

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO

Plaintiff-Appellant

v.

DEMETRIUS JONES

Defendant-Appellee

CASE NO. 2015-1427

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

COURT OF APPEALS CASE NO. 100068

APPELLANT-STATE OF OHIO'S REPLY BRIEF

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REPLY BRIEF

There is nothing in the trial court's record that indicates the potential testimony of appellee's mother. Although appellee claims to know the mother's testimony, his claims are speculative and not supported by the record in this case. Specifically, appellee represents the following:

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.

(Appellee Brief, 13).

Appellee's claims are largely based on representations made by defense counsel at the dismissal hearing and speculative assertions made by the trial court in its opinion as to what the mother would have said.

The primary evidence in the record concerning the role of appellee's mother and brother in this case stems from four lines in a Cleveland Police report taken on September 1, 1993. The police report states the following in relevant part:

She states that she was screaming and fighting with him. She also states that his mother nor his brother came to her aide. She states that he took a "Rambo" knife and put it to her throat and told her that she wasn't going anywhere until they have sex. They had vaginal intercourse and then she left the apartment.

Outside of the police report, there were two other pieces of evidence never introduced into the trial court's record that the parties relied upon. First, there was a written report concerning a September 3, 2013, follow-up interview with the victim, which stated:

When asked to describe the relationship she had with him, [S.W.] said that she had met him and known him for about 3 months. She knew that he lived in the area of 75th and Kinsman. Wise said that they were not involved in any relationship. Wise said that she had an acquaintanceship with the male, she only knew his name as "Demetrius" and not a last name.

On the night of the assault, she had met up with him and walked to his house. There she met his mother and brothers. She said they were getting high smoking marijuana. When Demetrius began to assault her, she said that she was yelling and banging on the doors and windows, but no one came to help her. She said that he had kept her in the room for about 4 hours. She also stated that he had produced a knife and threatened her with it. When she finally got away, her clothes were torn. She remembered going to St. Luke's Hospital.

Absent from this report is any clear indication as to what the mother would have testified to at trial. In addition, defense counsel also had the benefit of the audio record of this 2013 interview. The recorded interview was consistent with the police reports: the victim indicates that she was friends with the victim for about three months; that she had never had sexual intercourse with him; that she met his mother upon entering the apartment and saw his brother(s); that the defendant later threatened her with a knife, raped her and she fought him by banging on doors and tearing down curtains; and that she yelled for help but no one came to her aide.

Nevertheless, appellee argues that his mother would have testified to the relationship between him and S.W., which substantially predated this incident. While defendant's counsel at trial did represent that it was her "understanding" that the victim and suspect "were acquaintances," there is no indication in the record that appellee and S.W. enjoyed "a relationship that S.W. herself acknowledged substantially predated the incident." (03/06/2014 Hearing Tr., 12). Evidence outside of the record as described above indicates that appellee had been a casual acquaintance and friend to appellee for about three months. Appellee further argues that Ms. Watkins would have testified to S.W.'s demeanor, however there is no indication in the record that S.W. and Ms. Watkins saw each other after the attack. To the extent that Ms. Watkins could possibly testify to

S.W.'s demeanor prior to the attack, there is no indication such testimony would help Jones given that the record does not provide any indication that appellee threatened S.W. in any manner prior to the attack. Appellee argues that Ms. Watkins would have testified to specific details of the alleged attack, yet there is no indication that Ms. Watkins would have heard the attack or even remained in the apartment during the attack. None of this information was before the trial court when it issued its decision to dismiss this felony criminal case with prejudice. In fact, the trial court did not have the benefit of the investigative report or the audio interview when reaching its decision; instead, the trial court had to rely on the single statement of the victim made in the police report and the representations made by the parties as to the two other documents¹.

Rather than basing its decision upon the record, the trial court speculated as to the mother's testimony. While the victim did assert she met the mother and the brother and that she screamed for help, there is no indication that they were still present at the time of the attack. Appellee's trial counsel proffered that the defendant and the victim "were acquaintances" and did not provide any information as to whether the mother heard a confrontation. (03/06/14 Hearing Tr., 12). From the record before it, the trial court somehow determined that the mother "would have been able to testify that the alleged victim and defendant were more than just friends and that they had spent time together," in spite of the fact that the victim had stated otherwise. (04/04 Journal Entry, 2). Somehow the trial court determined that the mother did not hear anything that would reflect a fight or argument between the alleged victim and defendant or that the alleged victim acted in an unusual manner indicating that she had been raped," yet the record does not support such a claim.

¹ This is precisely why the argument of *Amicus Curiae*, the Ohio Attorney General, that we should decide these claims post-trial, is compelling. When these issues are considered pre-trial, the record has not yet been sufficiently developed to the point where a fair determination can be reached as to whether a defendant suffered actual prejudice.

(04/04/14 Journal Entry). Claims made by appellee as to the mother's potential testimony are not based on concrete evidence in the record but rather he relies on the trial court's speculation as to what the mother would have said.

Finally, the State does not agree with appellee's representations that (1) if the jury found Ms. Watkins credible that acquittal would have been all but assured; and that (2) the State is seeking to prosecute a case in which three people witnessed an event but only two would testify. Appellee's assertion of the strong possibility of acquittal based on Ms. Watkins testimony is wholly speculative. Appellee's second statement concerning Ms. Watkins serving as a witness to the crime again invites speculation. There is no evidence in the record that Ms. Watkins witnessed the incident itself. The only people who we know witnessed the alleged crime were S.W. and Demetrius Jones. Any other witnesses or evidence in this case would solely speak to the credibility or lack thereof of S.W. and Jones. Without some indication as to the content of the testimony of lost witnesses, we can only speculate as to what they would have stated in court. The crime of rape is personal and often involves a credibility determination where the defendant's identity is not at issue. Here, as with many rape cases, the jury would still have an opportunity to assess the credibility of the victim and possibly would have an opportunity to assess the credibility of the accused.

Appellee Claims to Seek Truth But Hid the Identity of the Other Witness to this Crime

The record indicates that appellee knows who was present in the home with his mother yet is unwilling to call this person forward to testify.

Specifically, the hearing transcript indicates that defense counsel stated the following:

MR. DE CARIS: As to his mother, it is actual prejudice because she's no longer here to testify. The defense would be a consensual argument. The other individual was not his brother, it was another individual, so now he's forced to testify to identify who the other individual was, and he an absolute right not to testify.

MS. WESTON: Well, who is the other individual?

MR. DE CARIS: Your investigators didn't do their job in 1993 * * *

(03/06/2014 Hearing Tr. 57 – 58).

This exchange indicates that the defense knows that someone other than appellee's brother was present in the home at the time of the alleged rape. This exchange also suggests that appellee has chosen to avoid providing any information about this witness.

This fact is critical because 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 the exculpatory evidence could not be obtained by other means.*” *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, ¶ 103, citing *United States v. Rogers*, 118 F.3d 466, 475 (6th Cir. 1997). As such, the facts surrounding the second witness are critical for making an accurate determination as to pre-indictment delay prejudice in this case.

Appellee claims that his pre-indictment delay claim is premised on a desire to “produce a reliable outcome” so that the jury can “get it right.” (Appellee Br. 3). He further supports this claim by stating that the “implicit premise of all this is that the jury will get as much information as we can provide.” (Id.). He also asserts that the less information juries are given, “the more they have to speculate on what missing witnesses or evidence would have shown, [and] the less reliable the outcome of trial will be.” (Id. at 4). In fact, appellee cites to these ideals to establish a framework for the remainder of his brief in which he argues for a due process standard that acknowledges “fundamental conceptions of justice.”

Nonetheless, when given an opportunity to provide any information about the one witness who could have provided comparable testimony to the mother, appellee chose to hide this witness's identity. If this individual could exculpate Jones and he truly desires a reliable trial outcome, it

would presumably be in his best interest to identify the witness and bring him forward; however, appellee has chosen not to do so. As such, it is likely that the testimony of this witness would not have assisted him. Furthermore, if this second witness were deceased, it would have benefitted appellee to say so at the hearing to strengthen his claim of pre-indictment delay. Appellee could have provided evidence that this individual was deceased or that he could not produce testimony through this witness that compares to the testimony of the mother. This record suggests the strong possibility that Jones has identified another person who was at the scene of the crime who he has chosen not to call forward. Although appellee certainly has a right not to compel the testimony of this witness, appellee's decision to neither name nor call this witness forward nor even identify the subject of his or her testimony, does not support appellee's claim that he is seeking to protect the integrity of the trial. If appellee genuinely believes that more evidence generally helps a search for the truth, why hide the identity of the one witness who could provide comparable testimony to the mother?

“Fundamental Conceptions of Justice” Involve Considerations to the Defense and the State

The State of Ohio has a legitimate interest in prosecuting rape cases in which the defendant fails to demonstrate that he has suffered actual prejudice and the delay was not an intentional device to gain a tactical advantage over the accused.

To be clear, the State acknowledges that due process claims of pre-indictment delay prejudice involve considerations of “those fundamental conceptions of justice that lay at the base of our civil and political institutions” and those standards which define “fundamental conceptions of justice which lie at the base of our civil and political institutions.” *United States v. Lovasco* (1977), 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752; *United States v. Marion* (1971), 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468.

However, as the Supreme Court clarified in *Marion*, those “fundamental conceptions of justice” are linked to “the *community’s* sense of fair play and decency.” *Marion, supra*, citing *Rochin v. California*, 342 U.S. 165, 173, 72 S.Ct. 205, 96 L. Ed. 183, 1952 U.S. LEXIS 2576 (1952) (Emphasis added). Applying this standard, the Supreme Court in *Marion* concluded that even though the defendant might have been “somewhat prejudiced by the lapse of time” and the death of two potential witnesses, prosecution of the case did not offend the “community’s sense of fair play and decency” because the State’s delay in investigating its case was justified. In other words, “fundamental conceptions of justice” involve considerations of the relative interests of both the State and the defendant in administering justice.

Cases like the prosecution of Demetrius Jones for the rape of S.W. belong to a much larger group of CODIS cases throughout the State of Ohio and the United States. In total, 4,800 kits in Cuyahoga County have been tested². The testing of formerly shelved rape kits in this county alone has led to the indictment and conviction of 145 rapists³. Our county has learned from prosecuting these cases that more than one-third of matched CODIS rape kits are serial rapists⁴. While it is difficult to place on a value on the harm caused to victims and the community as a result of rapes, it is estimated that more than \$100 million in economic harm was caused to victims and the community as a result of rapes⁵. While serial rapists attack strangers, they also frequently attack people with whom they are acquainted; research of tested rape kits indicates that over 20% of

² <http://www.cleveland.com/rape-kits/index.ssf/2016/03/what-local-research-about-rape-kits-could-mean-for-stopping-serial-rapists.html>, accessed April 14, 2016.

³ *Id.*

⁴ *Id.*

⁵

http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=3523&issue_id=102014, accessed on April 14, 2016.

offenses were committed against an acquaintance, an intimate partner⁶. By prosecuting rape kit cases, the State of Ohio seeks to protect the community against harm from offenders who committed serious harm yet so far evaded culpability for their actions⁷.

If a defendant does not demonstrate actual prejudice, fundamental conceptions of justice provide the State with the obligation and the right to prosecute. The State of Ohio has a legitimate interest in prosecuting rape cases on behalf of victims and the surrounding community when a defendant's due process claims are speculative. In the absence of actual prejudice, the community's sense of fair play and decency requires the State to prosecute. Indeed, it would be poor work to refrain from doing so.

To the extent that appellee argues that "basic concepts of fundamental justice" are interwoven into due process claims of pre-indictment delay prejudice, the State agrees. These concepts of fundamental justice and due process have led courts to create a legal standards for evaluating defendants' claims of pre-indictment delay prejudice. The debate in this case primarily concerns the appropriate legal standard to evaluate claims of pre-indictment delay and fundamental fairness, particularly how and when these considerations are assessed.

As the State explained in detail in its merit brief, the standard for evaluating a community's sense of fair play and decency started with *Marion* in 1971 and has been consistent for over the last forty years. The State submits to this Court that the standard for evaluating fundamental fairness requires two basic principles: (1) a burden shifting test in which the defendant must

⁶ http://begun.case.edu/wp-content/uploads/2016/04/SAK_CCPO_Serials_Final_4.pdf, accessed April 15, 2016. For additional reports on the backlog of Sexual Assault Kits by the Begun Center at Case Western Reserve University, see <http://begun.case.edu/begun-center-selected-assist-cuyahoga-county-sexual-assault-kits>.

⁷ <http://www.endthebacklog.org/backlog/why-backlog-exists>, accessed April 15, 2016.

demonstrate that he has suffered actual prejudice and then if the defendant meets his burden, the State must establish a justifiable reason for the delay; and (2) proof of actual prejudice requires a defendant to show that he was substantially and actually prejudiced through lost evidence or testimony that is specific and non-speculative. It is only after a defendant has demonstrated actual prejudice that fundamental conceptions of justice as considered in light of the State’s explanation for the delay.

The Eighth District Court of Appeals and appellee have abandoned this standard for evaluating claims of pre-indictment delay prejudice. The Eighth District Court of Appeals advocates for a new standard of law based upon “concepts of fundamental justice” that considers (1) whether the case is in the pre-trial or post-trial phase; (2) the “nature of the state’s case against the defendant and the effect of the lost or missing evidence on the pertinent issues”; and (3) a “question of whose problem should it be when we really do not know what the lost or missing evidence would have shown?” [sic]. *State v. Jones*, 8th Dist. Cuyahoga No. 101258, 2015-Ohio-2853, ¶¶ 37 – 40. By contrast, appellee proposes a third standard for measuring a community’s sense of fair play and justice that requires courts to make the following determination: “whether information material to the determination of guilt or innocence is lost, such that the loss would undermine confidence in the outcome of a trial.”

Neither the Eighth District nor appellee provides any legal precedent to suggest that either new legal standard has previously been expressly stated and relied upon in a prior case⁸. The lack

⁸ The State acknowledges that the Eighth District claimed that it previously applied the “fundamental fairness” standard in two prior cases: *State v. Doska*, 113 Ohio App.3d 277, 680 N.E.2d 1043 (8th Dist. 1996) and *State v. Mack*, 8th Dist. Cuyahoga No. 100964, 2014-Ohio-4817. *Jones, supra*, at ¶ 19. Nevertheless, neither *Doska* nor *Mack* expressly stated the “fundamental conceptions of justice” standard, and both decisions were likely a result of the unique facts in each respective case.

of any direct legal precedent should concern this Court because it strongly suggests that appellee is recommending that we break from over forty years of legal precedent and instead apply personal and private notions of fairness. Appellee argues that based on considerations of “fundamental fairness,” the facts of some pre-indictment delay cases may dictate that a new standard of law should be applied. However, the United States Supreme Court has cautioned that “[j]udges are not free, in defining ‘due process,’ to impose on law enforcement officials [their] ‘personal and private notions’ of fairness and to ‘disregard the limits that bind judges in their judicial function.’” *Lovasco, supra*, citing *Rochin v. California*, 342 U.S. 165, 170 (1952). This Court must determine whether it will re-affirm the existing standard for evaluating claims of pre-indictment delay or adopt one of the new standards recommended by the Eighth District Court of Appeals or appellee.

For the reasons that follow, the legal standard embraced by courts for over four decades is the only standard that maintains the careful balance of protecting defendants against actual prejudice while at the same time respecting the State’s legitimate interest in protecting the community against felony criminal offenders.

Appellee’s Reliance on *State v. Luck* is Misplaced

Appellee and his amici heavily rely upon *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984), to support his claim that this Court should affirm the dismissal of the charges of rape and kidnapping against S.W. This reliance is misplaced. The facts of *Luck* provide a showing of actual prejudice, based on evidence in the record, which is wholly different than the speculative claim of prejudice shown in this case. The defendant in *Luck* largely based his claim of pre-indictment delay prejudice upon the deaths of two key witnesses, Larry Cassano and Dr. Catalano. *Id.*

The lost testimony of Larry Cassano in *Luck* was substantially less speculative and more exculpatory than the lost testimony of appellee’s mother in this case. When Luck was arrested,

she told an investigating officer that Cassano was “the one person who could have helped her in this matter but he is dead.” *Id.*, 15 Ohio St.3d at 157. Luck also stated that Cassano was “with her” in the victim’s apartment at the time the victim was killed. *Id.* Moreover, a closer review of the record in *Luck* indicates that the victim even told investigating officers that Cassano was her accomplice in committing the burglary of the victim’s apartment that preceded the murder. (State’s Memorandum in Support of Jurisdiction in *State v. Luck*, 15). Cassano’s connection to the death of the victim was close enough that he was “an original suspect in the case.” *State v. Luck*, 8th Dist. Cuyahoga Nos. 47305 & 47306, 1983 Ohio App. LEXIS 13816 (Nov. 23, 1983).

Based upon the above facts, this Court reasonably concluded that Luck “is obviously prejudiced by being able to seek verification of her story from Cassano and thereby establish mitigating factors or a defense to the charge against here.” Luck had made statements to the police department that she did in fact murder the victim but that she did so in self-defense. *Id.* Given that the record in *Luck* provided specific evidence that Cassano was not only present at the scene of the crime when it was committed but that he was intimately involved in many of the attendant circumstances to the crime, this Court reasonably concluded that Cassano was substantially and actually prejudiced by the absence of his testimony.

This Court cannot reasonably conclude the same in this case because the record here is devoid of concrete proof of the potential testimony that appellee’s mother would have provided and whether appellee is “obviously prejudiced” by the absence of such testimony. The testimony of the mother in this case stems from a single line in the original police report in which the victim stated neither “the mother nor the brother came to help.” Based on such an assertion, the significance of the testimony of the missing witnesses is wholly unclear because they were not direct witnesses. Did the victim make this statement because she saw the mother and brother of

appellee in the apartment earlier that evening? Did the victim yell and no one came to her aid because they were not in the apartment at the time? If the mother and brother were in the home, were they sleeping during the commission of a rape and kidnapping? Unlike in *Luck*, where there was testimony directly provided by the victim that the missing witness was present and participating in the crime and was the one person who could help her, the record in this case indicates that defense counsel does not know what testimony the missing witness would have provided at all. (03/06/2014 Hearing Tr., 11). Moreover, appellee himself provided no evidence to support the speculative claims of counsel.

For Decades, Defendants Have Been Able to Show Prejudice When Making Claims of Pre-Indictment Delay

Appellee claims in part that the standard of law proposed by the State of Ohio is unworkable because it is impossible for defendants to meet such a high standard. Contrary to appellee's claim, the well-established standard of law is workable and allows for dismissal of rape cases when a defendant has demonstrated actual prejudice. Simply because demonstrating actual is prejudice is difficult does not make such a standard unconstitutional. *See State v. Keenan*, 143 Ohio St.3d 397, 2015-Ohio-2484, ¶ 1 ("That something is hard to do does not mean that it is unconstitutional"). Federal courts have already recognized that the "burden upon a defendant seeking to prove that pre-indictment delay violated due process is 'nearly insurmountable,' especially because proof of prejudice is always speculative." *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, ¶ 103, citing *United States v. Montgomery*, 491 Fed. Appx. 683, 691 (6th Cir. 2012), quoting *United States v. Rogers*, 118 F.3d 466, 1997 U.S. App. LEXIS 16238.

One example of a case where the defendant met the exculpatory evidence standard is *State v. Dixon*, 8th Dist. Cuyahoga No. 102335, 2015-Ohio-3144. In *Dixon*, the defendant lost two potential witnesses and was able to point to the nature of their testimony. Specifically, one of the

lost witnesses had previously stated that he had spoken with the alleged victim who had told him that the sexual encounter with the defendant was “mutual with no force.” *Dixon* at ¶ 29. Based on concrete lost testimony, the Eighth District Court of Appeals reasonably concluded that the defendant “demonstrated actual and substantial prejudice.” *Dixon* at ¶ 31.

There are a number of different ways that a defendant can meet the standard of actual prejudice that has been previously applied by this Court. As shown in *Dixon*, a defendant can meet this standard by submitting evidence that shows specifically how lost testimony would have supported his defense. Another way a defendant could help to strengthen a claim of actual prejudice would be to demonstrate that he or she has no substitute testimony for the lost witness. *Adams* at ¶ 103.

Precedent from Federal Courts and State Supreme Courts Support the State’s Proposition of Law and Disfavors the Proposition of Law Proposed by Appellee

A. Federal and State Case Law Supports the State’s Standard of Law

In its initial merit brief before this Court, the State of Ohio demonstrated that courts have never considered the reasons for the delay in prosecution as evidence of actual prejudice to the defendant. (*See* Appellant’s Br., 8 – 15). The State explained how all four previous opinions on pre-indictment delay prejudice issued by this Court embraced such a standard. *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954; *State v. Whiting*, 84 Ohio St.3d 215, 217, 702 N.E.2d 119; *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 2002-Ohio-5059; *State v. Luck*, 15 Ohio St.3d 150, 157-58, 472 N.E.2d 1097. Beyond precedent in this Court, the State pointed out how the applicable standard of law has been adopted by all twelve appellate districts in Ohio. (*See* Appellant’s Br. 10 – 11). The State then demonstrated that the separation between the State’s justification for delay in prosecution and a defendant’s proof of prejudice was rooted in precedent from the United States Supreme Court. (Appellant’s Br. 11 – 12). Furthermore, the State noted

that the burden-shifting standard of law for due process claims had been embraced by state supreme courts that neighbor Ohio. (*See* Appellant’s Br. 14 – 15).

In direct contrast to the wealth of precedent cited by the State, both the Eighth District and appellee advocate for a standard of law in which the State’s reasons for the delay are considered as part of the actual prejudice prong of pre-indictment delay claim. Neither the Eighth District nor appellee provides any legal precedent in support of their new standards of law. In the opinion by the Eighth District, the court justifies its use of the “fundamental conceptions of justice” standard over a total of eleven paragraphs, yet the court does not cite a single case to support the use of the new standard. *Jones, supra*, 8th Dist. Cuyahoga No. 101258 at ¶¶ 37 – 46. Similarly, appellee cites no prior cases that used his proposed standard of law. Instead, appellee reviewed existing case law, “divined” general principles of law based on his review of case law⁹, and then proposed a new legal standard based on the principles that he divined.

Furthermore, appellee advocates for a standard of law in which lost evidence of speculative exculpatory value may demonstrate actual prejudice. Again, in its merit brief, the State showed without divination that a wealth of courts, including the United States Supreme Court, nearly every Ohio appellate district, and this Court in *Adams, supra*, have required non-speculative proof of the exculpatory value of lost evidence to demonstrate actual prejudice. (*See* Appellant’s Br. 16 – 19). State of Ohio also joins *Amicus Curiae* Ohio Attorney General in its assertion that federal courts universally agree that proof of actual prejudice must be definite and non-speculative. (*See* Reply Br. of *Amicus Curiae* Ohio Attorney General, 3 – 4).

⁹ On page eight of appellee’s brief, he states that “[f]rom the cases, we can divine the following principles: * * *.”

The abandonment of a well-established standard for evaluating pre-indictment delay claims is problematic because it leads to inconsistent results in these cases. The Jones *opinion* never abandoned the exculpatory evidence standard; instead, the Jones opinion proposed a new standard of “fundamental conceptions of justice” that should be applied in some cases. As such, both standards remain law in Cuyahoga County and courts have differed on which standard of law to apply when reviewing pre-indictment delay claims.

The adoption of two standards is further problematic because courts may reach vastly different results in these cases based on which standard is applied. For example, in *State v. Smith*¹⁰, the defendant raised a due process claim similar to this case but instead the Eighth District Court of Appeals rejected his claim. Specifically, the victim in *Smith* reported that she had been sexually assaulted by a man while held down by two unknown males. *Id.* Although a CODIS hit in 2004 provided evidence that the defendant was the attacker, the case did not proceed to trial nine years later until 2013. *Id.* at ¶¶ 6 – 8. The defendant claimed he was prejudiced by the lost testimony of the two other men, who could have helped to show his encounter was a consensual act. *Id.* at ¶ 27. The Eighth District rejected the defendant’s claim and reasoned that there was no “concrete proof that the identity of the two unknown males would have been established had there been no delay in prosecution or that their testimony would have corroborated appellant’s version of events.” *Id.* at ¶ 30. The *Smith* and *Jones* opinions are inconsistent with one another; one case suggests that a defendant is not prejudiced because the testimony of the lost witness is speculative whereas this case suggests the defendant is prejudiced in spite of the fact that he cannot identify the lost testimony of his mother. This is the dilemma that trial courts face when determining how

¹⁰ *State v. Smith*, 8th Dist. Cuyahoga No. 100501, 2014-Ohio-3034.

to decide a claim of pre-indictment delay, which is compounded by the standard of law pronounced by the Eighth District and its inability to apply in other cases.

B. The State Constitution Does not Afford a Higher Standard of Due Process Protection

Amicus curiae, the Ohio Association of Criminal Defense Lawyers, proposes that this Court hold that the Ohio Constitution affords greater protection than the Due Process Clauses to the Fifth and Fourteenth Amendments to the United States Constitution. In support of its argument, *amicus curiae* cites to cases in which this Court has held that specific provisions of the Ohio Constitution provide greater protection than comparable provisions of the United States Constitution. None of the cases cited by *amicus curiae* compare the relationship between due process under the Ohio Constitution to due process under the federal provisions.

This Court has held that the “due course of law” provision of Article I Section 16 of the Ohio Constitution is the equivalent of the “due process of law” protection under the United States Constitution. *In re B.C.*, 141 Ohio St.3d 55, 2014-Ohio-4558, 21 N.E.3d 308, ¶ 17; *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420 (2007), at ¶ 48, citing *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544, 38 N.E.2d 70 (1941); *In re A.G.*, 139 Ohio St.3d 572, 584, 2014-Ohio-2597, fn. 7; *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422, 1994-Ohio-38, 633 N.E.2d 504 (1994).

Beyond the fact that *amicus curiae* provides no support for this argument, no explanation has been offered as to why the Ohio Constitution should provide greater protection than the federal Constitution on this issue. Analysis of due process pre-indictment delay claims have always been rooted in the federal due process protections articulated under *Marion, supra*, and *Lovasco, supra*. The test for evaluating these types of claims has been uniformly applied across state supreme courts and federal courts. Given the absence of a compelling reason to afford greater protection

to the state due process claims, this Court should reject the suggestion that the State due process provides greater protection than under the United States Constitution.

The Effects Already Seen from the Standard of Law in *Jones*

Appellee has argued that the decision in *Jones* does not create a new standard of law; however, decisions from the Eighth District indicate the contrary. One panel of the Eighth District described *Jones* as not abandoning the actual prejudice standard and remarked that its comments of “actual prejudice would be evaluated in terms of basic concepts of due process and fundamental justice,” since all claims of pre-indictment delay are concerned with the “fundamental conceptions of justice which lie at the base of our civil and political institutions * * *” *State v. Owens*, 8th Dist. Cuyahoga No. 102276, 2015-Ohio-3881. Other panels described *Jones* as revising the former approach to establishing pre-indictment delay prejudice. *State v. Battiste*, 8th Dist. Cuyahoga No. 102299, 2015-Ohio-3586, ¶ 49. The concurring opinion in *Battiste* described *Jones* as watering down the first prong of the pre-indictment delay test and stated that *Jones* is unworkable and brings inherently inconsistent results since speculative and dubious claims of missing or lost evidence creates a “due process and fundamental right” standard that replaces the traditional “exculpatory evidence” standard. *Battiste*, ¶ 59-60. (S. Gallagher, J., concurring). The Eighth District also referenced two different standards in *State v. Bell*, 8th Dist. Cuyahoga No. 102141, 2015-Ohio-4178, ¶ 34.

Appellee would have this Court believe that *Jones* made no appreciable change to existing standard of law used to analyze pre-indictment delay claims. In the ninth months since the Eighth District issued the *Jones* opinion on July 16, 2015, new appellate opinions that followed and relied upon *Jones* highlight the inherent danger of replacing the requirement of actual prejudice with the standard adopted in *Jones*. In *State v. Dickerson*, 8th Dist. Cuyahoga No. 102461, 2016-Ohio-807, a majority panel of the Eighth District relied upon its own decision in *Jones* and found

ineffective assistance of counsel. *Id.* A careful review of the *Dickerson* opinion shows that the majority based its finding of ineffective assistance on something other than a demonstration of actual prejudice. *Id.* Specifically, the majority in *Dickerson* found that the death of a particular witness was “key” as that witness could have explained an alleged gap of time that occurred prior to the time and place that the rape occurred. *Id.* However, as the dissenting judge properly recognized, the testimony that the majority found important was simply, “speculative” and completely “irrelevant” to the findings of guilty on the rape charges. *Dickerson* at ¶ 57 - 58 (Stewart, J. dissenting).

The *Jones* Decision Undermines the Legislative Intent of the New Statute of Limitation Adopted by the Legislature

By eliminating the burden shifting analysis previously embraced by this Court, the *Jones* opinion defeats the legislative intent of the statute of limitation for rape cases. As the United States Supreme Court previously explained, “a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict.” *Stogner v. California*, 539 U.S. 607, 615, 123 S.Ct. 2446, 156 L.Ed. 2d 544 (2003), citing *Marion, supra*, 404 U.S. 307 at 322. Furthermore, the Supreme Court further clarified that this “judgment typically rests, in large part, upon evidentiary concerns— for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable.” *Stogner v. California, supra*, citing *United States v. Kubrick*, 444 U.S. 111, 117, 62 L.Ed.2d 259, 100 S.Ct. 352 (1979) and 4 W. LaFave, J. Israel, & N. King, *Criminal Procedure* 18.5 (a), p 718 (1999). The statute of limitation represents the legislature’s judgment as to when the length of delay in a case has been so long that there is a presumption that evidence has been tainted or lost to the extent that it would undermine confidence in a fair trial; however, in cases where the State indicts within the statute of limitations, there is no presumption of evidentiary concerns so severe based on the passage of time that courts

should dismiss. By proposing this new standard, considerations of the length of delay may allow for dismissal of cases where no actual prejudice was demonstrated, which would defeat legislative intent. *Jones* at ¶ 55 (J., S. Gallagher, dissenting) (“shifting the burden to the State to demonstrate a justifiable reason for delay without a showing of actual prejudice circumvents an extended statute of limitations period, invariably defeating legislative intent.”)

The notes of the Legislative Service Commission on H.B. 6, indicate that the Ohio Legislature acted with two purposes when it amended the statute of limitations for the prosecution of rape cases on July 15, 2015: (1) to increase the period of limitation “for commencing a criminal prosecution for rape or sexual battery * * * to 25 years after the offense is committed” and (2) to extend the period of limitation for cases where a DNA match is made in connection with a DNA record of an identifiable person. <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA131-HB-6>, accessed April 12, 2016. By extending the statute of limitations, the Ohio Legislature expressed its intent to expand the time period beyond which there are evidentiary concerns that the passage of time has rendered the trial unreliable.

By contrast, here, appellee suggests that we shorten the window of time for prosecuting these cases due to evidentiary concerns. CODIS cases frequently have lost evidence due to the passage of time. Part of the difficulty in this particular case is that we do not have the benefit of the evidence that would have been introduced at trial to weigh against appellee’s claims of prejudice. In some respects, this case is similar to *Keenan, supra*, where the defendant argued that he could not possibly receive a fair trial due to the “passage of time, deceased witnesses, decreased memories” and the death of Mr. Espinoza, who was the sole source of “direct eye witness testimony” to the murder. *Keenan, supra*, 143 Ohio St.3d 397 at ¶ 11. In reviewing the defendant’s claim in *Keenan*, this Court noted that the State was also prejudiced by the lost testimony and that

it was not possible to determine whether the defendant was prejudiced by the lost evidence without first “giving the parties the opportunity to develop the record.” *Id.* at ¶ 13.

Rather than arguing that the parties should develop the record, appellee is suggesting that when evidence has been lost of speculative value, we should dismiss the case without further developing the record. The adoption of appellee’s proposition of law would undermine the judgment of the legislature, which recently signaled that twenty-five years is an appropriate length of time to prosecute in spite of concerns of absent witnesses, faded memories, and the passage of time. By allowing a dismissal based on speculative claims of prejudice, appellee’s proposition of law would abandon the truth-seeking function of the due process. To do so would fundamentally impede the State’s ability to prosecute numerous rape crimes that involve offenders who for many years have not been held accountable for their past criminal actions.

CONCLUSION

For the foregoing reasons, the decision of the Eighth District in *Jones* should be reversed and remanded. At a minimum, the appellate court applied the incorrect standard of law in reviewing this case. The standard applied by the appellate court defeats the intent of the legislature and pushes aside over forty years of legal precedent. In doing so, *Jones* creates a new standard that allows trial judges to apply their own personal and private notions of fairness to due process claims of pre-indictment delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent this 15th day of April, 2016 to the following via electronic mail: Counsel for Appellee, Russell Bensing, rbensing@ameritech.net; Counsel for amicus curiae Ohio Attorney General, Eric Murphy, eric.murphy@ohioattorneygeneral.gov and Samuel Peterson, samuel.peterson@ohioattorneygeneral.gov; Counsel for amicus curiae Ohio Prosecuting Attorney Association, Rachel Lipman Curran, Rachel.Curran@hcpros.org; Counsel for amici curiae Joyful Heart Foundation, et al., Georgia Yanchar, gyanchar@calfee.com, Alexander Reich, areich@calfee.com; Kevin P. Martin, kmartin@goodwinprocter.com; Alexandra Valenti, avalenti@goodwinprocter.com; Brigid Morris, bmorris@goodwinprocter.com; Counsel for Cuyahoga County Public Defender, Erika Cunliff, ecunliff@cuyahogacounty.us, Cullen Sweeney, csweeney@cuyahogacounty.us, and Jeffrey Gamso, jgamso@cuyahogacounty.us, Counsel for Amicus Curiae Ohio Public Defender, Terrance Scott, Terrance.Scott@opd.ohio.gov, and via U.S. mail to Counsel for Amicus Curiae Ohio Association of Criminal Defense Lawyers, Sarah Schregardus, Kura, Wilford & Schregardus Co., L.P.A., 492 City Park Avenue, Columbus, Ohio 43215.

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