Supreme Court of Ohio Clerk of Court - Filed April 12, 2016 - Case No. 2015-1107

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO PLAINTIFF-APPELLEE **-vs-** **CHRISTOPHER ANDERSON** DEFENDANT-APPELLANT	**CASE NO.: 2015-1107** ON APPEAL FROM **MAHONING COUNTY** COURT OF APPEALS, **SEVENTH APPELLATE DISTRICT.** COURT OF APPEALS Case No. **11 MA 43**

STATE OF OHIO-APPELLEE'S ANSWER BRIEF

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Statement of the Case, Facts, and Introduction

In 2003, Defendant-Appellant Christopher Anderson was convicted of Murder and sentenced to 15 years to Life for murdering 22-year-old Amber Zurcher, who was strangled to death in her apartment on June 3, 2002. The Seventh District Court of Appeals previously summarized the facts that supported Defendant's initial conviction:

> In June of 200[2] (sic), Amber Zurcher was 22 years old, attended Youngstown State University and was working as a waitress. She also had a four-year-old child. At approximately 11:00 p.m. on the evening of June 2, 2003, Amber went to Chipper's Bar in Youngstown. (11/18/03 Tr., p. 472.) A number of her friends and acquaintances were there, including John Orosz, a friend who grew up in the same home as Amber but was not actually related to her. John Orosz owned a pizza shop near Chipper's Bar, and he went from the pizza shop to the bar a number of times in the course of the evening. The following people were also at Chipper's Bar that night: Sandy Shingleton, a close friend of Amber's; Lynn Sanisteven, sister of Sandy Shingleton; Vivian Campati, a fairly recent acquaintance of Amber's; Anthony (Tony) Loibl, a friend from Amber's high school days; and Dino Socciarelli, another friend of Amber's. [Defendant] was at the bar as well.
>
> After the bar closed, all the aforementioned people went to Amber's apartment, located at 1031 Compass West, in Austintown. (11/18/03 Tr., p. 565.) They continued drinking, and some of them became extremely intoxicated during the evening. Some of the people were smoking marijuana. At approximately 2:30 a.m., John Orosz, Lynn Sanisteven, and [Defendant] left the apartment to go to Orosz's pizza shop. (11/18/03 Tr., p. 405.) According to Orosz, the three of them made pizzas and sandwiches, delivered some pizzas to the west side of Youngstown, and then returned to Amber's apartment. (11/18/03 Tr., p. 405.) After this, various people began leaving the party. Dino and Vivian left first. (11/18/03 Tr., pp. 523–524.) Tony and Lynn left together sometime later. At that point, Amber was in the apartment with John Orosz, Sandy Shingleton and [Defendant]. Sandy was asleep in the bedroom while the other three sat and talked in another room.
>
> At approximately 3:50 a.m. the three remaining guests—John Orosz, Sandy Shingleton and [Defendant]—left Amber's

apartment. (11/18/03 Tr., p. 408.) Orosz gave Amber a hug, locked the door from the inside, closed the door, and checked to see that it was locked. (11/18/03 Tr., p. 410.) Orosz testified that Amber was fully clothed at the time he left. (11/18/03 Tr., p. 410.) Orosz, Shingleton and [Defendant] then left in [Defendant]'s car. [Defendant] drove the short distance to Orosz's pizza shop, and dropped off the two passengers. (11/18/03 Tr., p. 425.) [Defendant] drove away, and Orosz did not know his destination. (11/18/03 Tr., p. 425.)

Later that morning, Amber's mother (Diane Whiteman) was concerned that Amber had not picked up her son. Amber was scheduled to pick up her son at 6:00 a.m. After a number of unsuccessful attempts to reach her by phone, Ms. Whiteman went to Amber's apartment. She obtained a key from the apartment manager, entered the apartment, and found her daughter dead, lying naked on the floor near the door. She immediately called the police. Later investigations did not find any signs of forced entry into the apartment, and the apartment did not appear to have been robbed. (11/18/03 Tr., p. 569.)

There were ligature marks around Amber's neck consistent with strangulation by a cord or wire. (11/18/03 Tr., p. 577.) The police were not able to identify what cord or wire was used to strangle her.

Samples were taken from under Amber's fingernails and from a bite wound in her left breast. [Defendant]'s DNA was identified in the fingernail sample, along with that of her son and an unidentified third person. Only [Defendant]'s DNA was found in the breast wound.

On June 6, 200[2] (*sic*), the day of Amber's funeral, a number of her friends gathered at Chipper's Bar to reminisce. [Defendant] arrived and was wearing a jacket with long sleeves. When he removed the jacket, witnesses noticed scratches on his hands and arms that were not there three nights earlier. John Orosz confronted [Defendant] about the scratches. (11/18/03 Tr., p. 416.) Orosz also contacted the police with this information. [Defendant] failed to show up at the police station to have pictures taken of the scratches or to discuss the DNA test results. (11/18/03 Tr., p. 613.)

On August 20, 200[2] (*sic*), detectives executed a search warrant of [Defendant]'s home. An arrest warrant was issued soon afterward, but police could not locate [Defendant]. On August 22,

200[2] (*sic*), based on an anonymous tip, [Defendant] was located and arrested at the Super 8 Motel in Liberty Township, Trumbull County. The room was not registered in [Defendant]'s name.

On August 29, 200[2] (*sic*), [Defendant] was indicted for the murder of Amber Zurcher pursuant to R.C. § 2903.02(A), (D). [Defendant] was found to be indigent, and counsel was appointed. Trial was set for May 27, 2003. On the day of trial, [Defendant] filed a motion to prevent the state from introducing evidence of prior bad acts as set forth in Evid.R. 404. [Defendant] wished to prevent Donna Dripps from testifying about an incident in which [Defendant] allegedly choked her and bit her on one breast. [Defendant] also wished to prevent Bradley Windle, his probation officer, from testifying. The trial judge sustained the motion to prohibit any evidence involving the Donna Dripps' incident; Bradley Windle was permitted to testify under certain restrictions. (5/27/03 Tr., pp. 334 ff.)

During the trial, witness Nichole Ripple made a reference to the attack on Donna Dripps. (5/27/03 Tr., p. 374.) Ms. Ripple testified that: "[Amber] said, no, he's a freak. He tried to strangle his ex-girlfriend." (5/27/03 Tr., p. 374.) Ms. Ripple's comment was repeated on the evening news. The next day, the trial court declared a mistrial based on the undue prejudice caused by Ms. Ripple's comment and by the media attention to it.

Retrial was scheduled for November 18, 200[2] (*sic*). Prior to retrial, the state filed a motion in limine to allow Donna Dripps and Bradley Windle to testify. (10/15/03 Motion in Limine.) [Defendant] did not respond to the motion. The motion was heard immediately prior to retrial, and [Defendant]'s counsel indicated then that he had not received the motion. The court proceeded with the hearing, and [Defendant]'s counsel restated his earlier arguments concerning the unfounded nature of Donna Dripps' testimony. He also relied on the fact that the trial court had declared a mistrial based on the slightest mention of the incident. The trial court changed its position, though, and allowed Donna Dripps to testify. She described an incident on February 16, 2002, in which she was visiting her brother and his roommate, and in which [Defendant] was also present. (11/18/03 Tr., pp. 781–782.) She testified that at about 4:00–4:30 a.m., Donna's brother and roommate went to bed upstairs and she was left alone in the room with [Defendant]. (11/18/03 Tr., p. 786.) She stated that [Defendant] kissed her, picked her up and carried her to a bedroom, put his hands around her throat and choked her. She testified that he fondled and grabbed her, and bit her on the breast.

> (11/18/03 Tr., p. 788.) She noted that he did not attempt to unbutton or take off her pants. She recalled that the struggle lasted about 20 minutes, after which [Defendant] rolled off of her and passed out. (11/18/03 Tr., p. 791.)
>
> During trial, a number of the people who had been at Amber's apartment on the morning of the murder were called to testify, including Sandra Shingleton, Anthony Loibl, Vivian Campati, and Dino Socciarelli. They testified about the events leading up to the time of the murder, and they all identified [Defendant] as being at the party at Amber's house. Orosz testified extensively as to the timing of the events of that night. He indicated that he left with [Defendant] and Sandy Shingleton just before 4:00 a.m., and that Amber was alive and well at that time.
>
> Deputy Coroner Jesse Giles testified that the approximate time of death was 4:00 a.m. Amber had multiple bruises on her body, and there was a distinct contusion on her left breast that appeared to be "more of a love bite or a hickey or a sucker bite." (11/18/03 Tr., p. 740.) She also had a deep scalp contusion. All of these occurred fairly close to the time of death. There were ligature marks completely around her neck, indicating at least four loops of some type of cord. The precise type of cord was not identified. The cause of death was determined to be asphyxia due to ligature strangulation. (11/18/03 Tr., p. 758.)
>
> Melissa Zielaskiewicz, a forensic scientist at the Ohio Bureau of Criminal Identification and Investigation, testified that [Defendant]'s DNA was found in the test sample taken from Amber's left breast. (11/18/03 Tr., p. 833.) No other person's DNA was found in that sample. [Defendant]'s DNA was also found under Amber's left fingernails, along with a lesser amount of DNA from Amber's son and that of an unidentified third person. (11/18/03 Tr., pp. 834–838.) There was no evidence of foreign DNA in the oral, vaginal, or rectal samples taken from Amber. (11/18/03 Tr., p. 828.)
>
> On November 26, 2003, the jury returned a guilty verdict on the charge of murder. After a sentencing hearing, [Defendant] was sentenced to 15 years to life in prison. (12/4/03 J.E.).

State v. Anderson, 7th Dist. No. 03 MA 252, 2006 Ohio 4618, at ¶¶ 2-16, *appeal not accepted*, 112 Ohio St.3d 1443, 860 N.E.2d 767.

During Defendant's first trial, the trial court excluded the introduction of evidence that Defendant previously attacked and strangled Donna Dripps in a manner similar to Amber Zurcher. *See id*. During trial, the trial judge declared a mistrial after a witness, Nicole Ripple, mentioned the Donna Dripps incident.

At Defendant's second trial, the trial court allowed Donna Dripps herself to testify about the prior incident, in which Defendant choked her and bit her breast, as he subsequently did to Amber Zurcher. *See id*. at ¶ 19.

Bradley Windle (Defendant's probation officer) testified about a number of probation violations that occurred immediately prior to and during Amber Zurcher's murder investigation. *See id*.

Following Defendant's conviction at his second trial, the Seventh District concluded (2-1) that the trial court erred in allowing Donna Dripps and Bradley Windle to testify, and their testimony regarding Defendant's other crimes and bad acts amounted to cumulative error. *See id*. at ¶ 128; *contra id*. at ¶ 134 (Vukovich, J., dissenting) (stating, "even if Donna Dripps' testimony is not considered, there is strong evidence as to appellant's guilt. Appellant's DNA was found in the bite on Amber's breast and under her nails. Three days after Amber's murder, appellant had scratch marks on his hands and arms that were not there prior to the night of her murder. Furthermore, he had contact with Amber just minutes before the murder.").

Defendant's third trial began in December 2008, but resulted in a hung jury. *See State v. Anderson*, 7th Dist. No. 11 MA 43, 2012 Ohio 4390, ¶ 6.

In April 2010, jury selection began in Defendant's fourth trial. During voir dire, a prospective juror commented on the fact that trial counsel had fallen asleep. The trial

court "determined that the entire venire of prospective jurors would be discharged and the case continued." (Judgment Entry, April 28, 2010.) *See State v. Anderson*, 7th Dist. No. 11 MA 43, 2015 Ohio 2029, ¶ 28.

Defendant's fourth trial resumed in August 2010, but for the second time, ended in a hung jury. *See Anderson*, 2012 Ohio 4390, at ¶ 8.

On February 2, 2011, prior to Defendant's fifth trial, Defendant filed a Motion to Dismiss Indictment and for Discharge, in which he argued that making him submit to a fifth trial violated his right to Due Process and the prohibition against Double Jeopardy. The trial court denied Defendant's motion to dismiss.

Thereafter, on March 17, 2011, Defendant filed a notice of appeal. The State filed a motion to dismiss Defendant's appeal based upon this Court's opinion in *Crago*, and argued that the denial of his motion to dismiss was not a final appealable order pursuant to R.C. 2505.02. On June 10, 2011, the Seventh District denied (2-1) the State's motion.

The State filed an Application for En Banc Consideration and Reconsideration on June 20, 2011, based upon the Seventh District's prior opinion in *State v. Hubbard*, 135 Ohio App.3d 518, 522 (7th Dist. 1999), in which the Seventh District held that "the overruling of a motion to dismiss on the grounds of double jeopardy is not an appealable order subject to immediate review."

The State's Application for Reconsideration was denied on October 4, 2011, but the State's Application for En Banc Consideration was granted on December 13, 2011. The Seventh District heard oral arguments on February 2, 2012.

On September 25, 2012, sitting en banc, a majority of the Seventh District was unable to concur on whether or not the trial court's denial of Defendant's motion to dismiss was a final appealable order. Thus, the original panel's decision stood.

On October 29, 2012, the State filed its Notice of Appeal and Memorandum in Support of Jurisdiction. On February 6, 2013, this Court accepted jurisdiction.

On appeal, this Court held that the trial court's order denying Defendant's motion to dismiss on double-jeopardy grounds was a final, appealable order pursuant to R.C. 2505.02. *See State v. Anderson*, 138 Ohio St.3d 264, 275, 2014 Ohio 542, 6 N.E.3d 23. Accordingly, Defendant's case was remanded back to the Seventh District to address the merits of Defendant's double jeopardy and due process arguments.

Following this Court's remand, the Seventh District concluded that the trial court did not abuse its discretion when it denied Defendant's motion to dismiss, because Defendant's right to due process or the prohibition against double jeopardy had not been violated. *See Anderson*, 2015 Ohio 2029, at ¶ 39.

Defendant filed a timely discretionary appeal with this Honorable Court, and jurisdiction was accepted on December 2, 2015.

The State of Ohio now responds with its Answer Brief, and requests this Honorable Court to Deny Defendant-Appellant Christopher Anderson's request for relief.

Law and Argument

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

State's Response to Proposition of Law No. 1: The continued prosecution following a hung jury must not infringe upon the State's prosecutorial discretion to bring charges against an accused where each retrial has complied with double jeopardy guarantees, and the proceedings have afforded the accused his constitutionally required due process.

As for Defendant's first proposition of law, he contends that the trial court should have granted his motion to dismiss based upon due process and double jeopardy because the State's continued prosecution has worn him down. To the contrary, the continued prosecution following a hung jury must not infringe upon the State's prosecutorial discretion to bring charges against Defendant absent a violation of his double jeopardy and due process rights. Therefore, the trial court properly denied Defendant's motion to dismiss because the State's continued prosecution has not violated his right to either double jeopardy or due process.

A. THE DECISION TO GRANT A DEFENDANT'S PRE-TRIAL MOTION TO DISMISS LIES IN THE TRIAL COURT'S SOUND DISCRETION.

This Court must give substantial deference to the trial court's decision to grant or deny a defendant's pre-trial motion to dismiss, and the court's decision must be upheld unless the court abused its discretion. *See State v. Steele*, 8th Dist. No. 85076, 2005 Ohio 2623, ¶ 5, citing *State v. Tankersley*, 8th Dist. Nos. 72398 and 72399, 1998 WL 196137 (Apr. 23, 1998).

In applying the abuse-of-discretion standard, this Court "may not generally substitute its judgment for that of the trial court." *State v. Kuriger*, 175 Ohio App.3d 676, 679, 888 N.E.2d 1134 (7th Dist. 2008), citing *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

"The term abuse of discretion connotes more than error of law or judgment. It implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Steele*, supra at ¶ 5, quoting *Nielson v. Meeker*, 112 Ohio App.3d 448, 450 (8th Dist. 1996), citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983); *see also State v. Miller*, 7th Dist. No. 07 MA 215, 2008 Ohio 3085, ¶ 40. "An abuse of discretion * * * implies a decision which is without a reasonable basis or one which is clearly wrong." *Steele*, supra at ¶ 5, quoting *Angelkovski v. Buckeye Potato Chips Co.*, 11 Ohio App.3d 159 (10th Dist. 1983).

More specifically, a trial court's decision to grant or deny a defendant's pre-trial motion to dismiss based upon due process lies "with the sound discretion of the trial court." *State v. Whiteside*, 10th Dist. No. 08AP-602, 2009 Ohio 1893, ¶ 20, citing *State v. Roper*, 9th Dist. No. 20836, 2002 Ohio 7321, ¶ 77.

B. CONSISTENT WITH THE RIGHT OF AN ACCUSED TO BE GIVEN A FAIR TRIAL IS THE SOCIETAL INTEREST IN PUNISHING ONE WHOSE GUILT IS CLEAR.

To begin, no reasonable person disputes the importance of due process in American jurisprudence. The United States Supreme Court, however, recognized an equally important principle that this country's administration of justice includes society's interest in punishing one whose guilt is clear:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball

> principle are the implications of that principle for the sound administration of Justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. The underlying purpose of permitting retrial is as much furthered by application of the rule to this case as it has been in cases previously decided.

United States v. Tateo, 377 U.S. 463, 466-467, 84 S.Ct. 1587 (1964); *see also State v. Widner*, 68 Ohio St.2d 188, 192, 429 N.E.2d 1065 (1981) (stating "[o]ur society still retains a genuine interest in making certain that the guilty are punished."). Consequently, "while the defendant has an interest in avoiding multiple trials, the [Double Jeopardy] Clause does not prevent the Government from seeking to reprosecute." *Yeager v. United States*, 557 U.S. 110, 118, 129 S.Ct. 2360, 2366 (2009).

Specific to double jeopardy, the United States Supreme Court "reiterated its determination that neither a jury's failure to reach a verdict nor a trial court's declaration of a mistrial following a hung jury is an event that terminates jeopardy so as to bar a second trial on the mistried charges." *State v. Lovejoy*, 79 Ohio St.3d 440, 445, 1997 Ohio 371, 683 N.E.2d 1112 (1997), citing *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 3086 (1984); Ohio Constitution, Article I, Section 10. The Court reasoned that a defendant is not entitled to go free every time a trial ends without a final judgment:

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. * * * What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

Richardson, 468 U.S. at 324-325, quoting *Wade v. Hunter*, 336 U.S. 684, 688-689, 69 S.Ct. 834, 836-837 (1949).

Thus, the Court in *Richardson* reaffirmed its "proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected." *Richardson*, 468 U.S. at 326. The Court found that "[t]he Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial." *Id*.

Thus, the "'interest in giving the prosecution one complete opportunity to convict those who have violated its laws' justifies *treating the jury's inability to reach a verdict as a nonevent* that does not bar retrial." (Emphasis added.) *Yeager*, 557 U.S. at 118, quoting *Arizona v. Washington*, 434 U.S. 497, 509, 98 S.Ct. 824 (1978).

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONCLUDED THAT THE CONTINUED PROSECUTION FOLLOWING THE SECOND HUNG JURY DID NOT VIOLATE DEFENDANT'S RIGHT TO DUE PROCESS OR DOUBLE JEOPARDY.

Here, Defendant's proposition contends that the trial court should have granted his motion to dismiss based because the continued prosecution has worn him down. While Defendant must concede that nothing in the Double Jeopardy Clause bars the State from the continued prosecution, Defendant nevertheless asserts his double jeopardy argument through the Due Process Clause. *See Blueford v. Arkansas*, 132 S.Ct. 2044, 2048, 182 L.Ed.2d 937 (2012) (stating that "[t]he Double Jeopardy Clause protects against being tried twice for the same offense. The Clause does not, however, bar a second trial if the first ended in a mistrial.").

To begin, various courts that have applied a *due process* and *fundamental fairness* analysis to defendants' claims that the Constitution forbids repeated trials following mistrials. The law governing the determination of when multiple trials violate a defendant's right to due process is far from uniform, as various courts have applied multiple factors to determine if the right has been violated.

In Ohio, only the Seventh, Ninth, and Tenth Districts have considered the due process argument. But even then, there is no consensus regarding which particular factors courts should review in determining whether a defendant's right was violated.

The Ninth District first addressed the argument in *State v. Roper*, 9th Dist. No. 20836, 2002 Ohio 7321, *appeal not accepted*, 98 Ohio St.3d 1567, 787 N.E.2d 1231. In *Roper*, the defendant argued that his due process right was violated when he was convicted of aggravated murder and aggravated robbery after *three* trials resulted in hung

juries. *Id*. at ¶ 72. Like Defendant, the defendant in *Roper* argued "that there is a point at which repeated mistrials will violate an accused's right to due process, and he contends that the point was reached in the present case after the third mistrial." *Id*. at ¶ 74.

In weighing the public's interest in the proper administration of justice against an accused's right to fundamental fairness, the Ninth District considered factors that were developed by courts from other jurisdictions. *See Roper*, supra at ¶¶ 85-86. The Hawaii Supreme Court developed a 6-factor list to consider:

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

Roper, supra at ¶ 85, quoting *State v. Moriwake*, 65 Haw. 47, 56, 647 P.2d 705 (1982). The Iowa Court of Appeals developed a more extensive 12-factor list:

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

State v. Lundeen, 297 N.W.2d 232, 236 (Iowa App. 1980); *accord State v. Brumage*, 435 N.W.2d 337, 341 (Iowa 1989) (approving the 12-factor list set forth in *Lundeen*). The Supreme Court of New Jersey developed a 5-factor list similar to Hawaii:

> The trial court must carefully and expressly consider the following factors, which shall govern its ultimate decision whether to dismiss

> the indictment: (1) the number of prior mistrials and the outcome of the juries' deliberations, so far as is known; (2) the character of prior trials in terms of length, complexity, and similarity of evidence presented; (3) the likelihood of any substantial difference in a subsequent trial, if allowed; (4) the trial court's own evaluation of the relative strength of each party's case; and (5) the professional conduct and diligence of respective counsel, particularly of the prosecuting attorney.

State v. Abbati, 99 N.J. 418, 493 A.2d 513, 521-522 (1985). The Supreme Court of New Jersey further recognized that the trial "court must also *give due weight to the prosecutor's decision to reprosecute*, assessing the reasons for that decision, such as the gravity of the criminal charges and the public's concern in the effective and definitive conclusion of criminal prosecutions." (Emphasis added.) *Id*.

In considering the several factors listed above, the Ninth District did not adopt any particular court's list mentioned above, but considered seven such factors: 1) the likelihood of new or additional evidence; 2) the seriousness of the offenses charged; 3) the defendant's criminal record; 4) the professional conduct of the parties; 5) the extent of the defendant's incarceration; 6) the strength of the state's case; and 7) the victim's desire for continued prosecution. *See Roper*, supra at ¶¶ 87-88.

In *Roper*, the Ninth District concluded that a fourth trial following *three* hung juries did not violate the defendant's right to due process. *See Roper*, supra at ¶ 89 (stating "we see no justice in denying the prosecution an opportunity to present its case.").

Similarly in *State v. Whiteside*, the Tenth District addressed whether the defendant's right to due process was violated when he was convicted of voluntary manslaughter after *two* previous trials resulted in hung juries. *See State v. Whiteside*, 10th Dist. No. 08AP-602, 2009 Ohio 1893. The Tenth District recognized that the Ninth

District's earlier opinion in *Roper*. *See id*. at ¶ 20, citing *Roper*, supra at ¶¶ 85-86, quoting *Moriwake*, 647 P.2d at 705, and *Lundeen*, 297 N.W.2d at 236.

Like the Ninth District in *Roper*, the Tenth District considered several of the factors listed above, but did not specifically adopt any particular court's analysis. *See Whiteside*, supra at ¶ 21. The Tenth District concluded that the defendant's right to due process was not violated when he was convicted of voluntary manslaughter after *two* previous trials resulted in hung juries. *See id*. at ¶ 22.

The State concurs that there appears to be "no case that says that 5 trial, 6 trial or 7 trials is too many as a rule of law." (Defendant's Brief, at 15.) The Ninth District properly reasoned that "[t]he question of whether due process has been breached by any number of retrials does not rest solely on a mechanical application involving the number of mistrials that have occurred." *Roper*, supra at ¶ 76. That same rationale must also apply to the multiple factors that the various courts have analyzed.

Accordingly, this Court should not adopt any particular test or set of factors in determining whether the trial court abused its discretion in denying Defendant's motion to dismiss based upon due process. Instead, this Court should consider the various factors that are relevant only to *this* particular case.

Thus, this Court should consider the following factors that are relevant to *Defendant's* case: 1) the seriousness of the offense charged; 2) the length and scope of the defendant's incarceration while awaiting trial; 3) the number and character of prior trials; 4) the professional conduct and diligence of the prosecution and defense; 5) an evaluation of the evidence, as it appears from the record; and 6) any resulting prejudice to the defendant. *See Anderson*, 2015 Ohio 2029, at ¶ 22.

a.) **Seriousness of the Offense Charged.**

First, Defendant is charged with the most serious offense—Murder.

Although the Seventh District did not directly consider this fact, several courts have directly considered the seriousness of the offense(s) charged. *See Roper*, supra at ¶¶ 87-88; *Whiteside*, supra at ¶ 21; *People v. Verducci*, 243 Cal.App.4th 952, 962-963, 196 Cal.Rrtr.3d 909 (Cal. Ct. App. 2016), citing *People v. Superior of Marin Cty. (Howard)*, 69 Cal.2d 491, 505, 72 Cal.Rptr. 330, 446 P.2d 138 (1968); *State v. Gonzales*, 132 N.M. 420, 425, 2002 NMCA 071, 49 P.3d 681, quoting *Abbati*, 493 A.2d at 521-522; *State v. Sauve*, 164 Vt. 134, 140, 666 A.2d 1164 (1995); *Ex Parte: Anderson*, 457 So.2d 446, 444-445 (Ala. Crim. App. 1984); *Moriwake*, 65 Haw. at 56; *Lundeen*, 297 N.W.2d at 236.

Defendant has placed extensive emphasis on *United States v. Ingram*, 412 .Supp. 384 (D.D.C. 1976), in which the D.C. District Court dismissed an indictment for *bank robbery* after two trials resulted in hung juries. *See id.* at 386. *Ingram*, however, is clearly distinguishable from the facts here, because Defendant is charged with and was previously convicted of *murder*, whereas the defendant in *Ingram* was charged with *bank robbery*, a lesser offense than murder. *See id.* at 385.

Thus, this factor weighs heavily in the State's favor, because Defendant is charged with (and previously convicted of) Murder, the most serious offense. *See id.*

b.) **Defendant's Incarceration.**

Second, Defendant has been incarcerated since his arrest in August 2002.

The Seventh District noted that Defendant's incarceration "presents the most troubling aspect of this case." *Anderson*, 2015 Ohio 2029, at ¶ 23. This Court, however, must consider the procedural posture of this case in determining the relevance of this factor. While it would appear at first glance that this factor weighs in Defendant's favor, the length of Defendant's incarceration has been greatly affected by "the very issue as to 'fundamental fairness' on which [Defendant] relies in seeking dismissal of his indictment." *Id*. at ¶ 35.

The Seventh District recognized that "[w]hile this process has been a long one to date, the record reflects that it is due, in part, to ensuring that [Defendant] will receive a process that is fair and untainted." The Seventh District unequivocally found that there has been no undue delay in prosecuting Defendant:

> We note that at every step, the process has moved as quickly as possible. There has been no undue delay in the refiling of charges or setting of new trial dates. Some of the delays here can be attributed solely to the process, itself. [Defendant] has twice successfully availed himself of the appellate process and the trial court has been zealous throughout in protecting [Defendant]'s rights at trial.

Anderson, 2015 Ohio 2029, at ¶ 40. In fact, Defendant's case has been pending longer in the appellate courts than the trial court. As of this brief's filing date, Defendant has been incarcerated for approximately 13 years, 7 months, and 22 days. And of that time, Defendant's case has been pending in the appellate courts for approximately 7 years, 9 months, and 6 days—*more than half* of Defendant's total period of incarceration.

Thus, Defendant has undoubtedly benefited from the *process* afforded thus far.

c.) **Number and Character of Prior Trials.**

Third, Defendant was subjected to three complete jury trials, while another ended in a mistrial during the State's case-in-chief.

During Defendant's first trial, the trial court excluded the introduction of evidence that Defendant previously attacked and strangled Donna Dripps in a manner similar to Amber Zurcher. *See Anderson*, 2006 Ohio 4618, at ¶ 1. During the State's case-in-chief, the trial judge declared a mistrial after a witness, Nicole Ripple, mentioned the Donna Dripps incident.

At Defendant's second trial, the trial court allowed Donna Dripps herself to testify about the prior incident, in which Defendant choked her and bit her breast, as he subsequently did to Amber Zurcher. *See id*. at ¶ 19. Bradley Windle (Defendant's probation officer) testified about a number of probation violations that occurred immediately prior to and during Amber Zurcher's murder investigation. *See id*. The jury convicted Defendant of murdering Amber Zurcher.

The Seventh District, however, reversed (2-1) Defendant's conviction after it concluded that the testimony provided by Dripps and Windle regarding his other crimes and bad acts amounted to cumulative error. *See id*. at ¶ 128, *appeal not accepted*, 112 Ohio St.3d at 1443; *contra id*. at ¶ 134 (Vukovich, J., dissenting) (stating, "even if Donna Dripps' testimony is not considered, there is strong evidence as to appellant's guilt. Appellant's DNA was found in the bite on Amber's breast and under her nails. Three days after Amber's murder, appellant had scratch marks on his hands and arms that were not there prior to the night of her murder. Furthermore, he had contact with Amber just minutes before the murder.").

Defendant's third trial began in December 2008, but resulted in a hung jury. *See Anderson*, 2012 Ohio 4390, at ¶ 6.

In April 2010, jury selection began in Defendant's fourth trial. During voir dire, a prospective juror commented on the fact that trial counsel had fallen asleep. The trial court "determined that the entire venire of prospective jurors would be discharged and the case *continued*." (Emphasis added.) (Judgment Entry, April 28, 2010.) *See Anderson*, 2015 Ohio 2029, at ¶ 28.

Defendant's fourth trial resumed in August 2010, but for the second time, ended in a hung jury. *See Anderson*, 2012 Ohio 4390, at ¶ 8.

On February 2, 2011, prior to Defendant's fifth trial, Defendant filed a Motion to Dismiss Indictment and for Discharge, in which he argued that making him submit to a fifth trial violated his right to Due Process and the prohibition against Double Jeopardy. The trial court denied Defendant's motion to dismiss.[1] Defendant's February 2, 2011 motion is the subject of this appeal.

In summation, one trial resulted in a conviction, one trial resulted in a mistrial, and two trials resulted in deadlocked juries.

Again, Defendant has placed extensive emphasis on *Ingram*, in which the D.C. District Court dismissed an indictment for bank robbery after two trials resulted in hung juries. *See id.* at 386. *Ingram*, however, is further distinguishable from the facts here, because the juries voted 10-2 and 11-1 for acquittal in *Ingram*. *See id.* at 385. Here, there is no evidence that either jury favored acquittal.

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[1] Defendant contends that his motion to dismiss was filed prior to his *sixth* trial, but the Seventh District found that his motion was filed prior to his *fifth* trial. *See Anderson*, 2015 Ohio 2029, at ¶¶ 28-30.

In comparison to *Roper*, the Ninth District found that the juries voted 11-1, 8-4, and 10-2 in favor of conviction. *See Roper*, supra at ¶¶ 78, 88. The Ninth District reasoned that the juries' votes established that another jury could reach a unanimous verdict. *See id.* at ¶ 88; *see also Anderson*, 457 So.2d at 451-452 (concluding a fourth trial following three deadlocked juries—favoring acquittal 10-2, 9-3, and 8-4—did not violate due process).

The Seventh District found that despite the number of trials, the process was neither egregious nor unduly onerous: "this record does not reflect an egregious number of procedures nor an unduly onerous process. Nothing in the record indicates that there was undue delay in setting or holding any one trial. Nothing in the record indicates delay in refiling charges." *Anderson*, 2015 Ohio 2029, ¶ 30.

Most importantly, the Seventh District recognized that State had previously convinced twelve jurors that Defendant murdered Amber Zurcher (a fact unseen in the several examples cited by Defendant). *See id.*

Thus, the Seventh District properly concluded that the number and character of Defendant's prior trials do not warrant the dismissal of his murder charge. *See id.*

d.) <u>Professional Conduct and Diligence of Both the Prosecution and the Defense.</u>

Fourth, the Seventh District reasoned that the parties' professional conduct must be reviewed, because "the only exception to the rule that retrial is not barred by Double Jeopardy is based on serious prosecutorial misconduct." *Id.* at ¶ 31, citing *Hubbard*, supra, and *State v. Loza*, 71 Ohio St.3d 61, 70, 641 N.E.2d 1082 (1994). Accordingly, several of the various courts that have addressed a defendant's right to due process in this

regard consider the parties' professional conduct. *See Roper*, supra at ¶¶ 87-88; *Moriwake*, 65 Haw. at 56; *Gonzales*, 132 N.M. at 425; *Sauve*, 164 Vt. at 140.

Here, the Seventh District explicitly found that "[t]here is nothing in this record leading us to find any type of misconduct on the part of the prosecutor. * * * No mistrial, continuance or hung jury can be attributed to any action or inaction on the part of the state. * * * [Defendant] admits this is true[.]" *Anderson*, 2015 Ohio 2029, at ¶ 32.

Thus, the Seventh District concluded that none of the now 13-plus-year "period can be in any way attributed to the 'fault' of either the prosecutor, [Defendant] or his various counsel[.]" *Id*. at ¶ 35.

e.) <u>Evaluation of the Evidence in the Record</u>.

Fifth, the Seventh District reviewed whether the evidence in the record warrants a dismissal. *See Anderson*, 2015 Ohio 2029, at ¶ 36; *accord Roper*, supra at ¶¶ 87-88; *Lundeen*, 297 N.W.2d at 236; *Moriwake*, 65 Haw. at 56; *Gonzales*, 132 N.M. at 425; *Sauve*, 164 Vt. at 140.

Again, Defendant has placed extensive emphasis on *Ingram*, supra, in which the D.C. District Court dismissed an indictment for bank robbery after two trials resulted in hung juries. *See id.* at 386. *Ingram*, however, is clearly distinguishable from the facts here, because the juries voted 10-2 and 11-1 for acquittal in *Ingram*. *See id.* at 385. Conversely, the Supreme Court of Alabama concluded that a fourth trial following three deadlocked juries did not violate the defendant's right to due process even though all three previous juries favored acquittal—10-2, 9-3, and 8-4. *See Anderson*, 457 So.2d at 451-452.

In comparison to *Roper*, the Ninth District found that the juries voted 11-1, 8-4, and 10-2 in favor of conviction. *See Roper*, supra at ¶¶ 78, 88. The Ninth District reasoned that the juries' votes established that another jury could reach a unanimous verdict. *See id.* at ¶ 88. Similarly, the Seventh District reasoned that "the fact that two trials resulted in hung juries leads credence to the fact that evidence exists to convince some jurors of guilt beyond a reasonable doubt." *Anderson*, 2015 Ohio 2029, at ¶ 37.

Here, the Seventh District previously found that the State presented strong evidence of Defendant's guilt:

> ***the state had strong evidence*** apart from Donna Dripps' testimony ***that identified*** [***Defendant***] ***as the person who committed the crime***, thus making her testimony somewhat unnecessary. There was the highly incriminating DNA test results. There were the scratches on [Defendant]'s hands and arms, coupled with the fact that his DNA was found under Amber's fingernails. There was the clear evidence that [Defendant] was with Amber just a short time before the crime occurred. These facts are all ***very powerful indicators that*** [***Defendant***] ***was the assailant***.

(Emphasis added.) *Anderson*, 2006 Ohio 4618, at ¶ 47; *accord id*. at ¶ 134 (Vukovich, J., dissenting) (stating, "even if Donna Dripps' testimony is not considered, there is strong evidence as to appellant's guilt. Appellant's DNA was found in the bite on Amber's breast and under her nails. Three days after Amber's murder, appellant had scratch marks on his hands and arms that were not there prior to the night of her murder. Furthermore, he had contact with Amber just minutes before the murder.").

Thus, unlike in *Ingram*, the evidence linking Defendant to the murder victim is strong, which leads credence that ample evidence exists to convince twelve jurors of Defendant's guilt beyond a reasonable doubt.

f.) **Resulting Prejudice to Defendant.**

Lastly, the Seventh District considered whether Defendant had been prejudiced by anything other than the lengthy incarceration. *See Anderson*, 2015 Ohio 2029, at ¶ 38 (stating it was "aware of the prejudice inherent in the incarceration for twelve years of a suspect who has not been convicted of a crime.").

Here, the Seventh District properly found the record is devoid of any evidence that Defendant suffered any actual prejudice beyond his mere incarceration:

> this record is devoid of evidence of other, more specific, harm. [Defendant]'s brief is full of vague, unsubstantiated claims as to his embarrassment and exhaustion. But [Defendant] has not provided any evidence that witnesses have become unavailable or that the lapse of time has had an effect on the DNA evidence. He does not allege that his own memory has lapsed.

Id. at ¶ 39.

Thus, Defendant has neither alleged nor established any resulting prejudice from the multiple trials in the 13-plus-year period. *See, e.g., State v. Winkle*, 7th Dist. No. 12 MA 162, 2014 Ohio 895 (finding the defendant was prejudiced by pre-indictment delay).

Here, the record before this Court must establish that a dismissal of Defendant's indictment is unwarranted, because the State's continued prosecution following a second hung jury did not violate his right to due process or double jeopardy.

In comparison, a New York appellate court found that the trial court abused its discretion when it dismissed the defendant's indictment after *three* hung juries:

> the crimes charged in the indictment are the most serious, the harm caused by the alleged acts is irredeemable, both defendants have long records of continued violence and there is not a scintilla of evidence that the prosecutions are motivated by bad faith or that the conduct of the trials has been unfair to the accused. *In the absence of other circumstances,* the failure of successive juries to

> agree on a verdict does not "clearly demonstrate" that an eventual conviction "would constitute or result in injustice"

(Emphasis sic.) *People v. Kirby*, 92 A.D.2d 848, 849, 460 N.Y.S.2d 572, 574-575 (N.Y. App. Div. 1983), quoting N.Y. Criminal Procedure Law §210.40. Further, the continued prosecution following a hung jury must not infringe upon the State's prosecutorial discretion to bring charges against the accused unless there is a clear violation:

> a dismissal after a second mistrial based on a hung jury may infringe on prosecutorial discretion, and we do not encourage trial courts to decide whether the State may retry a defendant after mistrial unless retrial will present a clear violation of principles of fundamental fairness and be contrary to the interests of justice. "[I]t is the duty of the district attorney, not the court, to engage in prosecutorial discretion with respect to charging individuals for the commission of crimes."

Gonzales, 49 P.3d at 685, quoting *State v. Bonilla*, 127 N.M. 566, 1999 NMCA 096, 985 P.2d 168, ¶ 12; *see Anderson*, 2015 Ohio 2029, at ¶ 35 (stating that "[t]he State of Ohio and its citizens have a duty to seek justice for this crime, its victim and her family.").

Therefore, the trial court did not abuse its discretion when it denied Defendant's motion to dismiss following the *second* hung jury. *See, e.g., Flowers v. State*, 158 So.3d 1009, 1068-1070 (Miss. 2014) (concluding the defendant could not assert a due process argument absent a double jeopardy violation after he was convicted at his *sixth* trial); *Arnold v. State*, 563 S.W.2d 792, 794-795 (Tenn. Crim. App. 1977); (concluding a fourth trial following *three* mistrials did not violate due process); *Anderson*, 457 So.2d at 451-452 (concluding a fourth trial following *three* deadlocked juries did not violate due process); *Kirby*, 92 A.D.2d at 849-850 (concluding fourth trial following *three* deadlocked juries did not violate due process).

Defendant's first proposition of law is meritless and must be overruled.

Conclusion

WHEREFORE, State of Ohio-Appellee hereby requests this Honorable Court to Deny Defendant-Appellant Christopher Anderson's request for relief, because the Seventh District properly concluded that "[t]his record shows no misconduct on the part of the state, no undue delay at any juncture and no reason to find the trial court otherwise abused its discretion in refusing to dismiss these charges." *Anderson*, 2015 Ohio 2029, at ¶ 39.

Respectfully Submitted,

/s/ Ralph M. Rivera

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Certificate of Service

I certify that a copy of the State of Ohio's Answer Brief was sent via **Electronic Mail** to counsel for Defendant, **John B. Juhasz, Esq**., at jbjuhasz@gmail.com, pursuant to S.Ct. Prac. R. 3.11, on April 12, 2016.

So Certified,

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