Supreme Court of Ohio Clerk of Court - Filed January 19, 2016 - Case No. 2015-1427

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant

v.

DEMETRIUS JONES

Defendant-Appellee

CASE NO. **2015-1427**

ON APPEAL FROM CUYAHOGA COUNTY COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

COURT OF APPEALS CASE NO. 100068

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STATEMENT OF THE CASE

A. The Allegations and Indictment

In Cuyahoga County Case No. CR-13-577686-A, Demetrius Jones was indicted in a two count indictment that charged him with rape, in violation of R.C. 2907.02 (A)(2), and kidnapping, in violation of R.C. 2905.01(A)(4). The indictment alleged that on September 1, 1993, he did engage in sexual conduct, to-wit: vaginal intercourse, by purposely compelling the victim to submit by force and threat of force, and the indictment further alleged that he did by force, threat, or deception, purposely remove the victim from the place where she was found or restrain the liberty of her for the purpose of engaging in sexual activity.

B. The Motion to Dismiss

On December 2, 2013, Demetrius Jones filed a Motion to Dismiss with Prejudice for Unconstitutional Pre-Indictment Delay. (12/2/2013 Journal Entry). The State opposed the Motion to Dismiss. (12/18/2013 Journal Entry). On March 6, 2014, trial court held a hearing on Defendant's motion to dismiss.

At the hearing, no evidence or testimony was presented by Jones. Instead, defense counsel represented that his client told him that he was interviewed regarding the case and that the interview, notes, and records did not exist. (Tr. 9). The State did not concede that an interview did in fact occur regarding the allegations in this case. (Tr. 9). Defense counsel argued that there was actual prejudice to his client based on the following:

> The loss of evidence; the loss of any detective records other than what we have as part of the RMS; and more importantly, Your Honor, Mr. Jones has suffered actual prejudice in that in the 19 years and 364 days it took the State of Ohio to indict him, his mother, who the victim alleges was present, has passed away. (Tr. 10).

Defense counsel argued that the testimony of the defendant's mother might have been helpful to the defendant if she could possibly have testified regarding (1) whether the Defendant

and the victim were acquaintances or were in a relationship; and/or (2) whether she heard the victim screaming as the victim claims. Nevertheless, Defendant's counsel admitted that he was unsure of what Defendant's mother would have actually testified to at trial. (Tr. 11-12). Defendant's counsel indicated he did not know what the mother would have testified to because the matter was not indicted until after she passed away. (Tr. 11-12). Defense counsel indicated that the mother could have testified as to the fact that the victim was acquainted with the Defendant. (Tr. 12). Defense counsel then suggested that the fact that the two were acquainted could prove that Defendant engaged in consensual sex with the victim. (Tr. 12).

Second, Defendant argued he was prejudiced because the clothing the victim was wearing at the time of the crime "no longer exists." (Tr. 57).

At the close of the hearing, the trial court indicated he would consider the law and arguments and make a ruling. On April 4, 2014, the trial court issued a journal entry, in which it granted Defendant's motion and dismissed the case with prejudice.

In reaching its decision to grant the motion to dismiss, the trial court concluded that Defendant had been prejudiced by pre-indictment delay in three respects: (1) Defendant's case was "significantly impaired by the loss of clothing and the lack of photographs, neither of which would demonstrate a struggle * * *"; (2) Defendant's case was prejudiced by the unavailability of Defendant's mother as a witness, whose "testimony would verify there was no fight, altercation or other disturbance on the date in question or that the victim was raped in her apartment"; and (3) the "almost certain diminishing of memories." (Journal Entry 04/04/2014, 5) The trial court reasoned that these three factors considered together make the preindictment "delay constitutionally impermissible." *Id.*

The State appealed the trial court's dismissal order as a matter or right pursuant to R.C. 2945.67.

C. The Appeal

After briefing and oral argument, the Eighth District convened for an en banc review of the case because the court determined a conflict existed between the proposed majority opinion in this case and the released decision in *State v. Mack,* 8th Dist. Cuyahoga No. 100965, 2014-Ohio-4817. The en banc court indicated that the conflict concerned the standard for proving that a defendant was prejudiced by pre-indictment delay. The Court indicated that the issue before it was the appropriate standard of law for evaluating claims of actual pre-indictment delay prejudice. *Jones* at ¶ 1, 13.

On July 16, 2015, a split en banc panel voted 7 – 4 to affirm the dismissal of this case and released its opinion in *State v. Jones,* 35 N.E.3d 606, 2015-Ohio-2853 (8th Dist. Cuyahoga). The majority en banc opinion indicated that the earlier majority panel in this case had proposed that in order to demonstrate prejudice, "Jones must show that missing or unavailable evidence would have been exculpatory, as opposed to merely attacking the credibility of the State's evidence." *Id.* at ¶ 14. The en banc majority explained that under *Mack,* 8th Dist. Cuyahoga No. 100964, 2014-Ohio-4817, that the court had utilized a less stringent standard for demonstrating actual prejudice. *Jones* at ¶ 17. However, it is unclear what the "less stringent standard" was in *Mack*. Although the appellate court in *Mack* determined there was a pre-indictment delay that necessitated dismissal of the indictment, a careful read of *Mack* does not illuminate the specifics of this "less stringent standard." In *Mack*, the appellate court acknowledged that a defendant must demonstrate the pre-indictment delay resulted in actual prejudice before moving on to the reasons for the delay. *Mack* at ¶ 9. The *Mack* court concluded that prejudice was established where witnesses were unavailable

and the 911 call was unavailable and the defendant was prosecuted for a crime he committed as a juvenile despite his identity always being known. *Mack* at ¶ 9. After finding actual prejudice, the court found the delay to be unreasonable. *Id.* at ¶ 10.

The opinion released by the en banc court in *State v. Jones*, 35 N.E.3d 606, 2015-Ohio-2853 created a new standard of review over the standard to determine actual prejudice and was convened based upon the alleged conflict with *Mack*. This standard was one that was not even apparent from the decision in *Mack*, 8th Dist. Cuyahoga No. 100964, 2014-Ohio-4817. In defining actual prejudice, the majority found the delay to be unreasonable. *Id*. at ¶ 10.

The en banc court utilized the alleged conflict over the standard for determining actual prejudice from the *Mack* indicated that the fact that the stage of the proceedings was relevant because in a pretrial scenario as opposed to post-conviction scenario they do not have the benefit of all the evidence and because of that the, "negative effect of the delay on the defendant's ability to prepare a defense should be a consideration." *Jones*, ¶36, 38. The majority went on to indicate it would consider the nature of the state's case and the effect of any lost evidence and that it would consider whether it would be fair to require a defendant to prove the exculpatory value of any lost evidence. *Id*, at ¶38-40. The majority acknowledged the speculative nature of Jones arguments, but found that Jones had suffered actual prejudice where he was a known suspect and where it believed that the State had barely investigated the case. *Id.* at ¶ 44, 47-48.

The dissent correctly noted that the concerns of the majority were interwoven into the second prong of pre-indictment delay and that the defendant must prove actual prejudice free from speculation before the court considers whether there was a justifiable reason for the delay. *Id.*, at ¶52 (S. Gallagher, J. dissenting). The dissent also reasoned that moving towards the standard set

forth by the majority would allow defendants to demonstrate prejudice through speculative and self-serving claims. *Id.* at ¶ 53.

C. **The State's Request for a Certified Conflict and Jurisdictional Appeal**

The State filed a motion to certify a conflict with the Eighth District on July 27, 2015. The State argued that there was an inter-district conflict on the following issue:

> Whether a defendant may prevail on a claim of pre-indcitment delay prejudice based upon principles of fundamental fairness or whether a defendant must first prove substantial and actual prejudice through non-speculative, exculpatory evidence before shifting the burden to the State to prove the delay was justified.

The State argued that the standard of law applied *Jones* conflicts with the standard of law applied in pre-indictment delay cases from every appellate district in the state of Ohio. Specifically, the State sought certification of a conflict between *Jones* and *State v. Mizell,* 1st Dist. Hamilton Nos. C-070750 and C-070751, 2008-Ohio-4907, *State v. Kaminski,* 2nd Dist. Montgomery No. 12447, 1991 Ohio App. LEXIS 4039 (Aug. 21, 1991), *State v. Mapp,* 3rd Dist. Union No. 14-10-34, 2011-Ohio-4468, *State v. Flickinger,* 4th Dist. Athens No. 98 CA 09, 1999 Ohio App. LEXIS 224 (Jan. 19, 1999), *State v. Fisher,* 5th Dist. Delaware No. 98CAA07036, 1999 Ohio App. LEXIS 25 (Jan. 4, 1999), *State v. Bruce,* 5th Dist. Richland No. 02 CA 40, 2003-Ohio-1714, *State v. Robinson,* 6th Dist. Lucas No. L-06-1182, 2008-Ohio-3498, *State v. Christman,* 7th Dist. Monroe No. 786, 1999 Ohio App. 2486 (May 28, 1999), *State v. Malone,* 9th Dist. Lorain No. 10CA009754, 2011-Ohio-2445, *State v. Tullis,* 10th Dist. Franklin No. 04AP-333, 2005-Ohio-2205, *State v. Ware,* 11th Dist. Lake No. 2007-L-154, 2008-Ohio-3992, *State v. Walls,* 12th Dist. Butler No. CA99-10-174, 2000 Ohio App. LEXIS 5779 (Dec. 11, 2000). These cases were previously raised to the Eighth District in briefing. The State further cited to cases from the Fifth, Sixth, Seventh, and Tenth Districts: *State v. Enyart,* 5th Dist. Fairfield No. 00-CA-28, 2001 Ohio App. LEXIS 1846 (Apr. 16, 2001), *State v. Fisher,* 5th Dist. Delaware No. 98CAA07036 (Jan. 4,

1999), *State v. Robinson,* 6th Dist. Lucas No. L-06-1182, 2008-Ohio-3498, *State v. Willis,* 7th Dist. Mahoning App. No. 95 C.A. 237, 1997 Ohio App. LEXIS 3153 (July 14, 1997), *State v. Woods,* 10th Dist. Franklin No. 87AP-736, 1988 Ohio App. LEXIS 2967 (June 16, 1988).

On September 29, 2015, the Eighth District certified a conflict but only found its decision in conflict with the Tenth District's decision in *State v. Woods,* 10th Dist. Franklin No. 87AP-736, 1988 Ohio App. LEXIS 2967. (09/29/2015 Journal Entry, CA-14-101258).

The State raised two propositions of law its notice of appeal and memorandum in support of jurisdiction filed on August 31, 2015. Amici curiae, the Ohio Prosecuting Attorney's Association and the Ohio Attorney General, filed jurisdictional memorandum in support of the State of Ohio.

On November 10, 2015, this Court accepted discretionary jurisdiction in this case, but declined in a 4 – 3 vote to find that a certified conflict existed based on the Eighth District's certification. *Jones,* 143 Ohio St. 3d 1542, 2015-Ohio-4633.

D. The Aftermath

Subsequent to the decision in *Jones,* 35 N.E.3d 606, 2015-Ohio-2853, the Eighth District declined to find an unconstitutional pre-indictment delay in *State v. Owens,* 8th Dist. Cuyahoga No. 102276, 2015-Ohio-3881, *State v. Bell,* 8th Dist. Cuyahoga No. 102141, 2015-Ohio-4178 and *State v. Jackson,* 8th Dist. Cuyahoga No. 102394, 2015-Ohio-4274, and *State v. Banks,* 8th Dist. Cuyahoga No. 102576, 2015-Ohio-5418. However, in *State v. Jones,* 8th Dist. Cuyahoga No. 102814, 2015-Ohio-5540, the Eighth District purportedly applied the new standard and affirmed the dismissal of other rape charges against Demetrius Jones on the grounds of pre-indictment delay.

STATEMENT OF THE FACTS

The Eighth District Court of Appeals summarized the facts as follows:

On the evening of the alleged crimes, the victim, who had been acquainted with Jones, went with him to his mother's house. The victim stated that Jones's mother and brother were at the residence. After some time, the victim told Jones that she had to leave, to which Jones responded that she was not going anywhere. The victim alleged that Jones locked her in his bedroom and forcibly raped her. According to the victim, the incident was combative with the victim screaming and fighting Jones and, during the course of it, some of her clothing ripped. The victim also stated that Jones had a "rambo knife," which he put to her throat.

After the alleged attack, the victim went home where she and her mother called the police. Two officers responded to the victim's house. The victim was transported to the hospital, where a rape kit was administered. Both the police report and the medical records indicate that the victim identified "Demetrius Jones" as her attacker. She also reported that he held a knife to her throat. No photos of the victim were taken.

The medical records also indicate that the victim was wearing the same clothing at the hospital that she had on at the time of the alleged attack. The 911 call made after the alleged rape, as well as the victim's clothing she was wearing at the time of the incident, were not available at the time of indictment.

The police went to the victim's house two times after her September 1, 1993 rape report: once on September 3, 1993, and once on September 6, 1993. They were unable to locate her, deemed the address to be "bad," and "closed the case unless the victim comes forward."

At the hearing, it was demonstrated that Jones has an extensive criminal history. That history predates the alleged rape here, and continued after this alleged crime; in the time since the alleged rape in 1993, Jones has had 22 other felony cases in Cuyahoga County. In 2005 or 2006, a DNA sample from Jones was obtained as a result of one of his other criminal cases.

The victim also has a criminal history. She had a 2003 criminal felony case in Cuyahoga County that was active through September 2010. She also had numerous criminal misdemeanor cases out of Cleveland Municipal Court dating from 1998 through 2013.

The 1993 rape kit was not sent out for testing until September 2011. It was returned to the Cleveland Police Department on June 20, 2012. The case was reopened on July 20, 2013, and Jones was indicted on August 30, 2013, which was one day before the running of the 20-year statute of limitations. The special agent from the Ohio Bureau of Criminal Investigation who testified before the grand jury that

> issued the indictment stated that the victim "knew [her alleged attacker] by his first name of Demetrius." The special agent further testified that the victim "only knew him as Demetrius. She did not know his last name."
>
> Jones maintained that he and the victim had engaged in consensual sex. According to Jones, he was interviewed by the police in 1993, and told them that he and the victim had had consensual sex. The state contends, however, that there is no evidence that the police interviewed Jones and it is the state's belief that he never was interviewed.
>
> Jones's mother passed away in February 2011. According to Jones, his mother would have been able to testify that he and the victim were more than just acquaintances, that they spent time together, and that she did not hear anything unusual at the home on the night in question.

State v. Jones, 8th Dist. Cuyahoga No. 101258, 2015-Ohio-2853, ¶ 4-12 (8th Dist.)

Additional facts and arguments are addressed below.

LAW AND ARGUMENT

PROPOSITION OF LAW I: 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.

The State asks this Court to reverse *State v. Jones*, 35 N.E.3d 606, 2015-Ohio-2853 because the opinion creates a new standard of law that breaks from firmly established precedent for reviewing claims of pre-indictment delay prejudice recognized by this Court, the United States Supreme Court, and every other appellate court throughout the state of Ohio. By abandoning prior legal precedent that required a burden shifting analysis, the *Jones* opinion allows for courts to dismiss felony cases based on speculative and self-serving claims of the value of lost evidence and testimony. As such, the State asks for this Court to reverse the decision of the Eighth District Court of Appeals to clarify the appropriate standard of law for reviewing claims of pre-indictment delay prejudice.

The Eighth District Court of Appeals has acknowledged that *Jones* created a new standard of law for reviewing claims of pre-indictment delay. In opinions issued by the Eighth District Court of Appeals following *Jones*, the appellate court recognized that *Jones* "revised its approach to establishing actual prejudice." *State v. Battiste*, 8th Dist. Cuyahoga No. 102299, 2015-Ohio-3586, ¶ 49; *State v. Dixon*, 8th Dist. Cuyahoga No. 102335, 2015-Ohio-3144, ¶ 22; *State v. Bell*, 8th Dist. Cuyahoga No. 102141, 2015-Ohio-4178, ¶ 34. Under this new standard of law, pre-indictment claims of prejudice are not evaluated based on whether a defendant could demonstrate the exculpatory value of lost evidence or testimony. Instead, this new standard of law permits courts to evaluate claims of pre-indictment delay prejudice based on "basic concepts of due process of fundamental justice." *Battiste*, *supra*, at ¶ 49. Furthermore, this new standard fails to separate the concepts of (1) the State's reasons for delaying prejudice and (2) whether the defendant in fact suffered substantial and actual prejudice.

Although the Eighth District Court of Appeals has stated in one opinion that it never created a new standard of law in *Jones*[1], the *Jones* opinion itself indicates otherwise. In *Jones*, the appellate court draws a clear distinction between the "exculpatory evidence standard" and a second standard that it termed "concepts of due process and fundamental fairness." *Jones* at ¶ 19. The court in *Jones* proceeded to explain that it needed to determine whether it would apply the "exculpatory evidence standard" or the "conceptions of due process and fundamental justice standard." *Id*. at ¶ 35. To determine which of the two legal standards to apply, the Eighth District Court of Appeals focused heavily upon the nature of the State's investigation and the State's

[1] In *State v. Owens*, 8th Dist. Cuyahoga No. 102276, 2015-Ohio-3881, ¶ 8, the Eighth District Court of Appeals stated that it "would be a misreading of *Jones* to conclude that it abandoned the actual prejudice standard set forth in decisions by both the United States Supreme Court and the Ohio Supreme Court."

reasons for delaying prosecution in this case. *Id*. at ¶ 43, 45 – 46 ("where the identity of the perpetrator was known from the beginning, where the state barely investigated the case and close it within one week of the start of its investigation, and where no further investigation or technological advances occurred in the time between the initial investigation and the indictment, we evaluate Jones's claim of actual prejudice in terms of basic concepts of due process and fundamental justice"). The appellate court ultimately concluded that under the facts of this case, "requiring Jones to demonstrate that any missing evidence or unavailable witness testimony would have been exculpatory is simply violative of his due process rights." *Id*. at ¶ 46.

By applying this new standard of law, *Jones* abandoned the burden-shifting analysis that this Court has applied in all four of its opinions on pre-indictment delay prejudice. *State v. Adams*, Slip Opinion No. 2015-Ohio-3954, ¶ 99; *State v. Whiting*, 84 Ohio St.3d 215, 217, 702 N.E.2d 119; *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829 (2002), ¶ 51; *State v. Luck*, 15 Ohio St.3d 150, 157-58, 472 N.E.2d 1097. According to precedent established by this Court, the defendant bears the initial burden of proof to demonstrate actual prejudice based on lost evidence. *Id*. If the defendant satisfies his initial burden of proof, then and only then does the reviewing court evaluate whether the State was justified in delaying prosecution. *Id*.

Relying upon the burden shifting analysis articulated by this Court, nearly all twelve appellate districts have chosen to apply a burden-shifting analysis when evaluating claims of pre-indictment delay prejudice. *State v. Rice*, 1st Dist. Hamilton No. C-150191, 2015-Ohio-5481, ¶ 19; *State v. Mapp*, 3d. Dist. No. 14-10-34, 2011-Ohio-4468, ¶ 42; *State v. Cochenour*, 4th Dist. No. 98CA2440 (March 8, 1999); *State v. Bruce*, 5th Dist. Richland No. 02 CA 40, 2003-Ohio-1714, ¶ 24; *State v. Zich*, 6th Dist. Lucas No. L-09-1184, 2011-Ohio-6505, ¶ 68; *State v. Winkle*, 7th Dist. Mahoning No. 12 MA 162, 2014-Ohio-895, ¶ 21; *State v. McFeeture*, 8th Dist. Cuyahoga

No. 100434, 2014-Ohio-5271; *State v. Earley*, 9th Dist. Wayne No. 99CA0059 (June 28, 2000); *State v. Adams*, 10th Dist. Franklin No. 12AP-83, 2012-Ohio-5088, ¶ 22; *State v. Clark*, 12th Dist. Warren No. CA2007-03-037, ¶ 45. By following the firm legal precedent established by this Court, these cases from ten different appellate districts considered the State's reasons for the delay in prosecution independently from any determination of whether a defendant suffered actual prejudice.

The State also emphasizes that this Court has previously considered the very issue of whether a burden shifting analysis should be abandoned when evaluating claims of pre-indictment delay prejudice. In *State v. Whiting*, 84 Ohio St.3d 215, 217, 702 N.E.2d 119, the State argued, "against established law," that the defendant had the burden of establishing actual prejudice and that the defendant also had the "burden to explain the delay." *Id*. In other words, the State was arguing that a burden-shifting analysis should be eliminated from pre-indictment delay claims. This Court ultimately rejected the State's argument. In rejecting the State's argument, this Court confirmed its "earlier pronouncement in *State v. Luck* (1984), 15 Ohio St.3d 150, 15 Ohio B. Rep. 296, 472 N.E.2d 1097, that where a defendant moves to dismiss an indictment" based on a claim of pre-indictment delay prejudice, that the defendant bears the initial burden of establishing actual prejudice. *Id*. If the defendant meets his burden of demonstrating actual prejudice, then the burden shifts to the state to produce "evidence of a justifiable reason for the delay." *Id*.

This Court correctly decided *Whiting* based on firm precedent in the United States Supreme Court. *United States v. Marion* (1971), 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed. 2d 468, and *United States v. Lovasco* (1977), 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 require courts to apply the same burden shift test that this Court upheld in *Whiting*, *supra*. In *Lovasco*, respondent argued that "due process bars prosecution whenever a defendant suffers prejudice as a result of pre-indictment

delay." *Lovasco*, 431 U.S. 783 at 789. The United States Supreme Court reviewed and rejected respondent's claim. *Id*. In rejecting respondent's claim, the United States Supreme Court clarified that "proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not that it makes the claim automatically valid." *Id*. Stated another way, "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id*. at 790. Therefore, *Lovasco* necessitates two requirements in order a defendant to establish pre-indictment delay prejudice: (1) the defendant must establish actual prejudice but in addition (2) the State must fail to provide a justifiable reason for the delay. *State v. Whiting*, *supra*, 84 Ohio St.3d 215, 217; *United States v. Gouveia*, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed. 146, 1984 U.S. LEXIS 91, 52 U.S.L.W. 4659 (U.S. 1984) ("the Fifth Amendment requires the dismissal of an indictment * * * if the defendant can prove that the Government' delay in bringing the indictment was a deliberate device to gain an advantage over him *and* that it caused him actual prejudice.") (Emphasis added).

By eliminating the burden shifting analysis previously embraced by this Court, the *Jones* opinion defeats the legislative intent of the statute of limitation for rape cases. As this Court previously explained, "the purpose of a statute of limitations is to discourage inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct." *State v. Bess*, 126 Ohio St.3d 350, 355, 2010-Ohio-3292, 933 N.E.2d 1076, citations omitted. Furthermore, a "statute of limitations protect[s] individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Id*. The legislature recently expressed its intent to extend the statute of limitations for prosecuting rape cases when it enacted H.B. 6. on July 15, 2015. Specifically, the General Assembly extended the

statute of limitations for prosecuting all rape cases from twenty years to twenty-five years. R.C. 2901.13 (A)(4). In cases where a DNA CODIS match is made twenty-five years after an offense was committed, the General Assembly expressed its intent to further extend the statute of limitations for prosecution of rape cases to thirty years. R.C. 2901.13 (D). By adopting a new standard for reviewing pre-indictment delay claims, the *Jones* opinion allows for the dismissal of cases prior to the recently extended statute of limitations largely based on whether or not the state justified its delay in prosecution. Such a standard largely ignores the issue of whether the defendant has demonstrated without speculation that the basic facts of the case have been obscured due to the passage of time. This is problematic because as the *Jones* dissent noted, "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., S. Gallagher, dissenting).

Furthermore, the new standard adopted in *Jones* will create inconsistent results in courts that review claims of pre-indictment delay prejudice. The *Jones* opinion evaluates the defendant's claim of actual prejudice "in terms of basic concepts of due process and fundamental justice." *Jones* at ¶ 47. However, the State submits that it is somewhat unclear based on *Jones* when the facts of a criminal case warrant dismissal based on principles of "due process and fundamental justice." Under this new standard, a court may dismiss a felony case based on a subjective determination that prosecution at a given time violates notions of "due process and fundamental justice" — even in cases in which a defendant fails to prove that he has been substantially and actually prejudiced by lost evidence. In short, the new test in *Jones* relies upon concepts that are "elusive and subject to differing interpretations given the myriad of facts that exist from case to case." *Jones* at ¶ 52 (J., S. Gallagher, dissenting). This is problematic because as the United States

Supreme Court has clarified, "[j]udges are not free, in defining 'due process,' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" *Lovasco, supra*, 431 U.S. 783 at 790, citing *Rochin v. California*, 342 U.S. 165, 170, 72 S.Ct. 205, 96 L.Ed. 183 (1965). It follows that while claims of pre-indictment delay prejudice do depend upon "fundamental conceptions of justice," courts also must be careful so that they do not "abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment." *Lovacso, supra*, 431 U.S. 783 at 790. Here, the Eighth District Court of Appeals erred when it determined that the case should be dismissed in large part because it disagreed with the State's explanation for why it delayed nearly twenty years to seek an indictment. *Jones* at ¶ 43, 45 – 46 ("where the identity of the perpetrator was known from the beginning, where the state barely investigated the case and close it within one week of the start of its investigation, and where no further investigation or technological advances occurred in the time between the initial investigation and the indictment, we evaluate Jones's claim of actual prejudice in terms of basic concepts of due process and fundamental justice").

For all the aforementioned reasons, the State asks this Court to reverse the *Jones* opinion. There is no significant precedential support for the new legal standard followed in *Jones*. To support a less stringent standard for dismissing cases, the *Jones* opinion relied upon *State v. Mack*, 8th Dist. Cuyahoga No. 100964, 2014-Ohio-4817 and *State v. Doksa*, 113 Ohio App.3d 277, 680 N.E.2d 1043 (8th Dist. 1996). *Jones* at ¶ 17, 19 ("In the conflict case, *Mack*, * * * this court utilized a less stringent standard than the 'exculpatory evidence standard' for demonstrating actual prejudice" * * *)[2]. Nonetheless, the new standard of law from *Jones* contradicts the standard of

[2] Although the *Jones* opinion cited to *Mack* and *Doksa* as legal authority to support the new standard of law, it is unclear if *Mack* and *Doksa* stand for the exact same standard of law established in *Jones*.

law adopted by many of the State Supreme Courts located close in geographical proximity to Ohio – the State Supreme Courts of West Virginia, Pennsylvania, Kentucky, Michigan, and Tennessee — all have adopted a burden shifting test in reviewing claims of pre-indictment delay prejudice. *Woolfolk v. Commonwealth*, 339 S.W.3d 411, 424 (Ky. 2011) ("Thus, dismissal [of a claim of pre-indictment delay] is required only where there is both substantial prejudice *and* an intentional delay to gain tactical advantage"). (Emphasis added). *State v. Baker*, 614 S.W.2d 352, 354 (Tenn. 1981) (recognizing that *Lovasco* and *Marion* require a test for evaluating pre-indictment delay claims based on whether it is shown that the case "caused substantial prejudice to appellee's rights to a fair trial *and* that the delay was an intentional device to gain tactical advantage over the accused") (citations omitted and Emphasis added); *Commonwealth v. Scher*, 569 Pa. 284, 803 A.2d 1204 (Pa. 2002) ("we hold that in order to prevail on a due process claim based on pre-arrest delay, the defendant must first show that the delay caused him actual prejudice, that is, substantially impaired his or her ability to defend against the charges. The court must then examine all of the circumstances to determine the validity of the Commonwealth's reasons for the delay."). *State v. Cook*, 228 W. Va. 563, 723 S.E.2d 388 (2010), paragraph two of the syllabus ("In determining whether preindictment delay violates the Due Process Clause * * * the initial burden is on the defendant to show that actual prejudice has resulted from the delay. Once that showing has been made, the trial court must then balance the resulting prejudice against the reasonableness of the delay.")

This Court should follow the well-established precedent and reverse and remand the *Jones* decision. Reversal is required so that appellate courts and trial courts will apply the correct legal standards when evaluating claims of pre-indictment delay prejudice.

<u>PROPOSITION OF LAW II:</u> 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.

As argued above, the reasons for delay cannot substitute for the Defendant's burden of demonstrating actual prejudice. The State asks this Court to hold that a pre-indictment delay claim requires a defendant to show that he was prejudiced by lost evidence that is non-speculative, concrete, and exculpatory as this is supported by existing precedence in Ohio. Jones has not provided any clear and non- speculative indication as to how his defense has been prejudiced by the unavailability of witnesses and evidence. This Court most recently in *State v. Adams,* Slip Opinion No. 2015-Ohio-3954 indicated, "that the death of a potential witness during the preindictment period can constitute prejudice, by only if the defendant can identify exculpatory evidence that was lost and show that the exculpatory evidence could not be obtained by other means." *Adams* at ¶ 103.

Legal precedent has firmly established that actual and substantial prejudice must be demonstrated with proof of non-speculative evidence. The United States Supreme Court first articulated this principle in *United States v. Marion* (1971), 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 when it considered the significance, for constitutional purposes, of a lengthy pre-indictment delay. In *Marion*, the Court noted that appellees relied "solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost." *Id*., 404 U.S. 307 at 325-26. The Court further reasoned that "[i]n light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment." *Id*. The Court then held "[e]vents of the trial may

demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." *Id*. *Marion* requires that speculative claims cannot serve as the basis for finding that a defendant has suffered actual prejudice.

Similarly, Ohio jurisprudence has conclusively indicated the importance of non-speculative evidence in claims of pre-indictment delay. Prior to the en banc decision in *Jones*, cases out of the Eighth District indicated that proof of prejudice could not be speculative. *See State v. Leonard*, 8th Dist. No. 98626, 2013-Ohio-1446, ¶ 25 ("The mere possibility that memories will dim, witnesses will become inaccessible, or evidence will be lost is not enough in itself to establish prejudice to justify the dismissal of an indictment); *State v. Ennist*, 8th Dist. No. 90076, 2008-Ohio-5100, ¶ 27 ("To prove actual prejudice, a defendant must show, by concrete proof, the exculpatory value of any alleged missing evidence.") (citations omitted); *State v. McFeeture*, 8th Dist. No. 100434, 2014-Ohio-5271, ¶ 119 ("the defendant may not rely on speculation or vague assertions of prejudice * * * rather, proof of actual prejudice must be specific, particularized and non-speculative." (citations omitted). *State v. Strickler*, 10th Dist. Franklin No. 03AP-746, 2004-Ohio-3557, ¶ 36; *see also State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415, ¶ 11.

The requirement that pre-indictment delay must be proved through non-speculative evidence extends to other Ohio appellate jurisdictions. In *State v. Mizell*, 1st Dist. Hamilton Nos. C-070750 and C-070751, 2008-Ohio-4907, the First District held that when a defendant points to no particularized loss of evidence or witnesses as a result of the delay, and when nothing in the record demonstrates such a loss, no actual prejudice is shown. *Mizell* at ¶ 40. In *State v. Mapp*, 3d. Dist. Union No. 14-10-34, 2011-Ohio-4468, the Third District adopted the standard of the Tenth District in *State v. Peoples*, 10th Dist. No. 02AP-945, 2003-Ohio-4680, and required that

proof "of actual prejudice to the defendant must be specific and non-speculative." *Mapp* at ¶ 42. Similarly, in *State v. Barnhardt*, 9th Dist. No. 05CA008706, 2006-Ohio-4531, the Ninth District held that proof of actual prejudice must be non-speculative and that the defendant bears the burden of demonstrating the exculpatory value. *Barnhardt* at ¶ 16.

Applying the relevant legal standards to Jones's claims, he failed to meet his burden of proving actual prejudice. Jones's claim that he suffered actual prejudice relies in part upon the possible testimony of his deceased mother and lost evidence. As previously stated, this Court clarified in *State v. Adams*, Slip Opinion No. 2015-Ohio-3954, ¶ 103, that in order to establish actual prejudice based on the potential testimony of a deceased witness, such as Jones's mother, the defendant must "identify the exculpatory evidence that was lost [from the witness] and show that the evidence could not be obtained by other means." *Id*., citing *Rogers*, 118 F.3d 466, 475, 1997 U.S. App. LEXIS 16238. With respect to lost physical evidence, the defendant must demonstrate, "how lost […] physical evidence would have proven [his] asserted defense." Here, Jones's claim fails because he does not offer anything beyond speculation as to what the lost testimony of his mother might have offered. The majority in *Jones* acknowledged as much when it stated that the potential testimony Jones's mother was speculative. *Jones* at ¶ 44. Jones's defense counsel at the pre-indictment delay hearing also conceded that she could not state with certainty the nature of the testimony from Jones's mother. (03/6/2014 Hearing Tr., 11). Vague claims of prejudice relating to witnesses and other possible exculpatory evidence are speculative at best, and does not establish actual prejudice. *State v. Kemp*, 8th Dist. Cuyahoga No. 97913, 2013-Ohio-167, ¶31.

The majority in the *Jones* opinion also found that it would be impossible for Jones to demonstrate the exculpatory value of the other missing evidence. *Id*. at ¶ 43. Absent from the

record is any specific proof as to how this loss of evidence prejudiced Jones's ability to defend himself. Because Jones's claims were speculative, there was no basis for the dismissal on grounds of pre-indictment delay. The dissent agreed with this notion when it concluded that Jones's claims were pure speculation. *Jones*, 35 N.E.3d 606, 2015-Ohio-2853 (8th Dist. Cuyahoga) (Gallagher, S., J., dissenting), ¶ 54. This is a case in which an appellate court found that the defendant suffered actual prejudice despite also finding that the exculpatory value of lost evidence was speculative.

CONCLUSION

The State of Ohio respectfully asks this Court to reverse the opinion of the en banc panel of the Eighth District Court of Appeals in *State v. Jones*, 35 N.E.3d 606, 2015-Ohio-2853 (8th Dist. Cuyahoga). The *Jones* majority breaks from well-established legal precedent in two respects: (1) *Jones* eliminates the burden-shifting test established by the United States Supreme Court; and (2) *Jones* allows for defendants to meet their burden of demonstrating actual pre-indictment prejudice even when they raise speculative claims of the exculpatory value of lost evidence. In order to clarify these two legal issues of great importance in the hundreds of CODIS cases that the State anticipates will be prosecuted throughout Ohio over the course of the next few years, this Court should reverse the en banc decision of the Eighth District and to remand this case to the trial court for prosecution.

Respectfully submitted,

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IN THE
SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant

v.

DEMETRIUS JONES

Defendant-Appellee

CASE NO.

ON APPEAL FROM CUYAHOGA COUNTY COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

COURT OF APPEALS CASE NO. 101258

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

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NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Pursuant to S.Ct.Prac.R. 7.01, 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. Demetrius Jones,* 8th Dist. Cuyahoga No. 101258, 2015-Ohio-2853 and journalized on July 16, 2015. This case involves a felony, raises a substantial constitutional question and is of public or great general interest.

Respectfully submitted,

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Submitted by:

/s/ Brett Hammond
Brett S. Hammond

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Kelley A. Sweeney, Clerk of Courts

STATE OF OHIO

Appellant

COA NO. 101258 | LOWER COURT NO. CR-13-577686-A

COMMON PLEAS COURT

-vs-

DEMETRIUS JONES

Appellee

MOTION NO. 483244

Date 03/06/15

Journal Entry

Sua sponte, the court finds the panel's proposed opinion in this case conflicts with State v. Mack, 8th Dist. Cuyahoga No. 100965, 2014-Ohio-4817. Accordingly, the court will consider this matter en banc. See separate journal entry of this same date ordering en banc consideration sua sponte (Motion no. 483244).

RECEIVED FOR FILING

MAR 06 2015

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By M. Jacobs Deputy

LARRY A. JONES, SR.
Presiding Judge

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

CA14101258 88274163

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Kelley A. Sweeney, Clerk of Courts

State of Ohio

Appellant

COA NO. 101258 | LOWER COURT NO. CP CV-13-577686

COMMON PLEAS COURT

-vs-

Demetrius Jones

Appellee

MOTION NO. 483244

Date 03/06/2015

Journal Entry

Sua sponte, the court finds that the panel's proposed opinion in this case conflicts with the opinion in *State v. Mack*, 8th Dist. Cuyahoga No. 100965, 2014-Ohio-4817. Accordingly, the court will consider this matter en banc with respect to the standard for proving that a defendant suffered actual prejudice from preindictment delay. No additional briefing or argument is invited at this time.

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LARRY A. JONES, SR., JUDGE

Concurring:

MARY J. BOYLE, J.,
PATRICIA A. BLACKMON, J.,
EILEEN A. GALLAGHER, J.,
EILEEN T. GALLAGHER, J.,
SEAN C. GALLAGHER, J.,
MARY EILEEN KILBANE, J.,
MELODY J. STEWART, J.

Dissenting:

FRANK D. CELEBREZZE, JR., A.J. and
TIM MCCORMACK, J.

Recused:

KATHLEEN ANN KEOUGH, J.

Kenneth A. Rocco, J., retired effective February 11, 2015, and did not participate in this decision.

Anita Laster Mays, J., joined the court effective February 12, 2015, and did not participate in this decision.

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101258

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DEMETRIUS JONES

DEFENDANT-APPELLEE

DECISION EN BANC:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577686-A

BEFORE: The En Banc Court

RELEASED AND JOURNALIZED: July 16, 2015

CA14101258 90134150

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LARRY A. JONES, SR., J.:

{¶1} Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, this court determined that a conflict existed between the proposed majority panel decision in this case and the released decision in *State v. Mack*, 8th Dist. Cuyahoga No. 100965, 2014-Ohio-4817,[1] on the standard for proving that a defendant was prejudiced by preindictment delay.

I.

{¶2} Plaintiff-appellant, the state of Ohio, appeals from the trial court's judgment granting the motion to dismiss the indictment against defendant-appellee, Demetrius Jones, because of preindictment delay.

{¶3} On August 30, 2013, Jones was charged with rape and kidnapping in a two-count indictment. The alleged crimes occurred on September 1, 1993. Jones filed a motion to dismiss on the ground of preindictment delay, and the trial court held a hearing. Numerous exhibits were entered into evidence at the hearing and, along with counsel's summations, the following was established.

{¶4} On the evening of the alleged crimes, the victim, who had been acquainted with Jones, went with him to his mother's house. The victim stated that Jones's mother and brother were at the residence. After some time, the victim told Jones that she had to leave, to which Jones responded that she was

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[1]*Mack* is pending in the Ohio Supreme Court. *See State v. Mack*, Supreme Court No. 2014-2149.

not going anywhere. The victim alleged that Jones locked her in his bedroom and forcibly raped her. According to the victim, the incident was combative with the victim screaming and fighting Jones and, during the course of it, some of her clothing ripped. The victim also stated that Jones had a "rambo knife," which he put to her throat.

{¶5} After the alleged attack, the victim went home where she and her mother called the police. Two officers responded to the victim's house. The victim was transported to the hospital, where a rape kit was administered. Both the police report and the medical records indicate that the victim identified "Demetrius Jones" as her attacker. She also reported that he held a knife to her throat. No photos of the victim were taken.

{¶6} The medical records also indicate that the victim was wearing the same clothing at the hospital that she had on at the time of the alleged attack. The 911 call made after the alleged rape, as well as the victim's clothing she was wearing at the time of the incident, were not available at the time of indictment.

{¶7} The police went to the victim's house two times after her September 1, 1993 rape report: once on September 3, 1993, and once on September 6, 1993. They were unable to locate her, deemed the address to be "bad," and "closed the case unless the victim comes forward."

{¶8} At the hearing, it was demonstrated that Jones has an extensive criminal history. That history predates the alleged rape here, and continued

after this alleged crime; in the time since the alleged rape in 1993, Jones has had 22 other felony cases in Cuyahoga County. In 2005 or 2006, a DNA sample from Jones was obtained as a result of one of his other criminal cases.

{¶9} The victim also has a criminal history. She had a 2003 criminal felony case in Cuyahoga County that was active through September 2010. She also had numerous criminal misdemeanor cases out of Cleveland Municipal Court dating from 1998 through 2013.[2]

{¶10} The 1993 rape kit was not sent out for testing until September 2011. It was returned to the Cleveland Police Department on June 20, 2012. The case was reopened on July 20, 2013, and Jones was indicted on August 30, 2013, which was one day before the running of the 20-year statute of limitations. The special agent from the Ohio Bureau of Criminal Investigation who testified before the grand jury that issued the indictment stated that the victim "knew [her alleged attacker] by his first name of Demetrius." The special agent further testified that the victim "only knew him as Demetrius. She did not know his last name."[3]

{¶11} Jones maintained that he and the victim had engaged in consensual sex. According to Jones, he was interviewed by the police in 1993, and told them that he and the victim had had consensual sex. The state contends, however,

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[2]We mention the victim's criminal history only to indicate that she was not missing or unavailable.

[3]The grand jury proceeding was transcribed and made part of the record.

that there is no evidence that the police interviewed Jones and it is the state's belief that he never was interviewed.

{¶12} Jones's mother passed away in February 2011. According to Jones, his mother would have been able to testify that he and the victim were more than just acquaintances, that they spent time together, and that she did not hear anything unusual at the home on the night in question.

II.

{¶13} The sole issue in this appeal is whether Jones demonstrated that he was actually prejudiced by the state's delay in prosecuting him. The issue that we consider en banc is the standard for demonstrating actual prejudice.

{¶14} The panel majority in this case proposed that to demonstrate prejudice, Jones must show that missing or unavailable evidence would have been exculpatory, as opposed to merely attacking the credibility of the state's evidence. This court has previously used the "exculpatory evidence standard."[4] For example, in *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415, a case involving a 1993 rape and a 2013 indictment, the defendant contended that he suffered actual prejudice because of the near 20-year delay in charging him. The defendant cited the following to demonstrate prejudice: (1) the death of the initial investigator; (2) the unidentified ambulance driver; (3)

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[4] *See, e.g.*, *State v. Smith*, 8th Dist. Cuyahoga No. 100501, 2014-Ohio-3034; *State v. Dixon*, 8th Dist. Cuyahoga No. 100332, 2014-Ohio-2185; *State v. Clemons*, 8th Dist. Cuyahoga No. 99754, 2013-Ohio-5131; *State v. Kemp*, 8th Dist. Cuyahoga No. 97913, 2013-Ohio-167; and *State v. Ennist*, 8th Dist. Cuyahoga No. 90076, 2008-Ohio-5100.

two neighbors who observed the victim immediately after the rape who had since died; and (4) the examining physician's lack of independent recollection of the exam.

{¶15} This court held that "in order to establish actual prejudice, the defendant must demonstrate the exculpatory value of the evidence of which he was deprived due to the delay," and found that the defendant had not done so. *Id.* at ¶ 11. In regard to the death of the initial investigator, this court rejected the defendant's contention that he suffered actual prejudice because the victim's trial testimony differed from the statement she gave to the investigator. This court noted that the victim's statement and trial testimony were "generally consistent, and both * * * unequivocally described a rape beside a house adjacent to a vacant lot." *Id.* at ¶ 12.

{¶16} In regard to the physician's lack of independent recollection, the deceased neighbors, and the unidentified ambulance driver, this court held "[t]hat these witnesses would have offered exculpatory evidence is purely speculative since [the defendant] cannot identify any specific evidence they would have provided that might have helped his defense." *Id.* at ¶ 14.

{¶17} In the conflict case, *Mack*, 8th Dist. Cuyahoga No. 100964, 2014-Ohio-4817, this court utilized a less stringent standard than the "exculpatory evidence standard" for demonstrating actual prejudice. The defendant in *Mack* was charged in 2013 with an alleged 1993 rape. At the time

of the alleged crime, the defendant and alleged victim knew each other. The named victim immediately reported the alleged crime and went to the hospital where a rape kit was administered. At that time, she identified the defendant as the perpetrator. Three detectives were assigned to investigate the allegation, but the case went "cold" because the alleged victim did not cooperate.

{¶18} In June 2013, the defendant was charged with rape after the state received notification from the Bureau of Criminal Investigations that it matched the defendant's DNA to the hospital specimen the alleged victim provided. The defendant filed a motion to dismiss the indictment because of preindictment delay. After a hearing, the trial court granted the defendant's motion and the state appealed.

{¶19} In affirming the dismissal, this court did not utilize the "exculpatory evidence standard," but, rather, relied on the concepts of due process and fundamental justice. This court also cited its prior holding in *State v. Doksa*, 113 Ohio App.3d 277, 680 N.E.2d 1043 (8th Dist.1996), that prejudice may be established by a defendant's contention that the state's preindictment delay resulted in the loss of witness testimony, lost memory, or spoiled or destroyed evidence. *Mack* at ¶ 10, citing *Doksa* at 280. *Doksa* similarly did not utilize the "exculpatory evidence standard" in affirming the trial court's dismissal of the indictment against the defendant five years after the alleged drug crimes were committed, finding that the record demonstrated that "[i]n short, the state made

a late attempt to proceed upon evidence in existence at the time the investigation ceased." *Id.* at 281.

{¶20} Three Ohio Supreme Court cases address the issue of due process violations based on preindictment delay: (1) *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984); (2) *State v. Whiting*, 84 Ohio St.3d 215, 702 N.E.2d 1199 (1998); and (3) *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829. None of these cases advance the "exculpatory evidence standard."

{¶21} In *Luck*, the first case the court considered, the victim was killed in 1967 and the police immediately began an investigation, which resulted in collection of evidence from the crime scene and interviews of potential suspects and witnesses. The defendant was identified as a potential suspect and interviewed in late 1967 and early 1968. After not gaining momentum, the police and prosecutor's office stopped their investigation, and it was not until March 1983 that the defendant was indicted.[5] The indictment was based on the same evidence that the state had in 1967.

{¶22} The defendant claimed that the 15-year delay between the offense and the indictment resulted in actual prejudice to her, thereby violating her right to due process of law. She cited the following as grounds for showing prejudice: (1) the deaths of two key witnesses; (2) the fading of memories and changes in appearance; and (3) the loss of evidence.

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[5]The record was silent as to what prompted the state to pursue the case again in 1983.

{¶23} The court, following United States Supreme Court precedent,[6] established the following two-part test for determining whether a due process violation occurred because of preindictment delay: (1) first, the defendant must demonstrate actual prejudice from the delay; (2) if demonstrated, then the prejudice must be weighed against the state's reasons for the delay.

{¶24} The Ohio Supreme Court did not evaluate the defendant's claim of actual prejudice in terms of whether the unavailable evidence and deceased witness testimony would have been exculpatory. Rather, the court evaluated it as follows:

> The prejudicial factors enumerated by defense counsel (the deaths of witnesses, the fading memories, and the loss of evidence), when balanced against the other admissible evidence in this case, show that the defendant has suffered actual prejudice by the fifteen-year delay in prosecution. Although the state is in possession of circumstantial evidence which may link the defendant to [the victim's] death, it cannot be said that the missing evidence or the dead witness would not have minimized or eliminated the impact of the state's circumstantial evidence. * * * [T]he defendant * * * is obviously prejudiced by not being able to seek verification of her story from [a deceased witness] and thereby establish mitigating factors or a defense to the charge against her.

Luck at 157-158.

{¶25} The court went on, under the second prong of the test, to find that there was no justifiable reason for the 15-year delay, stating, "[f]ifteen years later, the prosecutor sought an indictment based upon the same evidence that

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[6]*See United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), and *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

had been available in 1968. In fact, the deaths of witnesses and the loss of taped interviews had significantly *reduced* the available evidence by the time that the prosecutor sought the indictment of [the defendant]." (Emphasis sic and footnote omitted.) *Id.* at 158.

{¶26} In *Whiting*, 84 Ohio St.3d 215, 702 N.E.2d 1199, the second Ohio Supreme Court case on the issue of actual prejudice, the victim was found dead in 1981, and the police thereafter began investigating the circumstances surrounding her death and the defendant became a suspect. Fourteen years later, the defendant was indicted on a murder charge in connection with the death. The court, utilizing its standard as set forth in *Luck*, found that the defendant suffered actual prejudice, and the state did not present a justifiable reason for the delay. Again, the court did not use the "exculpatory evidence standard."

{¶27} *Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, is the third Ohio Supreme Court case on this issue. In *Walls*, the defendant was charged with aggravated murder 13 years after the crime. The victim was found dead in her home in March 1985. It was determined that she had been stabbed nine times and bled to death. The coroner who performed her autopsy opined that she died no earlier than 4:00 p.m. the day preceding the discovery of her body. It appeared that someone had forcibly entered her home, and in some areas the home had been ransacked. Latent fingerprints were recovered from

the scene and compared with various suspects, but no matches were revealed.

{¶28} In 1998, a new online automated fingerprint identification system became available and some of the prints from the crime scene were entered into the system. The system identified the defendant's fingerprints as a good match. After further investigation, it was determined that the defendant's fingerprints matched those found on several personal items of the victim and on a storm door to her house.

{¶29} Investigators located the defendant for questioning. The defendant, who, at the time of the murder, had been a student at a school close to the victim's house, denied ever having been at the victim's house.

{¶30} He was indicted in 1998 for aggravated murder. He filed a motion to dismiss based on preindictment delay, which the trial court denied. His case proceeded to trial, and he was convicted of aggravated murder and sentenced to life imprisonment.

{¶31} On appeal, the defendant contended that because of the passage of time he lost substantial "exculpatory" evidence. Specifically, at the time of indictment, the original coroner was deceased. The defendant contended that if the coroner had been alive to testify, he could have placed the time of death during school hours rather than around 4:00 p.m. The defendant contended he was at school on the afternoon of the death, but school attendance records were missing.

{¶32} The defendant further contended that there was an unavailable witness who could have supplied evidence implicating another person as the murderer. Additionally, the lead investigator was also deceased by the time of indictment and, according to the defendant, only that investigator knew why the defendant was considered a suspect. Moreover, the defendant contended that the following items of evidence had disappeared: (1) a tape made by a neighbor describing a person she saw entering the victim's house, (2) a faucet handle from the victim's house that had a blood stain on it, and (3) an anonymous letter that apparently discussed who committed the murder.

{¶33} The state contended that the defendant was not prejudiced because the evidence he complained of was either not missing, unhelpful, or duplicative. In regard to the initial coroner, another coroner testified extensively about the time of death. And, although the attendance records from individual classes were missing, the state produced a document showing that the defendant was in school on the day of the murder. With regard to the person who allegedly had evidence about someone else being the murderer, the police had interviewed that person but deemed her unreliable because she had given inconsistent statements. The state also contended that scientific testing revealed that a bloodstain on a "missing" pillow found in the other alleged suspect's home did not match the victim's DNA.

{¶34} The Ohio Supreme Court stated that

> [i]n addition to the state's substantial arguments refuting [the defendant's] contentions, we must also consider the fingerprint evidence implicating [the defendant]. Though [the defendant] stated that he had never been to the victim's home, his fingerprints were found in incriminating locations around the house, including on the storm door and on items scattered about the ransacked home. Furthermore, the fingerprints found in the home did not match those of * * * the individual who [the defendant] claims actually committed the crime.

Walls, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829 at ¶ 55.

{¶35} The court reasoned that "[a]lthough some prejudice may have occurred from evidence lost over the years, we conclude that [the defendant's] claims of prejudice are speculative at best." *Id.* at ¶ 56, citing *Marion*, 404 U.S. at 326, 92 S.Ct. 455, 30 L.Ed.2d 468. Further, the court was "firmly convinced that the delay was justified" because the defendant was indicted "only a couple of months after new computer technology made it possible to match the fingerprints at the murder scene to those of [the defendant]." *Id.* The court reasoned that this situation is "distinctly different from cases in which the state has compiled evidence but simply fails, or refuses, to take action for a substantial period." *Id.*

III.

{¶36} In determining what standard — the "exculpatory evidence standard" or the "conceptions of due process and fundamental justice standard" — should be used in this case to determine whether Jones suffered actual prejudice due to the preindictment delay, we are guided by three considerations.

{¶37} First, we consider the stage of the proceedings at which the matter is being reviewed. The majority of the cases on this issue involve post-trial/conviction review. For example, of the five cases from this district cited in the fourth footnote, only two involved pretrial/preconviction review.[7] The state cites 12 cases in its supplemental briefing on this issue, all of which were reviewed posttrial/conviction.[8]

{¶38} The stage of the proceeding is relevant because evaluation of the likely effect of any missing evidence is much easier in a posttrial/postconviction review, than in pretrial/preconviction cases where we do not have the benefit of all the evidence that the state will present against the defendant. It would seem that in the pretrial type of cases, the negative effect of the delay on the defendant's ability to prepare a defense should be a consideration.

{¶39} Second, we consider the nature of the state's case against the

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[7]Those two cases are *Dixon*, 8th Dist. Cuyahoga No. 100332, 2014-Ohio-2185, and *Clemons*, 8th Dist. Cuyahoga No. 99754, 2013-Ohio-5131.

[8]The state cites one case from each of the 12 Ohio appellate districts. The cited cases are as follows: *State v. Mizell*, 1st Dist. Hamilton Nos. C-070750 and C-070751, 2008-Ohio-4907; *State v. Kaminski*, 2d Dist. Montgomery No. 12447, 1991 Ohio App. LEXIS 4039 (Aug. 21, 1991); *State v. Mapp*, 3d Dist. Union No. 14-10-34, 2011-Ohio-4468; *State v. Flickinger*, 4th Dist. Athens No. 98 CA 09, 1999 Ohio App. LEXIS 225 (Jan. 19, 1999); *State v. Bruce*, 5th Dist. Richland No. 02 CA 40, 2003-Ohio-1714; *State v. Robinson*, 6th Dist. Lucas No. L-06-1182, 2008-Ohio-3498; *State v. Christman*, 7th Dist. Monroe No. 786, 1999 Ohio App. LEXIS 2486 (May 28, 1999); *State v. McFeeture*, 8th Dist. Cuyahoga No. 100434, 2014-Ohio-5271; *State v. Malone*, 9th Dist. Lorain No. 10CA009754, 2011-Ohio-2445; *State v. Tullis*, 10th Dist. Franklin No. 04AP-333, 2005-Ohio-2205; *State v. Ware*, 11th Dist. Lake No. 2007-L-154, 2008-Ohio-3992; and *State v. Walls*, 12th Dist. Butler No. CA99-10-174, 2000 Ohio App. LEXIS 5779 (Dec. 11, 2000).

defendant and the effect of the lost or missing evidence on the pertinent issues. For example, in cases where the identity of the perpetrator is not at issue, lost DNA evidence will generally be less important than lost or missing photos of the crime scene and lost witnesses.

{¶40} Third, we consider the question of whose problem should it be when we really do not know what the lost or missing evidence would have shown? Is requiring a defendant to prove that it would have been exculpatory an exercise in futility? Do we account for the fact that, from a systemic perspective, the search for the truth is diminished when potentially relevant evidence is lost or missing, even if we do not know what it would have shown?

IV.

{¶41} We now apply the above-mentioned three considerations to this case. First, this case was disposed of pretrial and, therefore, the only proceeding that we have to rely on for our review is the hearing on the motion to dismiss. The record from that proceeding, in sum, established that Jones and the victim were acquainted and it was Jones's position that they engaged in consensual sex. The victim reported that two other people were present in the home at the time of the attack — the defendant's mother and brother. By the time of indictment, the mother was deceased and the record is silent as to the availability of the brother.

{¶42} The physical and forensic evidence was scant: it consisted of the

match of the defendant's DNA to the sample taken from the victim as part of the rape kit administration. But from the beginning, the victim identified the defendant as her rapist and, according to the defendant, he was interviewed in 1993, and told the police that he and the victim had had consensual sex. Therefore, the identity of the defendant was not an issue in this case, and the forensic evidence did not advance the case.

{¶43} This record segues into the second consideration: the nature of the case. With identity not being an issue, and with the lack of physical evidence, the case was bound to be a credibility determination. Much of the "missing/unavailable" evidence was so because it was never even collected — no photographs of the alleged victim were ever taken, no photographs of the alleged crime scene were taken, and the victim's clothing was not retained. Thus, to require the defendant to demonstrate that that missing or unavailable evidence would have been exculpatory would have been a near impossibility.

{¶44} The last piece of missing evidence was Jones's mother, and we discuss her unavailability while addressing our final consideration: whose problem is it when we do not know what the lost or missing evidence would have shown? Jones's mother was never questioned or interviewed and, therefore, anything that she might have said about the incident is speculation. The issue with the mother's unavailability cannot be cured on this record with the testimony of Jones's brother. What he would testify to is as speculative as what

the mother would have testified to. That he was even available was speculation. Who he even is was speculative.[9]

{¶45} How did it come to be that there is an alleged rape in 1993, scant physical or forensic evidence, deceased and possibly unidentified witnesses but an identified perpetrator, and an indictment in 2013? It came to be because within one week of the alleged rape, after two attempts to contact the victim, the police "closed the case unless the victim comes forward." The victim never came forward. But, on the eve of the running of the 20-year statute of limitations, the state took the case to a grand jury and represented that the victim did not know the defendant's last name. She did know his last name, and she identified him by first and last name from the beginning to both the police and the medical personnel.

{¶46} Moreover, both the victim and the defendant had been involved in the criminal justice system in Cuyahoga County for years. In other words, the record here demonstrates that the state merely failed to take action for a substantial period. After this inaction of the state, requiring Jones to demonstrate that any missing evidence or unavailable witness testimony would

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[9]The parties refer to the other person who was alleged to have been in the home at the time of the rape as Jones's brother (as the victim had stated), but there is an indication in the record that this other person was not the defendant's brother, without an indication as to exactly who this other person was or is. *See* transcript of the hearing on the motion to dismiss at page 57, where defense counsel argued that the "other individual was not his brother, it was another individual, so now [Jones is] forced to * * * identify who the other individual was, and [the other individual] has an absolute right not to testify."

have been exculpatory is simply violative of his due process rights.

V.

{¶47} In conclusion, in this case, where the identity of the defendant as the accused perpetrator was known from the beginning, where the state barely investigated the case and closed it within one week of the start of its investigation, and where no further investigation or technological advances occurred in the time between the initial investigation and the indictment, we evaluate Jones's claim of actual prejudice in terms of basic concepts of due process and fundamental justice.

{¶48} In so evaluating his claim, we find that he suffered actual prejudice in the near 20-year delay in prosecuting him. This is the type of case the Ohio Supreme Court warned of in *Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, where the state "simply fails, or refuses, to take action for a substantial period." *Id.* at ¶ 56.

{¶49} In light of the above, the trial court properly granted Jones's motion to dismiss.

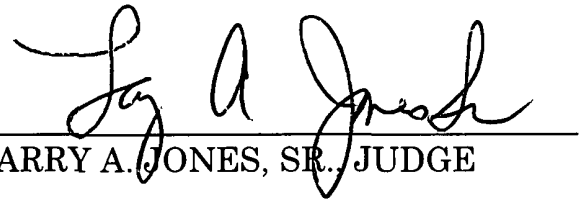
{¶50} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be set to said 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 Procedures.



LARRY A. JONES, SR., JUDGE

FILED AND JOURNALIZED
PER APP.R. 22(C)

JUL 16 2015

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Deputy

PATRICIA ANN BLACKMON, J.,
MARY J. BOYLE, J.,
EILEEN A. GALLAGHER, J.,
MARY EILEEN KILBANE, J.,
ANITA LASTER MAYS, J., and
MELODY J. STEWART, J., CONCUR

KATHLEEN ANN KEOUGH, J., RECUSED

SEAN C. GALLAGHER, J., DISSENTS WITH SEPARATE OPINION with FRANK D. CELEBREZZE, JR., A.J., EILEEN T. GALLAGHER, J., and TIM McCORMACK, J., CONCURRING

SEAN C. GALLAGHER, J., DISSENTING:

{¶51} I do not agree with the application of a less stringent standard for assessing actual prejudice in preindictment delay claims. This new so-called "due process and fundamental justice" standard offered by the majority is in conflict with the long-standing actual or substantial prejudice standard that has been in play over the past three decades in Ohio. *See State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984); *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829; *State v. Mizell*, 1st Dist. Hamilton Nos. C-070750 and C-070751, 2008-Ohio-4907; *State v. Kaminski*, 2d Dist. Montgomery No. 12447, 1991 Ohio App. LEXIS 4039 (Aug. 21, 1991); *State v. Mapp*, 3d Dist.

Union No. 14-10-34, 2011-Ohio-4468; *State v. Flickinger*, 4th Dist. Athens No. 98 CA 09, 1999 Ohio App. LEXIS 225 (Jan. 19, 1999); *State v. Bruce*, 5th Dist. Richland No. 02 CA 40, 2003-Ohio-1714; *State v. Robinson*, 6th Dist. Lucas No. L-06-1182, 2008-Ohio-3498; *State v. Christman*, 7th Dist. Monroe No. 786, 1999 Ohio App. LEXIS 2486 (May 28, 1999); *State v. McFeeture*, 8th Dist. Cuyahoga No. 100434, 2014-Ohio-5271; *State v. Malone*, 9th Dist. Lorain No. 10CA009754, 2011-Ohio-2445; *State v. Tullis*, 10th Dist. Franklin No. 04AP-333, 2005-Ohio-2205; *State v. Ware*, 11th Dist. Lake No. 2007-L-154, 2008-Ohio-3992; *State v. Walls*, 12th Dist. Butler No. CA99-10-174, 2000 Ohio App. LEXIS 5779 (Dec. 11, 2000). A violation of due process does not result from an unjustifiable delay unless it results in actual prejudice to the defendant. *Luck* at paragraph two of the syllabus.

{¶52} I acknowledge that certain cases present a unique challenge in assessing preindictment delay. These cases involve situations where the defendant's identity was known at the time of the alleged offense, but the authorities failed to pursue charges. Nevertheless, the statute of limitations provides no exception for such situations. Reading "actual prejudice" into these cases based on speculative claims of what might have been defeats the statute of limitations. Concepts like due process and fundamental fairness are interwoven in the second prong of the preindictment delay standard, and while important to our sense of justice, any such notions are nevertheless elusive and

subject to differing interpretations given the myriad of facts that exist from case to case. This is why a defendant must demonstrate actual prejudice free of speculation before a court considers whether there is a justifiable reason for the delay.

{¶53} Moving away from the actual prejudice standard to a less stringent "due process and fundamental fairness" standard, which allows defendants to demonstrate prejudice with speculative, self-serving claims of lost evidence, will result in inconsistent and unfair results when evaluating preindictment delay claims.

{¶54} Here, Jones has no way of demonstrating to what his mother would or would not have testified. There is no dispute the victim claimed that Jones's brother was also present, and his whereabouts were undetermined. Presumably, in light of the absence of evidence to the contrary, the brother could testify. Jones's claim is pure speculation. Further, what the clothing or other "missing" items would or would not have revealed is a red herring. There is no evidence that the supposed missing evidence existed or was preserved by the police investigation. The missing evidence may be evidence of an incomplete investigation, but that defense would have existed regardless of the passage of time.

{¶55} In most instances, the passage of time works against the prosecution. The state will have to account for the failure to pursue the claim

and deal with the effect of purported "missing" evidence. In any event, 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.

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CLERK OF COURTS
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**JUDGE JOHN D. SUTULA**
Plaintiff	)	**CASE NO. CR-577686**
vs	)	
DEMETRIUS JONES	)	**JOURNAL ENTRY**
Defendant	)	

John D. Sutula, J.

This matter came on for hearing on the motion to dismiss the matter against the defendant for pre-indictment delay. The facts are as follows: In 1993, defendant and the alleged victim were at least acquaintances with each other. Defendant maintains that he and the victim had consensual sex on the night in question.

The alleged victim made a report to the Cleveland Police Department alleging the named defendant did by force or threat of force did engage in sexual conduct with her against her will at his apartment at 7314 Kinsman, Cleveland. The alleged victim was taken to a local hospital for a physical examination and a forensic rape kit to be completed. While at the hospital, the alleged victim again identified the defendant as the one who sexually assaulted her and raped her at the same location she told the police.

Sheriff Signature BKa 4-4-14

Defendant submits that he was questioned by police soon after the complaint had been made. An officer testified that the then investigator attempted to locate the victim, but within one week of the alleged event, closed the file, because with the alleged victim was not present at the address or it was an incorrect address, even though police had previously met her there.

From the time the file was marked closed, the police did nothing to locate the victim or follow-up on the case until nearly 20 years later. Throughout the 20 year period of time, defendant continued to reside in the Cleveland area and from time-to-time was charged with offenses resulting in misdemeanors and felony prosecutions. As a result of one of these offenses, defendant's DNA was taken pursuant to newly enacted state law. It is from the sample taken in 2005-6 that was matched with the rape kit. The State tested this specific sample because of the identification given in 1993. This is not a situation of a match occurring because of a random search of databases.

The alleged victim also remained in the Cleveland area and she also became the subject of various criminal and traffic prosecutions, records easily checked for an address of the victim. Apparently, at no time did she raise with the CPD the status of the rape investigation during the pendency of any of her other cases.

Just prior to the running of the 20 year statute of limitations in 2013, the defendant was indicted in the current case for rape.

Since the time of the complaint was made, the mother of defendant passed away and the defense proffered the testimony she would have been able to testify that the alleged victim and defendant were more than just friends and that they had spent time

together, that she did not hear anything that would reflect a fight or argument between the alleged victim and defendant or that the alleged victim acted in an unusual manner indicating that she had been raped. In the police report, the victim placed defendant's mother on the scene. Further, the clothing of the victim has never been found so that it could be examined for evidence the clothes were torn, bloodied, or in an altered mode otherwise, as a result of an altercation.

In this matter, the alleged victim gave the police the name of her alleged attacker, the exact location where it was to have occurred and further indicated that she knew the alleged attacker for several months so it was not an issue that the DNA in the rape kit was the prime means or was even necessary to identify the attacker.

Once the case was closed by the police, it was never given a periodic check for location of the victim at any other address. The police did nothing to further to investigate. The police did not send the rape kit for testing, even though DNA testing was fully developed in 1993-4 and all the years up to and including 2013. (Recent developments in DNA testing allow the use of smaller samples for testing.) Again, the actual identity of the Defendant was never in question. Nothing new was discovered by the testing of the rape kit, as defendant had already been identified 20 years before by the alleged victim.

The rape kit was forwarded to BCI in 2011, tested in 2012, and results submitted. Not until 2013, one day before the running of the statute was the defendant indicted.

The statute of limitations presents the outer most date in which the state can bring a prosecution. If the state has all of the necessary information for an indictment

but sits on that information unreasonably long and defendant can show actual prejudice from that delay, then the case is subject to dismissal. The mere passage of time is not enough. There must be prejudice. *State v. Selvage*, 80 Ohio St.3d 405 (1997); *State v. Dokisa*, 113 Ohio App 3d 277 (1996); *State v. Luck*, 15 Ohio St.3d 150 (1984.

In this case, the identity of the alleged rapist was known immediately by the State as was the location of alleged attack. The State also had access to the clothing of the alleged victim, which is now missing. The State had access to the alleged victim for photograph for signs of any physical injuries, resulting from the attacks. No photographs are known to exist.

One justification that the State offers for the delay was that the alleged victim had a bad address when the detectives attempted to follow-up. The alleged victim gave 2884 E. 75th St., Cleveland to both the police and the hospital that did the rape kit. It is difficult to believe that this is a bad address. In addition, the alleged victim's mother is listed as a witness at a different address in the initial police report. There was no testimony or evidence that the police attempted to contact the mother or that her address was bad. To the contrary, the exhibits show 20 years later the victim was located through her brother who was living in Solon, Ohio. There is no evidence that the police and the State in this serious crime, ever attempted to locate the victim after 9-6-93 through any means whosoever, or to compel her to testify by way of Grand Jury subpoena, material witness warrant or other means.

Good police work means persistence in discovery of facts, of witnesses and victims. After 9-6-93, the police did nothing in spite of the fact they had the name of the defendant, the location of the alleged rape, a rape kit, the availability of defendant's

clothing, the address of the victim's mother and the name of the witness. The State could have presented the matter without the rape kit as it does nothing to further the proof of evidence of a crime.

Defendant was never charged in 1993 or any subsequent years and the question becomes whether the pre-indictment delay is prejudicial to him. The Court believes the extent of the delay is so severe that it is constitutionally prohibited. Defendant alleges his case is significantly impaired by the loss of the defendant's clothing, lack of photographs, neither of which would demonstrate a struggle as indicated by the alleged victim and the loss of defendant's mother as a witness who died in 2009. The alleged victim made statements that the defendant's mother was in the apartment at the time of the attack and should have heard the fight. Defendant denies any such attack or rape and claims that his mother's testimony would verify there was a relationship between defendant and the alleged victim, and that there was no fight, altercation or other disturbance on the date in question or that the victim was raped in her apartment.

These factors, taken with the almost certain diminishing of memories, makes the delay constitutionally impermissible.

The defendant's motion to dismiss is well taken and is granted.

IT IS SO ORDERED.

Date: 4-4-14

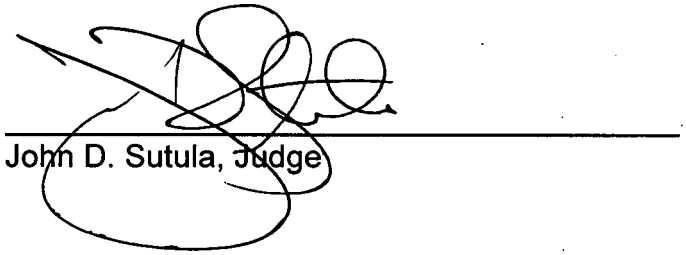
John D. Sutula, Judge

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry was sent by regular U.S. Mail this 4th day of April, 2014 to:

Mary C. Weston, Assistant County Prosecutor
Attorney for State

Gian DeCaris, Esq.
Attorney for Defendant



John D. Sutula, Judge