

No. 2015-2043

IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE
CUYAHOGA COUNTY COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT
CASE NO. 102462

STATE OF OHIO,
Plaintiff-Appellant,

v.

MICHAEL J. JENKINS,
Defendant-Appellee.

APPELLEE MICHAEL J. JENKINS' MOTION FOR LIMITED REMAND

Timothy McGinty, 0024626
Cuyahoga County Prosecutor

Office of the Ohio Public Defender

Daniel Van, 0084614
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Counsel for Appellant/Cross-Appellee,
State of Ohio

Counsel for Appellee/Cross-Appellant,
Michael J. Jenkins

APPELLEE MICHAEL J. JENKINS' MOTION FOR LIMITED REMAND

I. Introduction

This Court should grant a limited remand so that the court of appeals can rule on Appellee Michael J. Jenkins' motion for delayed cross-appeal, a copy of which is attached to this motion. Remanding this case will not delay this Court's resolution of this discretionary appeal because this Court has accepted the State's appeal but stayed briefing pending the resolution of *State v. Thomas*, No. 2015-0473. *03/23/2016 Case Announcements*, 2016-Ohio-1173. Remanding this case will permit the court of appeals to rule on the delayed cross-appeal motion while briefing remains stayed in this Court. Otherwise, the delayed-appeal motion will remain unsolved until this Court both resolves *Thomas* and then decides how to resolve this case based on *Thomas*.

II. Case History

A. Factual History

As the court of appeals correctly wrote in the decision in the appeal of Mr. Jenkins' co-defendant, this case concerns an allegation of rape where the identity of the accused was not at issue. *State v. Dickerson*, 8th Dist. Cuyahoga No. 102461, 2016-Ohio-807, ¶ 6-27. Exhibit F.¹ In 1994, the police found Mr. Jenkins and Oscar Dickerson in the hotel room where all agree the two young men had sexual relations with J.R., the complainant in this case. *Id.* at ¶20. Both young men were cooperative with police. *Id.*

¹ The exhibits refer to the attachments to the motion for delayed cross-appeal, which is attached to this motion.

The only issue was consent. The complainant testified that the sex was non-consensual; Mr. Jenkins and Mr. Dickerson argue the sex was consensual. A third man drove Mr. Jenkins, Mr. Dickerson, and J.R. to the hotel room, but he couldn't testify because he died before the State took this case to trial. *Id.* at ¶ 26.

B. Procedural History

The court of appeals correctly set forth the trial court history of this case in its earlier opinion in this case:

A jury found defendant-appellee Michael Jenkins guilty of rape, complicity to commit rape, and kidnapping. Although the offenses occurred in 1994 (at a time when the sentencing law provided for indefinite sentencing), the court imposed definite sentences under the current sentencing regime, Am.H.B. No. 86, effective September 30, 2011. The court imposed a sentence consistent with a line of decisions from this court holding that R.C. 1.58(B) allowed defendants like Jenkins, whose crimes were committed before the effective date of H.B. 86, to be sentenced under that statute's sentencing provisions because the penalties for rape under H.B. 86 had been reduced from those penalties in effect at the time he committed his crimes (in 1994, the maximum penalty for rape was up to 25 years; under H.B. 86, the maximum penalty is 11 years).

State v. Jenkins, 8th Dist. Cuyahoga No. 102462, 2015-Ohio-4583, ¶ 1.

At the December 29, 2014 sentencing hearing, Valerie Arbie-McClelland, Mr. Jenkins' trial counsel, said that he "intends to appeal his conviction." T.p. 1033.² In her attached affidavit counsel confirms that she knew at the time of sentencing that he wanted to appeal his conviction. Exhibit A.

² The transcript of the sentencing hearing is attached as Exhibit D to the motion for delayed cross-appeal.

Also at the sentencing hearing, the trial court told Mr. Jenkins that he has the right to appeal his conviction:

[Y]ou do have a right to appeal in both cases. Should you wish to appeal in either one or both and find yourself unable to afford appellate counsel, then appellate counsel will be provided by the State, as well as the papers to prosecute that appeal.

T.p. 1065. Trial counsel then expressly moved the trial court to appoint counsel and to grant a transcript at state expense. T.p. 1066 (“we would ask that appellate counsel be appointed in Case 585521 and (sic) transcript at State’s expense”).

The State filed a notice of appeal of Mr. Jenkins’ sentence on January 7, 2015. On January 26, 2015, two days before the deadline for filing a notice of appeal, the trial court appointed Patrick Lavelle as Mr. Jenkins’ appellate lawyer: Exhibit C. The entry stated that Mr. Lavelle was appointed as “counsel on appeal.” *Id.*³ Appointed appellate counsel interpreted the entry as appointing him to defend against the State’s appeal, not to pursue an appeal of Mr. Jenkins’ conviction. Exhibit B.

When appellate counsel asked Mr. Jenkins in a letter about what issues should be raised, Mr. Jenkins asked appellate counsel to challenge his court costs and fines, as well as a number of other issues based on the record.⁴

After hearing the State’s appeal, the court of appeals affirmed the trial court’s decision to impose a flat term-of-years. By contrast, counsel for Mr. Jenkins’ co-

³ The original entry is written in all capital letters.

⁴ Mr. Jenkins has filed a motion in the court of appeals for leave to file the correspondence under seal.

defendant filed a notice of cross-appeal, and the court of appeals reversed the conviction because of the same pre-indictment delay that occurred in Mr. Jenkins' case. *State v. Dickerson*, 8th Dist. Cuyahoga No. 102461, 2016-Ohio-807, ¶ 6-27. Exhibit F.

This Court has accepted the State's appeal of this Court's decision affirming Mr. Jenkins' sentence. *03/23/2016 Case Announcements*, 2016-Ohio-1173. Briefing in this Court is stayed pending resolution of *State v. Thomas*, No. 2015-0473. *Id.* Mr. Jenkins has filed the attached motion for delayed cross-appeal in the court of appeals.

III. Discussion

The court of appeals currently lacks jurisdiction to resolve Mr. Jenkins' motion for delayed appeal. Once "an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction[.]" Sup.Ct.Prac.R. 7.01(D)(1), applied in *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, ¶ 22. Further, a motion for delayed cross-appeal is not one of the three exceptions to the rule—to act in aid of an appeal, to rule on an application to reopen an appeal, and to rule on a motion to certify a conflict. So absent a remand, the court of appeals is powerless to rule on the motion for delayed cross-appeal.

Granting this motion will preserve judicial resources and result in a quicker overall resolution of this case. Absent a remand, the court of appeals will not be permitted to rule on the motion for delayed cross-appeal until this Court resolves *State v. Thomas*, and then decides how to resolve this case in light of *Thomas*. But with a

remand, the court of appeals can review Mr. Jenkins' motion while briefing is stayed in this Court.

The delayed cross-appeal is needed in this case because even though Mr. Jenkins told both his trial and appellate counsel that he wanted to appeal his conviction, neither filed a notice of cross-appeal. As shown by affidavits attached to the motion for delayed cross-appeal, Mr. Jenkins' trial counsel believed it was appellate counsel's responsibility to file the notice of cross-appeal, and appellate counsel believed it was beyond the scope of his representation. His lawyers' failures prejudiced Mr. Jenkins because his co-defendant's conviction was vacated on appeal because of a nearly twenty-year pre-indictment delay, and because Mr. Jenkins has never had the chance to challenge any aspect of his jury trial. *State v. Dickerson*, 8th Dist. Cuyahoga No. 102461, 2016-Ohio-807; *State v. Jenkins*, 8th Dist. Cuyahoga No. 102462, 2015-Ohio-4583.

CONCLUSION

This Court should grant a limited remand so that the court of appeals can rule on the motion for delayed cross-appeal that Mr. Jenkins filed in that court.

Respectfully submitted,

Office of the Ohio Public Defender

/s/ Stephen P. Hardwick
By: Stephen P. Hardwick (0062932)
Assistant Public Defender

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Counsel for Appellee/Cross-Appellant
Michael J. Jenkins

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **APPELLEE MICHAEL J. JENKINS' MOTION FOR LIMITED REMAND** was filed electronically. A copy was forwarded by electronic mail to Assistant Cuyahoga County Prosecutor Daniel Van, dvan@prosecutor.cuyahogacounty.us, on this 25th day of March, 2016.

/s/ Stephen P. Hardwick
Stephen P. Hardwick (0062932)
Assistant Public Defender

#462511



NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Appeals

MOTION Electronically Filed:
March 24, 2016 13:37

By: STEPHEN P. HARDWICK 0062932

Confirmation Nbr. 706354

STATE OF OHIO

CA 15 102462

vs.

MICHAEL JENKINS

Judge:

Pages Filed: 87

No. 102462

IN THE COURT OF APPEALS
CUYAHOGA COUNTY
EIGHTH APPELLATE DISTRICT

DIRECT APPEAL FROM THE
CUYAHOGA COUNTY COURT OF COMMON PLEAS,
CASE NO. CR-14-585521-B

STATE OF OHIO,
Appellant/Cross-Appellee,

v.

MICHAEL J. JENKINS,
Appellee/Cross-Appellant.

**CROSS-APPELLANT MICHAEL J. JENKINS' APPLICATION FOR
DELAYED CROSS-APPEAL PURSUANT TO APP.R. 5(A)**

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the State of Ohio

Counsel for Appellee/Cross-Appellant,
Michael Jenkins

CROSS-APPELLANT MICHAEL J. JENKINS' APPLICATION FOR DELAYED CROSS-APPEAL PURSUANT TO APP.R. 5(A)

I. Introduction

The record clearly shows that Appellee/Cross-Appellant Michael Jenkins wanted to challenge his conviction on appeal. But after the State perfected an appeal of his sentence, his appointed trial and appellate attorneys failed to file a notice of cross-appeal to challenge his conviction. As demonstrated by their attached affidavits, trial counsel believed it was appellate counsel's responsibility; appellate counsel believed it was beyond the scope his representation. As the opinion in the cross-appeal of his co-defendant shows, this failure resulted in the affirmance of convictions that would otherwise have been vacated. This Court should grant Mr. Jenkins a delayed cross-appeal.

II. Case History

A. Factual History

As this Court correctly wrote in the decision in the appeal of Oscar Dickerson, Michael Jenkins' co-defendant, this case concerns an allegation of rape where the identity of the accused was not at issue. *State v. Dickerson*, 8th Dist. Cuyahoga No. 102461, 2016-Ohio-807, ¶ 6-27. Exhibit F. In 1994, the police found Mr. Jenkins and Mr. Dickerson in the hotel room where all agree the two young men had sexual relations with J.R., the complainant in this case. *Id.* at ¶20. Both young men were cooperative with police. *Id.* The only issue was consent. The complainant testified that the sex was

non-consensual; Mr. Jenkins and Mr. Dickerson argue the sex was consensual. A third man drove Mr. Jenkins, Mr. Dickerson, and J.R. to the hotel room, but he couldn't testify because he died before the State took this case to trial. *Id.* at ¶ 26.

B. Procedural History

This Court correctly set forth the trial court history of this case in its earlier opinion in this case:

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State v. Jenkins, 8th Dist. Cuyahoga No. 102462, 2015-Ohio-4583, ¶ 1.

At the December 29, 2014 sentencing hearing, Valerie Arbie-McClelland, Mr. Jenkins' trial counsel, said that he "intends to appeal his conviction." T.p. 1033.¹ In her attached affidavit counsel confirms that she knew at the time of sentencing that he wanted to appeal his conviction. Exhibit A.

Also at the sentencing hearing, the trial court told Mr. Jenkins that he has the right to appeal his conviction:

¹ The transcript of the sentencing hearing is attached as Exhibit D.

[Y]ou do have a right to appeal in both cases. Should you wish to appeal in either one or both and find yourself unable to afford appellate counsel, then appellate counsel will be provided by the State, as well as the papers to prosecute that appeal.

T.p. 1065. Trial counsel then expressly moved the trial court to appoint counsel and to grant a transcript at state expense. T.p. 1066 (“we would ask that appellate counsel be appointed in Case 585521 and (sic) transcript at State’s expense”).

The State filed a notice of appeal of Mr. Jenkins’ sentence on January 7, 2016. On January 26, 2015, two days before the deadline for filing a notice of appeal, the trial court appointed Patrick Lavelle as Mr. Jenkins’ appellate lawyer: Exhibit C. The entry stated that Mr. Lavelle was appointed as “counsel on appeal.” *Id.*² Appointed appellate counsel interpreted the entry as appointing him to defend against the State’s appeal, not to pursue an appeal of Mr. Jenkins’ conviction. Exhibit B.

When appellate counsel asked Mr. Jenkins in a letter about what issues should be raised, Mr. Jenkins asked appellate counsel to challenge his court costs and fines, as well as a number of other issues based on the record.³

After hearing the State’s appeal, this Court affirmed the trial court’s decision to impose a flat term-of-years. By contrast, counsel for Mr. Jenkins’ co-defendant filed a notice of cross-appeal, and this Court reversed the conviction because of the same pre-

² The original entry is written in all capital letters.

³ Mr. Jenkins is filing a motion for leave to file the correspondence under seal along with this application.

indictment delay that occurred in Mr. Jenkins' case. *State v. Dickerson*, 8th Dist.

Cuyahoga No. 102461, 2016-Ohio-807, ¶ 6-27. Exhibit F.

The Ohio Supreme Court has accepted the State's appeal of this Court's decision affirming Mr. Jenkins' sentence and stayed briefing. *03/23/2016 Case Announcements*, 2016-Ohio-1173. Mr. Jenkins will file a motion for limited remand in order to give this Court jurisdiction to rule on this motion.

III. Standard of Review

Mr. Jenkins has the right to the effective assistance of counsel for his direct appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct.1029, 145 L. Ed.2d 985 (2000); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d821 (1985). "Effective appellate counsel is necessary if appellate courts are to perform their assigned function." *Gilbert v. Sowders*, 646 F.2d 1146, 1150 (6th Cir., 1981). Lawyers who fail to file a notice of appeal when they know their client wants an appeal act "in a manner that is professionally unreasonable." See *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S.Ct. 1029 (2000), citing *Rodriquez v. United States*, 395 U.S. 327, 23 L. Ed. 2d 340, 89 S. Ct. 1715 (1969). Even where the client did not specifically instruct counsel to file a notice of appeal, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Flores-Ortega* at 478, quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, Counsel has "has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational

defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.” *Flores-Ortega* at 480.

In Ohio, the remedy for failing to file a timely notice of appeal is a motion for delayed appeal. App.R. 5(A). This rule applies to both appeals and cross-appeals. Interpreting its own rules, the Ohio Supreme Court granted a delayed cross-appeal to a criminal defendant when the State had perfected a timely appeal. *State v. Alford*, 121 Ohio St.3d 1422, 2009-Ohio-1296, 903 N.E.2d 322. This Court should follow *Alford* because the relevant Appellate and Supreme Court rules are indistinguishable in felony cases:

S.Ct.Prac.R. II(4)(A) (2009)	App.R. 5(A)
In a felony case, when the time has expired for filing a notice of appeal in the Supreme Court, the appellant may seek to file a delayed appeal by filing a motion for delayed appeal and a notice of appeal.	After the expiration of the thirty day period provided by App. R. 4(A) for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in . . . [c]riminal proceedings[.]

IV. Discussion

A. Both trial and appellate counsel believed it was not their responsibility to file a notice appealing Mr. Jenkins’ conviction.

As shown by her attached affidavit, trial counsel believed that, pursuant to local practice, it was the responsibility of appointed appellate counsel to file a notice to

appeal Mr. Jenkins' conviction. Exhibit A. But appellate counsel believed a cross-appeal was beyond the scope of his duties. Exhibit B. As a result, neither attorney performed their duty to ensure that Mr. Jenkins could appeal his conviction.

B. Mr. Jenkins is entitled to a delayed cross-appeal because he said he wanted an appeal, the totality of the record shows that he communicated his instruction to his attorneys, and a rational defendant would want to appeal his conviction.

1. Mr. Jenkins said he wanted to appeal his conviction.

Mr. Jenkins' trial attorney explains that she clearly understood that Mr. Jenkins wanted a direct appeal of his conviction, but she believed it was the job of appointed appellate counsel to file the notice of appeal. Exhibit A. She also said on the record that Mr. Jenkins wanted a direct appeal. T.p. 1033. And Mr. Jenkins specifically asked his appointed appellate counsel to raise a number of issues that concern his conviction, but appointed appellate counsel believed that his appointment was limited to defending against the State's appeal. Exhibit B; Sealed Exhibits. Appellate counsel's belief was incorrect because the appointment entry contained no limiting language. It simply appointed Mr. Lavell as "counsel on appeal." Exhibit C.

Further, the context leading to the issuances of the entry shows that the appointment included challenging Mr. Jenkin's conviction. At the December 29, 2014 sentencing hearing, Mr. Jenkins' trial counsel told the court that Mr. Jenkins "intends to appeal his conviction." T.p. 1033. The trial court told Mr. Jenkins that he had the right to appeal at State expense. T.p. 1065. And trial counsel formally moved for the

appointment of counsel. T.p. 1066. The trial court's entry of appointment specifically states that it was granting Mr. Jenkins' "12/29/2014 motion for court-appointment appellate counsel[.]"

Because Mr. Jenkins told his attorneys that he wanted to appeal his conviction, his attorneys were ineffective because they did not perfect his appeal. *Flores-Ortega* at 477.

2. Mr. Jenkins reasonably demonstrated to counsel that he was interested in appealing.

As shown by the attached affidavit and the statements at sentencing, trial counsel knew that Mr. Jenkins had "reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega* at 480; Exhibit A; T.p. 1033, 1065, 1066. And appellate counsel received a list of potential issues from Mr. Jenkins that could only be raised on a cross-appeal. Sealed Exhibits. Accordingly, failing to file a cross-appeal was ineffective because Mr. Jenkins had "reasonably demonstrated" to both trial and appellate counsel that he wanted to appeal his conviction.

3. A rational defendant would want to appeal Mr. Jenkins' conviction.

Finally, even if Mr. Jenkins did not specifically request an appeal, he was entitled to a cross-appeal because "a rational defendant would want to appeal[.]" *Flores-Ortega* at 480. One example of when "a rational defendant would want to appeal" is where "there are nonfrivolous grounds for appeal)[.]" *Flores-Ortega* at 480. Here, as

demonstrated by his co-defendant's successful cross-appeal, Mr. Jenkins had an objectively non-frivolous basis to cross-appeal his conviction—pre-indictment delay.

C. Prejudice is presumed.

Prejudice is presumed because Mr. Jenkins was denied counsel for an appeal of his conviction. *Flores –Ortega* at 483. But even if he need show prejudice, this Court's decision in *State v. Dickerson* conclusively demonstrates that had Mr. Jenkins' lawyers filed a timely cross-appeal, his conviction would have been vacated with no opportunity for a retrial. It is hard to demonstrate stronger prejudice.

CONCLUSION

Michael Jenkins wanted to appeal his conviction, but both trial and appellate counsel failed to perfect such an appeal. As a result, his convictions were affirmed instead of vacated. This Court should grant him a delayed cross-appeal.

Respectfully submitted,

Office of the Ohio Public Defender

/s/: Stephen P. Hardwick

By: Stephen P. Hardwick (0062932)
Assistant Public Defender

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Counsel for Appellee/Cross-Appellant
Michael Jenkins

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the forgoing was filed electronically and was forwarded by electronic mail to Daniel Van, dvan@prosecutor.cuyahogacounty.us, on this 24th day of March, 2016.

/s/: Stephen P. Hardwick
Stephen P. Hardwick (0062932)
Assistant Public Defender

#461981

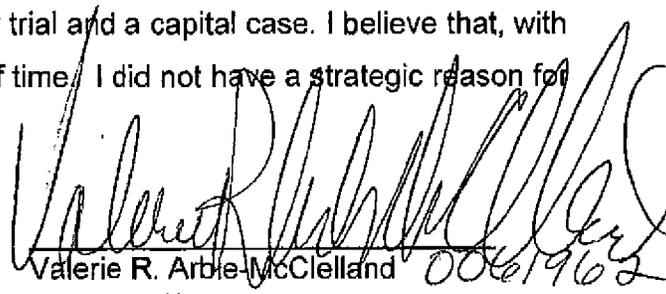
IN THE STATE OF OHIO :
COUNTY OF CUYAHOGA : SS

AFFIDAVIT OF VALERIE R. ARBIE-McCLELLAND

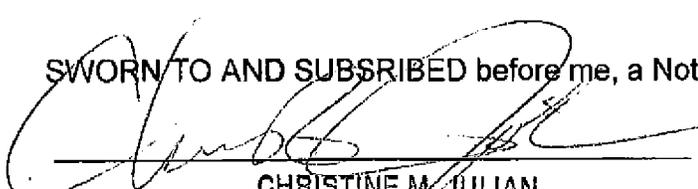
I, Valerie R. Arbie-McClelland, being first duly sworn according to law, do state the following:

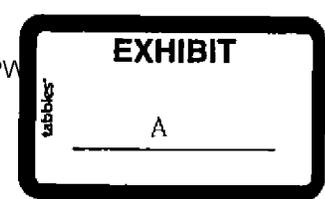
1. I am an Assistant Public Defender employed by the Cuyahoga County Public Defender Office.
2. I was the trial lawyer for Michael Jenkins in CR 585521-B, in the Cuyahoga County Court of Common Pleas. Mr. Jenkins was charged with two counts of Rape (R.C. 2907.02(A)(2)), two counts of Complicity (R.C. 2923.03(A)(2)), and one count of Kidnapping (R.C. 2905.01(A)(4)) for acts alleged to have occurred on July 2, 1994.
3. Because Mr. Jenkins strongly maintained his innocence and refused a plea offer (proposed during trial) that would have resulted in him being released from prison within a few months, I knew he wished to appeal his conviction. For that reason, I specifically asked the trial court to appoint appellate counsel. I also specifically requested a transcript be prepared at state's expense. The purpose of those requests were to perfect an appeal of Mr. Jenkins's conviction.
4. I did not file a Notice of Appeal because my requests were granted by the trial court prior to the expiration of time to file the Notice. It is common practice in Cuyahoga County for appointed appellate counsel, not trial counsel, to file the Notice of Appeal when appellate counsel is appointed prior to the expiration of time.
5. Prior to trial, I planned to file a Motion for Pre-Indictment Delay because I believed at that time and still believe that the Motion would have had merit. I was preparing for other trials including a rape trial, a murder trial and a capital case. I believe that, with my other commitments, I simply ran out of time. I did not have a strategic reason for not filing the motion.

FURTHER AFFIANT SAYETH NAUGHT.


Valerie R. Arbie-McClelland 0061962

SWORN TO AND SUBSCRIBED before me, a Notary Public, this 18th day of March, 2016.

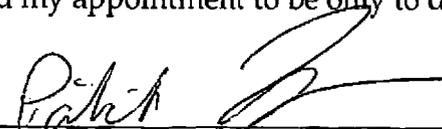

CHRISTINE M. JULIAN



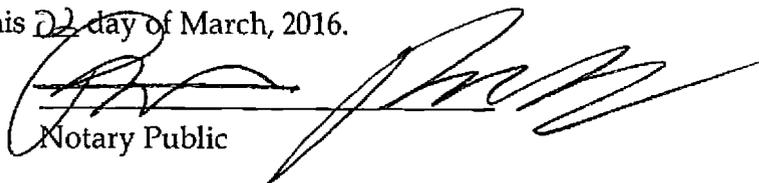
State of Ohio)
) ss:
County of Cuyahoga)

I, Patrick Lavelle, swear that the following is true:

I am the attorney appointed to represent Michael Jenkins in Cuyahoga County Court of Appeals No. 102462. I interpreted my appointment to be only to defend against the State's appeal in that case number.

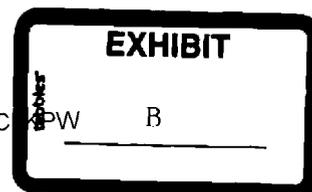

Patrick Lavelle

Signed and sworn before me this 22 day of March, 2016.


Notary Public



PATRICK J. GUMP
Attorney at Law
NOTARY PUBLIC
STATE OF OHIO
My Commission Has
- No Expiration Date
Section 147.03 O.R.C.





87650268

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

THE STATE OF OHIO
Plaintiff

MICHAEL J JENKINS
Defendant

Case No: CR-14-585521-B

Judge: JOHN P O'DONNELL

INDICT: 2907.02 RAPE
2907.02 RAPE
2923.03 COMPLICITY
ADDITIONAL COUNTS...

JOURNAL ENTRY

THE DEFENDANT'S 12/29/2014 MOTION FOR COURT-APPOINTED APPELLATE COUNSEL IS GRANTED.
THE DEFENDANT REMAINS INDIGENT AND ATTORNEY PATRICK S. LAVELLE IS ASSIGNED AS COUNSEL ON
APPEAL.

TRANSCRIPTS ARE ORDERED TO BE PREPARED AT THE STATE'S EXPENSE.

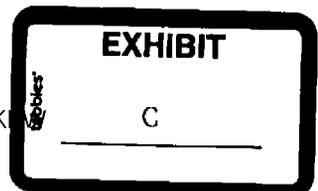
01/26/2015
CPJPO 01/26/2015 15:18:21

Judge Signature

01/26/2015

HEAR
01/26/2015

RECEIVED FOR FILING
01/26/2015 15:26:27
KELLEY A. SWEENEY, CLERK



1 prepared by Investigator Denise McNea, dated
 2 December 17th. Does anyone object to my
 3 making that part of the record of today's
 4 hearing, Ms. Weston?

10:32:49

5 MS. WESTON: No, Your Honor.

6 THE COURT: Mr. Johnson?

7 MR. JOHNSON: No, Your Honor.

8 THE COURT: What I would

10:32:54

9 like to do on the subject of sentencing is
 10 hear first from the prosecutor. I'm sure she
 11 has some argument or other statements she
 12 wants to make about what your sentence should
 13 be and why. Then I have little doubt
 14 Mr. Johnson wants to say some things on your
 15 behalf. Once the lawyers have made their
 16 presentations, you are welcome, but not
 17 required, to make a statement, and then
 18 sentences will be imposed.

10:33:09

10:33:25

19 Before we do that, though, on the
 20 subject of allied offenses of similar import,
 21 I will tell you, Mr. Johnson and Ms. Weston
 22 and Mr. Bokoch, that my instinct is that none
 23 of these are allied for the following reasons:

10:33:50

24 First, the way I view the evidence,
 25 Mr. Dickerson was found guilty of a separate

EXHIBIT

D

1 rape in Count 2 and then of complicity, aiding
2 and abetting, in essence, Michael Jenkins's
3 rape in Count 4. I also view the evidence as
4 showing a kidnapping as having occurred
10:34:12 5 beginning at approximately 140th and Puritas
6 and ending when Ms. Roy left the hotel at --
7 the times varied, but sometime late at night,
8 early in the morning. In other words, I don't
9 view the evidence as this being a conviction
10:34:35 10 for a kidnapping that was incidental to a rape
11 itself. Do you have a differing view,
12 Ms. Weston?

13 MS. WESTON: I do not.

14 THE COURT: Do you have a
10:34:49 15 different view, Mr. Johnson?

16 MR. JOHNSON: May it please
17 the Court, Your Honor, I wasn't sure which --
18 I mean, the situation was sketchy with respect
19 to how she got into the vehicle. I would
10:35:01 20 argue that if there was a kidnapping, I was
21 assuming the prosecutor was talking about at
22 the hotel during the sexual intercourse and
23 the same exact time.

24 THE COURT: Well, you make a
10:35:14 25 good point in the sense that in just about

1 every rape case -- you might say every,
2 although it doesn't have to be charged --
3 there is a kidnapping, a restraint of liberty
4 that occurs for some period of time, however
10:35:31 5 brief. In this case, there surely was
6 evidence to that effect. At the same time in
7 this case, there was evidence that Ms. Roy was
8 compelled by the threat of force, implicit or
9 otherwise, to get into the car, which happened
10:35:53 10 many minutes before the rape itself and the
11 kidnapping that would have been attendant --
12 the restraint of liberty that would have been
13 attendant to the actual rape.

14 So I didn't ask the jury to answer an
10:36:13 15 interrogatory, but my belief is that the
16 jury -- that Mr. Dickerson was charged with,
17 and the jury found him guilty of, the separate
18 kidnapping that happened beginning with
19 compelling Ms. Roy to get into the car. So
10:36:39 20 that's the way I look at it.

21 In other words, there probably could
22 have been at the grand jury stage five
23 kidnapping charges, one for each of the two
24 rapes, one for each of the two complicities,
10:36:59 25 and then the fifth, which is the one that I

1 think was charged, based upon the evidence,
2 for the restraining of liberty and movement
3 from place where found beginning at the
4 parking lot of, as I recall, Ascension Church
5 at about 140th and Puritas.

10:37:15

6 So my belief is that these are not
7 allied offenses of similar import and
8 Mr. Dickerson will be sentenced accordingly.
9 To be explicit, I'm not sure you exactly
10 objected, but I will preserve on the record an
11 objection for purposes of an appeal.

10:37:36

12 MR. JOHNSON: Thank you.

13 THE COURT: Let it be known
14 that Mr. Dickerson does object to the finding
15 that these are not allied offenses. And you
16 would have, Mr. Johnson, the kidnapping be
17 allied to what, Count 2?

10:37:47

18 MR. JOHNSON: Yes.

19 THE COURT: Do you have some
20 argument that the rape and the complicity are
21 in some way allied?

10:37:57

22 MR. JOHNSON: Well, Your
23 Honor, with respect to the complicity, I mean,
24 testimony was that Mr. Dickerson was nowhere
25 around. I believe she stated she was in the

10:38:10

1 bathroom, the door was shut, and she had no
2 idea whether he was there. So he was not
3 there aiding and abetting or holding her down
4 or doing anything with respect to her liberty
5 at that point in time.

10:38:23

6 THE COURT: Well, but that's
7 a factual defense and the jury has not found
8 in favor of that. You don't think, though,
9 that Count 4 is complicity with his own rape
10 in Count 2, do you?

10:38:38

11 MR. JOHNSON: I don't see how
12 he can be complicit in his own rape.

13 THE COURT: Right, so I
14 think that's right, too. So I think, I take
15 Count 4 to be complicity with Mr. Jenkins's
16 rape and, therefore, for that reason it's not
17 allied with Count 2. So that's my way of
18 looking at allied offenses of similar import
19 having heard all the evidence. So they will
20 not be sentenced as allied offenses, and I'll
21 be happy to hear presentation from the State.

10:38:48

10:39:13

22 Before you begin, I should note for
23 the oral record that the prosecution did file,
24 I think on December 19th, a sentencing
25 memorandum. I have read that sentencing

10:39:29

1 memorandum, it is of record, so there's no
2 need to make it again of record, but I do note
3 for the oral record that I did read it before
4 coming out here today.

10:39:41

5 I gather, Mr. Johnson, you were aware
6 of this filing?

7 MR. JOHNSON: Yes, Your Honor.

8 THE COURT: Thank you.

9 Ms. Weston.

10:39:50

10 MS. WESTON: Thank you. I
11 would just like to add a few comments to your
12 previous discussion with regard to allied
13 offenses. The State did argue throughout this
14 case, at Rule 29 as well as in front of the
15 jury, its theory of the case being that the
16 kidnapping started when the defendants
17 deceived the victim into getting into the car.
18 They did indicate to the victim that they
19 would have to take her home, it was too late,
20 she shouldn't be out that late. You better
21 get in the car, we're going to take you home.

10:40:15

10:40:29

22 A kidnapping was charged and argued
23 that by force, threat, or in this case
24 deception, they got her into the car and
25 transported her as a way to transport her to a

1 location where they could conceal their crime.
2 So for that reason the State believes the
3 kidnapping has a separate animus to the rapes.

4 Further, the State argued throughout
10:40:44 5 this case that the rapes and the complicity
6 was the defendant's own rape, as well as his
7 complicity, aiding and abetting that assisted
8 his co-defendant in the other rape of Ms. Roy.
9 For that reason, the two rapes which happened
10:40:58 10 in separate rooms by separate men must be --
11 must have been committed with separate animus.

12 So therefore, the State agrees with
13 this Court's indication that the defendant can
14 be sentenced up to 11 years -- it would be up
10:41:15 15 to 33 years, up to a maximum of 11 years on
16 each and every count in this case, which the
17 State is asking for, by the way, as the State
18 believes these are the absolute worst forms of
19 these offenses.

10:41:28 20 This Court did hear the testimony in
21 this case. I don't know how much worse it
22 gets than a 16-year-old girl being snatched
23 off the street, being taken to a dark, dirty,
24 dank hotel room and being raped by two men
10:41:41 25 over the course of several hours.

1 Then if that wasn't bad enough, to do
2 everything she was supposed to do, do
3 everything right, to go home and report it, to
4 go to the hospital and submit to an intrusive
10:41:56 5 and uncomfortable examination, to do
6 everything she was supposed to do just to be
7 found on the street by these very two men
8 again and be threatened if she prosecuted
9 them.

10 THE COURT: Let me interrupt
11 you. I thought the evidence was that Michael
12 Jenkins threatened her.

13 MS. WESTON: The evidence in
14 this case suggested that she had made a report
10:42:15 15 at the time in 1994 indicating both men were
16 in that car. She admitted on the stand that
17 she didn't recall -- she only recalled Michael
18 Jenkins being in the car, but when prompted if
19 she was -- it's that her recollection in 1994
10:42:29 20 was that both men were in the car, that was
21 accurate. She would have reported the truth
22 back then.

23 THE COURT: But isn't it
24 accurate that she was willing to prosecute
10:42:39 25 them despite the threat? In other words,

1 while no one can approve of that kind of
2 intimidation, it had no effect on her?

3 MS. WESTON: No. Her
4 testimony was that she reported it, but at
10:42:53 5 that point she kind of lost all interest in
6 going forward because she had been intimidated
7 by these men and because she was treated
8 poorly by the detective in the case.

9 THE COURT: My recollection
10:43:05 10 of the testimony was that it was the latter
11 that suits the prosecution, or the
12 investigation and prosecution at that point,
13 but you and I, I think, have different
14 memories of what it was that stopped this case
10:43:21 15 about two weeks or so after the crime had been
16 committed. I'm sorry for interrupting, go
17 ahead.

18 MS. WESTON: I would ask the
19 Court to take into consideration the
10:43:30 20 seriousness of these offenses and the fact
21 that this defendant apparently shows -- has
22 shown no remorse for his actions. This Court
23 will recall his reaction upon the verdict
24 being read was that his life is over,
10:43:45 25 obviously thinking only about himself, not

1 about the 20 years that he wreaked havoc upon
2 Judith Roy after he raped her in 1994.

3 I have spoken to Ms. Roy. As this
4 Court is aware, she lives out of town. She
10:43:57 5 has asked me to convey certain comments to
6 this Court to consider in sentencing. Ms. Roy
7 asks that the maximum sentence be imposed in
8 this case. She indicates that she has had to
9 undergo counseling, has had to deal with this
10:44:10 10 rape for the past 20 years. She indicated she
11 has some peace and some closure now that this
12 case is over.

13 I understand that this Court has to
14 abide by the decision, State v. Harrison
10:44:27 15 decision of about two weeks ago. At the time
16 of the verdict, everyone was under the
17 impression, I believe this Court as well as
18 defense counsel and myself, that the defendant
19 would be sentenced under what we would call
10:44:39 20 pre-Senate Bill 2 law. I believe this Court
21 has to comply with the State v. Harrison
22 decision and apply new law in this case, but
23 the State is putting an objection on the
24 record right now, because it's my
10:44:51 25 understanding my office is appealing that

1 decision and incorporating all sentences under
2 the new law into that appeal. So I just
3 wanted to place that on the record.

4 THE COURT: Are you able to
10:45:04 5 do that? Don't you have to separately appeal
6 each case?

7 MS. WESTON: I think we are.
8 As part of the fact we're appealing the
9 Harrison decision, we're appealing all other
10:45:14 10 cases as well, so I'm placing an objection on
11 the record with that, although I do understand
12 this Court would have to comply with that
13 decision for now.

14 I also ask this Court to consider
10:45:23 15 2929.14 in considering consecutive sentences
16 in this case. I have laid that out in my
17 sentencing memorandum. Thank you.

18 THE COURT: Thank you,
19 Ms. Weston. Mr. Bokoch, anything additional?

10:45:36 20 MR. BOKOCH: No, Your Honor.

21 THE COURT: Thank you,
22 Mr. Bokoch. Mr. Johnson.

23 MR. JOHNSON: May it please
24 the Court, Your Honor. Your Honor, he has
10:45:45 25 several family members here in support of him.

1 He would like to address the Court. I didn't
2 know what order or how would you like that to
3 happen.

10:45:54

4 THE COURT: I don't know who
5 they are, so whatever order Mr. Dickerson
6 thinks is best.

7 MR. JOHNSON: Your Honor, my
8 client will address the Court at this point.

10:46:11

9 THE COURT: Now,
10 Mr. Dickerson is entitled to an allocution.
11 Typically, I would have to get out the rule
12 and make sure, but typically that's after the
13 lawyers have made their presentations. Will
14 this be his allocution?

10:46:27

15 MR. JOHNSON: Yes, Your Honor.

16 THE COURT: And if I ask him
17 after you make your presentation if he has
18 something to say, he will probably say
19 something like, "I've already said it."

10:46:34

20 MR. JOHNSON: Correct.

21 THE COURT: Thank you.

22 Mr. Dickerson.

10:46:40

23 THE DEFENDANT: I want to thank
24 the Court for giving me and my family the
25 opportunity to speak. Thank you, Judge

1 O'Donnell, for granting me time to spend with
2 my wife and kids, that was greatly
3 appreciated. I'm sorry our family has to go
4 through this. I should have been at home with
10:46:53 5 my parents.

6 At this time I humbly please ask for
7 leniency. For the past 20 years -- for the
8 past 20 years my life has completely changed.
9 I have a son in college. I am married with
10:47:09 10 three beautiful children. I have a career. I
11 have been at my job for 16 years. I am the
12 head supervisor, which gives me a chance to
13 control hiring and also gives me a chance to
14 give back to my community.

10:47:23 15 I hire people with felonies and other
16 problems that make it hard for them to obtain
17 jobs. I give them full-time jobs, I mentor
18 them. I give them a second chance like
19 somebody gave me.

10:47:38 20 I humbly ask you, Judge O'Donnell,
21 that you consider the man that I am today.
22 Please have leniency and mercy on me. Thank
23 you, Judge O'Donnell.

24 THE COURT: Thank you,
10:47:49 25 Mr. Dickerson. Mr. Johnson.

1 MR. JOHNSON: I believe -- who
2 is next?

3 THE COURT: Mr. Dickerson
4 should probably be seated while his witnesses
10:47:57 5 come up to the podium.

6 MR. JOHNSON: State your name
7 and spell your last name for the record.

8 MS. A.R. DICKERSON: My name is
9 Angelique Ramirez Dickerson,
10:48:10 10 D-i-c-k-e-r-s-o-n.

11 THE COURT: Good morning.

12 MS. A.R. Dickerson: Good morning,
13 Your Honor.

14 THE COURT: I'll be happy to
10:48:17 15 hear whatever you have to say.

16 MS. A.R. Dickerson: I am the wife of
17 Oscar Dickerson. I cannot speak about the boy
18 from 20 years ago, but I can talk for the man
19 my husband is today, the man that I love and
10:48:30 20 the man that I have known for the past ten
21 years.

22 My husband and I have three children,
23 our eight-year-old son, our six-year-old
24 daughter, and our one-year-old baby boy. Our
10:48:43 25 children idolize their father, and in their

1 eyes he is the strongest and smartest man in
2 the world. They know that when they are with
3 him they have no worries.

4 My husband has always been the
10:48:57 5 provider and protector of our family. He has
6 never been away from our family. He has
7 always gone above and beyond putting our needs
8 and welfare above his own. My children need
9 their father to help them, to help guide them
10:49:16 10 in the right direction and to prepare them for
11 life. I ask you, Judge O'Donnell, to please
12 have leniency on my husband.

13 My husband is the most thoughtful and
14 caring man that I know. His love, guidance,
10:49:35 15 protection, understanding, and tenderness is
16 what I love and know about the man that my
17 husband is today.

18 I ask again, Judge O'Donnell, that
19 you please, please have leniency on my
10:49:51 20 husband, have mercy on the father of my
21 children, and to have mercy on the man that
22 has turned his life around for the better, the
23 man who he has become, and the man that I am
24 proud to call my husband. Thank you.

10:50:08 25 THE COURT: Thank you,

1 Ms. Ramirez Dickerson. Mr. Johnson.

2 MR. JOHNSON: Yes, Your Honor.

3 His son. State your name for the record.

4 THE COURT: Actually, I'm

10:50:25 5 sorry, Mr. Johnson. Ms. Weston, it wasn't

6 under oath, but do you have any cross-exam of

7 Ms. Ramirez Dickerson?

8 MS. WESTON: I do not. Thank
9 you.

10:50:35 10 THE COURT: Mr. Johnson.

11 MR. D. DICKERSON: Dominic

12 Dickerson, D-i-c-k-e-r-s-o-n.

13 THE COURT: Good morning.

14 MR. D. DICKERSON: Good morning,

10:50:43 15 Your Honor. I am Dominic Dickerson, the
16 oldest son of Oscar Dickerson Jr. I come to
17 you today to ask that you please grant mercy
18 on my father, for he is a good man and
19 excellent father. All throughout my life, my
10:50:57 20 father has always told me that he wanted me to
21 be a better man than he was, and he has done
22 everything in his power to make sure that I am
23 the man that I am today.

24 I am currently a junior in college.

10:51:07 25 I attend the University of Toledo and I am a

1 marketing major. I will be graduating next
2 year with my bachelor's degree. Throughout
3 college I have maintained a 3.0 GPA. I owe
4 all of my success to my father. He instilled
10:51:20 5 great morals upon me and always been in my
6 life. Without him, I know for a fact that I
7 wouldn't be the man that I am today, and I
8 would not be in a position that I am in to be
9 successful if it hadn't been for my father. I
10:51:34 10 would have been lost in this world.

11 So I come to you to humbly ask you to
12 please grant my younger brothers and sisters
13 the same opportunity I had of having a great
14 father in my life. He is truly a good man.
10:51:46 15 Thank you, Your Honor.

16 THE COURT: Thank you,
17 Mr. Dickerson. Mr. Johnson.

18 MR. JOHNSON: Who is next?

19 THE COURT: I'm sorry. Any
10:51:53 20 cross, Ms. Weston?

21 MS. WESTON: No, Your Honor.
22 Thank you.

23 THE COURT: Mr. Johnson.

24 MR. JOHNSON: Who is next?

10:52:14 25 THE COURT: Good morning.

1 THE WITNESS: Good morning,
2 Your Honor.

3 THE COURT: Your name is?

4 MR. SIKLO: My name is
10:52:19 5 Timothy Siklo, I am a brother-in-law of
6 Mr. Oscar Dickerson Sr. We, the family of
7 Mr. Oscar Dickerson Sr., sincerely apologize
8 to the victim of family and the Court. I have
9 been Mr. Dickerson's -- I knew Mr. Dickerson
10:52:41 10 since he was about ten years old when I was a
11 graduate student at Case Western Reserve
12 University when I started dating his sister.
13 I have observed Mr. Dickerson over the years
14 to have grown up, become a mature, responsible
10:52:57 15 and respected citizen of this great nation of
16 ours.

17 Mr. Dickerson has more than 20
18 nieces, nephews, and including his own
19 children. He has had positive effects on all
10:53:14 20 of them, including my own children. He always
21 advised asked them to keep in school. As you
22 can see, his older son is at Toledo
23 University.

24 I appeal to the Court to look on him
10:53:31 25 with kindness and also give him a second

1 chance, for he is the only boy among the
2 children of seven. He has six sisters and he
3 has had a positive effect on all of them.

4 He has also at his workplace where he
10:53:49 5 is a supervisor, he has a lot of many young
6 people who get second chances on improving
7 their lives. And I think if he's given the
8 opportunity to continue, he would be more of a
9 positive effect on society as a whole and in
10:54:06 10 the community, as opposed to being
11 incarcerated. So I appeal to the Honorable
12 Court to please give him a chance.

13 Thank you, Your Honor.

14 THE COURT: Thank you. And
10:54:19 15 sir, your last name is --

16 MR. SIKLO: Siklo,
17 S-i-k-l-o, Timothy.

18 THE COURT: Ms. Weston, any
19 cross-exam?

10:54:37 20 MS. WESTON: No, thank you.

21 THE COURT: Sir, I
22 appreciate you coming down here.

23 MR. SIKLO: Thank you.

24 THE COURT: Mr. Johnson.

10:54:43 25 MR. JOHNSON: One more.

1 THE COURT: Good morning.

2 Your name is?

3 MS. O. DICKERSON: Osmar,

4 O-s-m-a-r, Dickerson.

10:55:09 5 THE COURT: I'll be happy to
6 hear whatever you have to say.

7 MS. O. DICKERSON: Your Honor, I
8 would like to express my sincere gratitude to
9 you this morning for giving me the opportunity
10:55:16 10 to address the Court on my brother Oscar
11 Dickerson's behalf.

12 My name is Osmar Dickerson, I am
13 Oscar's older sister. Though I have always
14 looked at him as my older brother, he is the
10:55:26 15 only brother we have. He's not that teenage
16 boy he was 20 years ago.

17 So many of us stand before you today
18 because of God's grace. The man before you
19 today is the epitome of an ex-felon reformed.
10:55:40 20 He gets up every morning and works sometimes
21 16 hours a day to support his family. He
22 taught his son and nephews the importance of
23 working, staying out of trouble and being a
24 productive citizen.

10:55:51 25 He's the support system for our

1 family as well as his own. He mentored not
2 only his children, but his nieces, nephews,
3 and his friends. People no one else would
4 even think of hiring, he extends his hand, not
10:56:05 5 to push them away, but to pull them in and
6 give them a second chance. In hindsight,
7 there are so many things each and every one of
8 us in this courtroom today would have done
9 differently over the years.

10:56:15 10 I plead with you, Your Honor, for
11 leniency and grace. Please look at the man
12 Oscar Dickerson Jr. is today and has been for
13 the past 20 years, he's turned his life
14 around, when you hand down your sentence.
10:56:28 15 Thank you.

16 THE COURT: Thank you,
17 Ms. Dickerson.

18 Ms. Weston, do you have any
19 cross-exam?

10:56:32 20 MS. WESTON: I do not.

21 THE COURT: Mr. Johnson.

22 MR. JOHNSON: One more, Judge.

23 MS. WOODWORTH: Good afternoon,

24 Judge. My name is Oscarlane Dickerson
10:56:56 25 Woodworth. I am another sister of Oscar

1 Dickerson. I come here today to ask you for
2 leniency for my brother. My parents have been
3 married for over 30-something years. He's the
4 only son that they have. I thank you for
10:57:14 5 giving him the time that you gave him to spend
6 with his family for the holiday.

7 Our hearts are very heavy right now,
8 because we know who he is today; and what he
9 was back then, he's no longer. He's a good
10:57:30 10 role model to everyone that he comes in
11 contact with currently. Currently, I did
12 serve in the military, I'm still serving in
13 the military right now, because I work at the
14 VA Hospital as a nurse. I also served as a
10:57:44 15 marine in the military. But seeing who my
16 brother is today, he is one of the best
17 persons that I know.

18 Oscar helps out everybody. He has
19 overcome every situation that he's been to and
10:58:00 20 everything that has happened. He successfully
21 tried to give back in every way possible.
22 Today I just thank you for the opportunity to
23 talk for our family and to talk about the
24 character of Oscar Jr. Dickerson, who he is
10:58:17 25 today, and I ask that the Court continue to

1 have mercy on him for his sentences. Thank
2 you.

3 THE COURT: Thank you,
4 Ms. Woodworth. Ms. Weston, do you have any
10:58:32 5 cross-exam?

6 MS. WESTON: No, thank you.

7 THE COURT: Thank you.

8 Mr. Johnson.

9 Sir, good morning. Your name is?

10:59:10 10 MR. DICKERSON SR.: Good morning,
11 sir.

12 THE COURT: I'm sorry, I
13 didn't hear that.

14 MR. DICKERSON SR.: I am Oscar S.
10:59:18 15 Dickerson Sr.

16 THE COURT: Sir, good
17 morning.

18 MR. DICKERSON SR.: Good morning.
19 First, I didn't tell you --

10:59:37 20 THE COURT: Mr. Dickerson, I
21 can understand you being emotional here this
22 morning, but I'm going to ask that you calm
23 down for this reason: If we can't get an
24 accurate record of what is said, your son's
10:59:55 25 own rights might be prejudiced. So I'll give

1 you time, don't worry, but it is important
2 that not only all of us be able to understand
3 you, but especially our court reporter, who is
4 trying to make a record.

11:00:10

5 MR. DICKERSON SR.: I'm sorry.

6 Judge, Oscar is my only son I have.
7 I thank you and talk to you today on his
8 behalf.

11:00:36

9 If I talk, I will begin to cry,
10 because it hurts me so badly, so instead of
11 talking I will just read what I have very
12 carefully. It's a letter I wrote to you.
13 It's a letter I wrote to you and it reads as
14 follows. I will get my glasses.

11:01:04

15 Dear Honorable Judge, may God
16 continue to bless you now and forever as you
17 read my very humble letter to you on behalf of
18 my son, Oscar S. Dickerson Jr. Thank you very
19 much. Thank you very, very much, your highly
20 esteemed Honor. This letter, your most
21 respectful, highly esteemed Honor, is my most
22 humble plea to you, for you to please have
23 mercy, pardon, forgiveness, compassion,
24 sympathy, and pity on my son Oscar.

11:01:59

25 Your Honor, I most humbly

1 respectfully beg you to please use your
2 esteemed office, as a highly esteemed you,
3 with profound respect and honor, sir, I humbly
4 beg to you please, please grant my son Oscar
11:02:27 5 clemency in his case, for he is a very
6 respectable, loving, responsible Christian
7 gentleman, that people who knew him in and out
8 of his right place and in his family, among
9 his parents, his sisters, his relatives, his
11:02:53 10 wife and five children whom he has -- whom God
11 has gracefully blessed him with, is known to
12 be a faithful, good, kind, law-abiding citizen
13 of this great blessed country of ours whom we
14 all love so very much.

11:03:16 15 Please, Your Honor, his wife and all
16 of us very much need him most out of jail and
17 out of prison to help in the Christian support
18 and upbringing of their lovely five children.
19 As the oldest son is now in college, he needs
11:03:42 20 his father's encouragement and guidance now
21 than ever before.

22 Please help us, Your Honor, sir.
23 Please grant my son Oscar clemency, please,
24 your esteemed Honor, sir. For you mercifully
11:04:05 25 granting my son clemency, I am forever

1 grateful to you, sir. Thank you so very much,
2 very, very much.

3 God will bless you, will continue to
4 bless you, guide you, protect you and yours
11:04:27 5 and our very great country. Most
6 respectfully, I humbly submit to you. Oscar
7 S. Dickerson Sr. Thank you, sir.

8 THE COURT: Thank you,
9 Mr. Dickerson. Do you have any cross-
11:04:47 10 examination?

11 MS. WESTON: No.

12 THE COURT: I appreciate you
13 coming down here.

14 MR. DICKERSON SR.: Thank you, sir,
11:04:52 15 you're welcome.

16 THE COURT: Mr. Johnson.

17 MR. JOHNSON: May it please
18 the Court. Your Honor, there's not much I can
19 add to the heartfelt tears and the statements
11:05:03 20 from his family, but I would say --

21 THE COURT: You're welcome
22 to join your lawyer at this point if you wish.

23 MR. JOHNSON: I would say that
24 20 years ago Mr. Dickerson was arrested and at
11:05:14 25 some point in time they chose not to

1 prosecute. Had they chosen to prosecute, we
2 wouldn't be in this situation here today, Your
3 Honor. This gentleman has changed his life.
4 He had a little bump in the road in 2010 where
11:05:26 5 he got into an altercation with a young lady
6 at the store who worked there, who threw some
7 items at him as he was trying to check out,
8 but other than that, Your Honor, he
9 successfully completed probation.

11:05:38 10 As you heard, he's been on the job 16
11 years where he had a hard time finding a job
12 16 years ago because of his juvenile record
13 and stuff he had gotten into. Somebody
14 reached out to him, gave him an opportunity
11:05:50 15 and he took that opportunity and excelled,
16 where as of today he's a supervisor on his
17 job, supports his family. As you can see, he
18 has a great deal of support here, Your Honor.
19 We are just asking for an opportunity.

11:06:01 20 He respects the process, he intends
21 to appeal his conviction, and he just wants
22 another opportunity, Your Honor. Keep all
23 that in mind and look at the sentencing
24 factors in 2929.11 and 12. Thank you.

11:06:14 25 THE COURT: Thank you,

1 Mr. Johnson.

2 Mr. Dickerson, as I mentioned
3 earlier, by law you are entitled to an
4 allocution just to say a statement before
11:06:22 5 you're sentenced. You have already made one.
6 Is there anything additional you wish to say?

7 THE DEFENDANT: Your Honor,
8 please have mercy on me. Please have leniency
9 on me. I am a changed man. I have a family,
11:06:36 10 I have to be there for my family. I have a
11 career. I am not that juvenile. Thank you,
12 Your Honor.

13 THE COURT: Thank you,
14 Mr. Dickerson, and again, Mr. Johnson and
11:06:49 15 Mr. Bokoch and Ms. Weston.

16 The purposes of felony sentencing in
17 Ohio are first to protect the public from
18 future crime by a defendant; second, to punish
19 that defendant using minimum sanctions that
11:07:11 20 accomplish punishment and protection from
21 future crime without imposing an unnecessary
22 burden on the state or local government
23 resources.

24 In achieving the purposes, namely,
11:07:32 25 protection from future crime and punishment,

1 the Court should consider, must consider, the
2 need for incapacitating the defendant himself,
3 the need for rehabilitating the defendant and
4 making restitution to the victim, and
11:07:57 5 deterring the defendant and others from future
6 crime. It is noteworthy that deterrence of
7 others is no longer, as of 2011, considered to
8 be an overriding purpose of felony sentencing.
9 The same is true with rehabilitation.

11:08:18 10 Mr. Dickerson, I want you to know
11 that in imposing the following sentences I
12 have considered first of all those things I
13 just read, purposes of felony sentencing in
14 Ohio. Second, I have considered all of the
11:08:30 15 applicable provisions of Chapter 2929 of the
16 Revised Code. Third, I have considered
17 everything that's been said here on the oral
18 record here this morning. Fourth, I have
19 considered the presentence report that I
11:08:45 20 already believe I mentioned. Fifth, I have
21 considered the prosecutor's sentencing
22 memorandum. And finally, I have considered
23 the evidence at trial, which I heard and
24 remember.

11:08:58 25 Having considered all of that, on

)

1 Count 2 I'm going to order that you are
2 sentenced to five years at the Lorain
3 Correctional Institution; on Count 4, you are
4 ordered to serve five years at LCI; and on
11:09:14 5 Count 5, you are ordered to serve five years
6 at LCI. These sentences are ordered to be
7 served concurrently for essentially a single
8 five-year sentence.

9 Post-release control for five years
11:09:29 10 is part of this sentence, so when you are
11 released you will be on PRC for five years.
12 During those five years, you will be required
13 to report to your parole officer on a regular
14 basis and you must follow whatever conditions
11:09:52 15 the parole officer places. Should you violate
16 PRC, then your parole officer has the power to
17 return you to prison without bringing you to
18 court for a total of two-and-a-half years.

19 If you do not report as required to
11:10:25 20 your parole officer, then you can be charged
21 with escape, a new felony. Finally, if while
22 you are on PRC in this case you commit and are
23 sentenced for a new felony, when you are so
24 sentenced you may receive an extra prison term
11:10:40 25 equal to the greater of one year or the number

)
1 of years you have left on post-release
2 control.

3 You have a credit, to my knowledge,
4 of one day served in jail to date, that is
11:10:50 5 June 6th of 2014. If there has been other
6 time served in jail, which I expect would have
7 been in '94 if at all, then I am sure
8 Mr. Johnson will bring that to my attention.

9 You must pay court costs. I don't
11:11:05 10 know the amount of the costs, but I estimate
11 them to be in the range of a thousand dollars
12 or so. That is a civil judgment against you.

13 You are reminded of your obligations
14 under HB 180 of sexually oriented offender
11:11:21 15 that I already detailed earlier.

16 Ms. Weston, I certainly heard and
17 remember Ms. Roy's testimony, and I am
18 inclined in some ways to agree with you that
19 it's difficult to imagine much worse of a
11:11:41 20 thing happening to a person. At the same
21 time, while stipulating to Mr. Dickerson and
22 Mr. Jenkins's own cruelty, there is something
23 unjust about waiting 20 years to prosecute him
24 for a crime where you knew he was the, or a,
11:12:05 25 at least, prime suspect within a day of the

) 1 crime. But putting aside that
2 state-sanctioned cruelty, Mr. Dickerson is to
3 be sentenced to protect the public from future
4 crime.

11:12:29 5 Based on what I know of
6 Mr. Dickerson, which concededly is, you might
7 say, a one-sided view that comes from his
8 family and him here this morning, he is not
9 likely to re-offend, with or without a 33-year
11:12:43 10 prison term.

11 The other purpose of felony
12 sentencing is to punish him and to do so using
13 the minimum sanctions necessary to accomplish
14 that purpose and the purpose of deterring him
11:12:59 15 from committing future crimes. Again, based
16 on what I know about Mr. Dickerson, any prison
17 term would be almost considered sufficient to
18 punish him, considering that he has
19 established himself as a basically
11:13:23 20 law-abiding, job-holding, family-raising
21 citizen. Thirty-three years, it seems to me,
22 is an excessive punishment for accomplishing
23 the purposes of 2929.11.

24 Specifically not included in 2929.11
11:13:49 25 is sentencing a person from a victim's

1 perspective. So I can appreciate that Ms. Roy
2 thinks 33 years is an appropriate sentence;
3 frankly, I could appreciate if she would think
4 something like the death penalty would be
11:14:03 5 appropriate. Of course, you know and haven't
6 asked for that, because it's not an option.

7 The point is, while I do have a great
8 deal of sympathy for Ms. Roy, I cannot
9 sentence Mr. Dickerson based only upon
11:14:22 10 Ms. Roy's point of view. I do take her point
11 of view into account, but I am also required
12 to impose a sentence under law sufficient to
13 achieve the purposes set down by the
14 legislature. And I believe that this
11:14:40 15 sentence, which is, candidly, equal to a
16 sentence he would have gotten if he had been
17 tried and convicted within some reasonable
18 time after that offense, it is fair for those
19 purposes.

11:14:57 20 Mr. Dickerson, finally, you do have
21 the right to appeal. It's clear to me that
22 you're aware of that right, it having been
23 mentioned by Mr. Johnson, but I am required to
24 inform you of that right. I'm required to
11:15:09 25 inform you that if you want to appeal and you

1 cannot afford counsel to represent you in the
2 Court of Appeals, then such counsel will be
3 provided by the State, as will papers to
4 prosecute that appeal.

11:15:25 5 Something first, Ms. Weston, that I
6 have missed that I am required to mention, or
7 second, that you want to discuss that hasn't
8 been raised so far?

9 MS. WESTON: I do, Your
11:15:36 10 Honor. I appreciate your comments with regard
11 to 2929.11 and what this Court, I guess,
12 thinks that is required to consider with
13 regard to sentencing, and I certainly think
14 that's true. I don't know, because you
11:15:51 15 haven't indicated whether you have or not,
16 considered 2929.12. I hope you did.

17 Certainly, the suggestion under
18 2929.12 is that the Court should consider a
19 longer sentence when looking at things, as the
11:16:07 20 Court has indicated, from the victim's
21 perspective, physical or mental injury
22 suffered by a victim, physical harm,
23 psychological harm to a victim, the age of the
24 victim. So I disagree with this Court's
11:16:19 25 indication that the way that this crime harmed

1 the victim, I think it should be taken into
2 consideration, and not only should, but the
3 Court shall consider those things in
4 determining a sentence.

11:16:33 5 I appreciate that the Court has
6 indicated that even if this crime were
7 committed and prosecuted in 1994 that it
8 believes a five-year sentence is appropriate.
9 The State certainly disagrees. Thank you.

11:16:46 10 THE COURT: I will just tell
11 you that I can't mention every single
12 provision of every single statute, but as I
13 did note earlier, I have considered all of the
14 pertinent portions of Revised Code 2929.
11:16:58 15 Thank you, Ms. Weston.

16 Something that I omitted or that you
17 wanted to make sure was mentioned, Mr. Bokoch?

18 MR. BOKOCH: No, Your Honor.

19 THE COURT: Same question,
11:17:05 20 Mr. Johnson.

21 MR. JOHNSON: The only thing,
22 Your Honor, at this juncture, he owns no
23 property, has no real assets. I'd ask the
24 Court to find him indigent and appoint counsel
11:17:14 25 for the appeal, as well as the transcript at

1 State's expense.

2 THE COURT: I can't
3 remember, Mr. Johnson, were you retained or
4 assigned?

11:17:22 5 MR. JOHNSON: I was retained,
6 but he was working at the time and he's not
7 going to have his job at this juncture. And
8 also, would you entertain an appellate bond
9 with respect to this matter so that he could
11:17:34 10 pay for his appeal?

11 THE COURT: The answer to
12 the latter is no. The answer to the former is
13 Mr. Dickerson should probably file an
14 affidavit of indigency, only, of course, if
11:17:47 15 that would be strictly true, because it's done
16 under oath. Thereupon, a request to assign
17 appellate counsel will be -- well, file it,
18 file the affidavit with a request and then the
19 State will have time if it wishes to oppose
11:18:07 20 that request. But do it swiftly, because you
21 know it's 30 days.

22 MR. JOHNSON: Correct.

23 THE COURT: Thank you to the
24 lawyers. Good luck to you, Mr. Dickerson. We
11:18:18 25 are off the record.

1 (Mr. Jenkins was brought back into
2 the courtroom.)

3 THE COURT: We're here this
4 morning, back on the record in State of Ohio
11:32:37 5 versus Michael Jenkins, 585521 and 587645.
6 The case ending in 45 is a drug possession
7 case. The case ending in 21 is a rape case
8 for which we are here on.

9 First, a hearing pursuant to HB 180
11:32:58 10 to determine whether Mr. Jenkins is an
11 habitual sex offender or is a sexual predator.
12 He is by operation of law at least a sexual
13 oriented offender given the nature of the
14 conviction, which isn't technically a
11:33:22 15 conviction yet, because my sentence hasn't
16 been imposed, but I think the participants
17 know what I mean in 585521.

18 I should note, so that it is clear,
19 that the prosecutors, Mary Weston and Ryan
11:33:37 20 Bokoch, remain present. Mr. Jenkins is in the
21 courtroom with his lawyer, Ms. Valerie
22 Arbie-McClelland.

23 Does the State, Ms. Weston, have any
24 evidence on the question of whether
11:33:52 25 Mr. Jenkins is an habitual sex offender or a

1 sexual predator?

2 MS. WESTON: Your Honor, I
3 have reviewed the mitigation of penalty report
4 prepared by the court psychiatric clinic dated
11:34:04 5 December 19, 2014. It was provided to me by
6 your bailiff. I would ask the Court to take
7 that into consideration.

8 THE COURT: May I interrupt
9 you?

11:34:12 10 MS. WESTON: Yes.

11 THE COURT: Are you offering
12 that into evidence?

13 MS. WESTON: I would ask that
14 it be considered by this Court, so yes.

11:34:17 15 THE COURT: Do you object,
16 Ms. Arbie-McClelland?

17 MS. ARBIE-McCLELLAND: I do not.

18 THE COURT: It is admitted.
19 That's an 11-page report prepared by the chief
11:34:29 20 of psychology, Michael H. Aronoff, dated
21 December 19th.

22 Do you have additional evidence,
23 Ms. Weston?

24 MS. WESTON: I would also ask
11:34:38 25 the Court to consider the PSI that was

1 prepared in connection with this case.

2 THE COURT: By Denise McNea
3 on December 17th?

11:34:52

4 MS. WESTON: Yes, December
5 17th of 2014, because it does indicate the
6 defendant's prior criminal record, as well as
7 details about the current offense, although I
8 am aware the Court did sit through the trial,
9 so I would ask the Court to consider the trial
10 evidence as well.

11:35:03

11 THE COURT: Do you object,
12 Ms. Arbie-McClelland, to the introduction into
13 evidence at this HB 180 hearing of the
14 December 17 presentence investigation report?

11:35:18

15 MS. ARBIE-McCLELLAND: No, Your
16 Honor.

11:35:28

17 THE COURT: It is admitted
18 without objection and I'm not sure how we
19 could even enforce this if you did object, but
20 do you object to me taking into account the
21 evidence I heard at trial?

22 MS. ARBIE-McCLELLAND: I do not.

23 THE COURT: Any additional
24 evidence or arguments, Ms. Weston?

11:35:36

25 MR. BOKOCH: No, Your Honor.

1 THE COURT: Ms. Arbie-
2 McClelland.

3 MS. ARBIE-McCLELLAND: Your Honor, on
4 behalf of Mr. Jenkins, I have also reviewed
11:35:42 5 the mitigation of penalty report, the
6 presentence investigation report, and
7 obviously I was present for all of the trial
8 testimony as well. I would strongly suggest
9 that there is no evidence for a finding of
11:35:57 10 either -- that Mr. Jenkins is either a
11 habitual offender or a sexual predator.

12 We do know by operation of law, based
13 on this finding by the jury, that he is a
14 sexually oriented offender who is subject to
11:36:14 15 registration for a ten-year period on an
16 annual basis. I would respectfully suggest
17 that the findings of Dr. Aronoff result --
18 that there is no other option except that he
19 is a sexually oriented offender.

11:36:31 20 THE COURT: Thank you,
21 Ms. Arbie-McClelland. Do you rest?

22 MS. ARBIE-McCLELLAND: I do.

23 THE COURT: The defense
24 having offered no new evidence, there's no
11:36:39 25 opportunity for rebuttal. Much of what

1 Ms. Arbie-McClelland gave Ms. Weston was in
2 essence a closing argument. Do you want a
3 closing argument?

4 MS. WESTON: No. Thank you,
5 Your Honor.

11:36:48

6 THE COURT: Thank you to the
7 lawyers.

8 Mr. Jenkins, based upon the evidence,
9 I find that you are a sexually oriented
10 offender having been convicted of the crimes
11 for which the jury found you guilty.

11:36:54

12 I find that there is insufficient
13 evidence to conclude that you are an habitual
14 sexual offender or a sexual predator. As a
15 result, you will be required for the next ten
16 years to register your address with the
17 sheriff where you live and where you work,
18 once per year.

11:37:13

19 There are indeed specific
20 requirements that I want to read to you. This
21 admittedly can be tedious, but please bear
22 with me.

11:37:28

23 You have been convicted of a sexually
24 oriented offense. You are therefore required
25 to register personally -- that means you have

11:37:40

1 to go there, you can't call or e-mail or
2 mail -- with the sheriff of each county in
3 Ohio or any other state in which you reside or
4 are temporarily domicile for more than five
11:37:57 5 days, within five days of coming into that
6 county.

7 You are required to register
8 personally with the sheriff of each county in
9 Ohio or elsewhere immediately upon coming into
11:38:09 10 a county in which you attend a school or place
11 of education on either a full or part-time
12 basis.

13 You are required to register
14 personally with the sheriff of each county in
11:38:23 15 Ohio or any other state where you are
16 employed, regardless of where you live, if you
17 have been employed in that county for more
18 than 14 days or for an aggregate period of 30
19 or more days in that calendar year.

11:38:41 20 After your date of initial
21 registration, you are required to periodically
22 verify the addresses of your residence, place
23 of employment, and/or school, by personally
24 appearing before the sheriff of each county in
11:38:58 25 which any of those addresses is registered,

1 once per year.

2 You must appear and complete a
3 verification form no earlier than ten days
4 before the date by which verification is
11:39:12 5 required and no later than the date by which
6 verification is required. So in other words,
7 there was a ten-day window, the window closes
8 on the annual verification date. You can't do
9 it after.

11:39:25 10 As I mentioned, you're required to do
11 this for a period of ten years with
12 verification on each anniversary of the
13 initial registration.

14 You should know that at least 20 days
11:39:37 15 before changing your residence address or the
16 address of your school or place of education,
17 and not later than five days after changing
18 the address of your place of employment, you
19 must first provide written notice of the
11:39:56 20 residence, school, or place of employment
21 address change to the sheriff with whom you
22 most recently registered the address; and,
23 second, personally register each new address
24 with the sheriff of the county in which any
11:40:13 25 new address is located, whether in this state

1 or another state.

2 Importantly, you are advised that
3 failure to register, failure to verify your
4 residence at the specified times, or failure
11:40:27 5 to provide notice of a change in residence
6 address as detailed here today will result in
7 a separate new criminal prosecution. In other
8 words, it's a felony not to do these things
9 that you're required to do.

11:40:41 10 So those are your obligations as a
11 sexually oriented offender. I would now like
12 to proceed to sentencing in both cases.

13 What I would like to do, Mr. Jenkins,
14 is hear presentation from the prosecutor or
11:40:58 15 prosecutors, if they both have something to
16 say, and then I have little doubt
17 Ms. Arbie-McClelland will want to make some
18 statements on your behalf. Once the lawyers
19 have made their presentations, you are
11:41:10 20 welcome, if you wish, to make a statement and
21 then sentences will be imposed.

22 So thank you, Ms. Weston.

23 MS. WESTON: Thank you, Your
24 Honor. I know we dealt with this in the
11:41:23 25 previous sentencing hearing, but I wanted to

1 touch upon it now with regard to allied
2 offenses.

3 THE COURT: I am glad you
4 did. What's your position on whether these
11:41:31 5 three are allied?

6 MS. WESTON: My position is
7 that none of them are allied, Your Honor. I
8 know I placed my reasons on the record before,
9 but I will state them again.

11:41:38 10 Defendant has been found guilty of
11 two separate rapes. As the Court heard the
12 testimony in this case, the rapes were by two
13 different individuals, this defendant and his
14 co-defendant. It happened in separate rooms.
11:41:50 15 I believe those are clearly committed with
16 separate animus.

17 Kidnapping in this case, the State
18 did argue to this Court at Rule 29 as well as
19 to this jury throughout this case that the
11:42:00 20 kidnapping commenced when this 16-year-old
21 girl was snatched off the street. The
22 defendants did deceive her by telling her they
23 would take her home; however, they didn't.
24 The animus for this crime was to transport her
11:42:12 25 to a place where they could conceal their

1 crimes of rape, so I do believe that the
2 evidence showed that this was done with a
3 separate animus as to the rapes.

4 So the State's position is that all
11:42:22 5 three of these counts are separate, the
6 defendant should have a sentence imposed for
7 each and every one.

8 THE COURT: Thank you,
9 Ms. Weston.

11:42:32 10 Do you have a position on allied
11 offenses, Ms. Arbie-McClelland?

12 MS. ARBIE-McCLELLAND: I do, Your
13 Honor. I believe that the current state of
14 the law in this state stems from State of Ohio
11:42:47 15 versus Johnson in I believe 2010. What the
16 courts are advised to do when they are
17 determining whether or not offenses are allied
18 offenses or not under 2941, I think point 143,
19 is that they look at the course of conduct,
11:43:12 20 rather than the separate elements that it had
21 been in the past.

22 What I believe, Your Honor, is that
23 when -- as the evidence came through in the
24 testimony, was that this was all one course of
11:43:29 25 conduct. There were separate acts, but that

1 from, based on Ms. Roy's recollection of the
2 events, that it really is all one course of
3 conduct and I would suggest, Your Honor, that
4 the offenses are, in fact, allied offenses and
5 should be treated as such.

11:43:50

6 THE COURT: You do have your
7 own connection to the Internet right there in
8 front of you, but nevertheless, you were
9 close. It's 2941.25.

11:44:04

10 MS. ARBIE-McCLELLAND: Thank you.

11 THE COURT: Thank you,
12 Ms. Arbie-McClelland. Ms. Arbie-McClelland, I
13 don't mean to give short shrifts to
14 Mr. Jenkins, but suffice to say that
15 Ms. Weston, Mr. Johnson, and I had discussed
16 this very issue on the record about half an
17 hour ago. I believe, although I'm not
18 certain, you were present in the courtroom.

11:44:16

19 MS. ARBIE-McCLELLAND: I was.

11:44:26

20 THE COURT: The point is,
21 you know my reasons. So I find that,
22 Mr. Jenkins, in 585521 the three offenses are
23 not allied offenses of similar import and I
24 will proceed to sentence on that basis.

11:44:43

25 Ms. Weston.

1 MS. WESTON: Thank you, Your
2 Honor. Your Honor, State asks this Court take
3 into consideration 2929.11 as well as 2929.12.
4 As the Court is aware, 2929.11(B) tells this
11:44:58 5 Court to select a sentence that is
6 commensurate with and not demeaning to the
7 seriousness of the defendant's conduct and its
8 impact upon the victim. 2929.12 indicates
9 factors this Court shall consider in
11:45:10 10 determining whether the crime was more serious
11 or less serious.

12 The State has indicated within its
13 sentencing memorandum that several factors
14 indicate this crime was more serious. The
11:45:21 15 factors that would suggest any crime is less
16 serious do not apply in this case.

17 Here, the physical or mental injury
18 suffered by the victim of the offense due to
19 the conduct of the offender was exacerbated by
11:45:34 20 her physical or mental condition. Here she
21 was a 16-year-old girl who was kidnapped off
22 the street, taken to a hotel room and raped by
23 this defendant and his co-defendant. Raped by
24 two men in that hotel room.

11:45:49 25 Under 2929.12(C), factors that

1 indicate the offense was less serious, State
2 doesn't believe any of these factors apply.

3 It is perhaps of note that the
4 defendant has no remorse for his actions. He
11:46:04 5 was interviewed as part of the PSI, he has no
6 remorse for this rape; in fact, he denies it
7 and characterizes it as a sex-for-drugs
8 situation. So instead of taking any
9 responsibility for these crimes, he has
11:46:16 10 instead chosen to denigrate the 16-year-old
11 victim in this case and characterize her as a
12 drug addict and somebody who willingly took
13 part in this situation.

14 The Court will recall that the
11:46:32 15 defendant, once he found out that Ms. Roy had
16 reported these crimes to the police, found her
17 on the street, he knew where she lived, and
18 threatened to do her harm if she pursued
19 prosecution in this matter.

11:46:46 20 The State believes it is the
21 defendant's fault this case did not get
22 prosecuted for the last 20 years, not the
23 prosecution's fault.

24 I understand this Court must impose a
11:46:57 25 sentence that -- I'm sorry. After the State

1 v. Harrison decision, this Court must apply
2 the post-House Bill 86 law. The State is
3 placing an objection on the record at this
4 time. It's my understanding, Your Honor, that
11:47:13 5 my office is appealing the State v. Harrison
6 decision, and so if this case were to ever
7 come back, this Court may in the future have
8 to apply pre-Senate Bill 2 law. But at this
9 time it's my understanding it must apply
11:47:29 10 post-House Bill 86 law and I object to that at
11 this time.

12 Ms. Roy, the victim in this case, did
13 indicate to me her thoughts on sentencing.
14 Although she could not appear today, as she
11:47:39 15 lives out of town, Ms. Roy did ask for the
16 maximum sentence to be imposed. She indicated
17 she has dealt with this case and these crimes
18 that were imposed upon her for the last -- 20
19 years she's dealt with those crimes and the
11:47:52 20 emotional turmoil she has experienced. She
21 has sought out counseling to help her in that
22 aspect, but as this Court remembers from her
23 emotional testimony, clearly she's not over it
24 yet, although she did indicate to the State
11:48:08 25 that she has some amount of closure now that

1 the case has been prosecuted.

2 I would ask the Court to take all of
3 those things into consideration, but most
4 importantly how serious this offense was and
11:48:19 5 the effect upon the victim, as those things
6 are to be taken into consideration under
7 2929.11 and 12. Thank you.

8 THE COURT: Thank you,
9 Ms. Weston. Ms. Weston, I trust you
11:48:33 10 personally don't want to address sentencing in
11 587645?

12 MS. WESTON: That would be
13 fair to say. Thank you.

14 THE COURT: Mr. Bokoch, do
11:48:41 15 you have anything to say on either case?

16 MR. BOKOCH: As it relates to
17 the drug case, Your Honor, the facts in that
18 case, the defendant and his co-defendant were
19 drinking and smoking cigarettes at CMHA
11:48:54 20 housing. As the officers approached, they
21 quickly smelled the distinct odor of PCP.
22 Both the defendant and his co-defendant were
23 sharing a PCP cigarette back and forth.
24 Police did confiscate that. Once tested it
11:49:11 25 was positive, the defendant did admit to

1 having smoked PCP in that case. Those are the
2 facts of the case I just wanted to place on
3 the record.

4 THE COURT: Thank you,
5 Mr. Bokoch. Ms. Arbie-McClelland.

6 MS. ARBIE-McCLELLAND: Thank you,
7 Your Honor. As it relates to both cases, I
8 have reviewed the presentence investigation
9 report. As I stated before, we were all here
10 for trial testimony, but I'd like to note some
11 certain factors from the presentence
12 investigation report, as well as Mr. Jenkins
13 and my experience with him over the last
14 number of several months regarding what I
15 think is important for you to take into
16 consideration in determining the most
17 appropriate sentence.

18 He has, first and foremost, he has
19 been incarcerated for about 200 days on this
20 matter. While we recognize that he has had a
21 different criminal history than his
22 co-defendant, I know that both of these men --
23 now they are men. At the time of the 1994,
24 they were very young adults, 18 and 19 years
25 old, and it is my belief, Your Honor, that

1 there was bad decisions made that day.

2 My dispute or disagreement, I guess,
3 with Ms. Weston's version of the events, we
4 know there was a finding of guilt by the jury,
11:50:45 5 but I do think that it is not necessarily as
6 black and white as she does. What we do have
7 is 20 years have passed, Mr. Jenkins has
8 raised a son. His son is currently in the
9 United States Navy. While he has had
11:51:04 10 involvement with the criminal justice system,
11 he's obviously made some bad decisions, he
12 served penalties for that, and what I think is
13 more important is who is this gentleman today?
14 Yes, he has a history, but the last time he
11:51:23 15 was involved in the criminal justice system
16 prior to this charge and the drug offense was
17 in 2008.

18 When he and I talked about the drug
19 offense, "I don't know what I was doing, I was
11:51:38 20 hanging out with an old friend and we
21 shouldn't have done that, I know better. I'm
22 old enough and I know better." He fully
23 accepted responsibility in that matter.

24 As it relates to this case, I know
11:51:48 25 Ms. Weston notes that he is not accepting

1 responsibility or showing remorse, despite the
2 finding of the jury. I'd like you to know
3 that during trial there was a plea proposal
4 that had been proposed by the State of Ohio
11:52:06 5 which mandated that Mr. Jenkins would have to
6 implicate Mr. Dickerson in the offense.

7 Mr. Jenkins, in what I have seen as
8 nothing short of honorable, he said that he
9 would be willing to accept responsibility, but
11:52:23 10 he wasn't going to say anything bad about
11 Mr. Dickerson, Mr. Dickerson had much to lose.
12 Not that Mr. Jenkins had nothing to lose, but
13 he saw his life had gone a different route and
14 he said, I will accept responsibility, but I'm
11:52:37 15 not going to harm my friend.

16 Obviously, that decision is coming
17 back to affect him greatly. I did, however, I
18 thought that was very admirable, Your Honor,
19 that -- and the fact is we went through trial
11:52:58 20 maintaining the position that he was not
21 guilty of the actions described in the
22 indictment, but that it was a sex-for-drugs
23 exchange, and he maintains that position. But
24 when all is said and done, Your Honor, what I
11:53:20 25 think, he's looking at the situation as 20

1 years back and what was happening when he was
2 18 years old and dealing with things that go
3 on, and that that is what is cemented in his
4 mind as what has happened.

11:53:38 5 I would like you to know that he's a
6 very kind man who has raised his family. He
7 has been working throughout this time. And
8 while he's had incidences with the criminal
9 justice system, they do -- it's not exactly --
11:53:57 10 that doesn't define who he is.

11 This incident happened in 1994, we
12 all wish it would have been pursued at that
13 time. I think it would have been better for
14 Ms. Roy, I think it would have been better for
11:54:13 15 Mr. Jenkins and Mr. Dickerson. Keeping that
16 in mind, I suggest strongly that the sentence
17 that Mr. Dickerson received would be
18 appropriate as relates to Mr. Jenkins, the
19 five years that was imposed moments ago. I
11:54:33 20 think it would be an appropriate sentence
21 given the circumstances here.

22 The punishment in this case is
23 relating to what happened in 1994 and not
24 later bad acts. There are no other sex
11:54:52 25 offenses, there are no other indications. He

)
1 knows he must pay a penalty for his actions,
2 but I would think that the same sentence would
3 be warranted in this case as well.

4 I would also like to note that my
11:55:09 5 recollection from the discovery that had been
6 provided in this case, while Ms. Roy's
7 testimony was Mr. Jenkins did threatening --
8 committed some threatening behavior in order
9 to have the charges not pursued back in 1994,
11:55:27 10 in the police report that was provided, the
11 description of the person is actually
12 Mr. Dickerson. Her testimony here, and she
13 said she wasn't a hundred percent sure, but I
14 would like you to know that back in 1994 the
11:55:42 15 description of the person was not Mr. Jenkins.

16 I don't believe that Mr. Jenkins had
17 anything to do with the delay. I do believe
18 that the State of Ohio is responsible for the
19 delay, and I agree with you and your
11:55:59 20 interpretation in the previous sentencing that
21 that is a cruel way to enforce the law. We
22 are addressing the behavior that occurred 20
23 years ago when this gentleman was a very young
24 man.

11:56:16 25 I know that he's sorry for everything

1 that happened. I know that he wishes he could
2 change that night, but I also believe, Your
3 Honor, that a five-year sentence would be
4 appropriate in this case as well.

11:56:30

5 THE COURT: Thank you,
6 Ms. Arbie-McClelland. I gather while within
7 all that you were also addressing 587645?

8 MS. ARBIE-McCLELLAND: We are, Your
9 Honor.

11:56:40

10 THE COURT: Mr. Jenkins, by
11 law, you are entitled, if you wish, to make an
12 allocution, which is a statement, before
13 sentence is imposed. Sentences, I should say.
14 So if you want to, now is the time to do it.

11:56:53

15 THE DEFENDANT: I would just
16 like to say --

17 THE COURT: And let me
18 interrupt, I'm sorry. Of course, this applies
19 to both cases.

11:57:02

20 THE DEFENDANT: I would like to
21 say that my heart goes out to Ms. Roy and the
22 things she went through in her life.

11:57:16

23 THE COURT: Thank you,
24 Mr. Jenkins, and again Ms. Arbie-McClelland,
25 Mr. Bokoch and Ms. Weston.

1 Mr. Jenkins, in imposing the
2 following sentence, I want you to know that I
3 have taken into account the written
4 presentence report dated December 17th, and I
11:57:26 5 have taken into account the court clinic
6 report that's already been mentioned here. I
7 have taken into account the plaintiff's
8 sentencing memorandum filed on December 19th.
9 I have taken into account my recollection of
11:57:42 10 all the evidence in this case from trial. I
11 have taken into account all the oral
12 statements made here today on the record in
13 your case. And I have considered all of the
14 pertinent sentencing laws of Chapter 2929 of
11:57:58 15 the Ohio Revised Code.

16 Having considered all of that
17 information, in Case Number 585521 on Count 2,
18 I'm going to order that you serve eight years
19 at the Lorain Correctional Institution; on
11:58:12 20 Count 4, I order you to serve eight years at
21 LCI; and on Count 5 you are ordered to serve
22 eight years at LCI.

23 In Case Number 587645, the drug case,
24 you are ordered to serve eight months at the
11:58:26 25 Lorain Correctional Institution.

1 These sentences are ordered to be
2 served concurrently with each other. Five
3 years post-release control is part of the
4 sentence in 585521, and three years PRC is
11:58:39 5 part of the sentence in 587645. As a
6 practical matter, you're going to be on PRC
7 for five years.

8 What this means is that upon your
9 release from prison you will be supervised by
11:58:51 10 an officer of the Ohio Adult Parole Authority
11 for five years. During those five years you
12 will have to report to the officer on a
13 regular basis, and if you fail to do so, you
14 could then be charged with escape, a new
11:59:02 15 felony.

16 During those five years you will have
17 conditions placed upon your conduct. If you
18 fail to follow them, then the conditions may
19 be made more onerous or your parole officer
11:59:15 20 may return you to prison without bringing you
21 to court for a total of up to four years.

22 Finally, if you are on post-release
23 control and you then commit a new felony, when
24 you are sentenced for the new felony you may
11:59:28 25 receive as punishment violating PRC an extra

1 prison term equal to the greater of one year
2 or the number of years you may have left on
3 post-release control.

4 You are entitled to a credit to date
11:59:42 5 on each sentence of 210 days in jail. That
6 amount is for the time from June 2nd through
7 today.

8 You must pay court costs. I don't
9 know the amount of the costs, but I estimate
11:59:56 10 them to be in the one case probably near a
11 thousand dollars, and the other case probably
12 around 300 bucks. Those are civil judgments
13 against you. No restitution has been sought,
14 hence that is not part of either sentence,
12:00:15 15 particularly in 585521.

16 I should comment, Mr. Jenkins, that
17 you do have a right to appeal in both cases.
18 Should you wish to appeal in either one or
19 both and find yourself unable to afford
12:00:32 20 appellate counsel, then appellate counsel will
21 be provided by the State, as well as the
22 papers to prosecute that appeal.

23 Is there something that I am required
24 to mention that I either omitted, or is there
12:00:45 25 something that one of the parties thought I

1 should have mentioned and would like it to be
2 discussed before we go off the record? I will
3 first ask the question to Ms. Weston.

4 MS. WESTON: No, Your Honor.

12:00:54

5 THE COURT: Second,
6 Mr. Bokoch?

7 MR. BOKOCH: No, Your Honor.

8 THE COURT: Third, Ms.
9 Arbie-McClelland?

12:00:57

10 MS. ARBIE-McCLELLAND: Your Honor, I
11 would respectfully request the costs be waived
12 in this matter. Mr. Jenkins is indigent. He
13 was found indigent at the time of his
14 arraignment and has maintained my office as
15 representation. Given this sentence, that is
16 going to continue, and we would just
17 respectfully request that costs be waived.
18 Secondly, we would ask that appellate counsel
19 be appointed in Case 585521 and transcript at
20 State's expense.

12:01:12

12:01:28

21 THE COURT: Do you have a
22 position on the motion to waive costs,
23 Ms. Weston?

12:01:40

24 MS. WESTON: I'll leave it to
25 the Court, Your Honor.

1 THE COURT: Mr. Bokoch?

2 MR. BOKOCH: Same, Your

3 Honor.

4 THE COURT: I think this is

12:01:54

5 a matter for the legislature. As it stands,
6 costs are to be imposed to the non-prevailing

7 party, the defendant. I recognize that in

8 some jurisdictions, as a matter of course,

9 costs are waived based on a claim of

12:02:18

10 indigency, yet the statute doesn't require
11 such a waiver. It seems to me the legislature

12 should definitively address whether costs

13 should or should not, as a matter of course,

14 be imposed on the losing defendant, even where

12:02:39

15 that defendant is said to be indigent.

16 So I thank the lawyers, I wish you
17 luck, Mr. Jenkins, and we are off the record.

18 MS. ARBIE-McCLELLAND: Thank you,

19 Your Honor.

20 (Thereupon, Court was adjourned.)

21 - - - -

22

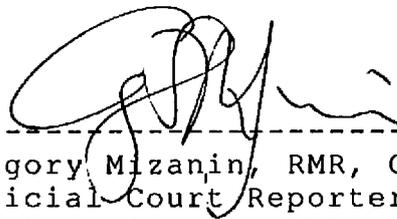
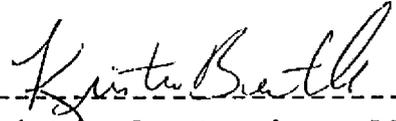
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C E R T I F I C A T E

We, Gregory Mizanin and Kristin Beutler, Official Court Reporters for the Court of Common Pleas, Cuyahoga County, Ohio, do hereby certify that as such reporter we took down in stenotype all of the proceedings had in said Court of Common Pleas in the above-entitled cause; that we have transcribed our said stenotype notes into typewritten form, as appears in the foregoing Transcript of Proceedings; that said transcript is a complete record of the proceedings had in the trial of said cause and constitutes a true and correct Transcript of Proceedings had therein.

 Gregory Mizanin, RMR, CRR
 Official Court Reporter
 Cuyahoga County, Ohio

 Kristin A. Beutler, RPR
 Official Court Reporter
 Cuyahoga County, Ohio

State v. Jenkins

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

November 5, 2015, Released; November 5, 2015, Journalized

No. 102462

Reporter

2015-Ohio-4583; 2015 Ohio App. LEXIS 4465; 2015 WL 6796810

STATE OF OHIO PLAINTIFF-APPELLANT vs. MICHAEL JENKINS DEFENDANT-APPELLEE

Subsequent History: Related proceeding at State v. Dickerson, 2016-Ohio-807, 2016 Ohio App. LEXIS 710 (Ohio Ct. App., Cuyahoga County, Mar. 3, 2016)

Prior History: **[**1]** Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-14-585521-B.

Disposition: AFFIRMED.

Counsel: FOR APPELLANT: Timothy J. McGinty, Cuyahoga County Prosecutor, Daniel T. Van, Assistant County Prosecutor, Cleveland, OH.

FOR APPELLEE: Patrick S. Lavelle, Van Sweringen Arcade, Cleveland, OH.

Judges: BEFORE: Stewart, J., Jones, P.J., and Blackmon, J. LARRY A. JONES, SR., P.J., and PATRICIA ANN BLACKMON, J., CONCUR.

Opinion by: MELODY J. STEWART

Opinion

JOURNAL ENTRY AND OPINION

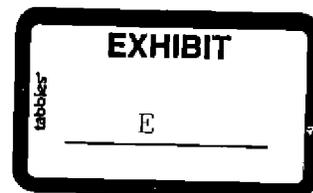
MELODY J. STEWART, J.:

[*P1] A jury found defendant-appellee Michael Jenkins guilty of rape, complicity to commit rape, and kidnapping. Although the offenses occurred in 1994 (at a time when the sentencing law provided for indefinite sentencing), the court

imposed definite sentences under the current sentencing regime, Am.H.B. No. 86, effective September 30, 2011. The court imposed a sentence consistent with a line of decisions from this court holding that R.C. 1.58(B) allowed defendants like Jenkins, whose crimes were committed before the effective date of H.B. 86, to be sentenced under that statute's sentencing provisions because the penalties for rape under H.B. 86 had been reduced from those penalties in effect at the time he committed his crimes (in 1994, the **[**2]** maximum penalty for rape was up to 25 years; under H.B. 86, the maximum penalty is 11 years). See State v. Jackson, 8th Dist. Cuyahoga No. 100877, 2014-Ohio-5137; State v. Girts, 8th Dist. Cuyahoga No. 101075, 2014-Ohio-5545; State v. Steele, 8th Dist. Cuyahoga Nos. 101139 and 101140, 2014-Ohio-5431.

[*P2] The state of Ohio appeals, arguing that the court erred by ordering a definite term of incarceration because Jenkins should have been subject to a indefinite sentence under the sentencing law as it existed at the time Jenkins committed his offenses. The state candidly acknowledges that it is arguing contrary to controlling authority from this appellate district and that it offers this assignment of error solely to preserve further appellate review. On that basis, we summarily overrule the state's assignment of error. See State v. Hill, 8th Dist. Cuyahoga No. 101633, 2015-Ohio-2389, ¶ 13, 37 N.E.3d 822; State v. Bryan, 8th Dist. Cuyahoga No. 101209, 2015-Ohio-1635, ¶ 5; State v. Irby, 8th Dist. Cuyahoga No. 102263, 2015-Ohio-2705, ¶ 5.

[*P3] Judgment affirmed.



It is ordered that appellee recover of said appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

MELODY J. STEWART, JUDGE

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

PATRICIA ANN BLACKMON, J., CONCUR

State v. Dickerson

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

March 3, 2016, Released; March 3, 2016, Journalized

No. 102461

Reporter

2016-Ohio-807; 2016 Ohio App. LEXIS 710

STATE OF OHIO,
PLAINTIFF-APPELLANT/CROSS-APPELLEE
vs. OSCAR DICKERSON,
DEFENDANT-APPELLEE/CROSS-APPELLANT

[*P1] In May 2014, defendant-appellee/cross-appellant, Oscar Dickerson, was indicted on several counts stemming from a July 1994 rape allegation and associated crimes.¹ In July 2014, by agreement of the parties, trial was set for August 27, 2014. However, upon Dickerson’s motion, the trial date was reset for November 12, 2014. On November 5, 2014, Dickerson filed a motion to dismiss based on preindictment delay; the motion was denied as untimely.

Prior History: [**1] Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-14-585521-A.

State v. Jenkins, 2015-Ohio-4583, 2015 Ohio App. LEXIS 4465 (Ohio Ct. App., Cuyahoga County, Nov. 5, 2015)

Disposition: VACATED.

Counsel: FOR APPELLANT/CROSS-APPELLEE: Timothy J. McGinty, Cuyahoga County Prosecutor; Daniel T. Van, Mary Weston, Assistant County Prosecutors, Cleveland, Ohio.

FOR APPELLEE/CROSS-APPELLANT: Patricia J. Smith, Streetsboro, Ohio.

Judges: BEFORE: Jones, A.J., Stewart, J., and Blackmon, J. PATRICIA ANN BLACKMON, J., CONCURS MELODY J. STEWART, J., DISSENTS WITH SEPARATE OPINION.

Opinion by: LARRY A. JONES, SR.

Opinion

JOURNAL ENTRY AND OPINION

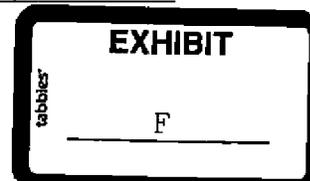
LARRY A. JONES, SR., A.J.:

[*P2] The case proceeded to a jury trial, [**2] and after its deliberations, the jury convicted Dickerson of one count each of rape, complicity, and kidnapping. The trial court sentenced Dickerson to an aggregate five-year sentence. The sentence was imposed under the current sentencing regime, Am.H.B. No. 86, which became effective on September 30, 2011.

[*P3] Plaintiff-appellant/cross-appellee, the state of Ohio, has appealed, contending that the trial court erred by ordering a definite term of incarceration under the present sentencing regime because Dickerson would have been subject to an indefinite sentence under the sentencing regime as it existed at the time he committed the offenses.

[*P4] Dickerson has cross-appealed, contending that the trial court erred in denying his motion to dismiss; he also contends that his trial counsel was ineffective for not timely filing it. Further, Dickerson contends that the evidence was insufficient to support his convictions.

¹ A codefendant, Michael Jenkins, was also indicted and jointly tried with Dickerson. He appealed, raising the same assignment of error as Dickerson relative to sentencing. His sentence was affirmed. State v. Jenkins, 8th Dist. Cuyahoga No. 102462, 2015-Ohio-4583.



[*P5] For the reasons set forth below, we find merit to Dickerson's ineffective assistance of counsel claim, and vacate his conviction under it. The state's assignment of error is therefore moot.

I. Facts

[*P6] The following facts were elicited at trial. The victim, J.R., testified that on [**3] the date of the incident, July 2, 1994, she was 16 years old. That day and into the evening, she had been with her boyfriend at his house. J.R. testified that her family life was troubled at the time, and she was "living recklessly."² She testified that on the day in question, she had been drinking and smoking marijuana and was under the influence. She left her boyfriend's house sometime after midnight to walk an approximate 40-minute walk to her home, where she lived with her mother and siblings; her boyfriend walked her part of the way home.

[*P7] J.R. testified that after her boyfriend left her, and while walking alone, a car, with three males inside, approached her while she was on West 140th Street in Cleveland. She was near her home at that time; her house was approximately an eight- to ten-minute walk, or a four-minute run, away.

[*P8] The males in the car called out to her as the [**4] car drove past her. The driver then "circled back" a few times. J.R. testified that she "waved them off." However, as she approached Puritas Road, the car pulled over by a library. The victim testified that inside the car there were two younger black males, and one older white male, who was driving the car; she denied knowing any of them.

[*P9] J.R. testified that she walked off the sidewalk and tried to cut through an open area to avoid the men, but one of the males got out of the car. She stopped walking while the man approached her. The male offered her a ride home,

which she declined, but when he persisted, she, "not thinking," got in the car. J.R. testified that she accepted the ride because she was scared. It was approximately 1:30 a.m. when she got in the car.

[*P10] Once in the car, she told the men where she lived, but the driver drove the car past her street. The victim testified that she protested, but the men ignored her. They eventually arrived at a hotel.

[*P11] J.R. testified that the car was parked in a manner so that the hotel clerk could not see that she was in the car. The white male went into the hotel to rent a room, while the two black males stayed in the car with her. When the white [**5] male returned, the two black males walked J.R. into the hotel through a back entrance, and took her to a room. Meanwhile, the white male had driven off. Records indicate that the white male, later identified as Jerry Polivka, rented the room at approximately 4:42 a.m. The victim was unable to recall what had happened between 1:30 a.m. when the males picked her up until 4:42 a.m. when the room was rented.

[*P12] J.R. testified that she tried to think of a way to get out of the situation. She asked to go outside to smoke a cigarette, hoping to escape, but one of the males went with her and even gave her crack cocaine to put on the end of her cigarette; she smoked the cigarette with the crack on it to "numb" herself for what she believed "was going to happen" so that she would not remember it. The victim testified that she was never left alone during the whole incident. One of the males told J.R. that his name was "Mike" and the other said he went by "O"; the victim testified that "O" said his real name was "Oscar."

[*P13] After J.R. finished smoking, she and the male went back into the hotel room. J.R. went into the bathroom, and "Mike" followed her. J.R.

² At the time of this incident, J.R. had been adjudicated unruly and was on probation. Her father had been imprisoned for sexually molesting her, but, as J.R. testified, "[t]hanks to the old law and shock parole," he had been released early. He was not living with J.R. and her family at the time of this incident, however.

testified that "Mike" began to take her clothes off, and she "weakly" protested, but "he wasn't hearing what [she] said." She told him that she could not have sex because she had a boyfriend and she might be pregnant. The victim testified that after telling "Mike" about having a boyfriend and possibly being pregnant, she "just kind of went dead; [she] put her mind in another place and * * * didn't respond or talk; [she] didn't do anything." J.R. testified that "Mike" then vaginally raped her. She testified that, although she had tried to push "Mike" away, she did not hit or kick him, or scream, because she feared that she would make the situation worse and he would hurt her if she fought back.

[*P14] J.R. testified that after "Mike" raped her, she put her clothes back on, and returned to the living area of the hotel room, unsure about what she should do next. There were not any lights on in the room, and the only illumination was from the television, which was on. "O" was in the living area, and he took her clothes off and vaginally raped her on the bed. The victim testified that she did not say anything during the rape, but she was crying. She explained that, like with the encounter with "Mike," she "just tried to kind of put [her] mind [**7] in a different place, and * * * didn't fight or hit or kick or any of those things." J.R. testified that although she cried during the rape, because the room was mainly dark, "O" might not have known she was crying.

[*P15] After "O" raped her, J.R. went to the bathroom again. "Mike" followed her and vaginally raped her again. "Mike" told her to "wash up, get comfortable because you are going to be here for a while." "Mike" left the bathroom and J.R. stayed in the bathroom to wash up and get her clothes back on. She testified that she believed she took a shower, although neither man had specifically directed her to do so.

[*P16] When she returned to the living area, it appeared that both males were asleep. She watched them for a little bit, to make sure they were asleep,

and after she decided that they were, she escaped. J.R. testified that she ran from the hotel to her home. Once inside her home, she attempted to "run upstairs to the bathroom," but her mother, who was angry, confronted her and demanded to know where she had been. J.R. told her mother what had happened.

[*P17] Her mother testified to a different version of events, however. According to her mother, she was sitting out on the front porch [**8] enjoying the nice weather when J.R. returned home sometime between 8:00 a.m. and 9:00 a.m. J.R. did not appear to be intoxicated when she returned home, but she looked "somber and broken"; her mother testified that she had never seen her like that before.

[*P18] Because of the mother and J.R.'s "very troubled relationship," usually when J.R. would come home after having been out all night, she would avoid her mother and just run to her room or go to get something to eat. But her mother testified that this time J.R. came and sat down with her on the front porch and looked like she wanted to talk. The mother testified that she (the mother) "just sat there and * * * looked at her, and she told me what had happened the previous night." J.R. and her mother immediately reported the incident to the police.

[*P19] Officer William Neider ("Officer Neider") of the Cleveland Police responded to the home. J.R. gave Officer Neider a description of "O" and "Mike," and told him where the incident had occurred, even giving him the room number at the hotel. The officer advised J.R. to go the hospital, and he and his partner went to the hotel to investigate.

[*P20] When the officers arrived at the hotel, an employee took [**9] them to the room, and knocked and announced that if the door was not opened she would unlock it. After receiving no response, the employee unlocked the door. The two suspects, "O" and "Mike," were inside

sleeping. The police awakened and arrested them. They were startled, but cooperative. The police learned that Jerry Polivka was the man who had driven them to the hotel and rented the room.

[*P21] Meanwhile, at the hospital, J.R. told the emergency room nurse who treated her that she had been "pushed around" and raped by two males at a hotel. Specifically, J.R. said that as she was walking home, the men approached her and invited her to a party at a hotel, which she declined. Upon declining, the "men grabbed her arm and pushed her into the back of the car."

[*P22] J.R. told the nurse that the sexual assaults included both vaginal and oral intercourse, and told the nurse that she "choked and gagged" after the oral intercourse. She also told the nurse that one of the men attempted anal intercourse, but she screamed and he stopped. J.R. testified that she was honest with the nurse, and that the discrepancies with what she told the nurse vis-a-vis her trial testimony was due to her not remembering everything [**10] at trial because of the passage of time, during which she tried to forget the whole event.

[*P23] The nurse noted in her report that J.R. was "moderately tearful," "moderately calm," with no signs of acute distress. The nurse noted, however, that the victim was apprehensive during the pelvic exam and would "jump" when she was touched. The victim told the nurse that the first man had vaginal intercourse with her and the second man had oral intercourse with her. According to the nurse, J.R. did not appear to be intoxicated. A pregnancy test taken at the hospital revealed that J.R. was not pregnant at that time.

[*P24] When she was finished at the hospital, J.R. and her mother went to the justice center where they met with a female detective. J.R. testified that the detective was "very rude," and gave her opinion of the incident. Feeling humiliated, J.R. told the detective to "forget it if

she wasn't going to help." However, her mother testified that they were "[t]reated with respect [and] taken seriously" during their meeting with the detective. The detective marked the file with code words indicating that no further investigation was to be had.

[*P25] A few days after the rapes, J.R. was walking to her boyfriend's [**11] house when "Mike" pulled up alongside her. The victim testified that he was "angry," "threatened her," and "forced" her to sign a note recanting the incident. J.R. signed the note, but then immediately reported the incident to the police. The police made an intimidation report, but, according to J.R., never followed up with her. J.R. testified that she just wanted to "get on with her life." Shortly after the incident, J.R. learned that she was pregnant and, as her mother testified, J.R. "started focusing on being excited about having a baby."

[*P26] In August 2012, the victim's rape kit was sent out for testing as part of the attorney general's sexual assault kit testing initiative. Dickerson's DNA was on a vaginal swab and Jenkins's DNA was on clothing J.R. had been wearing the day of the incident. The case was reopened and assigned to Detective Timothy Clark ("Detective Clark"), who had not originally been involved in the case. J.R. was contacted by Detective Clark. She was shown a photo array, and picked Jenkins as one of the perpetrators, but did not pick Dickerson. In 2014, Dickerson was indicted. Polivka, the driver on the evening in question, was deceased at the time of indictment. [**12]³

[*P27] On this evidence the jury found Dickerson guilty of one count each of rape, complicity, and kidnaping. The trial court sentenced him to a five-year prison term under the present sentencing regime. The state presents the following assignment of error for our review: "Because Defendant-Appellee committed his offenses prior to July 1, 1996, the trial court erred when it

³ The record does not indicate exactly when Polivka died, but Jenkins's counsel indicated that she believed it was in 2007.

sentenced Defendant-Appellee under sentencing provisions effective July 1, 1996 and H.B. 86 provisions effective September 30, 2011.”

[*P28] In his cross-appeal, Dickerson presents the following three assignments of error for our review:

[I.] The trial court erred when it failed to dismiss the case for pre-indictment delay.

[II.] Trial counsel provided ineffective assistance of counsel for failing to timely file a motion to dismiss for pre-indictment delay.

[III.] The state failed to meet its burden where there was not sufficient evidence of force or threat of force to sustain a conviction for rape, complicity to rape, and kidnapping pursuant to [R.C.] 2907.02(A)(2), 2905.01(A)(4) and 2923.03(A)(2).

II. Law and [*13] Analysis

State’s Appeal Moot

[*P29] For the reasons set forth below, we find merit to Dickerson’s appeal, which renders the state’s assignment of error moot. We therefore overrule the state’s sole assignment of error.

Dickerson’s Appeal

Preindictment Delay and Ineffective Assistance of Counsel

[*P30] Dickerson’s trial counsel filed a motion to dismiss based on preindictment delay on November 5, 2014, one week before the case went to trial. The trial court denied the motion as untimely. In his first assignment of error, Dickerson contends that the trial court erred in denying his motion. In his second assignment of error, Dickerson contends that his counsel was ineffective for not timely filing the motion.

[*P31] *Crim.R. 12* governs pretrial pleadings and motions in criminal cases. The rule provides that

pretrial motions “shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.” *Crim.R. 12(D)*. Dickerson was arraigned on June 6, 2014, and therefore, under *Crim.R. 12(D)*, his motion to dismiss should have been filed in July 2014.

[*P32] We consider whether, in the interest of justice, the trial court should have extended [*14] the time for the filing of the motion to dismiss. The trial court’s decision whether to permit leave to file an untimely pretrial motion is within its sound discretion. *Akron v. Milewski*, 21 Ohio App.3d 140, 142, 21 Ohio B. 149, 487 N.E.2d 582 (9th Dist.1985). Our review is, therefore, limited to whether the trial court abused its discretion in rendering its decision. *Id.* An abuse of discretion suggests the trial court’s decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (1983). When applying an abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993 Ohio 122, 614 N.E.2d 748 (1993).

[*P33] The trial court questioned Dickerson’s counsel about the untimeliness of his motion. Counsel responded that he had just recently learned that the driver, Jerry Polivka, was deceased. He also stated that he filed his motion based on a then-recent decision from this court, *State v. Mack*, 8th Dist. Cuyahoga No. 100965, 2014-Ohio-4817, appeal not accepted, 143 Ohio St. 3d 1480, 2015--Ohio-3958, 38 N.E.3d 901.

[*P34] The assistant prosecuting attorney responded that the defense was advised of Polivka’s death in the state’s initial discovery response. The court responded that *Mack* did not change the law on preindictment delay, a finding with which we agree, and moreover, that *Mack* was not even mentioned in the written motion to dismiss, another true finding. Defense counsel did

not dispute the [**15] state's claim that the defense was advised of Polivka's death at the early stages of this case.⁴

[*P35] On this record, we do not find that the trial court abused its discretion in denying the motion to dismiss as untimely. The first assignment is therefore overruled, and we next consider whether counsel was ineffective for failing to timely file the motion to dismiss.

[*P36] In order to successfully maintain an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance was deficient and that he was prejudiced by counsel's deficient performance; that is, there is a reasonable probability that but for counsel's unprofessional errors the result of the trial or proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), paragraph two of the syllabus. Thus, in order to be successful here, Dickerson must [**16] demonstrate that his trial counsel performed deficiently by failing to timely raise the claim he now presents, and that there was a reasonable probability of success had counsel timely presented that claim to the trial court. State v. Mack, 101 Ohio St.3d 397, 2004-Ohio-1526, 805 N.E.2d 1108, ¶ 31.

[*P37] Under some circumstances, the delay between the commission of an offense and an indictment can constitute a violation of due process of law guaranteed by the federal and state constitutions. United States v. Lovasco, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); United States v. Marion, 404 U.S. 307, 324, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); State v. Luck, 15 Ohio St.3d 150, 15 Ohio B. 296, 472 N.E.2d 1097 (1984), paragraph two of the syllabus.

[*P38] Courts apply a two-part test in considering whether preindictment delay constitutes a due

process violation. First, the defendant has the burden to show that he was substantially and actually prejudiced due to the delay. State v. Whiting, 84 Ohio St.3d 215, 217, 1998 Ohio 575, 702 N.E.2d 1199 (1998). However, "proof of actual prejudice, alone, will not automatically validate a due process claim" as "the prejudice suffered by the defendant must be viewed in light of the state's reason for the delay." Luck at 154, citing Marion. Thus, once the defendant establishes "actual prejudice," the second part of the test shifts the burden to the state to produce evidence of a justifiable reason for the delay. Luck at *id.* Thereafter, the due process inquiry involves a balancing test by the court, weighing the reasons for the delay against [**17] the prejudice to the defendant, in light of the length of the delay. State v. Walls, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 51.

[*P39] "The determination of 'actual prejudice' involves 'a delicate judgment based on the circumstances of each case.'" Id. at ¶ 52, quoting Marion at 325. Thus, prejudice is not presumed solely because of a lengthy delay. State v. Cope-land, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, ¶ 13. In determining whether a defendant suffered actual prejudice based on preindictment delay, courts have generally required a defendant to demonstrate that any missing evidence or lost witnesses were nonspeculative and exculpatory. *See, e.g., State v. McFeeture*, 2014-Ohio-5271, 24 N.E.3d 724, ¶ 119 (8th Dist.); State v. Clemons, 2013-Ohio-5131, 2 N.E.3d 930, ¶ 17 (8th Dist.); State v. Stricker, 10th Dist. Franklin No. 03AP-746, 2004-Ohio-3557, ¶ 36.

[*P40] In Luck, the Ohio Supreme Court evaluated the defendant's claim of actual prejudice as follows:

The prejudicial factors enumerated by defense counsel (the deaths of witnesses, the fading

⁴ The state initially provided the defense with discovery on June 12, 2014. That discovery included a photo identification of Polivka (as picked by the victim from an array), a March 2014 investigative report (which the state claimed reported that Polivka was deceased), and the initial police report. Further, Polivka was not listed as a witness whom the state intended to call at trial.

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 [**18] 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.

Id. at 157-158.

[*P41] The Ohio Supreme Court used its standard set forth in *Luck* again in *State v. Whiting*, 84 Ohio St.3d 215, 1998 Ohio 575, 702 N.E.2d 1199 (1998), and found that the defendant suffered actual prejudice by a 14-year delay in prosecution, when the defendant had been a suspect as a result of the initial investigation. Both *Luck* and *Whiting* were discussed in Dickerson's written motion to dismiss.

[*P42] Upon review, we find that counsel was deficient for not timely raising the issue of preindictment delay and that there was a reasonable probability of success had it been timely raised.

[*P43] Dickerson had a strong, viable claim of actual prejudice based in particular on the unavailability of Polivka. The victim got into the car with the defendants at approximately 1:30 a.m.; the hotel room was not rented by Polivka until approximately 4:42 a.m. The victim was completely unable to remember what had occurred in that time period between getting into the car and arriving at the hotel. This was of concern to at least one juror, who questioned, [**19] "[w]hat happened in the time period from 1:30 a.m. to 4:42 a.m.?"

[*P44] The state contends that Dickerson would not have been able to demonstrate prejudice relative to the unavailability of Polivka because if he were still alive, "he would have been indicted and would have been sitting next to [Dickerson] at the defense table for trial. In that situation, [Dickerson] would not have had a right to call Polivka as a witness at trial."

[*P45] During his testimony, Officer Neider stated that, although he had Polivka's name and an address for him, he did not attempt to contact him. A juror wondered about that, questioning "why wasn't the driver considered an accomplice on the commission of this crime or these crimes?" Neider answered, "because at the time his involvement as far as he went to the hotel, rented the room, gave the two black male suspects the keys, and he was no longer involved in the actual incident in the hotel. He left." We recognize that the police do not decide whether to indict, but, nonetheless, the testimony from the state's own witness does not support its contention.

[*P46] That aside, even if Polivka had been alive and indicted, the state's contention that Dickerson would not have been able [**20] to question him is purely speculation — it is possible that Dickerson could have had the opportunity to question Polivka. For example, if Polivka had been indicted, he certainly could have pled guilty to any charges and testified against Dickerson and Jenkins in hopes of consideration of his testimony at sentencing, in which case, Dickerson would have had the opportunity to cross-examine him. Thus, we are not persuaded by the state's logic.

[*P47] On this record, we find that Dickerson had a reasonable probability of success in demonstrating actual and substantial prejudice. To summarize, a key witness who was with the victim for a number of hours was unavailable, and the victim herself was unable to account for the time.

[*P48] Further, under the second part of the preindictment delay test, we find that Dickerson

would have had a reasonable probability of success on his motion given the state's reason for the delay. The state contends that the delay was investigative. We find that that argument reasonably could have failed for two reasons.

[*P49] First, the state contends that the Cleveland Police Department did not do DNA testing in 1994, so the "case would have gone to trial with no DNA evidence to [**21] corroborate the victim's claim that sexual activity occurred." It is true that a representative from the police department's lab testified that the department did not do DNA testing in 1994. But it is common knowledge that such testing was available at that time and thus, if the case had not been closed, the police department would have sent the evidence to an outside source for testing. Further, the representative testified that the department started doing DNA testing in either 1999 or 2000.

[*P50] Second, the state contends that the delay was investigative because it was unable to secure J.R.'s cooperation. The record here demonstrates that J.R. reached out to the police in the days after the incident by reporting the alleged instance of intimidation by "Mike." Despite that attempt by J.R., the state never did anything to further pursue the case. For all practical purposes, the state closed the case in 1994 after the victim's meeting with the detective immediately following the incident, and did not do any further investigation and, then, in 2014, with the same evidence it had in 1994, decided to commence its prosecution. As the Ohio Supreme Court warned, compiling evidence, but simply [**22] failing or refusing to take action for a substantial period of time, is not justifiable investigative delay. State v. Walls, 96 Ohio St.3d 437, 454, 2002 Ohio 5059, 775 N.E.2d 829 (2002).

[*P51] In light of the above, we find that counsel was deficient for not timely filing the motion to dismiss and that there was a reasonable probability that it would have been granted had it been timely filed.

[*P52] Further, although it was not decided at the time of the pretrial proceedings in this case, we note this court's recent en banc decision in State v. Jones, 8th Dist. Cuyahoga No. 101258, 2015-Ohio-2853, 35 N.E.3d 606. In *Jones*, this court analyzed a claim of preindictment delay under the "concepts of due process and fundamental justice," and found that under the circumstances presented in that case, the defendant suffered actual prejudice due to a nearly 20-year preindictment delay. *Id.* at ¶ 47.

[*P53] In *Jones*, the identity of the defendant was known immediately after the alleged crime. Here, Dickerson was arrested right after the crime, but was released. Thus, the testing of the DNA evidence years later in *Jones* and in this case did nothing to "advance the case," in terms of identifying the perpetrator. *Id.* at ¶ 42. Further, as was the case in *Jones*, Dickerson contends that, because of the years delay in prosecuting the case, a key witness was unavailable. [**23] Specifically, here, Polivka, the driver, was deceased. Moreover, the hotel clerk was no longer available.

III. Conclusion

[*P54] Having found that trial counsel was ineffective by not filing a timely motion to dismiss on the ground of preindictment delay, the conviction against Dickerson is vacated. Dickerson's first assignment of error is overruled, and his third assignment of error is moot. The state's assignment of error is moot and therefore overruled.

[*P55] Case remanded to the trial court to vacate appellant's conviction.

It is ordered that appellee/cross-appellant recover of appellant/cross-appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

PATRICIA ANN BLACKMON, J., CONCURS
MELODY J. STEWART, J., DISSENTS WITH SEPARATE OPINION

Dissent by: MELODY J. STEWART, J.

Dissent

MELODY J. STEWART, J., DISSENTING:

[*P56] I disagree with the majority that Dickerson met his burden of proving actual prejudice for his claim of preindictment delay. Dickerson's [*24] two arguments for actual prejudice are that Polivka was an essential defense witness who was unavailable to testify at the time of trial because of his death, and second, that the victim has faded memories. Dickerson has altogether failed to inform the court what Polivka would have testified to at trial, let alone explain how that testimony would have been beneficial to him such that a jury would have likely acquitted him. Indeed, according to the victim's testimony, Polivka left soon after paying for the motel room and was not present at any time during the alleged rapes. Therefore, it is difficult to conclude anything other than that

Polivka's testimony would have been completely irrelevant to the findings of guilt on the rape charges.

[*P57] Polivka's testimony might have been relevant to the kidnaping counts because the state argued that the kidnaping derived from the fact that the men deceived J.R. by luring her into their vehicle with the promise of giving her a ride home. However, there is nothing in the record that indicates what Polivka might have said and therefore any exculpatory testimony he might have given is entirely speculative. As the majority acknowledges *supra* at ¶ 39, [*25] mere speculation as to what a witness might have said, without more is insufficient evidence of prejudice. Accord State v. Owens, 8th Dist. Cuyahoga No. 102276, 2015-Ohio-3881, ¶ 4 (stating, "this court has made it clear that speculation does not show actual prejudice[.]" citing State v. Thomas, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415, ¶ 11; State v. McFeeture, 2014-Ohio-5271, 24 N.E.3d 724, ¶ 120 (8th Dist.)).

[*P58] Furthermore, Dickerson fails to explain how the victim's faded memories prejudiced him. At trial, the victim could not remember a three-hour interval between the time when she got into the car and when she arrived at the motel. If anything, the victim's faded memory was more harmful to the state. I therefore dissent from the decision to vacate Dickerson's conviction.