

**IN THE  
SUPREME COURT OF OHIO**

<b>STATE OF OHIO</b>	:	<b>NO. 2015-1427</b>
Plaintiff-Appellant	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
vs.	:	
<b>DEMETRIUS JONES</b>	:	Court of Appeals Case Number 101258
Defendant-Appellee	:	

**MEMORANDUM OF AMICUS CURIAE, THE OHIO PROSECUTING ATTORNEYS  
ASSOCIATION, IN SUPPORT OF THE STATE OF OHIO'S MEMORANDUM IN  
SUPPORT OF JURISDICTION**

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## STATE OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (“OPAA”) offers this amicus memorandum in support of the State of Ohio’s Memorandum in Support of Jurisdiction on Propositions of Law 1 and 2 in its appeal of the Eighth District Court of Appeals’ decision in *State v. Jones*, 8<sup>th</sup> Dist. Cuyahoga No. 101258, 2015-Ohio-2853.

The Ohio Prosecuting Attorneys Association is a private non-profit membership organization that was founded for the benefit of the 88 elected county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to, and reads: “To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members.”

Amicus has a great interest that the proper standard of review for dismissal as a result of prejudicial preindictment delay be consistently and uniformly interpreted and enforced in all districts of the State of Ohio. Prior to *Jones*, Ohio courts required defendants to show that they suffered actual prejudice resulting in a violation of their right to due process of law, even if the State delayed indictment for a significant period of time. The decision of the Eighth District to the contrary in *Jones* is properly reversed.

The impact of the Eighth District’s decision is significant. The reach of the *Jones* decision has already been commented on by some in Cuyahoga County. In fact, Russell Bensing, Jones’ own defense attorney, has noted:

[T]he DNA evidence added nothing to the State's case: Jones had been identified by the victim from the outset.

*Jones* certainly isn't a get-out-of-jail-free card for any defendant in a cold case rape. Most of those cases involve "stranger rapes," and

there the DNA evidence is virtually dispositive: it not only proves identity, it confirms that sexual activity took place. If your DNA is found in someone you didn't know, you got some 'splainin' to do. Here, though, there was a valid basis for a claim that the sex was consensual.

In fact, it's tempting to suggest that *Jones* is too fact-driven to be of broad application. I don't think so. First, it's an *en banc* determination: this is now unquestionably the law in the 8th District. Second, its rejection of the "exculpatory evidence" standard is huge: for that reason alone, *Jones* is the most defendant-friendly Ohio decision on pre-indictment delay. What you're able to make of it in a particular cases depends on the facts, but when isn't that true in appeals? The bottom line is that the law in this area is a whole lot better than it was two weeks ago.

Russell Bensing, *Pre-indictment delay* (July 24, 2015), <http://briefcase8.com/2015/07/pre-indictment-delay.html> (accessed August 28, 2015).

As Bensing notes, the fact that the Eighth District has abandoned the long-standing rule set out by this Court is important. Not only did the court wholly discount the value of the State's evidence, it also was done through an *en banc* opinion – typically a persuasive source when considered by other appellate courts.

This Court should not wait for other courts of appeals to follow in the Eighth District's footsteps before extending its jurisdiction to review this issue. The standard of review for evaluating the due process rights of defendants charged within the statute of limitations, but after some preindictment delay, must be reaffirmed by this Court. A defendant must first show that he has suffered actual prejudice, and only then should courts consider the cause of any delay. Without this long-standing rule, the State's power to enforce the criminal code will be severely hampered.

### **STATEMENT OF THE CASE AND FACTS**

Amicus adopts by reference the statement of case and facts contained in the State of Ohio's Merit Brief.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: The reasons for the delay in bringing a prosecution are never evidence of actual prejudice to the defendant where the prosecution is commenced within the statute of limitations.**

In this case, the Eighth District held that although the State charged Jones within the required time period, Jones' due process rights had been violated. In so finding, the court only considered that Jones' indictment was brought "on the eve of the eve of the running of the 20-year statute of limitations," and concluded that "the state merely failed to take action for a substantial period." *State v. Jones*, 8<sup>th</sup> Dist. Cuyahoga No. 101258, 2015-Ohio-2853, ¶45-46.

But the statute of limitations is a clear indicator of legislative intent about when a defendant must be charged in order to preserve both his rights under the law, as well as the State's interests in prosecuting criminals. As the Eleventh District has noted:

"The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge . . . 'the applicable statute of limitations is the primary guarantee against bringing overly stale criminal charges.' Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice . . . These statutes provide predictability by specifying a limit beyond which there is an irrebutable presumption that a defendant's right to a fair trial would be prejudiced."

*State v. Ware*, 11<sup>th</sup> Dist. Lake No. 2007-L-154, 2008-Ohio-3992, ¶ 14, citing *State v. Marion*, 404 U.S. 307, 322, 92 S.Ct. 455, 30 L.Ed.2d 468 (1972).

The dissent in *Jones* understood this when it reasoned that "shifting the burden to the State to demonstrate a justifiable reason for delay without a showing of actual prejudice circumvents an extended statute of limitations period, invariably defeating legislative intent." *Jones*, at ¶ 55 (J. Gallagher, dissenting). This Court should clarify the purpose of the statute of limitations and the due process rights of defendants in cases of delay. Courts must uphold the law, not subvert it.

**Proposition of Law No. 2: In order to prevail on a claim of pre-indictment delay, a defendant must first present evidence establishing that he was substantially and actually prejudiced. Substantial and actual prejudice requires the defendant to demonstrate the exculpatory value of lost evidence or testimony with proof that is specific and non-speculative.**

In *State v. Luck*, this Court explained that “pre-indictment delay resulting in actual prejudice to a defendant ‘makes a due process claim concrete and ripe for adjudication.’” But, “proof of actual prejudice, alone, will not automatically validate a due process claim, and the prejudice suffered by the defendant must be viewed in light of the state’s reason for the delay.” *State v. Luck*, 15 Ohio St.3d 150, at 154, 472 N.E.2d 1097, at 1102 (1984), citing *United States v. Lovasco*, 431 U.S. 783, at 789, 97 S.Ct. 2044, at 2048, 52 L.Ed.2d 752 (1977). The defendant bears the burden of first establishing actual prejudice from the delay; only then must the State show evidence of a justifiable reason for the delay. *State v. Whiting*, 84 Ohio St.3d 215, at 217, 702 N.E.2d 1199, at 1201 (1998), citing *Luck*, at 158. The court then engages in a balancing test, evaluating the prejudice in light of the state’s reason for delay. *Id.* at 154. There is no reason to alter this long-standing rule.

Even with such clear direction, the Eighth District Court of Appeals failed to apply the balancing test required for allegedly unjustifiable delay. This Court has said: “It would be unwise to adopt a rule requiring the commencement of prosecution whenever there is ‘sufficient evidence to prove guilt beyond a reasonable doubt.’” *Luck*, at 158. But that is exactly what the Eighth District has done in this case.

In this case, the Eighth District first focused on the cause of the delay in charging Jones instead of whether he suffered prejudice. The court noted that the rape kit, which was created in 1993, was not sent for testing until 2011. *State v. Jones*, 8<sup>th</sup> Dist. Cuyahoga No. 101258, 2015-Ohio-2853, ¶ 10. The court also noted that the kit was returned to the Cleveland Police

Department nearly one year later, and Jones was still not indicted for another year, one day before the statute of limitations had run. *Id.*

A court examining a defendant’s preindictment delay claim cannot ignore the evidentiary value of DNA simply because the victim knew her attacker. Here, the delay in commencement of prosecution against the defendant does not “violate those ‘fundamental concepts of justice which lie at the base of our civil and political institutions’ . . .and which define ‘the community’s sense of fair play and decency.’” *See Luck*, at 159. But, the Eighth District explicitly held that it was not applying the two-step test this Court has laid out, instead creating its own vague test of “conceptions of due process and fundamental justice standard.” *Jones*, at ¶ 36. Under this “standard,” the court asked “whose problem should it be when we really do not know what the lost or missing evidence would have shown?” *Id.* at ¶ 40. And then, the court went on to question the rule requiring defendants to prove prejudice.

The court never required Jones to prove that he had suffered actual prejudice. And here, he failed to do so. Jones claimed that he had been interviewed by police and had said he had engaged in consensual sex with the victim; but there was no record of this alleged interview, and the State could find no evidence that the police had interviewed Jones. Jones claims that his dead mother could have testified that he and the victim were more than friends, and that she did not hear anything unusual in her home on the night of the alleged rape. *Id.* at ¶ 12. But his brother, who was also in the home that night, cannot be presumed to be unavailable – the record is silent as to his availability as a witness. *Id.* at ¶ 41. And because the record is silent, the defendant failed to support his claim of prejudice. App. R. 9, 12, 16. As a result, Jones’ claims of prejudice are merely speculative. *See State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶ 56.

Instead of evaluating the cause of the delay in prosecution, the court went on to attack the evidentiary value of the State's evidence. Although this Court has held that reviewing courts should not second-guess the prosecutor's judgment of when enough evidence has been collected to charge an individual, the Eighth District said "the identity of the defendant was not an issue in this case, and the [DNA] evidence did not advance the case." *Jones*, at ¶ 42. The court went on to attack the lack of evidence that "was never collected." *Id.* at ¶ 43. The court went on to conclude that "the state merely failed to take action for a substantial period." *Id.* at ¶ 46.

From this record, the Eighth District found that Jones suffered actual prejudice. *Id.* at ¶ 47. How it reached this conclusion is a significant leap in reasoning and logic. This Court must reaffirm the two-step evaluation of *Luck*, *Whiting* and *Walls*, and require defendants to again show that they have suffered actual prejudice in order to substantiate a due process claim of prejudicial preindictment delay.

**CONCLUSION**

The appropriate test to determine whether a defendant's due process rights have been violated by preindictment delay is to first evaluate whether the defendant has suffered prejudice, and to then balance that prejudice against the cause of the delay. The Eighth District wrongly applied a more stringent and vague standard of review. The OPAA urges this Court to reverse the *Jones* decision of the Eighth District below.

Respectfully,

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**PROOF OF SERVICE**

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to RUSSELL BENSING (#0010602), 1370 Ontario Street, #1350, Cleveland, Ohio 44113, counsel of record, this 31st day of August, 2015.

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