the defendant's burden to present evidence of actual prejudice to warrant due process relief. Prejudice cannot, and should not, be presumed. Yet that is precisely what both lower courts did. Both courts relied on the Eighth District's prior precedent in a case that's holding is called into question by *Darmond*. The presumptions by both lower courts have created an unworkable standard that would frequently preclude retrying defendants whose convictions are later reversed for discovery violations. In this

case, it has prevented the state from retrying a defendant who was previously convicted of aggravated murder.

Therefore, the State of Ohio requests this Honorable Court adopt the State's propositions of law, and hold that trial courts must not presume prejudice when a retrial is necessary and that the courts must impose the least severe sanction that is consistent with the purpose of the rules of discovery rather than compound discovery sanctions for the same violation.

STATEMENT OF THE CASE

Thomas Michael Keenan, along with two co-defendants, was indicted for the 1988 kidnapping and murder of Anthony Klann. Keenan was twice tried and sentenced to death. However, his convictions were ultimately vacated as a result of prosecutorial misconduct. *State v. Keenan*, 66 Ohio St.3d 402, 613 N.E.2d 203 (1993); *Keenan v. Bagley*, N.D. Ohio No. 1:01 CV 2139, 2012 WL 1424751 (Apr. 24, 2012).

The court ordered that Keenan either be released or retried. *Keenan v. Bagley*, N.D. Ohio No. 1:01 CV 2139, 2012 WL 1424751 (Apr. 24, 2012). The State elected to retry Keenan. In the months leading up to trial, the trial court prohibited the State from admitting prior testimony of Keenan and his co-defendants Joseph D'Ambrosio and Edward Espinoza as a result of the prior discovery violations. Keenan subsequently filed a motion to dismiss based upon the same prior discovery violations. The State opposed the motion and submitted evidence that the majority of witnesses were ready and able to testify. The State also offered to make concessions to allow Keenan to be able to use otherwise inadmissible evidence to support his defense. Despite this, the trial court granted Keenan's motion and dismissed the matter with prejudice.

The State appealed and the Eighth District, in a divided opinion, affirmed. *State v. Keenan*, 8th Dist. Cuyahoga No. 99025, 2013-Ohio-4029 (Gallagher, J. dissenting). This Court granted jurisdiction over both of the state's propositions of law.

STATEMENT OF FACTS

This Court previously affirmed Keenan's convictions and summarized the facts of Klann's murder:

"Keenan employed Anthony Klann, Edward Espinoza, and Joseph D'Ambrosio in his landscaping business. On either Thursday, September 22, or Friday, September 23, 1988, at about 7:00 p.m., Klann went to "The Saloon," a Cleveland bar, with Paul "Stoney" Lewis, his roommate and friend (and a former employee of Keenan's). Keenan, Espinoza, and D'Ambrosio went to The Saloon after work that same evening.

Keenan and Lewis encountered each other at The Saloon and subsequently left the bar together. They took Keenan's truck to another bar known as Coconut Joe's, which was located in Cleveland Heights. Before going inside, Keenan gave Lewis some cocaine and marijuana, in lieu of seventy dollars Keenan owed Lewis. Later, Klann entered Coconut Joe's. Espinoza and D'Ambrosio arrived sometime after Klann.

According to Lewis, Espinoza had a dispute with Klann at Coconut Joe's and shouted at him several times. One time, Lewis followed them into the men's room; he found Espinoza "hollering" and shaking his finger in Klann's face. (Espinoza admitted that he and Klann went into the men's room together, but denied having a "disagreement" with Klann.)

Lewis left Coconut Joe's around midnight. Later, Espinoza was ejected from the bar. Keenan, Espinoza, and D'Ambrosio left Coconut Joe's together at approximately 1:30 or 2:00 a.m. Keenan drove away, while Espinoza and D'Ambrosio walked from the bar to D'Ambrosio's apartment. Before Espinoza and D'Ambrosio went inside the apartment, Keenan drove up in his truck. Keenan accused Lewis of stealing "dope" from his truck and asked Espinoza and D'Ambrosio to help look for Lewis. They agreed. In D'Ambrosio's apartment, Espinoza armed himself with a baseball bat, while D'Ambrosio grabbed a knife. About 2:00 or 2:30 a.m.,

they joined Keenan in the truck and the three of them cruised the so-called "Little Italy" area of Cleveland, looking for Lewis.

James Russell, an acquaintance of Keenan's, lived with Carolyn Rosell in an apartment in Little Italy. About 3:00 a.m., Russell and Rosell were awakened by someone banging on their door. They let Keenan, D'Ambrosio, and Espinoza into their apartment. Keenan asked where Lewis was and threatened to kill Lewis. Keenan told Russell that Lewis "had ripped him off." After about fifteen minutes, Keenan and his men left. Keenan, still searching for Lewis, drove up Mayfield Hill, where he saw Klann walking in the opposite direction. According to Espinoza, there was a "light rain, drizzle" falling "off and on." Keenan pulled over and hailed Klann. When Klann approached, Keenan grabbed him and forced him into the truck.

Keenan, Espinoza, and D'Ambrosio repeatedly asked Klann where Lewis was, threatening "to hurt him" if he did not tell. Klann insisted that he did not know. During this interrogation, Espinoza struck Klann in the head with the baseball bat. Klann did tell the group where he and Lewis lived. Keenan drove there, and he and Espinoza knocked on what Keenan thought was Lewis's door.

Memsel Dendak and Adam Flanik lived together in the same apartment complex as Lewis and Klann. About 3:00 a.m., they were awakened by "shouting and screaming" outside. Dendak heard someone yell, "I want my dope" (or "my coke"). Flanik went out to investigate and found Espinoza pounding on someone's door. Espinoza asked Flanik where "Stoney" (Lewis) lived. Espinoza then went to Lewis's door and pounded on it, saying, "Where is Stoney? I'm going to kill him."

Keenan got out of the truck and also began to pound on Lewis's door. Flanik later described Keenan's behavior as "very violent." Keenan informed Flanik that he was looking for Lewis because Lewis had stolen something.

Klann stayed in the truck. Flanik looked over and saw D'Ambrosio, who was sitting behind Klann, holding a knife to Klann's neck. Flanik thought Klann "looked intimidated by Joe, because he wasn't turning his head to see who was behind him * * *." Klann also looked to Flanik as though he had been "roughed up."

Finally, Espinoza gave up pounding on the door and proceeded to kick it until it came open. He and Keenan entered Lewis's apartment, looked around briefly, then got back in the truck and left.

Keenan drove back to Russell's residence. Espinoza went to the door and asked Russell if Lewis had been there. He told Russell to tell Lewis that Espinoza "had a contract out on him." He then returned to the truck.

Keenan then drove to Doan's Creek, where he pulled the truck over. Holding D'Ambrosio's knife, Keenan ordered Klann out of the truck. As they stood at the edge of the creek, Keenan asked Klann for the last time where Lewis was. Klann still did not know. Keenan ordered Klann to tilt his head back. Keenan then slashed Klann's throat, led him to the creek, and pushed him in. Klann got up and was "stumbling" around. Keenan said to D'Ambrosio, "Finish him." D'Ambrosio took the knife and jumped into the creek. Espinoza heard splashing and heard Klann yell, "[P]lease don't kill me."

On Saturday, September 24, a jogger found Klann's body in Doan's Creek. The next day, Dr. Elizabeth Balraj, the county coroner, performed an autopsy on the body. She found that Klann's throat had been slashed, his windpipe perforated. Klann had also been stabbed three times in the chest. Balraj was unable to estimate a time of death."¹

During pretrial proceedings before Keenan's retrial, the defense successfully had the trial court prohibit the state from using the testimony of Keenan and his co-defendants as a result of the same discovery violations that were the basis for the new trial. The trial court then later dismissed the case with prejudice as a result of the same prior discovery violations.

¹ *State v. Keenan*, 81 Ohio St.3d 133, 133-36, 689 N.E.2d 929, 935-37 (1998).

LAW AND ARGUMENT

PROPOSITION OF LAW I: A TRIAL COURT IS REQUIRED TO IMPOSE THE LEAST SEVERE SANCTION THAT IS CONSISTENT WITH THE PURPOSE OF THE RULES OF DISCOVERY AFTER AN INQUIRY INTO THE CIRCUMSTANCES PRODUCING AN ALLEGED VIOLATION OF CRIM. R. 16. A PARTY SHOULD NOT BE SANCTIONED MULTIPLE TIMES FOR THE SAME DISCOVERY VIOLATION.

I. Summary of Argument

This Court has already agreed with the substance of the State's first proposition of law in *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971. The idea that multiple sanctions should not be imposed for the same violation is a concept embodied within the purposes of Crim. R. 16 as well as this Court's decision in *Darmond*. It is a logical application of the principle of fairness that is at the core of Ohio law. Therefore, this Honorable Court should apply *Darmond* and reverse the lower court's ruling which prohibits prosecuting Keenan for offenses he committed against Anthony Klann.

II. The trial court was required to impose the least severe sanction consistent with the purposes of the discovery rules.

A. The purpose of the discovery rules is to promote fairness

Multiple sanctions for the same discovery violation are inconsistent with the purpose of the rules of discovery. While some situations may demand the ultimate sanction of prejudicial dismissal, that sanction should not be applied without careful consideration of less severe alternatives.

Crim. R. 16 became effective on July 1, 1973. The rule remained unchanged until 2010. Under both versions, the trial court has discretion when imposing sanctions.

However, precedent supports that the trial court should apply the least severe sanction available for violations from either party.

In *State v. Howard* (1978), 56 Ohio St.2d 328, 383 N.E.2d 912, this Court was asked to review a decision by the Tenth District Court of Appeals in which the appellate court reversed a conviction due to an alleged state discovery violation. In that case, the state called a rebuttal witness but did not provide that witness' name on its witness list. The trial court offered to grant a continuance, but after an extensive voir dire of the rebuttal witnesses, no continuance was requested. *Id.* at 332. This Court noted the trial court's offer of an alternative remedy and held that the trial court was not required to exclude the rebuttal testimony.

In *State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689, (1983) this Court reviewed a state discovery violation. In that case, the state inadvertently failed to provide defense with a statement made by a co-defendant. Applying an abuse of discretion standard, this Court noted that a trial court is "not bound to exclude [nondisclosed discoverable material] at trial although it may do so at its option. Alternatively, the court may order the noncomplying party to disclose the material, grant a continuance in the case or make such other order as it deems just under the circumstances." *Id.* at 445. This Court then considered whether the trial court abused its discretion. In doing so, this Court considered whether or not the violation was willful and if the defendant was prejudiced as a result of the nondisclosure. *Parson* was decided four years before *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987).

In *Lakewood*, this Court was asked to review a discovery sanction that was imposed against the defense. Once it was established that a sanction could be

imposed, this Court was next asked to consider whether or not the sanction was appropriate. This Court noted that “Crim.R. 16(E)(3) provides a range of sanctions which the trial court, in its discretion, may impose on a noncomplying party.” *Lakewood* at 4. The *Lakewood* Court expressed concern that the severe sanction of excluding all of a defendant’s witnesses would interfere with a defendant’s constitutional right to present a defense. To that end, this Court held that “a trial court **must** inquire into the circumstances surrounding a violation of Crim.R. 16 prior to imposing sanctions pursuant to Crim.R. 16(E)(3). Factors to be considered by the trial court include the extent to which the prosecution will be surprised or prejudiced by the witness’ testimony, the impact of witness preclusion on the evidence at trial and the outcome of the case, whether violation of the discovery rules was willful or in bad faith, and the effectiveness of less severe sanctions.” *Id.* (Emphasis added). This Court went on to state that a trial court “must impose the least drastic sanction possible that is consistent with the state’s interest. ***We hold 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.” *Id.* at 5.²

In *State v. Parker* (1990), 53 Ohio St.3d 82, 558 N.E.2d 1164, this Court applied *Lakewood* and *Parson* to a state discovery violation. The *Parker* court noted that a “sanction should not be imposed under Crim.R. 16 unless the prosecutor’s noncompliance is of sufficient significance [to] result in a denial of defendant’s right to a

² In *Lakewood*, this Court went on to state that exclusion may be a proper remedy in some circumstances but may not be used to completely deny a defendant his right to present a defense.

fair trial.” *Id.* at 86. This Court went on to state that a “trial court must inquire into the circumstances producing the alleged violation of Crim.R. 16. The court is required to impose the least severe sanction that is consistent with the purpose of the rules of discovery.” *Id.* citing *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 5, 511 N.E.2d 1138, 1141.

In 2008, this Court again applied the *Parson* factors to a state discovery violation in *State v. Hale* (2008), 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864. In *Hale*, the state failed to disclose an oral statement by a co-defendant. This Court stated that “*Parson* established guidelines for evaluating the trial court's exercise of discretion in this area: ‘Where, in a criminal trial, the prosecution fails to comply with Crim.R. 16(B)(1)(a)(ii) by informing the accused of an oral statement made by a co-defendant to a law enforcement officer, and the record does not demonstrate (1) that the prosecution's failure to disclose was a willful violation of Crim.R. 16, (2) that foreknowledge of the statement would have benefited the accused in the preparation of his defense, or (3) that the accused was prejudiced by admission of the statement, the trial court does not abuse its discretion under Crim.R. 16(E)(3) by permitting such evidence to be admitted.’ [citation omitted].” *Hale* at ¶115. This Court affirmed, finding that the *Parson* factors were not met.

On July 1, 2010, this Court unanimously adopted a new version of Crim. R. 16. Crim. R. 16 now states the following:

“(A) Purpose, Scope and Reciprocity. This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution

equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.”

This Court recently held that the language from *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138, applies to discovery violations committed by the state. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971. Under *Darmond*, the trial court was required to consider less severe sanctions before prohibiting prosecution. While the lower court claimed to do so, the record would suggest otherwise. The trial court prohibited the use of prior testimony from Keenan and his co-defendants and, without considering the effectiveness of that ruling, then again sanctioned the state by dismissing the case for the same discovery violations.

A majority of the Eighth District Court of Appeals took issue with the State’s proposal of other lesser sanctions, opining that they “find the state’s newly-fashioned argument on appeal that the trial court failed to consider the less severe sanction of dismissal of only the aggravated murder charges somewhat disingenuous given that it is the first time the state has raised the issue.” *State v. Keenan*, 998 N.E.2d 837, 2013-Ohio-4029, ¶35. But contrary to the majority’s position, a trial court has an obligation to consider less severe sanctions. *Darmond* at ¶39 (“Although it would have been helpful for the state in opposing the dismissal motions to offer the trial court specific alternatives to

dismissal with prejudice, the trial court nevertheless should not have dismissed this case with prejudice without first giving the parties the opportunity to develop the record regarding the other packages and then weighing the relevant factors.”) In the instant case, the State opposed dismissal and proposed alternatives. As the trial court had already sanctioned the State by prohibiting the use of prior testimony, the State additionally offered to consent to the admissibility of some of the otherwise inadmissible new evidence so that Keenan could use it in his defense. *Keenan*, 2013-Ohio-4029, ¶60 (Gallagher, J. dissenting).

The failure to address these alternatives warrants reversal. As the dissenting judge found:

“While the trial court addressed the *Parson* factors in this case, it failed to specifically consider the effectiveness of a less severe discovery sanction, concluding its sole obligation was to merely consider the sanction of a new trial, derived from the original *Brady* violation, as opposed to considering the effectiveness of a less severe sanction, such as preclusion of evidence. It is important to note the completely unworkable standard the majority perpetuates. The vehicle Keenan used to seek further sanctions for the *Brady* violations was a motion to dismiss the indictment *after* the retrial was already granted as a sanction for the *Brady* violation. Thus, the retrial was not a sanction available to impose any further discovery sanctions against the state; it was already granted. If, as the majority implies, the standard of review is derived from Crim.R. 16, the court necessarily abused its discretion when it failed to consider the effectiveness of any other discovery sanction to address the prejudice emanating from the deteriorated state of discovery. *Darmond* at 352, 986 N.E.2d 971. The trial court's only consideration was of the sanction imposing a retrial, a sanction not available at that stage of the proceedings for the purposes of a Crim.R. 16–derived sanction.”

State v. Keenan, 998 N.E.2d 837, 2013-Ohio-4029, ¶51 (Gallagher, J. dissenting).

Dismissal was not the only option in this case. The court already prohibited the admission of evidence and the state additionally proposed other less severe sanctions. But the trial court did not conduct this required analysis and instead prohibited Keenan

from ever being tried for his alleged criminal acts. Because the lower court's decision was clearly inconsistent with *Darmond*, the state respectfully requests this Court adopt the state's proposition of law and reverse the dismissal.

III. Application

Dismissal was inappropriate in this case for several reasons. When imposing a discovery sanction, trial courts should consider the following three factors: (1) whether the failure to disclose was a willful violation of criminal discovery rule, (2) whether foreknowledge of the undisclosed material would have benefited the accused in the preparation of a defense, and (3) whether the accused was prejudiced. *Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, ¶35 citing *State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689, (1983.) Keenan failed to establish prejudice.

In its brief to both the trial court and Eighth District, the state presented evidence that the majority of its witnesses were alive, located, and able to testify. These facts distinguished Keenan from the primary case that he, and both lower courts, relied on *State v. Larkins*, 8th Dist. Cuyahoga App. No. 85877, 2006-Ohio-90. But in addition to the critically distinct facts, *Larkins* is also legally unsound. See *Keenan*, 2013-Ohio-4029, ¶49 (Gallagher, J. dissenting.)

The state was actually sanctioned three times for the same discovery violation. The first was the federal court's grant of habeas relief, the second was the trial court's order prohibiting the use of prior testimony, and the third was dismissal. Keenan argued that the prior testimony of the eyewitness should be precluded. He then argued for dismissal alleging that he would not have an opportunity to cross-examine the deceased eyewitness with the withheld material. It is impossible to establish prejudice on that

basis. If the eyewitness is deceased, and his prior testimony barred, there is no need to cross-examine him. It is this circular reasoning that both lower courts used as their basis to preclude prosecution in this case.

When Keenan failed to establish prejudice, the trial court should have denied his motion to dismiss. A third sanction against the state for the same discovery violation was unwarranted and unprecedented. This misapplication of the law has now forever barred Keenan from being held accountable for murder. Therefore, the State respectfully requests this Honorable Court adopt the State's first proposition of law, reverse the holding of the Eighth District Court of Appeals, and remand this matter so that Keenan can be tried.

***PROPOSITION OF LAW II: DISMISSAL FOR LACK OF DUE PROCESS
IN UNWARRANTED UNLESS A DEFENDANT ESTABLISHES
PREJUDICE.***

I. Summary of Argument

The second proposition, while related to the first, presents this Court with a separate constitutional issue. What is the defendant's burden when he or she raises a due process claim as a result of a discovery violation? In addition to the violation, the defendant must establish prejudice. Keenan failed to do so.

II. Prejudice should not be presumed when a due process violation is alleged.

Keenan moved to dismiss his case because of a discovery violation. But his argument appeared to implicate his due process rights-that he could not be retried due to the passage of time and the unavailability of witnesses. *Keenan*, 2013-Ohio-4029, ¶154 (Gallagher, J. dissenting.)

A criminal defendant has no constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). However, the State is obligated to disclose evidence favorable to a criminal defendant. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). To obtain relief under *Brady*, the inmate must show (1) the evidence in question is favorable; (2) the state suppressed the relevant evidence either purposefully or inadvertently; (3) and the state's failure to disclose resulted in prejudice. *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). *Brady* is concerned only with government concealment of "material" evidence where a failure to disclose the information deprives the defendant of a fair trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

This Court has previously found that "found that no *Brady* violation occurs when evidence is discovered and presented during the trial. *State v. Wickline*, 50 Ohio St.3d 114, 116 (1990). When a defendant discovers that the State withheld potentially exculpatory evidence during the course of the trial proceedings, and not after, Crim.R. 16(L), and not *Brady*, governs. [citation omitted.]" *State v. Wilson*, 3rd Dist. Union App. No. 14-13-04, 2013-Ohio-4643, ¶22. Even if analyzed under *Brady*, Keenan was required to establish prejudice to obtain dismissal and he failed to do so.

The lower courts went further with the analysis and agreed with Keenan's argument that dismissal was appropriate because he could not be put back to the same position he would have been in during the first trial. This cannot be the standard. If that were the case, retrial would almost always be precluded. *Keenan*, 2013-Ohio-4029, ¶54 (Gallagher, J. dissenting.) Keenan argued that the trial court should presume that the witness' memory degraded due to the passage of time. The State was prepared to show

that was not the case. Yet the trial court never conducted a hearing and Keenan presented no evidence to support his allegation.

Keenan's claim in this respect is similar to an argument of pre-indictment delay. In order to obtain relief, a defendant must establish actual prejudice. Prejudice "may not be presumed from the passage of time." *State v. Cochenour*, 4th Dist. Ross App. No. 98CA2440, 1999 WL 152127 (March 8, 1999.) As the Fourth District Court of Appeals found, federal courts routinely hold that vague assertions of faded memories are insufficient to establish prejudice. *Id.* at *1 citing *United States v. Crouch*, 84 F.3d 1497,1515; *United States v. Beszborn* (C.A.5, 1994), 21 F.3d 62, 67, certiorari denied *sub nom Westmoreland v. United States*, 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 288; *United States v. Stierwalt* (C.A.8, 1994), 16 F.3d 282, 285; *United States v. Harrison* (S.D.N.Y.1991), 764 F.Supp. 29, 32; *United States v. Greer* (D.Vt.1997), 956 F.Supp. 525, 528.

As the dissent found, "Keenan acknowledged the lack of specific evidentiary material to substantiate the degradation of memory issue and instead relied on the notion of "common sense" to determine that the witnesses would not have sufficient memory to testify at the retrial. Tr. 395:13–20. Such a presumption would automatically entitle a defendant to a finding of prejudice that warrants a dismissal of the indictment in all cases where a retrial is granted based on any type of *Brady* violation made years after the original trial." *State v. Keenan*, 998 N.E.2d 837, 2013-Ohio-4029, ¶158 (Gallagher, J., dissenting.) The unworkable standard used by the trial court, and affirmed by the Eighth District, is inconsistent with decades of precedent on this issue.

Keenan failed to present evidence to sustain a due process claim. The state was ready to proceed to trial and was willing to stipulate to ordinarily inadmissible evidence to overcome any alleged difficulties. Despite this, the trial court imposed multiple discovery sanctions and prohibited trial.

III. Conclusion

Prejudice is a required element to obtain due process relief. It cannot be presumed from the passage of time alone. Keenan failed to present anything more than an insufficient vague assertion to support his claim and it was improper to dismiss his case with prejudice without a hearing or evidence on this issue.

CONCLUSION

The State respectfully requests this Honorable Court adopt the State's propositions of law and allow the state the opportunity to proceed to trial against Keenan.

Respectfully submitted,

TIMOTHY J. MCGINTY
Cuyahoga County Prosecuting Attorney

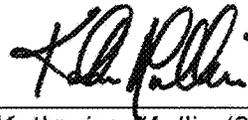


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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant was sent by regular U.S. mail this
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IN THE SUPREME COURT OF OHIO

13-1731

STATE OF OHIO)	CASE NO: _____
)	
Plaintiff-Appellant)	
)	On Appeal from the Cuyahoga
v.)	County Court of Appeals
)	Eighth Appellate District
THOMAS M. KEENAN)	
)	Court of Appeals
Defendant-Appellee)	Case No. CA-99025

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

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FILED
 NOV 04 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

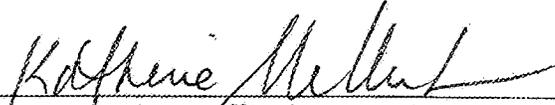
RECEIVED
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 CLERK OF COURT
 SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in *State v. Keenan*, 8th Dist. Cuyahoga App. No. 99025, 2013-Ohio-4029, (Gallagher, J. dissenting), Cuyahoga Common Pleas Case number CR-232189, on September 19, 2013.

This appeal raises a substantial constitutional question, involves a felony, or a question of public or great general interest and invokes this Court's discretionary authority pursuant to Art. IV, § 2(B)(2)(e). This felony case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,
TIMOTHY J. MCGINTY (00***)



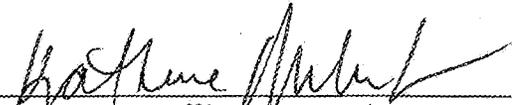
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I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail, postage prepaid, on this 1st day of November, 2013 to counsel for Appellee:

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[Cite as *State v. Keenan*, 2013-Ohio-4029.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99025

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

THOMAS M. KEENAN

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-232189

BEFORE: Jones, P.J., S. Gallagher, J., and McCormack, J.

RELEASED AND JOURNALIZED: September 19, 2013

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LARRY A. JONES, SR., P.J.:

{¶1} Plaintiff-appellant, the state of Ohio, appeals from the trial court's dismissal with prejudice of the indictment against defendant-appellee, Thomas Michael Keenan. We affirm.

I. Brief Overview of Pertinent Procedural History

{¶2} This case dates back to the September 1988 discovery of Anthony Klann's body in Doan Creek.¹ Keenan was indicted, along with alleged co-conspirators Joe D'Ambrosio and Edward Espinoza, in connection with Klann's death. Keenan was charged with two counts of aggravated murder, one count of kidnapping, and one count of aggravated burglary. In 1989, a jury returned a guilty verdict on all counts, recommended Keenan be sentenced to death, and the trial court sentenced him to death. In a subsequent appeal to the Ohio Supreme Court, the court determined that prosecutorial misconduct occurred during closing argument, and it vacated the convictions and ordered a new trial. *State v. Keenan*, 66 Ohio St.3d 402, 613 N.E.2d 203 (1993).

{¶3} In 1994, a second trial commenced on the same charges; Keenan was again convicted and sentenced to death. This court and the Ohio Supreme Court affirmed the convictions and sentence. *State v. Keenan*, 8th Dist. Cuyahoga No. 67452, 1996 Ohio App. LEXIS 3569 (Aug. 22, 1996), *aff'd*, 81 Ohio St.3d 133, 689 N.E.2d 929 (1998).

¹A complete factual history, as adduced by the evidence presented at Keenan's second trial, can be found in *Keenan v. Bagley*, N.D. Ohio No. 1:01 CV 2139, 2012 U.S. Dist. LEXIS 57044 (Apr. 24, 2012), and *State v. Keenan*, 81 Ohio St.3d 133, 689 N.E.2d 929 (1998).

{¶4} After exhausting his state remedies,² Keenan filed a petition for a writ of habeas corpus in the United States District Court, Northern District of Ohio. In the district court, Keenan filed numerous motions to expand the record, primarily to include documents from D'Ambrosio's federal habeas and state court retrial proceedings. The district court allowed the inclusion of these documents in Keenan's habeas proceeding. *Keenan v. Bagley*, at *32-22.

{¶5} The district court subsequently found that the state suppressed evidence in violation of its duties under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by withholding seven specific categories of evidence. *Keenan v. Bagley* at *134. The district court described the *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.* The district court referenced the state's "stonewalling" for nearly 20 years, *id.*, and noted that Keenan only learned of the evidence as a result of discovery ordered by the federal court in D'Ambrosio's habeas case. *Id.* at *68 and 83.

{¶6} The district court concluded that there was a reasonable probability that the suppressed evidence would have produced a different verdict sufficient to undermine confidence in the outcome of the trial. *Id.* at *128-129. The court issued a conditional writ of habeas corpus, dated April 24, 2012, ordering the state to either set aside Keenan's

²Additional procedural history is outlined in *Keenan v. Bagley*, N.D. Ohio No. 1:01 CV 2139, 2012 U.S. Dist. LEXIS 57044 (Apr. 24, 2012).

conviction for aggravated murder and his death sentence, or conduct another trial within 180 days from the date of the order.

{¶7} The state elected to retry Keenan for Klann's murder and filed a motion for a new trial on May 31, 2012. The trial court granted the motion on July 9, 2012, and vacated Keenan's convictions.

{¶8} On July 11, 2012, the state filed notices of intent to (1) introduce Keenan's prior testimony under Evid.R. 801(D)(2)(a), (2) introduce prior testimony of deceased witness Edward Espinoza pursuant to Evid.R. 804(D)(1), and (3) introduce prior testimony and statements of D'Ambrosio pursuant to Evid.R. 801(D)(2)(e). Keenan filed motions in opposition to the state's notices of intent. The trial court conducted a hearing on August 23, 2012, and subsequently ordered that the state could not use any of the prior testimonies or statements. On August 29, 2012, the state elected to remove the death penalty specifications from the indictment.

{¶9} Meanwhile, on August 8, 2012, Keenan filed a motion to dismiss the indictment. After the state opposed, the trial court conducted a hearing on August 27, 2012, but held its ruling on the motion in abeyance.

{¶10} A hearing was set to commence on September 5, 2012, relating to Keenan's motion to dismiss, but the court once again held its ruling in abeyance because the parties were involved in plea discussions. After a partial plea colloquy, however, Keenan decided not to plead guilty.

{¶11} On September 6, 2012, the trial court issued the following order, granting

Keenan's motion to dismiss with prejudice:

Pursuant to Criminal Rule 48(B), a hearing on defendant Thomas Michael Keenan's motion to dismiss the indictment with prejudice was held in open court on 9/5/12. The court issued [its] findings of fact & conclusions of law on the record. The court finds in the interest of justice and fairness, the harm done to the defendant Keenan has been so egregious that this is the extraordinary case where the court has no other option but to grant the motion to dismiss. Defendant's motion to dismiss the indictment against him with prejudice is granted. *See* Crim.R. 48(B); Criminal Rule 16(L)(1); *State v. Larkins*, 8th Dist. No. 85877, 2006-Ohio-90.

Defendant Keenan's request for appellate bond is granted over state's objection. Defendant Keenan's bond is set [at] \$5,000 personal bond with court supervised release supervision. Defendant is to report to CSR bi-weekly while this case is pending in the Court of Appeals. Defendant ordered released.

{¶12} The state appealed from this ruling and submits one assignment of error:

[I.] The trial court erred when it granted the Defendant-Appellee's Motion to Dismiss the Indictment with Prejudice.

II. Law and Analysis

New Trial

{¶13} The state claims that the district court already sanctioned the state when it issued the April 24, 2012 conditional writ of habeas corpus ordering the state to either set aside Keenan's conviction for aggravated murder and his death sentence, or conduct another trial within 180 days from the date of the order. The state argues that the trial court did not follow the district court's mandate when it sanctioned the state a second time for the same discovery violation by dismissing Keenan's indictment with prejudice as this

action was neither setting aside the conviction and sentence nor conducting a new trial. We find no merit to this argument.

{¶14} The district court remanded the case to the trial court for further action, and the state elected to retry Keenan. The decision to go forward with a new trial did not divest the trial court of its continuing powers of jurisdiction over any further actions of the parties. *See Larkins*, 8th Dist. Cuyahoga No. 85877, 2006-Ohio-90, ¶ 58 (Kilbane, J., concurring). The trial court was not sanctioning the state a second time for the same actions or refusing to follow the district court's mandate.

{¶15} As this court noted in *Larkins* at ¶ 32, "Civ.R. 33(D) and R.C. 2945.82 govern the manner in which a new trial is to be conducted." Civ.R. 33(D) provides that "[w]hen a new trial is awarded on appeal, the accused shall stand trial upon the charge or charges of which he was convicted." And R.C. 2945.82 provides that "when a new trial is granted by the trial court * * * the accused shall stand for trial upon the indictment or information as though there had been no previous trial thereof."

{¶16} Consequently, once the district court remanded the case and the state elected to proceed with a new trial, "matters stood in the same position they did before any trial had been conducted. It follows that the court possessed all authority to reopen discovery or entertain any pretrial motions available at law." *Larkins* at ¶ 33, 55 (Kilbane, J., concurring). Therefore, Keenan was within his rights to file a motion to dismiss and the trial court could consider said motion.

State v. Darmond

{¶17} We review the trial court’s decision to grant Keenan’s motion to dismiss with prejudice for an abuse of discretion. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 33, citing *State v. Parson*, 6 Ohio St.3d 442, 445, 453 N.E.2d 689 (1983).

{¶18} The state submits the trial court failed to consider a less severe sanction than dismissal with prejudice.

{¶19} In *State v. Darmond*, 8th Dist. Cuyahoga Nos. 96373 and 96374, 2011-Ohio-6160, this court held that the “least severe sanction” language from *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987), does not apply to cases where sanctions are imposed on the prosecution. In *Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, the Ohio Supreme Court disagreed and concluded that its previous holding in *Lakewood* 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, 2013-Ohio-966, 986 N.E.2d 971, at the syllabus, quoting *Lakewood*, paragraph two of the syllabus.

{¶20} In *Lakewood*, the court had viewed the trial court’s sanction of excluding the testimony of the defense witnesses as too severe because it effectively deprived the defendant of the ability to present a defense. *Id.* at 4-5. The court concluded that the trial court should not have imposed the sanction without first considering and rejecting the

feasibility of less severe sanctions. *Id.* at 5.

{¶21} In expanding its *Lakewood* holding, the *Darmond* court noted that the stated purpose of the 2010 amendment to Crim.R. 16(A) was to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice; the amended rule “expands the reciprocal duties in the exchange of materials,” and “balances a defendant’s constitutional rights with the community’s compelling interest in a thorough, effective, and just prosecution of criminal acts.” *Darmond* at ¶ 29; Staff Notes to the 2010 amendment to Division (A) of Crim.R. 16. The *Darmond* court further recognized that the current Crim.R. 16(A) applies to “all parties in a criminal case,” and “all duties and *remedies*” of the rule are reciprocal and apply “to the defense and the prosecution equally.” (Emphasis sic.) *Id.*; Crim.R. 16(A).

{¶22} In comparing *Lakewood* to *Darmond*, the Ohio Supreme Court recognized the sanction of dismissal with prejudice in *Darmond* was also “extremely severe” because it foreclosed the possibility of further prosecution. *Darmond* at ¶ 30. The court noted that

Crim.R. 16’s emphasis on equal and reciprocal treatment of parties clarifies that the strong preference expressed in *Lakewood* for imposing the least severe sanction that will further the purposes of the discovery rules is a critical consideration that must be taken into account in any criminal case before a severe sanction is imposed for a discovery violation.

Darmond at 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 31. A trial court should not impose the sanction of dismissal with prejudice unless the trial court specifically weighs and rejects the feasibility of less severe sanctions. *Id.* at ¶ 30.

{¶23} That being said, the *Darmond* court noted that, despite this mandate, the trial court retains the discretion in determining a sanction for a discovery violation.³ *Id.* at ¶ 33, citing *Parson*, 6 Ohio St.3d at 445, 453 N.E.2d 689. The 2010 amendments to Crim.R. 16 did not change this long-standing principle. *Darmond at id.* The court stated:

Crim.R. 16(L)(1) is identical to former Crim.R. 16(E)(3) in detailing a trial court's authority to issue orders in the wake of a party's failure to comply with discovery obligations, and in particular provides that the trial court may issue any order "it deems just under the circumstances."

Id., citing *Parson at id.*; see also Staff Notes to 2010 amendment to Division (L) of Crim.R. 16 ("The trial court continues to retain discretion to ensure that the provisions of the rule are followed. This discretion protects the integrity of the criminal justice process while protecting the rights of the defendants, witnesses, victims, and society at large.")

Three-Prong Test

{¶24} In *Parson*, the Ohio Supreme Court established a three-prong test governing a trial court's exercise of discretion in imposing a sanction for the prosecution's discovery violation: (1) whether the failure to disclose was a willful violation of Crim.R. 16; (2) whether foreknowledge of the undisclosed material would have benefitted the accused in the preparation of a defense; and (3) whether the accused was prejudiced. *Id.* at syllabus; see also *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864.

{¶25} In *Darmond*, the Ohio Supreme Court noted that several of the factors

³We, therefore, reject the state's proposition that a trial court's legal conclusions in a pretrial motion to dismiss are subject to a de novo review on appeal.

discussed in *Lakewood* are similar to the *Parson* factors. *Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 36. These factors include the degree of prejudice to the opposing party and whether the violation was willful or in bad faith. *Id.*; see *Lakewood*, 32 Ohio St.3d at 5, 511 N.E.2d 1138. The court emphasized that its holding did not mean that

a discovery violation committed by the state can never result in the dismissal with prejudice of a criminal case. That option remains available when a trial court, after considering the factors set forth in *Parson* and in *Lakewood*, determines that a lesser sanction would not be consistent with the purposes of the criminal discovery rules.

Darmond at ¶ 41.

{¶26} In the present case, the trial court conducted the three-prong analysis set forth in *State v. Wiles*, 59 Ohio St.3d 71, 78-79, 571 N.E.2d 97 (1991), which is the same as the *Parson* analysis.

{¶27} In rendering its decision, the trial court stated its findings of fact and conclusions of law on the record. In pertinent part, the trial court found:

The first prong is the violation and was the violation willful; the second prong is foreknowledge, would foreknowledge have benefitted Mr. Keenan or the Defendant; and the third prong is has the Defendant suffered prejudice as a result of the State's failure to disclose the information.

Applying that test to this case, I'm going to make the following specific findings of fact as they pertain to this case:

As to the first prong, it is without question, based on the egregious history of the prosecutorial misconduct and the *Brady* violations outlined in detail by both the Ohio Supreme Court and the Northern District of Ohio in this case that the State willfully withheld exculpatory evidence from Keenan and his attorneys.

Looking at the second prong, the knowledge of this material prior to trial would have clearly benefitted Mr. Keenan's case.

It would have allowed for more effective cross-examination of witnesses, especially Edward Espinoza, the co-defendant, and the alleged sole eyewitness to this crime.

The evidence that Paul Lewis had been indicted for the rape of [a male victim]; that Anthony Klann, the decedent, had some knowledge of this rape, and that Paul Lewis had never been prosecuted for it[,] would have also been beneficial for Keenan. This evidence could have strengthened Keenan's case by establishing a motive of someone other than Keenan for the murder of Anthony Klann.

For the same reasons, the evidence that Paul Lewis was the anonymous caller who called police and identified Anthony Klann as the murder victim, and had information regarding the murder that was not publicly known could also have benefitted Mr. Keenan's case.

The evidence that the initial responding detectives believed the murder to have occurred somewhere other than Doan's Creek would have allowed a more effective questioning of the police investigation, impeachment of Espinoza, and could have cast doubt on the State's theory of the case.

The cassette tape that was made by Angelo Crimi that may have implicated others in the murder would have been obviously beneficial to the Keenan case. The disclosure of the existence of this tape and its subsequent disappearance could have held significant impeachment value towards the impeachment of the police and Edward Espinoza.

James "Lightfoot" Russell's relocation request could have been used by Keenan's defense counsel to question the State of Ohio regarding his unavailable status in the second trial.

The statements made by the neighbors, Theresa Farinacci, and the older couple who was not identified, would have strengthened the initial detective's conclusion that the murder occurred somewhere else or somewhere other than Doan's Creek.

It could have also been used to question the thoroughness of the police investigation, and Paul Lewis' involvement in the crime since the statements were overheard by neighbors near Mr. Lewis' apartment.

It is clear to this court that the exculpatory evidence would have strengthened and been beneficial to Keenan's case as outlined in prong two [of *Wiles*, 59 Ohio St.3d at 78-79, 571 N.E.2d 97].⁴

Looking at the third prong and final prong, has Keenan suffered severe prejudice as a result of the State's failure to disclose the exculpatory evidence.

Keenan's case is now 24 years removed from the crime. The witnesses would have to testify to detailed issues that took place that long ago, including the date and time of this alleged murder which have never been decisively established.

The only alleged eyewitness, Edward Espinoza, is deceased. And his testimony is not admissible because he was never able to be cross-examined with the newly discovered exculpatory material. Additionally, Keenan was never able to use the exculpatory evidence to impeach Espinoza.

Other witnesses of importance are also deceased, including Detective Timothy Horval, Lee Oliver, Angelo Crimi, and James Russell. None of whom have been able to be cross-examined or confronted with the exculpatory evidence.

The Keenan case before the court today clearly satisfies the three-prong test as outlined by the Ohio Supreme Court case of *State v. Wiles*. As in *Larkins*, this case is the unique and extraordinary case, that the harm done to Mr. Keenan cannot be resolved by a new trial, and this Court is going to dismiss this case with prejudice.

⁴The district court also found this material had significant exculpatory and impeachment value:

The State had a clear obligation to reveal the information it possessed concerning Lewis' rape charge, request for assistance from the police and role in the early investigation; the initial police theories of where the murder occurred; the statement of a former roommate of the victim regarding who was involved in the murder; and the statements of wholly disinterested witnesses to activities near Lewis' apartment on Friday night/Saturday morning.

* * *

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.

{¶28} Again, our review is limited to whether the trial court abused its discretion in granting Keenan's motion to dismiss. A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). An abuse of discretion includes a situation in which a trial court did not engage in a "sound reasoning process." *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). An abuse-of-discretion review is deferential, and an appellate court may not simply substitute its judgment for that of the trial court. *Id.*

{¶29} In granting the motion to dismiss, the trial court relied, in part, on *Larkins*, 8th Dist. Cuyahoga No. 85877, 2006-Ohio-90, a case in which a defendant's indictment was dismissed as a sanction against the state for its violation of Crim.R. 16. The trial court in *Larkins* found that the state had willfully withheld exculpatory material from the defendant, including information that called into question the state's identification of the defendant as the perpetrator. *Id.* at ¶ 43-48. This court affirmed and concluded that the prejudice to *Larkins* could not be cured by a new trial because nearly 20 years had passed since the original trial, eight witnesses for the defense were deceased, numerous witnesses

had unknown addresses, and to present the witnesses' prior testimony "would be useless because none of the witnesses had been previously questioned about the exculpatory evidence withheld in the case." *Id.* at ¶ 51.

{¶30} In this case, the state contends that, unlike Larkins, Keenan is unable to prove the third *Wiles* or *Parson* prong, a prima facie showing of prejudice. The state argues that Keenan is unable to show that the discovery violations prejudiced him due to (1) the unavailability of critical witnesses and the passage of time, (2) the degradation of memory, or (3) an inability to meaningfully use the newly discovered *Brady* material. The state also asserts that "Keenan should not be permitted to argue for the exclusion of Espinoza's testimony, and then once its excluded, also be able to argue that he is prejudiced because he cannot confront the testimony with the newly discovered *Brady* material." According to the state, "by moving to exclude Espinoza's testimony, the defendant has invited the 'error' of not being able to effectively use the newly discovered *Brady* material."

{¶31} We reject the state's position. Espinoza was the state's only eyewitness to Klann's murder. Based solely on the state's knowingly withholding the exculpatory material, Keenan is forever barred from *effectively* using the material to cross-examine or impeach Espinoza because Espinoza is dead. Keenan is prejudiced because he cannot confront a living Espinoza with the exculpatory material because he did not have it when Espinoza testified at his first and second trials.⁵ As recognized by the district court,

⁵*See Keenan*, N.D.Ohio No. 1:01 CV 2139, 2012 U.S. Dist. LEXIS 57044, *123-129, for a

“Keenan could have used the evidence to impeach Espinoza, and, because Espinoza was the State’s sole witness to the crime and the only evidence linking Keenan to the murder, thereby undercut the State’s entire case.” *Keenan*, N.D. Ohio No. 1:01 CV 2139, 2012 U.S. Dist. LEXIS 57044, *123.

New Argument on Appeal

{¶32} For the first time on appeal, the state proposes that while any form of dismissal was improper, the trial court should have imposed a less severe sanction of dismissal of the murder count (due to the unavailability of Espinoza), but preserved the burglary and kidnapping counts, for which both parties had sufficient witnesses available to independently proceed with trial on those charges.

{¶33} During oral argument, the state vehemently reiterated its position that the trial court should have allowed the trial to proceed on the kidnapping and burglary counts as a less severe sanction, rather than dismissing the entire indictment with prejudice. The state contends that it was prepared to proceed to trial on all counts, or only on the kidnapping and burglary counts, and could do so without a prejudicial impact on Keenan.

{¶34} We reject the state’s contention that the trial court abused its discretion when it “failed” to allow the state to proceed on the charges of kidnapping and burglary. Not only does the state raise this argument for the first time on appeal, but, in fact, the state urged the trial court to allow it to proceed on all charges even after the court disallowed use of Espinoza’s prior testimony. *See* tr. 417-418. At no time during the state’s

discussion of the significant exculpatory and impeachment value of the withheld evidence.

argument to the trial court, *nor in its post-argument briefing*, did the state propose the less severe sanction of dismissing only some of the charges. The state repeatedly told the court that it was prepared to go forward on the aggravated murder charges, even without the use of the prior testimony the court excluded from Keenan, D'Ambrosio, and Espinoza.

{¶35} We are well aware that the trial court had the discretion to fashion its own sanction and could have granted the motion to dismiss as to one, some, or all of the charges. But we find the state's newly-fashioned argument on appeal that the trial court failed to consider the less severe sanction of dismissal of only the aggravated murder charges somewhat disingenuous given that it is the first time the state has raised the issue. In addition, the trial court expressly stated it was aware of its obligation to impose the least severe sanction that is consistent with the purposes of the rules of discovery before it dismissed the indictment.

{¶36} The aggravated murder, kidnapping, and aggravated burglary crimes with which Keenan were charged were part of one continuous course of conduct over several hours and, despite the state's arguments to the contrary, dependent upon Espinoza's allegations. The state fails to accept responsibility for its intentional inactions, and thus fails to recognize these inactions over the span of more than two decades resulted directly in the trial court's dismissal of the entire indictment. Were it not for D'Ambrosio's habeas hearing and the discovery of this "new" evidence, Keenan would most likely still

be without it.⁶ We agree that the prejudice caused by the state's refusal to divulge exculpatory evidence has now made it impossible to restore Keenan to the position that he should have been in at the time of the first and second trials had he been made aware of the exculpatory evidence.

{¶37} *Larkins*, 8th Dist. Cuyahoga No. 85877, 2006-Ohio-90, was the extraordinary case in which prejudice caused to the defendant as a result of the state's failure to disclose exculpatory evidence could not be cured except by a dismissal with prejudice. This is also such an extraordinary case. The trial court was in the best position to determine which sanction under Crim.R. 16(L) was most appropriate. The trial court considered, but rejected, a less severe sanction, as mandated by *Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971.

{¶38} Based on the record in this case, we cannot state that the trial court's decision to grant Keenan's motion to dismiss the indictment with prejudice was so arbitrary, unreasonable, or unconscionable as to be an abuse of the trial court's discretion.

{¶39} There will be no sense of legal or human relief or resolution resulting from our collective work on this now quarter century-long pursuit of truth.

⁶*See Keenan*, N.D. Ohio No. 1:01 CV 2139, 2012 U.S. Dist. LEXIS 57044, *68 and 83 ("An examination of the development of Keenan's *Brady* claims during this long and complex case, and the symbiotic relationship between his case and that of his co-defendant, demonstrates that despite Keenan's and D'Ambrosio's persistent discovery efforts, the State continued to withhold much of the evidence now at issue until its hand was forced in the [2002] D'Ambrosio case. * * * Throughout the twenty-three years of his case, Keenan persistently has sought discovery from the State, and was thwarted at every stage. He only obtained most of the information as a result of his co-defendant's highly contentious and hard-won habeas discovery.").

{¶40} In 1988, a cowardly and unspeakable vicious homicide was carried out upon the victim, Anthony Klann. All surviving family, friends, and this community are frustrated by the failure to effectuate justice resulting from his violent death.

{¶41} The 2012 trial court is not at fault for dismissing the retrial of this murder. The degradation of this case began 25 years ago, when the desire to obtain a conviction overwhelmed the state's responsibility to seek the fullest truth of that day in September 1988.

{¶42} A defendant's right to a fair trial dates back to the adoption of our nation's most revered founding documents. In this case, the federal court determined that a fair trial had not taken place; and in 2012, the trial court decided it could not in the future. While the victim deserved justice, the bad-faith conduct from 1988 forward made that impossible.

{¶43} The state's sole assignment of error is overruled.

{¶44} Judgment affirmed.

It is ordered that appellee recover from appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

TIM McCORMACK, J., CONCURS
SEAN C. GALLAGHER, J., DISSENTS WITH
SEPARATE OPINION

SEAN C. GALLAGHER, J., DISSENTING:

{¶45} I respectfully dissent from the opinion of the majority. In my opinion, the trial court abused its discretion by imposing the most severe discovery sanction, dismissal of the indictment, after it already imposed a less severe one, precluding evidence, all for the same *Brady* violations that formed the basis of awarding a new trial as the original sanction. I further believe that the majority combines two different standards used to review a due process claim based on prior *Brady* violations, with ongoing discovery violations, to create one unworkable standard that offers no prospective guidance to the trial courts. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Understandably, this conflation of issues began with this district's *Larkins* decision; however, in light of the Ohio Supreme Court's decision in *Darmond*, *Larkins* must be limited by the facts of that case. I would, accordingly, reverse the decision of the trial court and remand for further proceedings. *State v. Larkins*, 8th Dist. Cuyahoga No. 85877, 2006-Ohio-90; *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971.

{¶46} In its assignment of error, the state argues the trial court erred by relying on *Larkins* and granting the motion to dismiss with prejudice as a discovery sanction, when either no sanction or a lesser sanction was appropriate. This case originated from the

federal district court's judgment determining that the state committed a *Brady* violation by withholding evidence, and sanctioning the state for the violation by ordering either a new trial or dismissal of the indictment, at the state's election. The state elected a new trial upon remand to the trial court. Keenan, after pursuing cursory discovery, filed a motion to dismiss the indictment based on the *Brady* violation, claiming the new trial would not remedy the violation. Both the trial court and the majority analyzed Keenan's claim as a discovery violation sanctionable pursuant to Crim.R. 16, rather than as a due process violation based on the original *Brady* violation, when the discovery for the new trial revealed that a retrial would violate the defendant's constitutional due process rights in light of the degraded state of discovery caused by the passage of time.

{¶47} If the dismissal of the indictment was predicated upon a Crim.R. 16 discovery violation and analysis, once the trial court determined that a discovery sanction was warranted based on its tripartite *Parson* analysis, the court should have determined whether a less severe sanction would suffice to remedy the prejudice caused by the discovery violation. *State v. Parson*, 6 Ohio St.3d 442, 445, 453 N.E.2d 689 (1983). The trial court conducted the three-prong analysis as set forth in *State v. Wiles*, 59 Ohio St.3d 71, 78-79, 571 N.E.2d 97 (1991) (reiterating the tripartite *Parson* analysis), to determine that a further discovery sanction was warranted, given the ongoing prejudice to Keenan caused by the *Brady* violations. The state's appeal focuses on the trial court's conclusion that Keenan was prejudiced by the discovery violations in its analysis of the third *Wiles* prong, and whether a less severe sanction would have been consistent with the

purposes of the criminal discovery rules.

{¶48} In *Larkins*, 8th Dist. Cuyahoga No. 85877, 2006-Ohio-90, upon which the majority heavily relies, this court affirmed the trial court's dismissal of the defendant's indictment as a sanction for the state's violation of Crim.R. 16. In that case, the state had willfully withheld exculpatory material from the defendant, including information that called into question the state's identification of the defendant as the perpetrator, resulting in prejudice to the defendant. *Id.* at ¶ 43-48. The prejudice to *Larkins* could not be cured by a new trial because eight witnesses for the defense were deceased and 16 other witnesses had unknown addresses, and to present those witnesses' prior testimony would have been useless because none of the witnesses had been previously questioned about the exculpatory evidence. *Id.* at ¶ 51.

{¶49} The *Larkins* court essentially shoe-horned a due process argument — that the new trial awarded as a sanction for the *Brady* violation would violate a defendant's right to due process in light of the passage of time and degradation of witnesses' memories — into the framework for analyzing sanctions used to remedy ongoing pretrial discovery violations pursuant to Crim.R. 16. It is for this reason that *Larkins* must be limited to its facts. In both *Lakewood v. Papadelis* and *Darmond*, the Ohio Supreme Court interposed an additional factor to resolving discovery disputes that this court's *Larkins* analysis omitted. *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 4-5, 511 N.E.2d 1138 (1987); *Darmond*, 135 Ohio St.3d 343, 352, 2013-Ohio-966, 986 N.E.2d 971.

{¶50} *Lakewood* and *Darmond* instruct the court to analyze the effectiveness of a

less severe sanction, such as preclusion of evidence, prior to imposing the most severe sanction available pursuant to Crim.R. 16, which is dismissal of the indictment. *Lakewood; Darmond* (acknowledging that although it would have been “helpful” for the state to provide alternative sanctions in its opposition to a motion to dismiss the indictment, it was an unnecessary prerequisite). The obligation rests with the trial court to ensure that the least severe sanctions available are considered. *Id.* The majority creates a standard shifting the burden to the state to provide the court with less severe sanction options. Under that standard, the state’s failure to do so would forfeit its right to argue that the court failed to consider the effectiveness of the less severe sanction. *Lakewood* and its progeny set no such standard.

{¶51} While the trial court addressed the *Parson* factors in this case, it failed to specifically consider the effectiveness of a less severe discovery sanction, concluding its sole obligation was to merely consider the sanction of a new trial, derived from the original *Brady* violation, as opposed to considering the effectiveness of a less severe sanction, such as preclusion of evidence. It is important to note the completely unworkable standard the majority perpetuates. The vehicle Keenan used to seek further sanctions for the *Brady* violations was a motion to dismiss the indictment *after* the retrial was already granted as a sanction for the *Brady* violation. Thus, the retrial was not a sanction available to impose any further discovery sanctions against the state; it was already granted. If, as the majority implies, the standard of review is derived from Crim.R. 16, the court necessarily abused its discretion when it failed to consider the

effectiveness of any other discovery sanction to address the prejudice emanating from the deteriorated state of discovery. *Darmond* at 352. The trial court's only consideration was of the sanction imposing a retrial, a sanction not available at that stage of the proceedings for the purposes of a Crim.R. 16-derived sanction.

{¶52} Moreover, the trial court imposed an additional sanction against the state for the *Brady* violation by precluding its use of Espinoza's prior testimony at the new trial. The court then, without addressing the effectiveness of that sanction, bootstrapped the preclusion of testimony with Keenan's argument that he was prejudiced by the exclusion because he could not use the newly discovered exculpatory evidence, which was the basis for the *Brady* violation, to impeach the only eyewitness to the crime. Such a circular argument leaves the state in an untenable position.

{¶53} Under the majority's rationale, trial courts are now free to consider Crim.R. 16 sanctions that are unavailable, or to consider imposing the most severe sanctions based on the prejudice caused by the imposition of the less severe sanction in resolving criminal discovery disputes. I cannot join such a broad advancement of *Darmond* or *Larkins*. The majority rationalizes the broad interpretation by perpetuating an unsupported standard, from *Larkins*, that a trial court does not abuse its discretion in dismissing an indictment based on *Brady* violations for which a new trial was already granted if it is impossible to restore the defendant to the position he should have been in at the time of the first trial. This essentially creates a bright-line rule that the state will be precluded from retrying defendants after a *Brady* violation is found years after the original trial: it will always be

impossible to restore the defendant to his original position through the ravages of time. Most courts have established that the typical remedy for a *Brady* violation is the granting of a new trial, and speak nothing of a requirement that the defendant be restored to his original position. *State v. Mapp*, 3d Dist. Union No. 14-10-34, 2011-Ohio-4468, __ 32; *United States v. Presser*, 844 F.2d 1275, 1286 (6th Cir.1988).

{¶54} Keenan's argument and the trial court's ruling are both grounded on a Crim.R. 16 discovery violation. The reality is, however, Keenan's motion to dismiss the indictment raises a due process claim in that a new trial would violate Keenan's constitutional right to due process because of the passage of time and the unavailability of witnesses after discovery was conducted for the new trial, which was awarded as a sanction for the *Brady* violation. This analysis stands apart from a claim for ongoing discovery violations pursuant to Crim.R. 16. Keenan, however, failed to substantiate the merits of a due process argument based on the record before this court. Tellingly, the majority avoids any discussion on the due process arguments Keenan raised, while implicitly relying on such in affirming the trial court's decision through reliance on *Larkins*.

{¶55} Any reliance on *Larkins* to fuse the due process standards with a Crim.R. 16 discovery violation analysis is especially misplaced in light of *Darmond*.⁷ *Larkins* was

⁷I acknowledge the Ohio Supreme Court's decision in *Darmond*, 135 Ohio St.3d 343, 351, 2013-Ohio-966, 986 N.E.2d 971, occurred subsequent to the trial court's proceedings in the current case. Our references to *Darmond* are intended for the sake of convenience. *Darmond* merely reiterated the standard advanced in *Lakewood*, 32 Ohio St.3d 1, 4-5, 511 N.E.2d 1138, which was the same standard the trial court applied in dismissing the indictment. Further, this district held that

decided under the presumption that the discovery sanction inquiry ended without any specific analysis regarding the effectiveness of less severe discovery sanctions, specifically, but not exclusively, whether the sanction of exclusion of the unavailable witnesses' testimony the trial court already imposed would have sufficed to remedy the prejudice caused by the discovery violation. See *Larkins*, 8th Dist. Cuyahoga No. 85877, 2006-Ohio-90, __ 51 (in *Larkins*, this court did not consider the effectiveness of precluding the use of the unavailable witnesses' prior testimony at the retrial). The *Larkins* court merely relied on *Larkins*'s establishment of prejudice, with no analysis regarding the effectiveness of the least severe sanction. *Id.* at __ 51.

{¶56} Similar to the *Larkins* court's approach, the concept of due process does not require the court to determine the effectiveness of a less severe sanction before dismissing an indictment on due process grounds either. See, e.g., *State v. Cline*, 8th Dist. Cuyahoga No. 64776, 1994 Ohio App. LEXIS 683, *5-6 (Feb. 24, 1994) (defendant need only show actual prejudice before the burden shifts to the state to establish a justifiable basis for the delay in indicting the defendant). Thus, according to the *Larkins* court, the due process and Crim.R. 16 discovery sanction arguments were coextensive: both required the defendant to establish prejudice as the culminating inquiry. The fact that the *Larkins*

Lakewood applied equally to discovery violations by the state and the defendant prior to the Ohio Supreme Court's final pronouncement on the issue. See *State v. Wolf*, 8th Dist. Cuyahoga No. 83632, 2004-Ohio-5023, __ 17 (applying the least severe sanction rationale to the standard of review to determine whether the trial court abused its discretion in not excluding a state's witness despite the failure to disclose in favor of a less severe sanction, given the scope of the discovery violation and the lack of prejudice to the defendant); *State v. Brown*, 8th Dist. Cuyahoga No. 83976, 2004-Ohio-5863, ¶ 6 (applying *Lakewood* analysis to the state's discovery violations).

court combined the two separate arguments was harmless, given that overlap and the fact that Larkins presented specific evidence supporting the due process arguments. *Larkins* must be limited to the facts and circumstances of that case in light of the fact that discovery sanctions predicated upon Crim.R. 16 must undergo the effectiveness of a less severe sanction analysis. The majority's reliance on *Larkins* is, therefore, misplaced.

{¶57} Further, *Larkins* does not stand for the proposition that the degradation of a witness's memory is presumed from the passage of time, as Keenan argued and the trial court considered. The *Larkins* court found the unavailability of 24 witnesses prejudiced the defendant's ability to defend the case "wholly apart from issues relating to the typical degradation of memories occurring over long periods of time." *Larkins*, 8th Dist. Cuyahoga No. 85877, 2006-Ohio-90. Thus, the *Larkins* court did not address the degradation of the witnesses' memories because the unavailability of so many witnesses precluded the defendant from presenting a meaningful defense in the first place.

{¶58} In this case, it is not enough to presume the degradation of a witness's memory prejudices Keenan for the purposes of whether any retrial would violate Keenan's right to due process under Article I, Section 16, of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. In fact, Keenan acknowledged the lack of specific evidentiary material to substantiate the degradation of memory issue and instead relied on the notion of "common sense" to determine that the witnesses would not have sufficient memory to testify at the retrial. Tr. 395:13-20. Such a presumption would automatically entitle a defendant to a finding of prejudice that

warrants a dismissal of the indictment in all cases where a retrial is granted based on any type of *Brady* violation made years after the original trial. It must be reiterated that, to the contrary, most courts have established that the typical remedy for a *Brady* violation is the granting of a new trial. *Mapp*, 3d Dist. Union No. 14-10-34, 2011-Ohio-4468, _ 32; *Presser*, 844 F.2d 1275, 1286 (6th Cir.1988).

{¶59} This court has maintained in the similar context of pre-indictment delay, the mere “possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost[,] * * * are not in themselves enough to demonstrate that [a defendant] cannot receive a fair trial * * *.” *State v. Cline*, 8th Dist. Cuyahoga No. 64776, 1994 Ohio App. LEXIS 683, *5-6 (Feb. 24, 1994), citing *State v. Starks*, 8th Dist. Cuyahoga No. 50087, 1986 Ohio App. LEXIS 5845 (Mar. 6, 1986). It is incumbent upon the defendant to establish that the witnesses currently have such a diminished ability to recollect the events as to prejudice the defendant in a retrial. *State v. Leonard*, 8th Dist. Cuyahoga No. 98626, 2013-Ohio-1446, _ 25. I see no reason to create a presumption and deviate from our pre-indictment delay standard for the purposes of determining whether the retrial, premised on the *Brady* violation after the parties pursued discovery, is violative of the defendant’s constitutional right to due process. Accordingly, the trial court’s conclusion that the available witnesses were unable to effectively testify at the retrial is not supported by the evidence. There is no evidence in the record establishing the prejudice created by the passage of time. Quite the opposite. The state presented evidence that witnesses were ready and able to testify at the retrial.

{¶60} Of the five witnesses who are unavailable to testify at Keenan's retrial, any potential prejudice caused by Espinoza's and Crimi's unavailability was seemingly resolved by the trial court's preclusion of Espinoza's previous testimony and the state's stipulation as to the content of Crimi's alleged exculpatory statements. Neither the trial court nor Keenan offered any rationale explaining the ineffectiveness of those remedial steps for the purposes of the aggravated murder counts other than the bootstrapping claim that the exclusion then prejudices Keenan. The trial court completely failed to consider any prejudice with regard to the individual counts for kidnapping and aggravated burglary as required when considering whether to impose sanction pursuant to Crim.R. 16. The trial court thus abused its discretion in dismissing the indictment without undergoing the correct analysis prior to imposing the most severe discovery sanction available.

{¶61} It is unfortunate that Keenan may be placed in the position of potentially having to endure a third trial for acts that occurred over two decades ago, but the victim deserves a just process, as does Keenan. Accordingly, I would find the trial court abused its discretion in dismissing the entire indictment as a discovery sanction pursuant to Crim.R. 16 without first addressing the effectiveness of a less severe discovery sanction to address the *Brady* violations. If the dismissal was predicated upon due process grounds, it cannot be determined that the retrial violates Keenan's right to due process based on the record submitted on appeal. In light of the foregoing, I would reverse the decision of the trial court and remand for further proceedings.

RULE 16. Discovery and Inspection

(A) **Purpose, Scope and Reciprocity.** This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) **Discovery: Right to Copy or Photograph.** Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

- (1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;
- (2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;
- (3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;
- (4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;
- (5) Any evidence favorable to the defendant and material to guilt or punishment;
- (6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;
- (7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting Attorney's Designation of "Counsel Only" Materials. The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting Attorney's Certification of Nondisclosure. If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

- (1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
- (2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;
- (3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;
- (4) The statement is of a child victim of sexually oriented offense under the age of thirteen;
- (5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of Inspection in Cases of Sexual Assault.

- (1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the

information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of Prosecuting Attorney's Certification of Non-Disclosure. Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of Testimony. Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in

which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(H) Discovery: Right to Copy or Photograph. If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

- (1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;
- (2) Results of physical or mental examinations, experiments or scientific tests;
- (3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;
- (4) All investigative reports, except as provided in division (J) of this rule;
- (5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

(I) Witness List. Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information Not Subject to Disclosure. The following items are not subject to disclosure under this rule:

- (1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;
- (2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

(K) Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

(M) Time of motions. A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

[Effective: July 1, 1973; amended effective July 1, 2010.]

Staff Notes (July 1, 2010 Amendments)

Division (A): Purpose, Scope and Reciprocity

The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties. Nothing in this rule shall inhibit the parties from exchanging greater discovery beyond the scope of this rule. The rule accelerates the timing of the exchange of materials, and expands the reciprocal duties in the exchange of materials. The limitations on disclosure permitted under this rule are believed to apply to the minority of criminal cases.

The new rule balances a defendant's constitutional rights with the community's compelling interest in a thorough, effective, and just prosecution of criminal acts.

The Ohio criminal defense bar, by and through the Ohio Association of Criminal Defense Lawyers and prosecutors, by and through the Ohio Prosecuting Attorneys Association, jointly drafted the rule and submitted committee notes to the Commission on the Rules of Practice and Procedure. The Commission on the Rules of Practice and Procedure discussed, modified, and adopted the notes submitted in developing these staff notes.

Division (B): Discovery: Right To Copy or Photograph

This division expands the State's duty to disclose materials and information beyond what was required under the prior rule. All disclosures must be made prior to trial. This division also requires the materials to be copied or photographed as opposed to inspection as permitted under the prior rule. Subject to several exceptions, the State must provide pretrial disclosure of all materials as listed in the enumerated divisions.

Division (C): Prosecuting Attorney's Designation of "Counsel Only" Materials

The State is empowered to limit dissemination of sensitive materials to defense counsel and agents thereof in certain instances. Documents marked as "Counsel Only" may be orally interpreted to the Defendant, or to counsel's agents and employees, but not shown or disseminated to other persons. The rule recognizes that defense counsel bears a duty as an officer of the court to physically retain "Counsel Only" material, and to limit its dissemination. Counsel's duty to the client is not implicated, since the rule expressly allows oral communication of the nature of the "Counsel Only" material.

Division (D): Prosecuting Attorney's Certification of Nondisclosure

This division provides a means to prevent disclosure of items or materials for limited reasons. The prosecution must be able to place reasonable limits on dissemination to preserve testimony and evidence from tampering or intimidation, and certain other enumerated purposes. The new rule explicitly recognizes that it is the prosecution's duty to assess the danger to witnesses and victims, and the need to protect those witnesses and victims by controlling the early disclosure of certain material, subject to judicial review.

A nondisclosure must be for one of the reasons enumerated in the rule, and must be certified in writing to the court. The certification need not disclose the contents or meaning of the nondisclosed material, but must describe it with sufficient particularity to identify it during judicial review as described in division (F).

The certification process recognizes the unique nature of sex crimes against children. In the event of a certification of nondisclosure, defense counsel will have the right to inspect the statement no later than the seven-day review hearing provided in subsection (F), which is an improvement from the prior Criminal Rule 16(B)(1)(g).

Finally, the rule recognizes that not every eventuality can be anticipated in the text of a rule, and allows nondisclosure in the interest of justice.

Division (E): Right of Inspection in Cases of Sexual Assault

This division recognizes the intensely personal nature of a sexual assault, and provides a special mechanism for discovery in such cases. It represents an exception to division (B).

The compromise between the interests in the privacy and dignity of the victim are balanced against the right of the defendant to a thorough review of the State's evidence by permitting inspection, but not copying, of certain materials. Upon motion of the defendant, the court may, in its discretion, permit these materials to be provided under seal to defense counsel and the defendant's expert.

In cases involving the sexual abuse of a child under the age of 13, upon motion and for good cause shown, the trial court may order dissemination of the child's statement under seal and pursuant to protective order to defense counsel and the defendant's expert. This provision facilitates meaningful communication between defense counsel and the defense expert, and to permit timely compliance with division (K) of the rule.

Division (E)(2) is intended to give sufficient time for an expert to evaluate the statement, and also to permit defense counsel to consult with the expert on the content of the statement and issues related to it. This division is designed to provide an exception to the nondisclosure procedure sufficient to permit the expert and defense counsel to effectively evaluate the statement. The protective order shall apply to defense counsel and defendant's experts and agents.

Division (F): Review of Prosecuting Attorney's Certification of Non-Disclosure

This division provides for judicial review at the trial court level of a prosecutor's certification of nondisclosure. As in many other executive branch decisions the standard for review, subject to constitutional protections, is an abuse of discretion – that is, was the prosecutor's decision unreasonable, arbitrary or capricious? The prosecution of a case is an executive function. The rule's nondisclosure provision is a tool to ensure the prosecutor is able to fulfill that executive function.

The prosecutor should possess extensive knowledge about a case, including matters not properly admissible in evidence but highly relevant to the safety of the victim, witnesses, or community. Accordingly, the rule vests in the prosecutor the authority for seeking protection by the nondisclosure, and deference when making a good faith decision about unpredictable prospective human behavior.

The review is conducted *in camera* on the objective criteria set out in division (D), seven days prior to trial, with defense counsel participating. If the Court finds an abuse of discretion, the material must be immediately disclosed to defense counsel. If the Court does not find an abuse of discretion, the material must nonetheless be disclosed no later than the commencement of trial. Further judicial review is provided by giving the prosecutor a right to an interlocutory appeal of an order of disclosure as provided for in Criminal Rule 12(K), which is amended to accommodate that process.

Upon motion of the State, the certification of nondisclosure or "Counsel Only" designation is reviewable by the trial judge in the *in camera* proceeding. The preferred practice is to record or transcribe the *in camera* review to preserve any issues for appeal and sealed to preserve the confidential nature of the information.

The *in camera* review is set seven days prior to trial so that it is, in essence, the end of the trial preparation stage. There was substantial debate regarding the time for this review. Seven days provides adequate opportunity for the defense to prepare for trial and respond to the content of any nondisclosed material. The protective purpose of this process would be destroyed if courts routinely granted continuances of a trial date after conducting the seven-day nondisclosure review. The Commission anticipated that continuances of trial dates would occur only in limited circumstances.

Division (F)(4) seeks to protect victims of sexual assault who are still in their tender years.

Division (G): Perpetuation of Testimony

This division provides that if after judicial review the Court orders disclosure of evidence, the prosecutor upon motion to the Court is given a right to perpetuate testimony in a pretrial hearing as set forth in the subsection.

Division (H): Discovery: Right to Copy or Photograph

The previous rule allowed for disclosure of specified relevant evidence in the possession of defense counsel to the State upon the State's motion. This division expands defense counsel's duty to disclose materials and information beyond what was required under the prior rule. In this division a reciprocal duty of disclosure now arises upon defense counsel's motion for discovery without further demand from the State. This division requires the materials to be copied or photographed, as opposed to the prior rule that only allowed for inspection by the State. Subject to several exceptions covered in division (J), defense counsel must provide pretrial disclosure of materials as listed in the enumerated subsections. This division seeks to define the defense counsel's reciprocal duty of disclosure while respecting the constitutional and ethical obligations required in representing a client.

For the first time, defense counsel has a duty to provide the State with evidence that tends to support innocence or alibi. This allows the State to properly assess its case, and re-evaluate the prosecution. The Commission believes this provision will facilitate meaningful plea negotiation and just resolution.

Division (I): Witness List

This division imposes an equal duty on each party to disclose the list of witnesses that will be called at trial. It prohibits counsel from commenting on the witness lists but does not prohibit the commenting upon the absence or presence of a witness relevant to the proceeding. See, *State v. Hannah*, 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978).

Division (J): Information Not Subject to Disclosure

This division clarifies what information is not subject to disclosure by either party for reasons of confidentiality, privilege, or due to their classification as documents determined to be work product. This division also references that the disclosure or nondisclosure of grand jury testimony is governed by Rule 6 of the Rules of Criminal Procedure.

Division (K): Expert Witnesses; Reports

The division requires disclosure of the expert witness's written report as detailed in the division no later than twenty-one days prior to trial. Failure to comply with the rule precludes the expert witness from testifying during trial. This prevents either party from avoiding pretrial disclosure of the substance of expert witness's testimony by not requesting a written report from the expert, or not seeking introduction of a report. This division does not require written reports of consulting experts who are not being called as witnesses.

Division (L): Regulation of Discovery

The trial court continues to retain discretion to ensure that the provisions of the rule are followed. This discretion protects the integrity of the criminal justice process while protecting the rights of the defendants, witnesses, victims, and society at large.

In cases in which a defendant initially proceeds *pro se*, the trial court may regulate the exchange of discoverable material to accommodate the absence of defense counsel. Said exchange must be consistent with and is not to exceed the scope of the rule. In cases in which the attorney-client relationship is terminated prior to trial for any purpose, any material designated "Counsel Only" or limited in dissemination by protective order must be returned to the State. Any work product derived from such material shall not be provided to the defendant.

The provisions of (L)(2) and (L)(3) are designed to give the court greater authority to regulate discovery in cases of a *pro se* defendant and addresses the problems that could arise if a defendant terminates the employment of his attorney and then demands everything in the attorney's file. This could frustrate the protections built into the rule to avoid release of material directly to the defendant in some cases.

Section (M): Time of Motions

This division requires timely compliance with all provisions of this rule subject to judicial review. Adherence to the requirements of this division will help to ensure the fair administration of justice.