

**IN THE SUPREME COURT OF OHIO
CASE NO. 2015-1427**

STATE OF OHIO,	}	
	}	
Plaintiff-Appellant,	}	ON APPEAL FROM THE CUYAHOGA
	}	COUNTY COURT OF APPEALS
	}	EIGHTH APPELLATE DISTRICT
v.	}	
	}	
DEMETRIUS JONES,	}	COURT OF APPEALS CASE NO. 101258
	}	
	}	
Defendant-Appellee.	}	

**MERIT BRIEF OF APPELLEE
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STATEMENT OF THE CASE AND THE FACTS¹

When Detective King of the Cleveland Police Sex Crimes Unit got the report about the alleged rape of S.W. on September 1, 1993, he had a wealth of information. The complainant had been picked up by the police at her home, in the company of her mother, and transported to St. Luke's Hospital, where a rape kit was performed. S.W. told the police that Demetrius Jones had asked her to meet him at his mother's apartment. According to her, when he got there, he took her into her mother's bedroom and raped her, while his mother, Patricia Watkins, was sitting outside in the living room. S.W. told the police that she had screamed loudly, but Ms. Watkins did not intervene. She identified Jones and Watkins by name, and provided the address where the assault allegedly took place. (Joint Exhibit 1.)

This is what Detective King did in his investigation of the crime:

- He made a notation in the file that he attempted to contact S.W. at her home, but that it was a "bad address."
- He made a notation that he attempted to contact her by phone – the number isn't listed on the report – but was unable to reach her.

This is what he did not do:

- Anything else.

He made no further effort to reach S.W. He did not contact the officers, who had picked up S.W. at her home. He did not attempt to contact S.W.'s mother, who had accompanied her to the hospital, although her presence was indicated in both the police report and the medical

¹ The record consists of the transcript of the Grand Jury proceedings, which will be designated as "Grand Jury #," the transcript of the hearing on the motion to dismiss the indictment, which will be designated as "Motion #," and the exhibits introduced at the motion hearing.

records, her address was also provided on the report. He did not go to the scene; no pictures were taken of the room where the incident allegedly occurred. He did not talk to Jones, or to Watkins. S.W. claimed that her clothing had been ripped; he made no attempt to retrieve them from the hospital. He did not attempt to interview any neighbors in the apartment building to see what they might have heard or observed. After making two brief attempts to contact S.W., he closed out the file five days after he got it, his entire “investigation” into the most serious crime in the Revised Code other than murder consisting of twenty-eight words: “I responded to the address listed for the victim and found same to be a bad address. I attempted to contact the victim at number listed for same.” As the assistant county prosecutor abjectly acknowledged, “My understanding is [the police] made two attempts to locate her. And that is all they did.” (Motion 30.)

Nor did the police send out the rape kit. It was placed in a police evidence locker and sat there for over eighteen years, until someone finally sent it to the Bureau of Criminal Investigation for testing on September 23, 2011. The BCI conducted its analysis, and nearly a year later sent a report to the Cleveland Police, telling them what they’d known all along: that Demetrius Jones had engaged in sexual activity with S.W. on September 1, 1993.

Almost a year after that, the prosecutor’s office finally submitted the case to the grand jury, one day before the statute of limitations was set to expire. The only witness was John Saraya, a special agent at BCI. (Joint Exhibit 4.) He recounted the information from the police report, inaccurately informing the grand jury that S.W. knew Jones only by his first name (Grand Jury 5); as mentioned, S.W. gave both the police and the hospital Jones’ full name. (Joint Exhibit 1, Joint Exhibit 6.) The grand jury returned with an indictment of rape and kidnapping later that day.

Patricia Watkins died on February 8, 2011, two and a half years before the indictment was returned. (Defendant's Exhibit D.)

After the customary motion practice and exchange of discovery, the defense filed a motion to dismiss for pre-indictment delay on December 2, 2013. After conducting a hearing, the trial judge granted the motion on April 4, 2014. The State appealed to the 8th District Court of Appeals, which affirmed the decision *en banc* on July 16, 2015. *State v. Jones*, 8th Dist. Cuyahoga No. 101258, 2015-Ohio-2853. The court subsequently certified that a conflict existed with its decision and that in *State v. Woods*, 10th Dist. Franklin No. 87AP-736, 1988 Ohio App. LEXIS 2967, 1988 WL 64003. This Court determined that no conflict existed, and dismissed the appeal. 143 Ohio St.3d 1541, 2015-Ohio-4633. The State also sought a jurisdictional appeal, which this Court granted. 143 Ohio St.3d 1542, 2015-Ohio-4633.

ARGUMENT

The jury's task in a criminal trial is to produce a reliable outcome. We do not want the routine acquittal of the guilty, and even less the routine conviction of the innocent. We want the jury to get it right.

And so we have constructed a system which we believe will allow the jury to produce an accurate verdict. We have rules to ensure the jury gets only reliable, relevant evidence. We have procedures – “cross-examination, the greatest engine ever invented for the discovery of truth” – intended to aid the jury in coming to the correct result. We have two adversaries presenting the evidence in support of their respective positions.

But the implicit premise of all this is that the jury will get as much information as we can provide. It is a universal truth that the more information one has in making a decision, the more

likely it is that one will make the correct decision. And so it is with juries. The less information they are given, the more they have to speculate on what missing witnesses or evidence would have shown, the less reliable the outcome of the trial will be.

The statute of limitations is the legislature's determination that at a certain point, so much information has been lost, through faded memories or missing evidence and witnesses, that the outcome of a trial would no longer be reliable. As the Supreme Court observed in *United States v. Marion*, 404 U.S. 307, 322-323, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), those statutes "specify[] a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."

But the statute of limitations is not the only bar to delayed prosecution. The courts have held that if a defendant can show actual prejudice from an unjustifiable delay in commencing prosecution, due process requires dismissal of the charges against him.

The sole issue in this case is what constitutes "actual prejudice." We submit that resolution of this question requires focusing on the jury process: has the jury been deprived of so much relevant information that its verdict is no longer reliable? We present the following proposition of law:

DEFENDANT-APPELLEE'S PROPOSITION OF LAW: A defendant has suffered actual prejudice as a result of the unreasonable delay in the commencement of prosecution when information material to the determination of guilt or innocence is lost, such that the loss would undermine confidence in the outcome of a trial. (State v. Luck, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984), followed.)

We will begin by examining the case law underpinning the concept of pre-indictment delay, and show that it conforms to the analysis we present here, the focus on the jury process.

We will show that the proposition we propose is consistent with prior case law, and

provides clear guidance to the courts below in considering the issue of pre-indictment delay.

Finally, we will demonstrate that the State's and amici's Propositions of Law are not supported by the case law they cite, nor do they present a cogent and coherent method of determining actual prejudice. We will show that Demetrius Jones suffered actual prejudice, and that the delay in his prosecution was completely unjustified.

I. The Case Law on Pre-Indictment Delay

A. Recognition of the right. The defendants in *United States v. Marion*, *supra*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), argued that the speedy trial provision of the Sixth Amendment required dismissal of the indictment against them, which was brought three years after the activities for which they were charged. The Court found that “the speedy trial provision has no application until the putative defendant in some way becomes an ‘accused,’” an event which occurred only when the defendants were indicted, a month before they filed their motion to dismiss. 404 U.S. at 313.

But the Court did not stop there. While acknowledging that the statute of limitations provided the main defense against delayed prosecution, the Court found that “the statute of limitations does not fully define the appellees’ rights with respect to the events occurring prior to indictment”; as the government conceded, the Fifth Amendment’s Due Process Clause would require dismissal if “the pre-indictment delay in this case caused substantial prejudice to appellees’ rights to a fair trial.” U.S. at 324. What might constitute “substantial prejudice” the Court left for another day; the defendants had not even alleged they had suffered any.

The Supreme Court considered the issue of preindictment delay for the next, and last, time six years later in *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752

(1977). That case did not provide an answer to what constitutes actual prejudice, either. After again acknowledging that the Due Process Clause guaranteed protection against delayed prosecution beyond that provided by the statute of limitations, the Court held that while *Marion* established that “proof of prejudice is generally a necessary but not sufficient element of a due process claim ... the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” U.S. at 789.

Lovasco thus established two requirements for a defendant seeking dismissal of the case against him on the basis of pre-indictment delay: he must demonstrate that he suffered actual prejudice from the delay, and that the delay was unjustifiable. The Court in *Lovasco* dealt only with the second issue, finding that the government’s reason for the mere eighteen-month delay – to conduct a full investigation before bringing charges – was not an unreasonable one, and did not “violate those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency.” 431 U.S. at 790 (internal citations and quotation marks omitted).

While both *Marion* and *Lovasco* held that the Due Process Clause required dismissal of the indictment if the defendant suffered “substantial” or “actual” prejudice from unjustified delay in initiating the prosecution, neither defined what those terms meant. In *Marion*, the defendants claimed no prejudice; in *Lovasco*, while the Court in *dicta* noted that the defendants had been “somewhat prejudiced” by the deaths of two witnesses, it did not reach that question because it found the delay completely justified.

B. The definition of “actual prejudice.” This Court first confronted the issue of pre-indictment delay in *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984). Luck was the suspect in the murder of Helen Marie Tietjen in 1967. The police interrogated Luck and

interviewed several other witnesses shortly after Tietjen's death, but then inexplicably sat on the case for the next fifteen years. Luck was finally indicted in 1983.

The court adopted the approach articulated in *Lovasco*, that "the prejudice suffered by the defendant must be viewed in light of the state's reason for the delay." O.St.3d at 153. The analysis of prejudice focused on a witness named Cassano, who died in the fifteen-year interim between the crime and the indictment. Luck told the police that Cassano was in the apartment at the time of the killing – in fact, the police originally considered him a suspect – and was "the one person who could have helped her." The court found that this, and the loss of all the witness interviews and statements, demonstrated actual prejudice.

This Court then moved to consideration of the reasons for delay. While *Marion* and *Lovasco* had talked only in terms of the delay being unjustifiable if it was intended to "gain a tactical advantage over the defendant," *Luck* expanded that to include "when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased." O.St.3d at 158. The court found that the delay in Luck's prosecution easily satisfied that standard.

The court also found actual prejudice from the fourteen-year delay in *State v. Whiting*, 84 Ohio St.3d 215, 1998-Ohio-575, 702 N.E.2d 1199: according to the lower court opinion, Whiting "offered evidence showing that witnesses to support his proffered alibi were no longer available. He also showed that some of the physical evidence that police obtained during the 1981 investigation were [sic] no longer available." *State v. Whiting*, 2d District Miami No. 96-CA-13, 1997 Ohio App. LEXIS 4165, 1997 WL 568018, at *2. The focus then shifted to the justification for the delay. The appellate court had held that while the State had the burden of

coming forward with reasons for the delay, the defendant still had the burden of proving it was unjustified. The Supreme Court reversed, reiterating that once the defendant established actual prejudice, the burden was on the State to prove the reason for the delay.

C. *The core concepts of pre-indictment delay.* From these cases, we can divine the following principles:

1. *The due process clause provides additional protections against delayed prosecution beyond that provided by the statute of limitations.*² As noted, the statute of limitations conclusively presumes that the defendant has been prejudiced if prosecution is delayed beyond a certain point, regardless of the reasons for the delay. Thus, a defendant claiming pre-indictment delay must show more than the statute provides. He cannot claim the mere passage of time or the fading of memories as grounds for dismissal, because the statute of limitations already takes that into account.

For that reason, courts have routinely denied motions to dismiss where the defendant relies “solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost.” *State v. Willis*, 7th Dist. Mahoning No. 95 C.A. 237, 1997 Ohio App. LEXIS 3153, 1997 WL 419613. Similarly, in *State v. Flickinger*, 4th Dist. Athens No. 98 CA 09, 1999 Ohio App. LEXIS 225, 1999 WL 34854, the court affirmed the denial of the motion to dismiss where the only prejudice claimed by the defendant was that “his memory as to the events surrounding the alleged offense has faded.”

² While Supreme Court was obviously referring to the Federal Constitution’s Due Process Clause, Ohio’s Constitution also provides that protection in Article I, Section 14. We join in the argument of *Amicus* Ohio Association of Criminal Defense Lawyers that this Court should decide this case under the Ohio Constitution, and incorporate that argument here.

The court reached the same result in *State v. Tullis*, 10th Dist. Franklin No. 04-AP-333, 2005-Ohio-2205, where the defendant contended only that “the delay made it difficult for him to locate and present relevant witnesses.” See also *State v. Copeland*, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, ¶14 (“Copeland did not allege any prejudice other than arguing a general presumption of prejudice based on the length of the delay”); *State v. Wade*, 8th Dist. Cuyahoga No. 90029, 2008-Ohio-4574, ¶47 (“Wade is not able to allege any prejudice other than arguing a general presumption of prejudice based on no more than a 14-month delay”); and *State v. Bolton*, 8th Dist. Cuyahoga No. 96385, 2012-Ohio-169, ¶30 (defendant’s only claim of prejudice was that “he could have already served a substantial portion of his sentence had he been indicted and convicted earlier”).

The lack of prejudice was also key to this Court’s latest pronouncement on pre-indictment delay, *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127. Adams contended that the death of a key witness prejudiced him. But that witness would have been a co-defendant; as the court observed, “[i]f anything, Landers’s absence at trial was a benefit to Adams’s defense because Landers had implicated Adams in the murder before he died.” ¶103. The problem was not that Adams failed to show *actual* prejudice, it was that he showed *no* prejudice. “Indeed, we find no evidence in the record that Adams was prejudiced by the passage of time prior to indictment.” ¶101.

But *Marion*, *Lovasco*, *Luck*, and *Whiting* establish that the statute of limitations does not provide the full extent of protections against delayed prosecution: if the defendant can show actual prejudice from unjustifiable delay, the Due Process Clause compels dismissal of the indictment.

2. *The focus of the Due Process Clause in the context of pre-indictment delay is the*

fairness of subjecting the defendant to trial. *Lovasco* perhaps states it best: the defendant suffering actual prejudice from unreasonable delay “violate[s] those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency.” 431 U.S. at 790.

3. *Actual prejudice is established by the absence of critical information – eyewitnesses, alibi witnesses, or other such evidence – lost as a result of the delay.* That “sense of fair play and decency” has governed the courts’ application of law on pre-indictment delay. While there are no hard and fast rules – even the death of a witness may not in itself demonstrate prejudice – the courts have focused on whether the delay has caused the loss of so much critical information that the trial result cannot be deemed fair.

That will not necessarily result in dismissal, because the justification for the delay must still be considered. In *United States v. Mills*, 704 F.2d 1553, 1557 (11th Cir. 1983), for example, the court found that the death of the person who had confessed to the murder for which Mills was charged was “genuinely prejudicial to preparation of [Mills’] defense,” but found the delay in prosecution justified. The court in *United States v. Lindstrom*, 698 F.2d 1154, 1158 (11th Cir. 1983) came to a similar conclusion, holding that while the death of two key witnesses constituted “a prima facie showing of prejudice,” the delay was occasioned by a “good faith ongoing investigation.”

Ohio courts have also concluded that the defendant has demonstrated actual prejudice when the loss of key evidence will result in an unfair trial. In *State v. Dixon*, 8th Dist. Cuyahoga No. 102335, 2015-Ohio-3144, Dixon had a parole violation hearing shortly after he was alleged to have committed a rape in 1993. At the hearing, Diamond, Dixon’s employer at the time, testified that he spoke to the alleged victim after the incident, and she told him that the sexual

encounter was “mutual with no force,” that she had “feelings for Dixon,” and that “if she could not have Dixon, no one would.” Despite the parole violation, the State waited until 2013, just prior to the expiration of the statute of limitations, to indict him. By that time, Diamond had died. The court found that “the unavailability of Diamond's testimony would greatly impair Dixon’s ability to create a defense.” ¶30.

The court in *State v. Winkle*, 7th Dist. Mahoning No. 12 MA 162, 2014-Ohio-895, also found that the delay in prosecution substantially prejudiced the defendant. Winkle was prosecuted for rape and gross sexual imposition against his daughter sometime between 1994 and 1996, and claimed to be prejudiced “due to the destruction or loss of many evidentiary records.” ¶2. In affirming the dismissal of the indictment prior to trial, the court found that Winkle had indeed “provided a wide array of potential evidence that is no longer available that he believes would have directly contradicted key aspects of the victim's story or could have provided an alibi ... Hospital records, invoices, tax records, personal calendars, employment records, medical equipment records had all been lost or destroyed during the delay in prosecution.” ¶24.

Since the evidence is lost, we have no way to tell whether every night during the alleged period of the crimes can be accounted for, or whether the evidence would have considerably narrowed the dates that need to be accounted for, greatly simplifying Appellee’s defense. Either way, the lost evidence appears to seriously affect Appellee’s ability to even create a defense. ¶27.

And, of course, we have this Court’s decisions in *Luck* and *Whiting*, where the indictments were dismissed because the court found actual prejudice from the death of key witnesses.

4. *The burden is on the State to show justification for the delay.* While *Marion* and

Lovasco spoke of unjustifiable delay occurring only if the government using it to gain a tactical advantage over the accused, *Luck* and *Whiting* have expanded that: an unjustifiable delay occurs “when the state, through negligence or error in judgment, effectively ceases the active investigation of a case.” *Luck, supra*, 15 Ohio St.3d at 158.

And a critical factor here is whether the belated prosecution was prompted by the discovery of new evidence. If the State proceeded on nothing more than it had at the time of the crime, the delay is not justifiable. In *Dixon*, as here, the State’s prosecution was triggered by the receipt of the CODIS hit. But in *Dixon*, as here, that provided no more information than the State already had: as the court explained in *Dixon*, identity was not at issue, since the State had been aware of that since Dixon’s appearance at the parole violation hearing twenty years earlier.

II. Application to the Facts

Appellee’s Proposition of Law comprehends the core ideas which lie at the heart of the doctrine of pre-indictment delay. It focuses on the key concept: whether so much critical information has been lost by the delay that it compromises the jury’s ability to render a reliable verdict. And it provides guidance to the lower courts by applying a standard with which they are already familiar, in the context of ineffective assistance and *Brady* claims: whether the lost evidence undermines confidence in the verdict.

The application of that standard to this case amply demonstrates that the trial court did not abuse its discretion in dismissing the indictment. This is not a situation where Jones is relying on nothing more than the fading of memories or the potential loss of evidence inevitably resulting from the prosecution of a crime which happened two decades ago. As the courts have consistently recognized, those factors are already taken into account in the statute of limitations.

A defendant must show more than that.

Jones has. Patricia Watkins was not simply *a* witness, she would have been a *critical* witness at trial, her testimony arguably as important as that of the alleged victim. She would have testified as to the relationship between Jones and S.W., a relationship that S.W. herself acknowledged substantially predated the incident. She would have testified to the incident itself: the presence or absence of a struggle, S.W.'s demeanor, confirmation or refutation of S.W.'s claim of screams and other resistance. The jury would have had the opportunity to evaluate the credibility of her testimony. If it found she was simply covering for her son, it would have discounted her testimony. On the other hand, if the jury found her credible, Jones' acquittal was all but assured. But her testimony was essential to a reliable outcome. When three people witness an event and only two of them testify, it is difficult to conceive how the jury could have come up with a reliable verdict in the absence of the third person's testimony.

It must be remembered that this was not the only evidence which was lost. The physical evidence – the condition of the bedroom where the incident occurred, whether S.W.'s clothes were ripped, as she claimed – all would have been critical in the jury's determination of whether a crime had occurred. The issue in this case was not whether sexual activity had occurred, but whether it had been consensual. *All* of the evidence material to that issue had been lost.

Conducting a trial when the defendant has been deprived of all of the evidence for his defense would indeed “violate those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency.”

Lovasco, supra, 431 U.S. at 790.

In this light, it is not surprising that this Court's decision in *Luck* is mentioned only in

passing in the briefs of the State and its amici.³ The similarities between *Luck* and this case are striking. The State argues here that it is not enough that Patricia Watkins died; Jones has to show precisely what she would have testified to. That same argument could have been made in *Luck*: we don't know what Cassano would have testified to, or what the interviews and statements would have shown. In fact, the court's observation in *Luck* could just as easily be applied to this case:

In the instant case, the state delayed prosecuting the defendant because of an alleged "error in judgment," which led to a halt in the Lakewood Police Department's active investigation of Tietjen's death. This investigation remained at a stand-still for approximately fifteen years. During that time, witnesses died, memories faded, and evidence was lost. When the state finally decided to commence its prosecution of the defendant herein, it did so without one shred of new evidence – its case being substantially the same as it had been since 1968.

That is exactly what happened here. The State had all the information it needed to prosecute Demetrius Jones on September 1, 1993: the allegations of S.W., the address where the crime allegedly occurred, and, contrary to the testimony of the BCI investigator in the grand jury hearing, Demetrius Jones' full name. This is not a case where the prosecution deferred indictment until it had completed its investigation; the misnamed "investigating" detective closed his file less than a week after getting the case, after having done no more than make minimal efforts to contact S.W. Even assuming that DNA evidence would have provided any significant evidence to support the State's case, the State allowed the rape kit to gather dust in its evidence room for over eighteen years before finally sending it out for testing.

Jones has established actual prejudice: the delay in his prosecution resulted in the

³ In fact, those briefs devote more time to an analysis of a blog post by this writer than to an analysis of the seminal Ohio Supreme Court decision on the subject of pre-indictment delay.

complete deprivation of any evidence with which he could defend himself. That delay was completely unjustifiable. A man may not have a right to a perfect trial, but he has a right to a fair one, and trying Demetrius Jones when the twenty-year unjustified delay in prosecution left him with no defense is simply not fair.

III. The Propositions of the State and its Amici

APPELLANT’S PROPOSITION OF LAW NO. 1: THE REASONS FOR THE DELAY IN BRINGING A PROSECUTION ARE NEVER EVIDENCE OF THE ACTUAL PREJUDICE TO THE DEFENDANT WHERE THE PROSECUTION IS COMMENCED WITHIN THE STATUTE OF LIMITATIONS.

The State and its amici begin by misconstruing the lower court’s opinion, claiming that the decision “abandon[s] prior legal precedent,” “permits courts to evaluate claims of pre-indictment delay prejudice based on ‘basic concepts of due process of [sic] fundamental justice,’” and “allows for courts to dismiss felony cases based on speculative and self-serving claims of the value of lost evidence or testimony.” State’s Brief at 8-9.

As the 8th District explained in a subsequent case, *State v. Owens*, 8th Dist. Cuyahoga No. 102276, 2015-Ohio-3881, ¶8, “[i]t would be a misreading of *Jones* to conclude that it abandoned the actual prejudice standard,” noting that “[t]he [*Jones*] court’s statement that claims of actual prejudice would be evaluated in terms of basic concepts of due process and fundamental justice was unremarkable because due process, upon which all claims of preindictment delay are based, is concerned with ‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’” citing *Lovasco, supra*. In short, *Jones*’ focus on due process and fundamental fairness is hardly surprising, given that the entire concept of pre-indictment delay is based on due process and fundamental fairness.

Nor is *Jones*' determination that the justification for the delay has to be considered in light of the actual prejudice suffered by defendant a novel proposition. In one of the main cases relied upon by the State, *State v. McFeeture*, 8th Dist. Cuyahoga No. 100434, 2015-Ohio-1814, ¶141, the court explained that after engaging in the two-step analysis – the existence of prejudice and the reasons for the delay – “the due process inquiry involves a balancing test by the court, weighing the reasons for the delay against the prejudice to the defendant, in light of the length of the delay.” Other courts have employed a similar analysis. *State v. Smith*, 8th Dist. Cuyahoga No. 100501, 2014-Ohio-3034, ¶25, (same); *United States v. Mays*, 549 F.2d 670, 678 (9th Cir. 1977) (“[t]he greater the length of the delay and the more substantial the actual prejudice to the defendant becomes, the greater the reasonableness and the necessity for the delay will have to be to balance out the prejudice”); *State v. Saxon*, 9th Dist. Lorain No 09CA009560, 2009-Ohio-6905, ¶9 (“court must then balance the actual prejudice to the defendant against the reasoning offered by the State to determine if dismissal is appropriate”).

Finally, whatever test *Jones* employed to determine actual prejudice is irrelevant at this point. The issue in this case is not the standard of actual prejudice employed in *Jones*, it is what this Court will articulate as that standard. That is the question for this Court to resolve. We have presented a standard which appropriately balances the State's power to prosecute with the defendant's right to defend. We now turn to the State's arguments in support of the standard it proposes.

APPELLANT’S PROPOSITION OF LAW NO. 2: IN ORDER TO PREVAIL ON A CLAIM OF PRE-INDICTMENT DELAY, A DEFENDANT MUST FIRST PRESENT EVIDENCE ESTABLISHING THAT HE WAS SUBSTANTIALLY AND ACTUALLY PREJUDICE. SUBSTANTIAL AND ACTUAL PREJUDICE REQUIRES THE DEFENDANT TO DEMONSTRATE THE EXCULPATORY VALUE OF LOST EVIDENCE OR TESTIMONY THAT IS SPECIFIC AND NON-SPECULATIVE.

AMICUS CURIAE PROPOSITION OF LAW: TO PREVAIL UNDER A THEORY THAT PRE-INDICTMENT DELAY VIOLATED DUE PROCESS, A DEFENDANT MUST FIRST SHOW ACTUAL PREJUDICE WITH SPECIFIC, CONCRETE ALLEGATIONS SUPPORTED BY THE EVIDENCE; VAGUE, SPECULATIVE, OR CONCLUSORY ALLEGATIONS DO NOT SUFFICE.

A. The State and its amici misconstrue the case law. The arguments of the State and its amici can be distilled to a single proposition: not only did Demetrius Jones have to show that his mother was dead, he had to prove precisely what her testimony would have been had she lived. The State’s effort to justify this contention begins with citation to a host of cases which it believes supports it. They do not, as even cursory scrutiny of the cases reveals.

For example, the State quotes from *State v. Adams, supra*, 144 Ohio St.3d 429, ¶103, for the proposition that “the death of a potential witness during the preindictment period can constitute prejudice, but only if the defendant can identify exculpatory evidence that was lost and show that exculpatory evidence could not be obtained by other means.” As explained earlier, the problem Adams had was not in his failure to specifically identify what the dead witness would have said, but to explain how the dead witness could possibly have helped him, since the witness had given statement implicating Adams in the murder. Here, Patricia Watkins was the sole witness who could have provided exculpatory evidence, and her testimony was not available from other means.

The State’s analysis of *Marion, supra*, is equally flawed. Again, the defendants’ problem

in *Marion* was not that they insufficiently demonstrated prejudice, it was that *they didn't claim any*: “[n]o specific prejudice was claimed or demonstrated,” U.S. at 310, the defendants instead relying solely on the delay.

The same problem prevails in the remainder of the cases the State relies upon. Some of them, such as *State v. Mizell*, 1st Dist. No. C-070750 and 070751, 2008-Ohio-4907, are irrelevant to the issue here; Mizell’s only claim of prejudice was that the later inclusion of a felonious assault charge might subject him to consecutive prison terms. The court found that “this argument only relates to how Mizell may have been prejudiced in a general sense by being charged with felonious assault, and it has no bearing on any prejudice he may have suffered as a result of the pre-indictment delay.” ¶40. Others, such as *State v. Ennist*, 8th Dist. Cuyahoga No. 90076, 2008-Ohio-5100, contain only generalized *dicta* about the necessity of showing prejudice. Ennist’s problem was not that his evidence of prejudice was insufficiently concrete, it was non-existent. “Other than merely speculating that witnesses’ memories may have faded, Ennist offers no evidence that his defense would be prejudiced at trial. Indeed, Ennist fails to point to one witness that would have assisted in his defense absent the [20-month] preindictment delay.” ¶28.

To be sure, there are cases which state that “proof of actual prejudice must be specific, particularized, and non-speculative,” such as *State v. McFeeture*, *supra*, 2015-Ohio-1814, a case upon which the State heavily relies. Again, though, the attempt to fit that into the framework of this case fails. McFeeture claimed first that the two medical examiners, Dr. Balraj and Dr. Miller, were no longer employed by the County Coroner’s office and did not testify at trial. But another doctor had performed the autopsy, “and was personally involved in the homicide investigation of the coroner's office. He provided lengthy testimony regarding both the change

and manner of death and was subject to extensive cross-examination.” ¶144. The opinion’s statement that “McFeeture claims prejudice but does not offer specific or particularized proof of actual prejudice resulting from the absence of Balraj and Miller from trial” is substantially broader than necessary; a statement more fitting to the facts would be that McFeeture did not offer *any* proof of actual prejudice.

The same can be said of McFeeture’s argument that the initial investigator, Detective Moore, had retired by the time of trial and didn’t testify. Unlike Patricia Watkins, Detective Moore had not been at the scene when the crime was committed, and could only relate what other witnesses had told him. The court found that “McFeeture does not demonstrate how any potential testimony would have been exculpatory or how his absence otherwise prejudiced her.”⁴ ¶145.

B. The proposition of the State and its amici is unworkable and inconsistent with the concept of preindictment delay. While the State bandies about words like “particularized” and “non-specific” as the demonstration of prejudice necessary to establish pre-indictment delay, application of those terms, particularly in the context of this case, would make such a demonstration impossible. Again, the State apparently contends that not only must Jones demonstrate that Patricia Watkins was present at the scene of the crime – which she was; the alleged victim, not Jones, places her there – but he must demonstrate what she would have testified to at trial.

The State is correct in asserting that we do not conclusively know what the evidence

⁴ Also noteworthy is that McFeeture never raised the issue of pre-indictment delay in the trial court, so it was reviewed for plain error.

would have been. We don't know if pictures of the apartment would have shown an absence of disarray in the bedroom, we don't know whether the alleged victim's clothes were indeed ripped, we don't know what the mother would've testified to.

Of course, the reason we don't know any of this is because of the utter indolence the Cleveland police displayed in "investigating" the alleged crime. One could hardly have expected Jones to take pictures of the apartment to disprove an accusation he had no idea would be made. One could hardly have expected Jones' mother to confide in her friends that her son didn't rape anyone, when the first time such an allegation was made came two years after she died. The reason we don't know what Patricia Watkins would have testified to is that the police, knowing that a crime was alleged and knowing that she was a witness to it, never bothered to interview her. And now the State argues that the abysmal failure of the police to do their job condemns Jones to stand trial without the evidence to defend himself. In essence, the State seeks to be rewarded for its own sloth.

The State's argument is not consistent with any concept of due process, nor is it consistent with this Court's own decisions. As noted, the same argument that the State makes here could have easily been applied to *Luck*: we don't know what Cassano would have testified to, we don't know what the interviews would have shown. The court there did not require Luck to demonstrate exactly how Cassano's testimony might have aided her, or to show what the witnesses said in their statements and interviews. It instead found that the death of a witness who would have provided critical testimony as to the crime rendered a trial unfair. So does the death of Patricia Watkins.

C. The State had no justifiable reason for the delay. As indicated earlier, once the defendant has established actual prejudice, the burden then shifts to the State to justify the delay,

and the prejudice is then balanced against the reasons for the delay.

The State and its amici make an oblique attempt to shoehorn this case into the holding of *Lovasco*, contending that “mere disagreement with a prosecutor’s decision about when to commence a prosecution” is insufficient to show an unjustifiable delay. Brief of *Amicus* Attorney General Mike DeWine, at 6. That certainly was a valid argument in *Lovasco*, where the prosecution had delayed indictment for a mere eighteen months while it completed the investigation of the crime.

But that could not be more different from what occurred in this case. The “investigation” here lasted all of five days, the detective closing the file after making two desultory efforts to contact the victim. *Eighteen years later*, the police sufficiently roused themselves to send out the rape kit, and then, when the DNA analysis was sent back to them a year later, the State deferred action for another year, finally indicting Jones 19 years and 364 days after he was alleged to have committed the crime.

If this is not an unjustifiable delay, one experiences great difficulty in imagining what would be.

D. The dismissal of an indictment because of prejudicial pre-indictment delay may be determined at the pre-trial stage. *Amicus* Attorney General makes one last argument which merits attention, that “the prejudicial effect of a pre-indictment delay should be evaluated only after trial.” Brief at 8.

Problems with this contention abound. First, it relies primarily upon a misrepresentation of the Court’s opinion in *Marion*. The phrasing in the Amici’s brief is as follows:

As the U.S. Supreme Court concluded when it first recognized a due process claim arising from pre-indictment delay, “[e]vents of the trial may demonstrate

actual prejudice,” **but a pre-indictment challenge before that time is generally** “speculative and premature.”

Brief at 9, quoting *Marion*, 404 U.S. at 326.

Here is the actual quote from *Marion*:

Events of the trial may demonstrate actual prejudice, **but at the present time appellees’ due process claims are** speculative and premature.

At the time of the Court’s ruling, of course, the defendants hadn’t alleged any prejudice, “rely[ing] only on potential prejudice and the passage of time,” at 323. In short, *Marion* wasn’t addressing the preferred “general” procedural posture of cases involving a challenge for pre-indictment, it was addressing the specifics of that case.

Amicus’ argument also suffers from the fact that in both *Luck* and *Whiting*, this Court upheld what amicus claims it shouldn’t have: dismissal of the indictment for prejudicial delay at the pretrial stage.

The final defect in amicus’ argument is both logical and practical. Essentially, amicus argues that the best way to determine the effect of missing evidence is to have a trial where the evidence is missing, or, to put it in the context of this case, the best way of determining whether Jones was prejudiced by the absence of any evidence with which to defend himself is to subject him to the ordeal of a trial in which he has no evidence with which to defend himself.

CONCLUSION

It is difficult to overstate the importance of this case. Thousands of rape kits from Cleveland still remain to be tested. The legislature has just extended the statute of limitations for rape to twenty-five years, and in cases where there is DNA evidence and the crime allegedly

occurred more than twenty-five years ago, to five years after the discovery of the DNA evidence.⁵ Defendants may find themselves called upon to defend themselves against a crime allegedly committed over a quarter century ago.

For most, it will not matter. The parade of horrors trotted out by the State and its amici, of thousands of rapists allowed to go free on nothing more than a sliver of supposed prejudice, is baseless, for two reasons. First, it ignores the fact that prejudicial pre-indictment delay becomes a factor only if there is some legitimate basis for claiming that the sexual activity was consensual. If not, the courts will “consider the delay in light of the other uncontroverted evidence presented of his guilt, namely the DNA evidence.” *State v. Leonard*, 8th Dist. Cuyahoga No. 98626, 2013-Ohio-1446, ¶¶27-P28. Moreover, “stranger rapes” rarely result in the identification of the defendant at the time, and so the State will have a valid argument that only the discovery of the DNA evidence allowed it to prosecute the case, and the delay in doing so was thus justifiable.

But it will matter to some. A defendant faced with the prospect of defending himself against an allegation lodged decades ago already faces heavy obstacles. If the charges had been filed immediately after the incident, a defendant would have had counsel, assigned or retained, who would have begun an investigation of the case, interviewing witnesses named by his client. The police investigation might have proved helpful as well; it could provide names of neighbors who indicated they saw or heard nothing consistent with a woman being raped, or other potential witnesses. Physical evidence – the complainant’s clothes, for example – can be examined to

⁵ The statute makes no exception for cases such as this one, where the defendant was identified at the time of the offense.

determine whether they are consistent with the allegation. The defendant can easily recall his whereabouts at the time of the alleged offense, assembling potential alibi evidence or witnesses.

None of this is possible where the defendant is haled into court to answer a decades-old charge, especially where, as here, there was no police investigation. The State can rely on the complainant's testimony and the DNA evidence to prove its case; the defendant has to sort through his faded memory to determine who or what might help him prove his, and then hope it is still around.

For the most part, there is no quarrel with this: that is what the courts have held the statute of limitations permits. But the courts have also held that, wholly separate from the statute of limitations, a defendant's right to due process is violated where he suffers actual prejudice from the government's unjustifiable delay in prosecuting him.

This Court held in *Luck* that the State's delay in prosecuting her was unjustifiable. That is the case here. This Court held in *Luck* that she suffered actual prejudice from the death of a critical witness. That is the case here.

For the foregoing reasons, Appellee respectfully prays the Court to affirm the judgment of the court below.

Respectfully submitted,

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SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellee Demetrius Jones was sent by ordinary U.S. mail, postage prepaid, to Brett Hammond and Daniel Van, Attorneys for Appellant State of Ohio, 1200 Ontario Street, 9th Floor, Cleveland, OH 44113; Eric E. Murphy and Samuel C. Peterson, Attorneys for *Amicus Curiae* Ohio Attorney General Michael DeWine, 30 East Broad Street, 17th Floor, Columbus, OH 43215; Rachel Lipman Curran, Attorney for *Amicus Curiae* Ohio State Prosecutor's Association and Hamilton County Prosecutor Joseph T. Dieters, 230 East Ninth Street, Suite 4000, Cincinnati, OH 45202; and Georgia E. Yanchar and Alexander B. Reich, 1405 East Sixth Street, Cleveland, OH 44114, Kevin P. Martin, 53 State Street, Boston, MA 02109, and Alexandra D. Valenti and Brigid M. Morris, 62 Eighth Avenue, New York, NY 10019, all attorneys for *Amicus Curiae* Joyful Heart Foundation, Aequitas: The Prosecutors' Resource on Violence Against Women, Rape Abuse Incest National Network, Ohio Alliance to End Sexual Violence, and National Alliance to End Sexual Violence, this 29th day of March, 2016.

/s/Russell S. Bensing
Russell S. Bensing