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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Appellee *-vs-* CHRISTOPHER L. ANDERSON, Appellant	Case № 2015-1107 On Appeal from the Mahoning County Court of Appeals, Seventh Appellate District Case No. 2011 MA 0043

MERIT BRIEF OF APPELLANT CHRISTOPHER L. ANDERSON

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STATEMENT OF THE CASE AND FACTS

Almost 14 years ago, on June 3, 2002, 22 year old Amber Zurcher ("Amber") was found dead in her apartment in Austintown Township, Mahoning County, Ohio. Amber's mother, Diane Whiteman, growing concerned because Amber failed to picked up her 4 year-old son at 6:00 a.m., went to the apartment. Ms. Whiteman obtained a key from the apartment manager, unlocked the door, entered the apartment, and found her daughter dead, lying naked on the floor. The police found no signs of forced entry into the apartment, suggesting, I light of other facts either that Amber knew and trusted her killer, or that someone had gained entrance by deception. There was no evidence of robbery.

The night before, a number of friends and acquaintances who frequented a bar in Austintown Township called "Chippers" made the quick junket to Amber's apartment for an "after hours" party. Among the partygoers was the Appellant, CHRISTOPHER L. ANDERSON ("Anderson"). At the apartment, the confederates continued drinking. Some became extremely intoxicated; some smoked marijuana; some tried to "score" cocaine. While Anderson was among the last to leave the party,

it is undisputed that when Anderson and another partygoer, John Orosz, left Amber's apartment, her door was locked from the *inside*. Orosz checked from the outside to make certain that the door was locked. During Anderson's last trial, Orosz admitted for the first time that after he, his girlfriend, and Anderson left Amber's apartment, Orosz returned to look for something that he had lost.

Austintown Township Police questioned the erstwhile confederates, including Anderson. Both Anderson and his mother informed the police that Anderson had come home, and the mother even informed the police of the time that Anderson, because the dog awakened her and she looked at her alarm clock. But police arrested Anderson two months after the murder and Anderson was indicted by the Mahoning County Grand Jury for Amber's murder. Doc. 1. Anderson entered a plea of not guilty and the case was scheduled for trial.

Before the first trial, the trial judge sustained a pretrial defense motion to prohibit the testimony of Donna Dripps. Ms. Dripps claimed that more than a year before Amber's murder, there was an encounter during which she claimed Anderson had choked her and bitten her

breast. Despite the ruling that the testimony was excluded as prejudicial, Amber's friend, Nichole Ripple, blurted out on the stand Ms. Dripps' claim under the guise of a statement made by Amber.[1] Ms. Ripple's blurted out comment was repeated on the evening and nighttime news. The next day, the trial judge declared a mistrial, premising the ruling upon the undue prejudice caused by Ms. Ripple's comment and by the attention given by the news media to that comment. (Doc. 69.)

At Anderson's second trial, the State presented evidence through the coroner's pathologist that Amber was strangled. A mixture of a small amount of DNA, some said to be consistent with Anderson, some said to be consistent with Amber's son, and some said to be consistent with a third person, was found under Amber's fingernails. A small amount of DNA consistent with a "hickey" or love bite on Amber's breast was also said to contain DNA consistent with Anderson. The State presented, in addition to that evidence, the testimony of all of the attendees (exclusive of Anderson and Amber) at the after hours party. But the cumulative

[1] Ms. Ripple testified that Amber had said to her that Anderson was: "a freak. He tried to strangle his ex-girlfriend."

effect showed little more than that the partygoers ate and drank; some smoked marijuana; some tried to "score some coke." None of the party-goers had any evidence to offer to the effect that Anderson murdered Amber. The State could not explain how Anderson could have gotten back into Amber's apartment, in light of the testimony that her door was locked and that there was no forced entry. The State, therefore, cannot explain how Anderson would have gained entry. There was some evidence that Anderson had physical contact with Amber, but no evidence as to when that was, and no evidence that Anderson murdered Amber. In fact, the State's attempt to paint Anderson as a "freak" whom Amber did not like and who crashed the party only posed more difficulty for the government, which had no satisfactory explanation of why Amber would unlock her door to permit Anderson to enter and have an opportunity to kill her.

To bolster this shortcoming in the State's case, prior to the second trial, the State asked the trial court to permit Donna Dripps to testify. The trial judge reversed his ruling from the first trial, and now permitted into evidence a more extensive version of the very testimony that had

derailed the first trial into a mistrial. The details that Dripps gave about her attack were "by and large irrelevant to establishing a behavioral fingerprint, because there was no corresponding evidence arising from Amber's murder." See, *State v. Anderson*, 7th Dist. No. 03 MA 252, 2006 Ohio 4618, 2006 Ohio App. LEXIS 4581, at ¶56. Dripps was permitted to testify to many details about the claimed attack, leaving a record that the appellate court later said gave the appearance that Anderson "was being tried for attacking Donna Dripps in addition to being tried for the murder of Amber Zurcher." *State v. Anderson*, supra, 2006 Ohio 4618, at ¶57.

The trial judge also sustained the State's motion offer the testimony of Anderson's probation officer about a claimed litany of probation violations, apparently to demonstrate that Anderson had "a guilty mind because he did not report the suspected crime to the probation officer." *State v. Anderson*, supra, at ¶77. The Dripps and probation officer testimony were rightly labeled by the Court of Appeals as "extensive, largely irrelevant, and highly prejudicial." *State v. Anderson*, 2006 Ohio 4618, at ¶84.

Anderson presented no defense at the second trial. The Court of Appeals found that Anderson "would likely have presented a different defense if he were only defending himself against the murder charge, rather than also defending against Donna Dripps' charges and [probation officer's] innuendo." *State v. Anderson*, 2006 Ohio 4618, at ¶84.

Anderson was convicted at the second trial. But the conviction was reversed by the Seventh District Court of Appeals. See, *State v. Anderson*, supra, 2006 Ohio 4618, discretionary appeal not allowed, *State v. Anderson*, 112 Ohio St.3d 1443, 2007 Ohio 152, 860 N.E.2d767. Since that reversal, the State has had two additional opportunities to present its entire litany of evidence against Anderson—save the evidence that rendered the second trial unfair. On both of those occasions, the jury has deadlocked. Without the improper assistance of the Dripps and probation officer testimony, and without the flight instruction, the State simply lacks sufficient evidence to convince 12 jurors of Anderson's guilt beyond a reasonable doubt.

The third time that Anderson had to prepare to defend himself was in December of 2008. The State offered the same evidence from the

coroner's pathologist and the same DNA evidence. Adhering to the opinion which had reversed Anderson's conviction, the trial judge refused to allow the testimony of Donna Dripps and the probation officer, and the trial judge refused to give a flight instruction. The jury that was empaneled in Anderson's third trial was hopelessly deadlocked, and the trial judge declared a mistrial. Doc. 232.

The State's fourth effort to convict Anderson of Amber's murder began in April of 2010. During jury selection, however, one of the jurors commented that she believed that Anderson's co-counsel had fallen asleep during the jury selection process. Based upon the intensity of the juror's comments, made in front of the entire venire, the trial judge declared another mistrial. (Doc. 309.)

The State's fifth effort to convict Anderson of Amber's murder began in August of 2010. Once again, the same witnesses testified—the coroner, police, forensic scientist, and the bar patrons-cum-partygoers. Once again, the jury announced itself hopelessly deadlocked, and the trial judge declared *another* mistrial. (Doc. 365.)

When the State again announced its intention to prosecute Anderson for a *sixth* time for Amber's murder, Anderson filed a motion to dismiss. He argued that continuing to prosecute him without new evidence violated the Fourteenth Amendment to the United States Constitution and Ohio Constitution, Article I, Sections 1, 2, 10, and 16. Anderson reminded the trial court that on five prior occasions, he had prepared for trial. While on two of those prior occasions, the State did not complete the presentation of its evidence, on three of those five occasions, the State was afforded a full opportunity to complete the presentation of its evidence. Anderson argued that with no new evidence that he had committed the murder, the State could not continue to force him to prepare for, and to run the gauntlet of, another trial. Anderson's argument was premised largely upon the Fourteenth Amendment to the United States Constitution and Ohio Constitution Article I, Section 16. Anderson's argument was that these provisions bar the State, with no new evidence of guilt, from continuing to prosecute him in a simple effort to wear down Anderson. As Anderson argued to the trial judge, the government's continuing attempts to force Anderson to run the

gauntlet again, and again, and again have placed him in a position where he cannot effectively defend his liberty. Anderson told the trial judge that "[h]e is worn down. His family is worn down. His lawyer is worn down. *See*, OHIO CONST., art. I, §1." See, Motion to Dismiss (Doc. 374, at 13.)

The trial judge overruled Anderson's motion to dismiss, and Anderson appealed to the Court of Appeals, Seventh Appellate District. The State filed a motion to dismiss Anderson's appeal. The Seventh District Court of Appeals found that Anderson's appeal could continue as the ruling on the motion to dismiss was a final appealable order. The State then sought *en banc* review of the panel's ruling on the dismissal motion. The entire Court then considered the issue, and divided 2 to 2, which of course left standing the original ruling that Anderson's appeal could continue. Before the appeal was heard, the State appealed to this Court, and this Court accepted jurisdiction. *State v. Anderson*, 134 Ohio St.3d 1448, 2013 Ohio 347, 982 N.E.2d 727. The Court ruled that Anderson's appeal of the judge's overruling of a motion to dismiss was a final appealable order. See, *State v. Anderson*, 138 Ohio St.3d 264, 2014 Ohio 542, 6 N.E.3d 23. On remand, the Seventh District affirmed the trial

court's overruling of the motion to dismiss. See, *State v. Anderson*, 7th Dist. № 11 MA 43, 2015-Ohio-2029; 2015 Ohio App. LEXIS 1956. Anderson appealed and this Court accepted jurisdiction on Proposition of Law № 1.

ARGUMENT

> *Proposition of Law No. 1*: The Due Process Clause of the Fourteenth Amendment and Ohio Constitution, Article I, Sections 1, 2, 10, and 16 bar the State from making repeated attempts over a long course of time to convict a person by simply wearing him down when there is no new evidence of guilt.

I

Citizens of Ohio enjoy the protections, under the Ohio and United States Constitutions, *inter alia*, of due process, equal protection,[2] the right to defend themselves, and the right to have justice administered without denial or delay. Read together, citizens who have been indicted have a right to be put on trial in a process that is *fair*. Judge Gerhard Gesell's holding in *United States v. Ingram*, 412 F. Supp. 384 (D. D.C. 1976) is particularly apt here:

> Apparently the Government, *always a hard loser, simply wishes to keep pressing so long as juries disagree in the hope that a conviction eventually will result*. Appellate courts have approved this process of attrition under different circumstances. See, *United States v. Castellanos*, 478 F.2d 749 (2d Cir. 1973); *United States v. Weinstein*, 452 F.2d 704 (2d Cir. 1971), cert. denied *sub nom. Grunberger v. United States*, 406 U.S.

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[2] Though one might argue that this is not a suspect class or protected class situation, and indeed it is not, this Court has said that because *all* citizens are promised due process, a denial of due process is *ipso facto* a denial of equal protection. *See, State v. Lane*, 60 Ohio St.2d 112, 397 N.E.2d 1338 (1979).

> 917, 92 S.Ct. 1766, 32 L.Ed.2d 116 (1972); *United States v. Dooling*, 406 F.2d 192 (2d Cir.), cert. denied *sub nom. Persico v. United States*, 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224 (1969).
>
> Here is a man in jail now more than seven months primarily because of an offense which the Government is unable to convince a jury he committed. *If another trial takes place there is every reason to believe the jury will again be divided or will acquit*. There is great deference shown jury determinations that result in conviction, and the same attitude should prevail when, as here, members of a jury disagree so conclusively when not even faced with conflicts in the proof. Under the circumstances of this case the verdicts themselves indicate a reasonable doubt in the minds of a substantial majority of the jury members who have heard the evidence. … The judgment of the Court or the prosecutor as to the weight of the evidence is, under these circumstances, not entitled to outbalance the obvious.

Id., at 385-386. (Emphasis added.) Here is a man in jail for nearly 14 years. Had he been lawfully convicted, he would nearly be eligible for parole. But he has not been lawfully convicted. The State has been given the opportunity to convict him but the State, absent the "other acts" evidence that the Court of Appeals held made the second trial unfair, has been unable to convict. Contrary to what the Court of Appeals suggested, the State cannot continue to try Anderson until justice for the victims and the citizens of this State has been attained. For justice is giving the state a fair opportunity to convict, which it has had. Like many of the cases cited here and to the courts below, the State has no

new evidence. To the extent that there has been "new" evidence, it is Anderson's alibi. The State produced no new witnesses who can furnish information of guilt. The State's only "new" evidence is trying to make Anderson's alibi look unbelievable.

II

The Due Process Clause is meant in part to limit the power of government to act when that action would be oppressive or unfair. *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923), held that, even when there is no "state action," the Due Process Clause demands measures by the judiciary to correct an unfairness that cannot be overlooked. The Supreme Court sent the case back to the district judge. In an opinion by the paragoned Oliver Wendell Holmes, the Court held:

> We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.

Citing the Leo Frank case, *Frank v. Magnum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915), Justice Holmes noted that the courts must supply a "corrective process" when the train of justice slips off the tracks,

regardless of who is responsible for the train slipping off the tracks—be that government actor or otherwise. In fact in *Moore*, a mob justice case, the mob, not the government, slipped the train off the tracks. Nonetheless, regardless of the genesis:

> there is an actual interference with the course of justice, *there is a departure from due process of law*; and that "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."

Moore, supra, at 91, citing *Frank, supra*, 237 U.S., at 335. Justice Holmes did not search the Due Process Clause nor the Court's dusty volumes for a case that said: due process is denied when a mob atmosphere prevails and the defense lawyer acts like a eunuch. But Holmes *did* note the obligation of the judiciary to right the ship when there has been an actual interference with justice. Five trials and 14 years after his arrest, there has been no *lawful* conviction. Chris Anderson, incarcerated the entire time, has been deprived of his liberty without due process of law. See, Fourteenth Amendment to the United States Constitution. He has been denied the ability to effectively defend his liberty. See, Ohio Constitution, Article One, Section 1. He has been denied the ability to have justice

administered without denial or delay and a remedy by due course of law. See, Ohio Constitution, Article One, Section 16. Denial of these rights is a denial of equal protection. See, See, Ohio Constitution, Article One, Section 2.

We should as a system be able to hold out any case and say, regardless of the outcome, the process used was fair, was "due." Justices Harry Blackmun and John Paul Stevens once aptly observed that the *due* process clause is not the *some* process clause. See, *Medina v. California*, 505 U.S. 437, 463, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (BLACKMUN, J., joined by STEVENS, J., dissenting).

III

No case has a brother. There is, so far as Anderson can discover, no case that says that 5 trial, 6 trial or 7 trials is too many as a rule of law. A case that has many similarities with this one was dismissed years ago by the legendary Judge Gerhard Gesell. That case, quoted above, is *United States v. Ingram*, 412 F. Supp. 384, 385 (D. D.C. 1976). There, the court dismissed the prosecution as a matter of "fair play." *Ingram* involved dismissal of an indictment following two hung jury mistrials

where no new evidence was anticipated. Like *Ingram*, this case is one where the [g]overnment has no new proof; it simply wants another chance." 412 F. Supp., at 385. Does the Double Jeopardy Clause prohibit the State from being afforded repeated chances to convict? Probably not, though we might do well to re-evaluate in another case how that makes complete sense in light of the name of the Clause. For purposes of this case, we must remember that these rights do not exist in a vacuum, and one provision or holding does not pre-empt another, equally sacrosanct guarantee in the Constitution. And so while Double Jeopardy may not prevent retrial after retrial when there was a manifest necessity to declare a mistrial, see, *United States v. Perez*, 22 U.S. (9 Wheaton) 579, 6 L.Ed. 165 (1824), Due Process, the right to defend one's life and liberty, and the right to have justice administered without denial or delay cannot suffer as a result of such continued attempts to convict.

In this case, at the time the motion was filed, Chris Anderson had been in jail for over eight (8) years, not for seven (7) months. Now, he has been in jail for nearly 14 years. There is nothing new pointing to Anderson's guilt. There is no reason to assume that a new jury will do

anything other than acquit or be deadlocked since the evidence that the first appeal excluded has not been used. This is simply a matter of fair play, the very heart of the Due Process Clause. As in *Ingram*, the government simply wishes to keep pressing, in the hope that a conviction eventually will result. To fail to perceive the palpable undue emotional, personal, and financial hardship on any defendant undergoing a criminal trial is myopic. To fail to recognize the wearying effect of 6 trials and more than a decade in jail is "blinking reality." One can only imagine the long and expensive ordeals for the Anderson and his family that the 5 prior trials have been.

Anderson pointed out to the trial court, and repeats here, that the State has employed a cadre of prosecutors for the 5 trials, while Anderson struggled, first with court-appointed counsel, and now with the financial devastation of his family paying for counsel, and for transcripts and other expenses. To allow this prosecution to go any further violates the fair play that the Constitution says must obtain.

Is there a magic rule or holding that we can grasp in this case? Probably not, though it is easy to say that when the State has had

repeated chances to convict and has failed, when more than a decade has passed, when Anderson, if acquitted, would have served enough time to make him eligible for parole (post-release control), the due process, right to have justice administered without denial or delay, and right to effectively defend liberty have all been shattered on the rocks of government power. Samuel Winship's case reminds us all that the due process clause guarantees that no man, in that case, even a minor, shall be convicted and suffer the loss of liberty except upon proof beyond all reasonable doubt. See, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The case reminds us also that at stake is the very integrity of the judicial system and the citizenry's respect for it. Our system has always endeavored to ensure that if we make a mistake, we err on the side of letting a guilty man go free rather than convicting an innocent one.

While there is no "on all fours" case, *Ingram* and a few others are helpful to the ultimate analysis that must be performed. In *State v. Abbati*, 99 N.J. 418, 432, 493 A.2d 513 (1985), the court held that judicial responsibility for the proper administration of criminal justice gives rise to the

inherent power to dismiss an indictment in appropriate circumstances. Similarly, *State v. Moriwake*, 65 Haw. 47, 55, 647 P.2d 705 (1982), held that a trial court has "implicit powers" to terminate a prosecution. See, also, e.g., *State v. Gonzales*, 132 N.M. 420, 49 P.3d 681, 685-86 (App. 2002); and, *State v. Witt*, 572 S.W.2d 913 (Tenn. 1978); *State v. Lundeen*, 297 N.W.2d 232, 236 (Iowa App. 1980); *People v. Andrade*, 86 Cal. App.3d 963, 976-77, 150 Cal. Rptr. 662 (1978); *People v. Orin*, 13 Cal.3d 937, 946, 533 P.2d 193, 120 Cal. Rptr. 65 (1975); *People v. Stern*, 83 Misc.2d 935, 937-938, 372 N.Y.S.2d 932 (1975). The appellate court implied that the decisions of other jurisdictions are of little use. There is no reason to conclude that the country's collection of intellectually superior judges all reside in Ohio.

Is there a holding that the Due Process Clause permits five trials but not six? Six trials but not seven? Or eight trials but not nine? No. Nor does the Court of Appeals give us any comfort. That Court was unwilling to say that even one more trial with a hung jury would be a violation. If there was another mistrial, under the appellate court's ruling Anderson wold have to move to dismiss, and if the trial judge overruled that motion, Anderson would have to appeal again. How can we say a

system is fair when a man who is presumed *not* to have committed this crime languishes in jail, doing life on the installment plan between trials? If we cannot hold up this case as a paragon of the idea of due process, if we cannot hold it up as a paragon of the right to defend liberty or have justice administered without denial or delay, then we have no choice but to order the action that says that enough is enough.

Likewise, if Anderson, after his time, patience, and resources are exhausted, were to be convicted, how can we have confidence in the verdict as anything other than the equivalent of a "rubber hose" confession extracted by the police? There's no provision in the Constitution that says "no rubber hoses to be used during police questioning,"but we all know it violates due process to use a rubber hose to extract a confession.

The question of whether the proceedings are no longer fair does not rest solely on a mechanical application that involves counting the number of mistrials that have occurred, or how serious are the charges, or the votes of jurors (which in any event we do not know in this case), or any other single factor. The totality of circumstances is good enough

for many other thorny legal and constitutional questions. There is no reason why it cannot be so here. This is scarcely a case where the government has been denied a fair opportunity to try to convict the Appellant beyond a reasonable doubt. Anderson's motion to dismiss was presented prior to the *sixth* trial. No one can claim that it was premature.

IV

The question involved here requires *analysis*, though not necessarily *definition,* of what some judges and legal writers have characterized as an elusive term, a term incapable of precise definition: due process of law. But, as the great Justice Felix Frankfurter once wrote, where you come out case depends on where you go in. Though the case was a Fourth Amendment case, what the esteemed justice had to say was not just about the Fourth Amendment, but how one approaches cases in questions of constitutional construction or application.

> 1. It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in *Boyd v. United States*, 116 U.S. 616, in *Weeks v. United States*, 232 U.S. 383, in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, in *Gouled v. United States*, 255

> U.S. 298, or one approaches it as a provision dealing with a formality. *It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.*

(Emphasis added.) See, *United States v. Rabinowitz*, 339 U.S. 56, 69 70 S.Ct. 430, 94 L.Ed. 653 (1950) (FRANKFURTER, J., joined by JACKSON, J., dissenting). There is, to be sure, no mechanical formula that can be applied here. There is no constitutional language that says Due Process, or the right to have justice administered without denial or delay limits the State of Ohio to *x* number of attempts at conviction. But then neither was there a hard and fast rule in *Moore v. Dempsey, supra*, or in this Court's pronouncement in *Thomas v. Mills*.

Ohio's first female Supreme Court Justice, Florence Allen, quoted from an Oklahoma case, *State ex rel. Tucker v. Davis*, 9 Okl. Cr. 94, 130 P. 962, 44 L.R.A. (N.S.) 1083 (1913), when applying Section 16, Article One of the Ohio Constitution, and Justice Allen spoke of fair play:

> In the opinion, the court says:
> "It would be a cheap subterfuge of and shameless mockery upon justice for the state to put a man on trial in its courts, charged with an offense which involved his life, liberty, or character, and then place him in such a position

> that he could not prepare to make his defense. It would be just as reasonable to place shackles upon a man's limbs, and then tell him that it is his right and duty to defend himself against an impending physical assault. If the right of defense exists, it includes and carries with it the right of such freedom of action as is essential and necessary to make such defense complete. In fact, there can be no such thing as a legal trial, unless both parties are allowed a reasonable opportunity to prepare to vindicate their rights. …
>
> "The right to be heard by counsel would, in the language of Saint Paul, 1 Cor. 13, 1, 'become as sounding brass, or a tinkling cymbal,' if it did not include the right to a full and confidential consultation with such counsel, with no other persons present to hear what was said. This is a material, substantial right, essential to justice."

See, *Thomas v. Mills*, 117 Ohio St. 114, 157 N.E. 488 (1927). There was no language in the Ohio Constitution that said a warden can keep a lawyer from conversing with his imprisoned. This Court hose not to employ the provisions guaranteeing counsel, but chose instead to use the "fair play" provisions.

The constitutional shield of Due Process, the United States Supreme Court reminded us in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), does more than protect the rights of a young juvenile. At stake is the very integrity of the judicial system and the citizenry's respect for it. Our system has always endeavored to ensure that if we make a mistake, we err on the side of letting a guilty man go

free rather than convicting an innocent one. In juxtaposition to that premise and to the constitutional protection of acquittal except upon proof beyond all reasonable doubt is the desire of the government and the demand of its citizens that those who can be proven guilty beyond all reasonable doubt shall be convicted for the protection of society—to ensure the "peace and dignity" of the people of this state. For this and for other reasons, then, a jury that is unable to conclude unanimously that a defendant is guilty, but likewise is unable to conclude unanimously that the defendant is not guilty has never stood as a bar to re prosecution if the trial court, upon declaring the mistrial, finds that there is a "manifest necessity" to do so. That is not the end of the issue, however.

Every criminal case, whether the issue be in the foreground or the background, involves the limits of the government's power and the freedoms of the citizen being prosecuted. The Constitution presumes that Chris Anderson did not commit this crime. The State is entitled to rebut that presumption with evidence at a trial. It has been unable to do so, despite ample opportunity. So far, those in power have presumed Chris

Anderson *did* commit the crime. It is through those glasses that they have viewed the Ohio sand United States Constitutions.

With due respect, where the Court of Appeals came out of the case depended on where it went in. And so when the Court held that "justice demands the victim and her survivors, as well as the citizens of the state, itself, are equally entitled to the ends of justice." *State v. Anderson*, 2015 Ohio 2029, at ¶24. That statement by the appellate court reveals much. It also ignores that the "ends of justice" does *not* mean repeated attempts to convict a defendant who someone in authority thinks is guilty. The ends of justice does not mean that the "victim and her survivors" are denied justice only because there is yet no lawful conviction. The ends of justice does not mean that "the citizens of the state" are denied justice because a citizen who the prosecution and the victims think is guilty has not yet been lawfully convicted. It cannot escape mention that this very same Court of Appeals once held that Anderson may or may not be guilty, but evidence of extraneous other acts could not be allowed to infect his trial. See, *State v. Anderson*, 7th Dist. № 03 MA 252, 2006 Ohio 4618, 2006 Ohio App. LEXIS 4581, *discretionary appeal not allowed by State*

v. Anderson, 112 Ohio St.3d 1443, 2007 Ohio 152, 860 N.E.2d 767. It also cannot escape mention that the State, when presented opportunities to convict Anderson *without* that extraneous evidence, and using just evidence tending to show that Anderson did or did not murder this poor young woman, has been unable to make its case. The *Winship* standard of proof beyond a reasonable doubt to the satisfaction of all jurors convened to hear a case has been afforded to the State of Ohio, to the citizens of this State, to the victim and her survivors. *That* is the process which is "due" in criminal cases. *That* is the process by which in Ohio we administer justice without denial or delay.

The Court of Appeals noted that Anderson was unable to cite a case that holds that, regardless of "manifest necessity," a certain number of trials violates due process. The Court of Appeals "recognize[d] that, at some point, continued retrial will present too onerous a burden on [Anderson's] rights," but concluded that the "time has not yet come." *State v. Anderson*, 7th Dist. № 11 MA 43, 2015 Ohio 2029, 2015 Ohio App. LEXIS 1956, ¶40. With due respect, that analysis does not advance the ball. It is little more than and endorsement of the idea that the State and

the victims have been denied justice because Anderson has not yet been lawfully convicted. How many more attempts will the State have? The Court of Appeals does not tell us.[3] How many times will Anderson have to move for discharge? The Court does not tell us. How many years will he have to spend in prison before due process or the Ohio Constitution is violated? The Court does not tell us.

The appellate court noted that, had Anderson not appealed, he would have been subjected to a fifth trial and not a sixth. This is with due respect, an example of failing to appreciate fully the realities of trial practice and why the "wearing down" is itself a constitutional violation. Every trial lawyer knows that it is the preparation for trial that is every bit, if not more, taxing upon resources as the actual trial.

The State claims Appellant has not been prejudiced. No one asked Chris Anderson or his mother. She is broke or nearly so; he is in jail, adamant that he did not murder this young woman.

---

[3] The Court of Appeals also observed that the State "refiled" the murder charge against Appellant. *State v. Anderson*, 2015 Ohio 2029, ¶¶3-5. The indictment was never dismissed.

The Court of Appeals said that "[i]n this case, Appellant has been convicted once and, due to procedural rulings, certain evidence was permitted in one trial but not in others." ¶19. That again with respect, is a bit myopic. These were *not* "procedural" rulings. The Court ruled that admission of the evidence rendered the conviction unfair. Actually, the fact that Appellant has not been convicted since that evidence was excluded speaks volumes, an observation that eluded the appellate court.

Here is the point of the case. One can find cases where the charges were dismissed where there were fewer trials than held here. One can find cases where factors are listed to decide if dismissal is proper. One can balance incarceration against other factors like the seriousness of the charge. One can massage the factors to make the result come out however one wants it to come out. With all that having been said, if we can say that putting Chris Anderson to trial again; after there have been 2 miscues because of unfairness to Anderson (the Nicole Ripple instigated mistrial and the reversal because the State was permitted to overreach with evidence); if we can continue to put Chris Anderson to trial with the same evidence that twice has refused to meet the *Winship*

standard, if we can hold him in jail until he is eligible for parole on a life sentence and if we can say that this is "fair" play, that it is just, that the process is "due," then Anderson will lose this appeal.

But, if we say that due process and the provisions of the Ohio Constitution that guarantee justice without denial or delay and that guarantee the ability to effectively defend one's life and liberty, then the Court of Appeals must be reversed with instructions to remand to the trial court to enter a dismissal.

CONCLUSION

Chris Anderson continues to languish in jail. The law presumes he did not commit this crime. The State has been given chances to rebut that presumption. To continue to permit the State to run at Anderson again and again is itself unfair, the unfairness that the Ohio and United Constitutions. What the constitutional provisions cited are summarized by Justice Jones of the Alabama Supreme Court. See, *Ex parte Josephus Anderson,* 457 So.2d 446 (Ala. 1984), at 452:

> I respectfully dissent. * * * . The test is one of essential, basic fairness. How many times must a defendant in a criminal case be put to trial, with each one ending in a hung jury, before the "unfairness" flag is raised? If three times is

> not enough, would three more times likewise not be enough? Except for the seriousness of the matter at hand, one might theorize in jest that, because the State gained one more juror for conviction with each successive trial, the State should be afforded eight additional trials in order to obtain a guilty verdict (at the third trial the jurors stood eight for acquittal, four for conviction). Or maybe "fairness" would dictate that so long as the State gains at least one more juror for conviction with each trial, the defendant's constitutional challenge to a retrial is due to be rejected.
>
> While the cited precedents are helpful, these cases, as does the majority opinion in this case, lay undue stress upon the defendant's burden to object to the trial court's declaration of a mistrial, as well as the burden to produce evidence from the trial jurors to the effect that in their opinion no future jury could agree upon a verdict. It seems to me that these are misplaced elements in the fairness test. The legal conclusion of fairness *vel non* must be found in the inherent fact that the defendant is being put to a fourth trial where three separate juries in three separate prior trials have failed to reach a verdict.
>
> * * * . Indeed, I believe the considerations here are even more favorable to the defendant, and this for the reason that the test applicable to a criminal prosecution finds its genesis not merely in a legislative expression but in the organic law--the State Constitution.
>
> After all, once we have applied all the objective elements, "fairness," ultimately, is a matter of subjective judgment; and in this case it is my personal subjective judgment that to put this defendant to a fourth trial is violative of constitutional due process.

Id. (JONES, J., dissenting.) This case must be reversed and Anderson discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was: [__] sent by regular United States Mail, postage prepaid; [__] hand delivered to counsel or counsel's office; or [___] sent by telecopier [___] sent via electronic mail this _____ day of February, 2016 to Mr. Ralph M. Rivera, Esq., 21 West Boardman Street, Youngstown, Ohio 44503.

/s/ John B. Juhasz
JOHN B. JUHASZ

H:\Anderson C 3115\SCt Brf Dr 5.wpd*Mon 22 February 2016 - 01:37pm (1337 hrs)

APPENDIX

Constitutional Provisions:

Fourteenth Amendment, United States Constitution

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution, Article 1, Section 1

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Ohio Constitution, Article 1, Section 2

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Ohio Constitution, Article 1, Section 10

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any

witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Ohio Constitution, Article 1, Section 16

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

[Cite as *State v. Anderson*, 2015-Ohio-2029.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 11 MA 43
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
CHRISTOPHER L. ANDERSON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 02 CR 854

JUDGMENT: Affirmed. Remanded.

APPEARANCES:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: May 20, 2015

[Cite as *State v. Anderson*, 2015-Ohio-2029.]
WAITE, J.

{¶1} Appellant Christopher L. Anderson appeals a February 15, 2011 Mahoning County Common Pleas Court judgment entry denying a motion to dismiss his indictment and seeking discharge from his scheduled trial. Appellant argues that fairness dictates the state should be barred from trying him a "sixth time" on the same murder charge. Appellant contends that another trial would violate both the Due Process Clause and the Double Jeopardy Clause. The state responds by arguing that previous mistrials and hung juries do not bar the state from retrying a defendant. For the following reasons, Appellant's arguments are without merit and the trial court's decision is affirmed.

Factual and Procedural History

{¶2} Appellant was charged with murdering Amber Zurcher in June of 2003. During Appellant's first trial, the trial court ruled that witnesses were barred from introducing testimony alleging that Appellant had previously bitten and strangled an ex-girlfriend. However, during one witnesses' testimony, she blurted out this information while on the stand. *State v. Anderson,* 7th Dist. No. 03 MA 252, 2006-Ohio-4618, ¶37. The evening news highlighted the witness' testimony and the trial court declared a mistrial.

{¶3} The state refiled the murder charge against Appellant. During the second trial, the trial court did permit witnesses to testify as to Appellant's alleged violence against his ex-girlfriend. In November of 2006, the jury reached a verdict and found Appellant guilty. *Id.* On appeal, we reversed the conviction after finding

that the trial court erred in admitting the testimony. The state again refiled the murder charge against Appellant.

{¶4} Appellant was tried a third time in December of 2008. The jury deliberated but was unable to reach a verdict. The state again refiled the charges. During *voir dire* in Appellant's fourth trial, a prospective juror observed Appellant's attorney fall asleep and commented in front of other jurors about this incident. The trial court dismissed the prospective jurors and continued the case. After a new *voir dire* process and selection of a new defense attorney, Appellant stood trial and the jury was once again unable to reach a verdict.

{¶5} The state again refiled the murder charge against Appellant. At this point, Appellant filed the within motion to dismiss the charges based on alleged violations of the Due Process and Double Jeopardy Clauses. The trial court denied his motion. *Id.* Appellant filed a timely appeal, which was initially allowed.

{¶6} Before briefing, the state filed a motion to dismiss the appeal. The state contended that a trial court's decision to deny a motion to dismiss on grounds of double jeopardy is not a final, appealable order. We overruled the state's motion, and the prosecutor then filed a motion for reconsideration and requested an *en banc* hearing on the issue. We denied the motion for reconsideration but granted an *en banc* hearing. However, our *en banc* panel could not reach a consensus as to whether the trial court's denial constituted a final, appealable order. Accordingly, our previous decision stood. The Ohio Supreme Court accepted jurisdiction and ruled

that, at least in this case, the denial was final and appealable, and remanded the matter for a ruling on the merits.

Assignment of Error No. 1

> The trial court erred in failing to grant appellant's motion to dismiss based upon due process grounds.

Assignment of Error No. 2

> The trial Judge erred in not dismissing the indictment as continued prosecution violates Double Jeopardy.

{¶7} As both of Appellant's assignments of errors are intertwined, they will be addressed together. To date, Appellant has arguably faced trial four times. He asserts that the protections found in the Due Process Clause prevent the state from trying him a fifth time. (Appellant mischaracterizes this as the sixth time, for reasons later explained). As the state apparently has no new evidence, Appellant believes that there is nothing to suggest that a jury will convict him. Further, Appellant posits that the process to date has been expensive and stressful for himself, his family, and his lawyer. Although he concedes that there is no bright line as to the number of times a defendant can be tried following successive mistrials, he offers caselaw from Hawaii and Iowa which address this issue in order to reach the conclusion that Appellant's murder charge should now be dismissed.

{¶8} Appellant acknowledges that many state courts have held that the Double Jeopardy Clause does not apply when there is a manifest necessity for a mistrial. He urges, however, that this case requires application of the Due Process

Clause. While conceding that no direct language in either the Due Process Clause or the Double Jeopardy Clause support his arguments, Appellant argues that for almost twelve years he has suffered the anxiety of not knowing whether he will be found guilty and sentenced to prison. He claims that the constant fear of the process has hampered his life, exhausted him, and subjected him to embarrassment. He also alleges (with no evidence to substantiate this claim) that an innocent person has a greater chance of being convicted when subjected to multiple trials. Accordingly, Appellant urges that "fundamental fairness" dictates the state should be prevented from trying him again.

{¶9} In response, the state consolidates the factors from the Hawaii and Iowa cases cited by Appellant, and applies each factor to the facts of this case. The state uses these sixteen combined factors to argue that Appellant is not entitled to dismissal of the indictment. The relevant facts discussed by the state are: not all of Appellant's trials were completed; there is highly incriminating evidence against Appellant; Appellant has been convicted once; there has been no evidence of misconduct or bad faith on the part of the state; and, Appellant has not shown that he has been actually prejudiced by the delay.

{¶10} The state highlights the fact that Ohio law is clear. Neither a jury's failure to reach a verdict nor a mistrial bars the state from retrying the matter. The state notes that the Ninth District has emphasized that a state is equally entitled to finality in a case, which is only obtained through a final jury verdict. The state also

urges that a trial court's ruling on a pre-trial motion is given great deference. Thus, the state argues that the trial court did not err in denying Appellant's motion.

{¶11} Generally, the Double Jeopardy Clause does not bar retrial following a mistrial. *State v. Hubbard,* 150 Ohio App.3d 623, 2002-Ohio-6904, 782 N.E.2d 674, ¶50*,* citing *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). The Ohio Supreme Court has declared a narrow exception to this rule exists only when the defendant has been goaded into seeking a mistrial by the prosecutor's conduct. *Hubbard* at ¶50, citing *State v. Loza,* 71 Ohio St.3d 61, 70, 641 N.E.2d 1082 (1994). To fall within this exception, the prosecutor's conduct must reflect that the state "engaged in an 'intentional act of deception.' " *Hubbard* at ¶50, citing *Loza* at 71. It is undisputed that there are no allegations of such conduct, here.

{¶12} Despite the fact that no actions here can be characterized as prosecutorial misconduct, Appellant does argue in general fashion that the state has had ample opportunity to obtain a conviction here, and continued prosecution of the matter is simply an "exercise of power" intended to "wear down" the accused, his family and friends. He cites to a number of federal cases that outline rights found in both the Due Process and Double Jeopardy Clauses. And he makes broad factual assertions that are unsupported in this record. He also does raise very troubling concerns as to how certain rights and responsibilities must be balanced, the most glaring of these appears to be deciding just how long a defendant may be incarcerated while going through the criminal process and yet subject to no conviction.

{¶13} It appears that there is no clearly analogous Ohio case where we may look for guidance. As earlier discussed, Ohio clearly allows retrial following mistrial and/or hung jury. Our body of law does not, however, address the number of retrials which may be permitted.

{¶14} In 2002, the Ninth District ruled in a case where a defendant was convicted after three mistrials. *State v. Roper,* 9th Dist. 20836, 2002-Ohio-7321, ¶87. The *Roper* court looked to law from other states and, most importantly for our purposes, reviewed the Hawaii and Iowa caselaw on which Appellant relies in the matter before us. After applying the factors listed in *State v. Moriwake*, 65 Haw. 47, 55, 647 P.2d 705 (1982) and *State v. Lundeen*, 297 N.W.2d 232, 236 (Iowa App.1980), the Ninth District held in *Roper* that trying the defendant four times did not violate the Double Jeopardy Clause or Due Process Clause. *Id. at* ¶90.

{¶15} The *Moriwake* factors included:

> 1) the severity of the offense charged; 2) the number of prior mistrials and the circumstances of the jury deliberation therein, so far as is known; 3) the character of prior trials in terms of length, complexity and similarity of evidence presented; 4) the likelihood of any substantial difference in a subsequent trial, if allowed; 5) the trial court's own evaluation of the relative case strength; and 6) the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney.

Roper at ¶85, citing *Moriwake* at 55.

{¶16} The *Lundeen* factors included:

> (1) weight of the evidence of guilt or innocence; (2) nature of the crime involved; (3) whether defendant is or has been incarcerated awaiting trial; (4) whether defendant has been sentenced in a related or similar case; (5) length of such incarceration; (6) possibility of harassment; (7) likelihood of new or additional evidence at trial; (8) effect on the protection to society in case the defendant should actually be guilty; (9) probability of greater incarceration upon conviction of another offense; (10) defendant's prior record; (11) the purpose and effect of further punishment; and (12) any prejudice resulting to defendant by the passage of time.

Roper at ¶86, citing *Lundeen* at 236.

{¶17} The *Roper* Court noted that in both *Moriwake* and *Lundeen* a new trial was approved despite the fact that no new evidence was anticipated. *Roper, supra,* at ¶87. And similar to the instant case, one of the mistrials in *Roper* resulted from a witness who inadvertently provided improper testimony. *Id*. at ¶89.

{¶18} In 2009, the Tenth District heard a case where the defendant was convicted after his third trial. *State v. Whiteside,* 10th Dist. No. 08AP-602, 2009-Ohio-1893, ¶12. He appealed his conviction alleging that these three attempts to convict violated the Double Jeopardy Clause. *Id.* at ¶14. In applying *Roper, Moriwake,* and *Lundeen,* the Tenth District held that retrying a defendant following

two trials that resulted in hung juries did not violate the Double Jeopardy Clause. *Id.* at ¶21.

{¶19} Our review of the various factors found in *Moriwake* and *Lundeen* reveal that they appear to be somewhat repetitive, and address questions either not present in this matter (such as the defendant's own prior record), addressed in Ohio by sentencing statutory schemes (purpose and effect of punishment), or readily apparent (seriousness of the crime and the effect on protection to society if defendant is guilty). Thus, we decline to adopt these courts' factors as our own. Further, *Moriwake* and *Lundeen* are factually distinguishable from this case. In *Moriwake,* the defendant was tried twice and both trials ended in a mistrial. *Moriwake* at 49. Unlike Appellant, the defendant never had a trial end in conviction and both of the trials were mirror images of one another, with no additional witnesses, evidence, or defenses. *Id.* at 57. In this case, Appellant has been convicted once and, due to procedural rulings, certain evidence was permitted in one trial but not in others.

{¶20} In *Lundeen,* the defendant was charged with four counts of an offense on the basis of four separate county attorney's information filings. The four charges were not consolidated for trial. *Lundeen* at 234. When the defendant was acquitted on the first charge, the trial court dismissed the three remaining counts. *Id.* The trial court reasoned that the state had lost on its strongest case and a trial on the remaining counts would end in the same result. *Id.*

{¶21} Despite the differences between these two cases and the matter at bar, certain of the combined *Moriwake* and *Lundeen* factors do provide a useful tool for analysis of Appellant's claims. While we decline to directly adopt these tests, which clearly derive from other states' body of law on the issue, some factors contained within these cases do highlight important considerations as we analyze the matter before us.

{¶22} Again, we note that not all of the factors are relevant to Appellant or to the law in Ohio. And it is readily apparent that he is charged with a severe crime and failure to prosecute may result in a negative societal impact. A few of these factors do bear heavily on Appellant's constitutional arguments. Chief among these are: 1) whether the defendant has been incarcerated awaiting trial and the length of the incarceration; 2) the number and character of prior trials; 3) the professional conduct and diligence of respective counsel (in Ohio, especially the prosecutor); and 4) an evaluation of the evidence as it appears from the record. Finally, we also must delve into other prejudice to the defendant, if it appears on the record.

Defendant's Incarceration

{¶23} The record reflects that Appellant has been incarcerated for the entire length of this process: almost twelve years. Initially, due to many factors including the severity of the crime, bond was set at $1,000,000. Sometime in 2008, on his motion, Appellant's bond was reduced to $500,000. Apparently, he was unable to post bond and has remained incarcerated. There can be no question that this fact presents the most troubling aspect of this case. No one will argue that this is not a

substantial amount of time to remain in jail without the finality of a conviction. As Appellant so eloquently argues, one of our most fundamental rights is that of liberty. We note, also, that had Appellant already been convicted, his sentence would result in a mandatory fifteen years to life imprisonment. Hence, it is theoretically possible that he has already spent the bulk of the minimum sentence, here, incarcerated.

{¶24} However, we also note that this one fact alone cannot override all others. No one right exits in a vacuum and, already discussed, justice demands the victim and her survivors, as well as the citizens of the state, itself, are equally entitled to the ends of justice. Hence we turn to the next factor in order of its importance.

Number and Character of Prior Trials

{¶25} Appellant was indicted on August 29, 2002. He was brought to trial for the first time on May 27, 2003. On May 30, 2003, the trial court declared a mistrial based on an unsolicited comment made by one of the witnesses during the state's case. Although the record does not provide the actual date, it is clear the state immediately refiled the charge.

{¶26} The second trial began on November 29, 2003. Following his guilty verdict, Appellant was sentenced on December 4, 2003. On September 5, 2006, Appellant's conviction was reversed. Again, the record does not reveal the date, but the murder charge appears to have been refiled immediately.

{¶27} Appellant's third trial began on December 8, 2008. On December 18, 2008, the jury failed to reach a verdict, resulting in a hung jury. Appellant was immediately notified he would be tried again. Before this fourth trial began, on

Appellant's motion his bond was modified from $1,000,000 to $500,000. However, as earlier discussed, it does not appear that he posted bond.

{¶28} During pre-trial in his fourth trial, one of the potential jurors commented on the fact that Appellant's attorney had fallen asleep during *voir dire.* Although Appellant characterizes this as a mistrial, the judgment entry specifically states that the trial court ordered a continuance, not a mistrial. Thus, we cannot characterize the trial that followed as an entirely new proceeding. Following a new *voir dire* process and selection of new defense counsel, this trial was completed and the jury again failed to reach a verdict.

{¶29} The state filed a notice of intention to refile on October 22, 2010. On February 15, 2011, Appellant filed his motion to dismiss, which was denied by the trial court. On March 17, 2011, Appellant filed a notice of appeal. A panel of this Court initially found the denial of the motion to dismiss was a final, appealable order. On the state's request, we sat *en banc* on this limited issue. Our *en banc* panel was unable to reach a consensus and the case went to the Ohio Supreme Court. On February 19, 2013, the Ohio Supreme Court held that this denial did, in fact, constitute a final, appealable order. Accordingly, the case was remanded for a ruling on the merits.

{¶30} Hence, Appellant was subject to three complete trials, one of which resulted in conviction and two of which ended in hung juries. He was subject additionally to mistrial that occurred partially through his first attempt at trial. One of the trials resulting in a hung jury was delayed by the necessity of seating a new jury.

Appellant erroneously refers to the continuance as a mistrial and thus claims this caused a fifth trial, which is clearly not the case. Hence, in looking at relevant Ohio law, as found in *Hubbard, Roper* and *Whiteside*, this record does not reflect an egregious number of procedures nor an unduly onerous process. Nothing in the record indicates that there was undue delay in setting or holding any one trial. Nothing in the record indicates delay in refiling charges. We note that he was actually convicted during one of his trials. And only three proceedings, including the trial resulting in a guilty verdict, were fully concluded. The first attempt at trial was only partially completed when the necessity of mistrial occurred. And despite Appellant's mischaracterization, only one mistrial occurred. Based purely on our body of law as it currently exists, nothing in this set of facts leads us to conclude that dismissal of the murder charge is warranted.

Professional Conduct and Diligence of Counsel

{¶31} Because we acknowledge there is more to Appellant's fundamental fairness argument than simply counting the number of earlier proceedings, and because there can be no bright line test for the particular rights and issues that are involved, a review of the actions of both counsel is next required. This is particularly true as we have already noted that in Ohio, the only exception to the rule that retrial is not barred by Double Jeopardy is based on serious prosecutorial misconduct. See *Hubbard* and *Loza, supra*. As earlier stated, Appellant concedes this is not the case, but goes on to generally denounce the actions of the prosecutor in refiling these charges as a bullying tactic.

{¶32} There is nothing in this record leading us to find any type of misconduct on the part of the prosecutor. The charges appear to have been promptly refiled. No mistrial, continuance or hung jury can be attributed to any action or inaction on the part of the state. While Appellant admits this is true, he believes that by merely continuing to refile the charges this amounts to some sort of misconduct.

{¶33} It is readily apparent on the record, however, that Appellant's "fundamental fairness" argument cuts both ways. Appellant's first attempt at trial ended in mistrial solely because that was the only fundamentally fair outcome for Appellant. His second full trial ended in conviction. Despite the length of time that passed during his appeal following conviction, no one will argue that it was not fundamentally fair that Appellant, through counsel, pursue his successful appeal.

{¶34} Because his appeal was successful, the matter was remanded, leading to two more refilings by the prosecutor and to two hung jury decisions. During the last of these, Appellant's lawyer fell asleep during *voir dire*. This misstep was noticed and discussed by the proposed jurors. It was unquestionably fundamentally fair to continue the matter until an entirely new jury panel, untainted by the incident, could be seated. And we doubt Appellant would argue that it was not fundamentally fair to allow him this period of continuance to obtain new, competent counsel.

{¶35} Thus, while none of this twelve-year period can be in any way attributed to the "fault" of either the prosecutor, Appellant or his various counsel, it is clear that it has occurred because of the very issue as to "fundamental fairness" on which Appellant relies in seeking dismissal of his indictment. The State of Ohio and its

citizens have a duty to seek justice for this crime, its victim and her family. Appellant has a right to a full and fair trial. The goal is to impinge on Appellant's rights, including his liberty interests, as little as possible in the process. While this process has been a long one to date, the record reflects that it is due, in part, to ensuring that Appellant will receive a process that is fair and untainted.

Evaluation of the Evidence

{¶36} Also of importance in our review of whether fundamental fairness requires dismissal of the indictment is whether the evidence in the record appears to lead to a conclusion that dismissal is warranted, perhaps on other grounds. We note that the trial court refused to dismiss the charges against Appellant. While the dismissal was sought solely based on the number of times Appellant has been retried and not specifically on the basis that the state had no evidence on which to convict, this issue is inherent in Appellant's request for dismissal. He claims that as two trials resulted in a hung jury and the state appears to have no new evidence, there is no likelihood that the state can obtain a conviction on retrial.

{¶37} As earlier discussed, the state's response is that they did obtain conviction during one trial, and while there is apparently no new evidence pending, there is DNA evidence linking Appellant to the murder victim and most witness testimony has been favorable to the state. Appellant has clearly never been acquitted, and the fact that two trials resulted in hung juries leads credence to the fact that evidence exists to convince some jurors of guilt beyond a reasonable doubt.

Other Prejudice to the Defendant

{¶38} An evaluation of fundamental fairness would be incomplete without a review as to how Appellant would be prejudiced by retrial. Clearly we are aware of the prejudice inherent in the incarceration for twelve years of a suspect who has not been convicted of a crime. Appellant's entire argument circles back to this fact. However, it must be noted that his argument otherwise is devoid of evidence of other harm.

{¶39} We do not make light of a twelve-year incarceration and all the inherent harm this implies. But in addressing the question that confronts us, whether the trial court erred by not dismissing the charges against Appellant and discharging him from scheduled trial, we must also note that this record is devoid of evidence of other, more specific, harm. Appellant's brief is full of vague, unsubstantiated claims as to his embarrassment and exhaustion. But Appellant has not provided any evidence that witnesses have become unavailable or that the lapse of time has had an effect on the DNA evidence. He does not allege that his own memory has lapsed. While we certainly agree that his life cannot help but be severely disrupted, we do so with the understanding that this record reveals that it is possible for a jury to convict him. He has once been subject to conviction, and the fact that jurors twice have been unable to agree to convict or acquit does show that some jurors are convinced of guilt beyond a reasonable doubt. Ohio law permits retrial after mistrial or hung juries, even multiple times. This record shows no misconduct on the part of the state, no undue delay at any juncture and no reason to find the trial court otherwise abused its discretion in refusing to dismiss these charges. At the same time, Appellant presents

a compelling argument that no defendant should be subject to an unlimited number of retrials and at some point (which appears to be fast advancing) the balance will tip towards finding that Appellant's due process concerns override other legitimate state interests. Ultimately, we hold that on careful review of the record before us, we cannot say that it reveals any error on the part of the trial court in refusing to dismiss the charges at this time.

Conclusion

{¶40} This case presents a highly unusual, and highly emotionally charged, set of facts. Although we are well aware that Appellant has been incarcerated throughout this entire process, we find nothing in the record to suggest that the state has at any point acted in bad faith. Under Ohio law, in the absence of misconduct on the part of the state, a mistrial or hung jury does not bar retrial or retrials. We note that at every step, the process has moved as quickly as possible. There has been no undue delay in the refiling of charges or setting of new trial dates. Some of the delays here can be attributed solely to the process, itself. Appellant has twice successfully availed himself of the appellate process and the trial court has been zealous throughout in protecting Appellant's rights at trial. While we recognize that, at some point, continued retrial will present too onerous a burden on Appellant's rights, that time has not yet come. Based on all of the above, Appellant's assignments of error are overruled and the decision of the trial court to deny Appellant's motion to dismiss the indictment is affirmed. This matter is remanded to

the trial court for further proceedings according to law and consistent with this Opinion.

DeGenaro, J., concurs.

Robb, J., concurs.