Case No. 2013-1731

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellant, v. **THOMAS M. KEENAN**, Defendant-Appellee.	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 99025

MERIT BRIEF OF APPELLEE THOMAS M. KEENAN

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STATEMENT OF THE CASE

The State's Brief glosses over the shameful history of this prosecution, but that history is essential to a proper understanding and resolution of the issues presented.

1. Keenan's First Trial

Thomas Michael Keenan's first trial was commenced on January 23, 1989. The State's case against Keenan was based principally on the alleged eyewitness testimony of co-defendant Edward Espinoza that Keenan and co-defendant Joe D'Ambrosio allegedly kidnapped and then murdered Anthony Klann with a knife at Doan Creek in the late evening/early morning hours of September 22/23, 1988 or September 23/24, 1988, allegedly following a night of heavy drinking at the bars on Coventry Road in Cleveland Heights.

The following eleven witnesses testified for the State in the 1989 trial: (1) Elizabeth Balraj, (2) Ronald Watson, (3) Paul "Stoney" Lewis, (4) Carolyn Rosell, (5) James "Lightfoot" Russell, (6) Mimsel Dendak, (7) Adam Flanik, (8) Ernest Hayes, (9) Nancy Somers, (10) Edward Espinoza, and (11) Det. Leo Allen.

The jury returned a guilty verdict on all four counts. After the penalty phase, at which Keenan was compelled to testify on his own behalf, Keenan was sentenced to death.

Keenan's convictions and death sentence in the 1989 trial were ultimately reversed by this Court based upon prosecutorial misconduct, and the case was remanded for a new trial. State v. Keenan, 66 Ohio St. 3d 402 (1993). The Court held that prosecutor Carmen Marino committed numerous acts of prejudicial misconduct during the 1989 trial.

In reversing the convictions, the Court noted that the State's case was weak to begin with and was heavily reliant on the flawed Espinoza. State v. Keenan, 66 Ohio St. 3d 402, 411 (1993).

2. Keenan's Second Trial

Keenan was retried on the original indictment in April 1994. And, as with the 1989 trial, the 1994 trial was again based almost entirely on Espinoza's alleged eyewitness testimony. The same eleven witnesses that had testified for the State in the 1989 trial again testified during the State's case in chief in the 1994 trial (with one additional witness on an uncontested matter). Keenan was convicted on all counts and sentenced to death.

3. Keenan Obtains Relief from his 1994 Conviction in Federal Court

Keenan's aggravated murder conviction and death sentence were later found by the federal habeas court to have been obtained in violation of Keenan's federal constitutional rights. In an order dated April 24, 2012, the federal court found that the State had suppressed evidence in violation of its duties under Brady v. Maryland. Keenan v. Bagley, 2012 U.S. Dist. LEXIS 57044 (N.D. Ohio Apr. 24, 2012).

The federal court's order in Keenan's case was similar to that earlier entered by Judge Kathleen M. O'Malley in D'Ambrosio's federal habeas case. D'Ambrosio v. Bagley, 2006 U.S. Dist. LEXIS 12794 (N.D. Ohio Mar. 24, 2006), aff'd, 527 F.3d 489 (6th Cir. 2008). Indeed, in part because of ongoing discovery violations by the State during D'Ambrosio's retrial in the state trial court during 2009, Judge O'Malley later issued an unconditional writ of habeas corpus, ordered D'Ambrosio's release from custody, and ordered expungement of D'Ambrosio's convictions and sentence. D'Ambrosio v. Bagley, 619 F. Supp. 2d 428, 460 (N.D. Ohio 2009). Then, after learning that Espinoza had died on April 26, 2009, and that the State had hidden that fact from D'Ambrosio and the courts for some three months, Judge O'Malley on March 10, 2010, issued an order that forever barred the State from seeking to re-prosecute D'Ambrosio. D'Ambrosio v. Bagley, 688 F. Supp. 2d 709, 727-28 (N.D. Ohio 2010), aff'd, 656 F.3d 379 (6th Cir. 2011), cert. denied, Bobby v.

D'Ambrosio, 132 S. Ct. 1150 (2012). D'Ambrosio has thus been free and unburdened by these charges since 2010.

In its April 24, 2012 order granting relief in Keenan's favor, Judge David A. Katz held that the State suppressed the following seven categories of evidence and/or police reports concerning said matters, all in violation of Brady:

(1) That Paul Lewis, "one of the State's main witnesses," had been indicted for the rape of Christopher Longenecker, then roommate to Klann, that Klann had some knowledge of this rape, and that Lewis was never prosecuted for it.

(2) That the police had identified State-witness Lewis as the anonymous caller who called the police to identify Klann as the victim and that Lewis had information regarding the murder that was not publicly known.

(3) That State-witness Lewis asked the police to help him resolve a DUI charge against him in exchange for his testimony against Keenan.

(4) That the initial investigating detectives on the scene at Doan Creek where Klann's body was found, Ernest Hayes and Melvin Goldstein, believed that, because there was no blood or signs of struggle at the Doan Creek location, the murder must have occurred someplace else and Klann's body was dumped in Doan Creek.

(5) That police had a cassette tape containing conversations between a police informant working with officer Timothy Horval and a jail inmate named Angelo Crimi – whom the court identified as "an inmate who once lived with Klann" – in which Crimi may have implicated other persons in Klann's murder.

(6) That police had evidence that State-witness James "Lightfoot" Russell and his girlfriend, State-witness Carolyn Rosell, requested assistance from the police in relocating after testifying at the trials, and evidence that Russell called the police on December 10, 1988, before the Keenan and D'Ambrosio trials, to request the relocation because he claimed to have been threatened by two men who came to his door looking for him, and he feared for his safety.

(7) That a neighbor of State-witness Lewis's who lived on Lewis's street, Fairview Court – Therese Farinacci – reported to police that, after returning home around midnight on Friday evening/Saturday morning, September 23/24, 1988, she noticed a black pickup truck parked on the street, and at 4:10 a.m. that morning, she was awakened by "loud yelling of obscenities" and "loud pounding on a door," but she did not look out of her windows

> because she was frightened, and also that Carmon Pinzone, who evidently owned two buildings near Lewis's apartment, told the police that "an older couple who live at 2026 Murray Hill (up) were heard to have made the comment that they heard someone at about the same time that the truck was on Fairview Ct. say 'Lets [sic] dump the body in the basement.'"

Keenan, 2012 U.S. Dist. LEXIS 57044 at **87-113.

Judge Katz described the State's Brady violations in Keenan's case as "serious and disturbing violations of the State's constitutional obligation to produce to defendants any and all exculpatory information in their possession." Id. at *134.

The federal court held that Keenan was not aware of the relevant suppressed evidence during his trial in 1994, that the State had "stonewall[ed] for nearly twenty years" (id. at *134), and that Keenan only learned of the evidence as a result of discovery ordered by the federal court in D'Ambrosio's habeas case. Id. at **68, 83. And, as with the habeas court in D'Ambrosio, Judge Katz found that the suppression of this evidence was prejudicial and denied Keenan a fair trial. Id. at **123-26.

The federal court thus issued a conditional writ of habeas corpus, dated April 24, 2012, which ordered that "Respondent shall either: (1) set aside Keenan's conviction for aggravated murder and death sentence attendant thereto; or (2) conduct another trial within 180 days from the effective date of this Order." Id. at *246. Neither side appealed.

4. Keenan's Third Trial: Resulting in a Dismissal With Prejudice

The state trial court set Keenan's third trial for October 31, 2012, more than 24 years after Klann's death. This would have been the **fifth** time the State would have gone forward with a trial for Klann's murder. In pretrial proceedings the trial court took special care to ensure that Keenan's rights were protected. Early on the court raised with the parties its concerns about how the State planned to present a case with Espinoza dead. (Pretrial Transcript ("PT") at 106-12.) The State

advised that it would file motions to permit it to use Espinoza's prior testimony and other motions concerning evidence from the prior trials. (PT at 108, 113, 117.)

The State filed three such notices/motions on July 16, 2012. In its filings, the State asked the court for permission to allow it to use at Keenan's third trial: **(1)** the prior testimony and statements of Espinoza pursuant to Evid. R. 804(B)(1); **(2)** the prior testimony and statements of Keenan given during the sentencing phases of his 1989 and 1994 trials, pursuant to Evid. R. 801(D)(2)(a); and **(3)** the prior testimony and statements of D'Ambrosio as those of an alleged "co-conspirator" under Evid. R. 801(D)(2)(e).

In filings on August 8, 2012, Keenan timely opposed each of the State's three notices/motions and contemporaneously moved in limine that the court bar all such testimony and evidence on the grounds that such evidence was not admissible under the Rules of Evidence and its admission would violate Keenan's constitutional rights in various respects. Contrary to the egregiously false and yet often-repeated assertion by the State in its Brief, Keenan did **not** seek these in limine pretrial evidentiary rulings as "sanctions" against the State for "discovery violations." Instead, the legal grounds Keenan presented to the trial court for barring the prior testimony were:

> (1) **Keenan's prior testimony**: Keenan's prior sentencing-phase statements and testimony from his two prior trials were compelled and involuntary and their admission would thus violate Keenan's rights to due process, to an individualized sentencing determination in a capital case, and the privilege against self-incrimination, and citing, among other cases, New Jersey v. Portash, 440 U.S. 450, 459 (1979) ("[A] defendant's compelled statements . . . may not be put to any testimonial use whatever against him in a criminal trial."), Simmons v. United States, 390 U.S. 377 (1968), Harrison v. United States, 392 U.S. 219, 222 (1968), Mincey v. Arizona, 437 U.S. 385, 398 (1978), Garrity v. New Jersey, 385 U.S. 493 (1967), and Harris v. New York, 401 U.S. 222 (1971).
>
> (2) **Espinoza's prior testimony**: The admission of Espinoza's prior testimony, in the circumstances here where Keenan had **not** previously had an opportunity for **effective and adequate cross-examination** of Espinoza, would violate Keenan's right to confront the witnesses against him, including to confront Espinoza with the "Brady" evidence, and citing, among other cases, Crawford v. Washington, 541 U.S.

36 (2004), Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) ("the Confrontation Clause guarantees an opportunity for effective cross-examination"), United States v. Fitzgerald, 615 F. Supp. 2d 1156 (S.D. Cal. 2009), Commonwealth v. Bazemore, 614 A.2d 84 (Pa. 1992), and State v. Self, 56 Ohio St. 3d 73 (1990).

(3) **D'Ambrosio's prior testimony**: The admission of D'Ambrosio's prior testimony from Keenan's 1994 trial is barred because D'Ambrosio is not "unavailable," and also because the prior testimony is not a statement of a "co-conspirator" under Evid. R. 801(D)(2)(e), is not admissible as an "adoptive admission" under Evid. R. 801(D)(2)(b), and the admission of any such testimony would deny Keenan his right to confront the witnesses against him, and citing, among other cases, Pointer v. Texas, U.S. 400 (1965), Chambers v. Mississippi, 410 U.S. 284 (1973), State v. Carter, 72 Ohio St. 3d 545 (1995), State v. Lindsey, 87 Ohio St. 3d 479 (2000), State v. Jalowiec, 91 Ohio St. 3d 220 (2001), State v. Liberatore, 69 Ohio St. 2d 583 (1982), and State v. Shelton, 51 Ohio St. 2d 68 (1977).

The trial court agreed with Keenan and thus granted his motions in limine as to the prior testimony and statements of Espinoza, Keenan, and D'Ambrosio (although the court reserved the question of whether Keenan and D'Ambrosio's testimony could be used for impeachment if either testified). (Journal Entry, August 27, 2012; see also PT at 369-73.) As is clear from even a cursory review of the trial court's pretrial evidentiary rulings, the court did not make these rulings as "sanctions" against the State for "discovery violations," but, instead, because the rulings were compelled by the law of evidence and Keenan's constitutional rights. Moreover, the State never appealed **any** of these pretrial evidentiary rulings.

With the parties' pretrial litigation on the rules-of-evidence track thus seeking clarity on the evidentiary parameters under which any trial would proceed, Keenan on a separate track also sought to have the case dismissed with prejudice. He filed this separate motion on August 8, 2012, and sought dismissal under Crim. R. 16, Crim. R. 48(B), the court's inherent power to dismiss with prejudice, and the due process and/or double jeopardy protections under the U.S. and/or Ohio Constitutions.

On September 6, 2012, the trial court granted Keenan's motion to dismiss. (PT at 481-88.) The court carefully explained its findings and conclusions on the record and in open court. (PT at 488-96.)

The State timely appealed the dismissal with prejudice. The Eighth District affirmed.

STATEMENT OF THE FACTS

The State's "Statement of the Facts" is exclusively lifted from this Court's opinion affirming Keenan's 1994 conviction. That is emblematic of the State's persistent failure to appreciate that its misconduct over 20+ years resulted in three prior trials at which the "facts" presented were only a small and misleading part of the story. As a direct result of the State's own misconduct, and because significant exculpatory and impeachment information was hidden from both defendants **and from this Court**, any factual findings made solely in reliance upon the record from such prior trials are by definition incomplete, misleading, and/or unreliable.

Any proper statement of "facts" for purposes relevant to this appeal **must** at least minimally engage with the suppressed evidence and also with the State's announced intentions as to how it was planning to present its case in the 2012 retrial.

The glaring omissions from the State's Brief thus begin with the then-pending rape charge against key State-witness Paul Lewis. Lewis resided in the Little Italy neighborhood in the same building as Klann. State-witnesses Adam Flanik and Mimsel Dendak resided in the same or an adjoining building, on the top floor. (Transcript 1994 Trial ("T2") at 1184-87, 1211, 1223, 1240.) Espinoza's wife also resided in the neighborhood (with Espinoza, before his wife kicked him out), as did State-witnesses James Russell and Carolyn Rosell. (T2 at 1263-64, 1269-70, 1598.) All of these witnesses against Keenan and D'Ambrosio were thus Lewis's friends and neighbors, and at a time when Lewis was facing rape charges for raping another man.

On May 11, 1988, Christopher Longenecker, then Klann's roommate, filed a complaint with the Cleveland police charging Lewis with rape. As Judge Katz found: "The police report states that 'after the alleged assault, the victim's roomate [sic] by the name of Tony (LNU) came downstairs and asked for a cigarette. The victim then left out of the apartment with Tony and he went to his apartment. The victim began to cry and Tony asked him what was wrong but he refused to tell him what happen [sic] to him.'" (Keenan, 2012 U.S. Dist. LEXIS 57044, *87.) "Longenecker testified [in habeas proceedings] that he did not tell Klann that he was raped, but told him 'that something happened' and he was going to the police department. Two days later, on May 13, 1988, Lewis was arrested for aggravated rape, a felony, and incarcerated. Carmen Marino was the original prosecutor on the case, but later assigned the case to another prosecutor, whom he instructed to 'get [the] last name of Tony.'" (Id.) The State subpoenaed "Tony Last Name Unknown" to testify at the trial, which was scheduled for August 1, 1988. (Id. at *88.) Lewis himself subpoenaed "Anthony Klann" to testify. (Id.) The case was dismissed without prejudice the day of trial, however, when Longenecker failed to appear, and Lewis was discharged.

Longenecker did not appear at trial because, being legally blind, he misread his subpoena. (Id.) Longenecker called the police and/or prosecutor's office the next day to give them his correct contact information, and Lewis was reindicted soon after with a court appearance scheduled for **September 16, 1988**. (Id.)

Lewis thus had an obvious motive to kill Klann, as the only sighted witness to the rape charges against Lewis. Although none of Keenan's juries ever heard about the evidence of Lewis's connection to Klann through the pending rape charge, because it was suppressed, they did hear from Lewis and Espinoza about the night of heavy drinking with Keenan and D'Ambrosio on September 22/23 or 23/24, 1988, a **mere week** after Lewis's re-indictment on September 16. It was on this night

that Espinoza claimed Klann was murdered at the hands of Keenan and D'Ambrosio at Doan Creek, while Espinoza supposedly stood by watching.

Espinoza is the only claimed witness to the murder and kidnapping, and the whole story of Keenan's involvement hinges on Espinoza's testimony. Espinoza's "incredible" story begins with his assertion that the night of drinking included a prolonged visit to Coconut Joe's on Tequila Night. The testimony was clear that Tequila Night was a regular weekly event that happened only on **Thursdays**. (See T2 at 1437, 1996, 2210, 2211, 2228, 2235, 2236; D'Ambrosio, 2006 U.S. Dist. LEXIS 12794, *21.) The events Espinoza described thus happened, if at all, on Thursday evening/Friday morning September 22/23. And, as Judge Katz held: "Espinoza consistently testified that the events at Coconut Joe's took place on Thursday night/Friday morning." (Keenan, 2012 U.S. Dist. LEXIS 57044, *141; see also T2 at 1311.)

Espinoza had been severely intoxicated that Thursday evening/Friday morning: "Espinoza testified that on Thursday and into early Friday morning, when the disturbance at Coconut Joe's occurred, he had consumed twenty-six cans of beer and four shots of tequila, smoked marijuana and snorted cocaine." (Id. at *124, n.21; see also T2 at 1435.) While at Coconut Joe's, Espinoza dragged Klann into the washroom several times and was yelling and swearing at him loud enough for Lewis to hear him outside at the bar. (State v. Keenan, 81 Ohio St. 3d 133, 134 (1998); T2 at 1872, 1908, 1911, 1912.) On at least one occasion Lewis supposedly went into the washroom to find out what was going on and saw Klann backed up against the sink with Espinoza in his face, poking him with his finger. (Keenan, 81 Ohio St. 3d at 134.)

In addition to fighting and/or arguing with Klann in the men's room at Coconut Joe's that evening, Espinoza was kicked out of the bar for his disorderly behavior and the Cleveland Heights Police were called because of the disturbance he was creating as he left. (Keenan, 81 Ohio St. 3d at

134.) As Judge Katz found: "The Cleveland Heights Police Department dispatch log shows that the disturbance at Coconut Joe's happened on **Thursday night/Friday morning**, not Friday night/Saturday morning as the prosecution suggested." (Keenan, 2012 U.S. Dist. LEXIS 57044, *110; see also id. at *113.)

Espinoza is the **sole source** for the contention that – during his, Keenan and D'Ambrosio's search for Lewis after Espinoza had been kicked out of Coconut Joe's – they supposedly encountered Klann as he was walking alone down Mayfield Hill toward Little Italy and allegedly forced him into Keenan's truck for the next hour or so, until his death, for the purpose of extracting from Klann the whereabouts of Lewis. (Keenan, 81 Ohio St. 3d at 134-35; T2 at 1342-50.) Espinoza is also the **sole source** for the contention that, after their brief ensuing search in the Little Italy neighborhood, Keenan then drove down to Doan Creek where Keenan and D'Ambrosio allegedly killed Klann with a knife, while Espinoza watched, supposedly because Klann refused to tell them Lewis's whereabouts. (Keenan, 81 Ohio St. 3d at 134-35; T2 at 1358-75.) Espinoza is also the **sole source** for the claims that as Keenan supposedly held Klann, preparing to slit his throat, Klann did not put up any struggle and that, after Klann's throat had been slit, Klann then "walk[ed] in circles," as ordered by Keenan, "before being led to and pushed in the creek (and all this with no blood being spilled)." (Keenan, 2012 U.S. Dist. LEXIS 57044, *124.) Judge Katz said Espinoza's story "**strains credulity**." (Id.)

Lewis's friends and neighbors, State-witnesses Flanik, Dendak, Russell and Rosell, had in the prior trials been offered by the State to corroborate certain aspects of Espinoza's story about the search for Lewis in Little Italy, but they presented no evidence about Klann's alleged kidnapping or murder. Their stories also put the alleged events they claimed to have witnessed as occurring on **Friday night/Saturday morning at about 3:00 AM**, **not** Thursday/Friday. (T2 at 1155, 1162-63,

1166, 1178, 1240-41, 1599-1600, 1687-88, 1704.) Keenan had an alibi for Friday night/Saturday morning because he was attending a party with his girlfriend. (Keenan, 2012 U.S. Dist. LEXIS 57044, *112, 125, 127.)

Lewis and his cohorts were instrumental in pointing the finger of blame at Keenan and D'Ambrosio almost immediately after Klann's body was discovered by a jogger on Saturday September 24, 1988. As Judge Katz held: "Lewis had a central role in the investigation of the murder; it was he who first identified Klann for the police and identified Keenan, D'Ambrosio and Espinoza as suspects. He even led the police to D'Ambrosio's apartment to find them. Lewis also played an important role in the prosecution's theory that the murder occurred after the defendants' frenetic search for Lewis on Thursday night/Friday morning." (Keenan, 2012 U.S. Dist. LEXIS 57044, *94.) And it was Lewis, along with Flanik and Russell, who all went together to the morgue, shortly after Klann's body was discovered, to identify the body. (Keenan, 2012 U.S. Dist. LEXIS 57044, *89; T2 at 1180-83, 1700, 1705-06.)

Lewis knew a lot for someone supposedly not involved. As Judge Katz noted: "Lewis was the first person to contact police about the murder. He called the police anonymously early on Monday morning, less than forty-eight hours after Klann's body was discovered, and asked them questions that revealed information about the murder that was not publicly known." (Keenan, 2012 U.S. Dist. LEXIS 57044, *89.) But this information was suppressed from the defense, just like Lewis's rape charge and that charge's connection to Klann. (Id. at *87-96.)

And Lewis exploited his role, seeking to benefit, also unbeknownst to the defense. As Judge Katz found: "At some point, [Lewis] asked the police to help him resolve a DUI charge against him since he was 'a star witness' in Klann's murder case." (Id. at *89.) This information was suppressed. (Id. at *87-96.)

State-witnesses James Russell and Carolyn Rosell, too, tried to benefit from their involvement, also unbeknownst to the defense. They "requested assistance from the police in relocating after testifying at the 1989 trials. A police report . . . stated that on December 10, 1988, before the Keenan and D'Ambrosio trials, Russell called the police to request the relocation because he had been threatened by two men who came to his door looking for him, and he feared for his family's safety." (Id. at *105.) This may in part explain why Russell was unavailable to testify in Keenan's 1994 trial and why Rosell was then living in Maryland. The information was suppressed. (Id. at *105-07.)

The glaring discrepancy about whether the events happened on Thursday night/Friday morning or Friday night/Saturday morning was never able to be fully or fairly exploited by Keenan, in part because the State suppressed the evidence of what several neighbors of Lewis reported to police regarding what they had seen or heard on **Friday night/Saturday morning**. As Judge Katz explained:

> Therese Farinacci, who lived on Lewis' street, Fairview Court, told Detective Allen that after returning around midnight on Friday night, she noticed a black pickup truck parked on the street, and at 4:10 a.m. that morning, she was awakened by "loud yelling of obscenities" and "loud pounding on a door." She did not look out of her windows because she was frightened. In addition, Carmon Pinzone, who it appears owned two buildings near Lewis' apartment, told the police that "an older couple who live at 2026 Murray Hill (up) were heard to have made the comment that they heard someone at about the same time that the truck was on Fairview Ct. say 'Lets [*sic*] dump the body in the basement.'"

(Id. at *110-11.)

Being able to credibly place the murder on Friday night/Saturday morning, **a full 24 hours after Espinoza claimed it happened**, and when Keenan had an alibi, would have also enabled Keenan to more effectively expose the major inconsistencies with the coroner's testimony as to when the victim died. Judge Katz explained these issues:

> The coroner's testimony regarding Klann's time of death has its own weaknesses, however. In Keenan's first trial, she testified that the "estimated time" of death was "24 hours or less" before the autopsy was performed, which was at 8:15 a.m. Sunday morning. This would put the time of death in the early hours of Saturday, September 24. She explained that the time of death written in her autopsy report "is consistent with him dying on the 24th of September. . . . That is an estimated time of death based on the appearance of the body, the amount of stiffness in the body. The body was found in the water. . . . The food in the stomach, all of these, and also the investigations surrounding his death." She acknowledged that the time of death was an estimate and could have been "a little more" or "a little less" than the twenty-four hours. But she testified that "everything goes along with him dying on the 24th", and repeated the twenty-four hours "or less" estimate numerous times. When asked if the time of death could have been forty-eight hours before the autopsy, she replied, "**[p]robably not, because the body had not undergone decomposition**." At Keenan's second trial, she revised her opinion on cross-examination by defense counsel to include the possibility that the time of death could have occurred "even forty-eight hours" before the autopsy, which would have put the time of death at 8:15 a.m. Friday morning, still several hours past when Espinoza claims the murder occurred, which was before sunrise.

(Id. at *148 n.32.)

The suppressed evidence about "dump[ing] the body in the basement" would have also made particularly helpful to Keenan the evidence in early police reports containing the conclusions of detectives Ernest Hayes and Melvin Goldstein, the first detectives on the scene, that because there was no blood or signs of struggle at the Doan Creek location where Klann's body was found, the murder must have occurred someplace else. As Judge Katz found:

> [T]he detectives testified [in the habeas proceedings] that they were the first Cleveland Police Detectives on the scene after Klann's body was discovered by joggers. They observed that there was neither blood on the creek bed surrounding the body, nor signs of a struggle. They also noted that there were no tire marks or footprints in the wet ground leading up to the bank where Klann's body was discovered, and that Klann had no shoes or underwear on. Based on these observations, the detectives concluded that the murder had occurred elsewhere and the body had been dumped in Doan Creek. In fact . . . , Goldstein testified that Doan Creek often was used as a dumping ground and a place of criminal activity. The detectives averred in their affidavits that they recall including their opinion about the location of the murder in their initial report about the crime scene, but when the police reports were produced, their opinion was not in them.

(Id. at *100-01.) Although this evidence would have been helpful to Keenan, it too was suppressed.

(Id. at *100-03.)

Also suppressed were police reports concerning, and a cassette tape containing, conversations between an informant and an inmate who once lived with Klann named Angelo Crimi, in which Crimi may have implicated other persons in Klann's murder. As Judge Katz explained:

> A police report produced in [habeas discovery] states: "Received a cassette tape of conversations between informant of PTL. HORVAL 2343 and one ANTHONY CRIMI who is incarcerated in our county jail, which may incriminate others in this crime. This tape attached to this file." The tape has never been found. Another police report produced in the D'Ambrosio habeas discovery showed that the police talked to the detective who handled Crimi's crime (burglary) and asked people in his Little Italy neighborhood about him and his connection to Klann. (Id. at Ex. 25.) But Detective Horval testified at the D'Ambrosio evidentiary hearing that while he does not recall the tape or its contents, he remembers Crimi was an informant and he does not understand why there is no report from him about the tape, which would have been customary.

(Id. at *103-04.) Although this evidence would have been helpful to Keenan, it too was suppressed. (Id. at *103-05.)

The State in its Brief also ignores that it was planning at the third trial in 2012 to have jailhouse snitch Robert L. Winlock testify against Keenan. (ST at 412-13, 427-29.) Prior to the 1994 trial, police evidently obtained a written statement from Winlock, dated November 24, 1993, which Keenan's trial counsel in 2012 learned about only shortly before the case was dismissed with prejudice by Judge Russo. (PT at 405-07, 419; Keenan's Proposed Findings of Fact and Conclusions ("FFCL"), and Exhibit 1 thereto.)

The written statement alleges that Winlock met and spoken with Keenan while both were inmates at the Cuyahoga County Jail in November 1993. (Id., Exh. 1.) Winlock describes two alleged encounters with Keenan at the jail during which, Winlock alleges, Keenan made allegedly incriminating statements about his supposed involvement in the Klann murder. In the first of these alleged encounters, which supposedly occurred on November 21, 1993, Winlock claims that

Keenan's incriminating statements were made to Winlock and another inmate named Lee Oliver, who is described by Winlock as an "attorney." In the second of these alleged encounters, which supposedly occurred on November 23, 1993, Winlock claims that Keenan's incriminating statements were made only to Winlock himself, and were to the effect that Klann's murder was allegedly committed because Klann was having an affair with **Espinoza's "wife."** (Id. (emphasis supplied).)

During discovery leading up to the 1994 trial, the State listed a witness identified as Robert "Winlonck," 38330 Lost Nation Rd., Willoughby, Ohio. (Id., Exhibit 2.) But neither Winlonck, nor Winlock, were called to testify in 1994, and there is a question whether Keenan's counsel in 1994, James Kersey, even knew about Winlock or knew that Winlock was a snitch who would offer up a new and different angle to this crime: a fight over Espinoza's "wife." (PT at 419-29.)

In support of his motion to dismiss in the trial court, Keenan presented evidence that Winlock was, in 2012, in federal prison for an identity theft offense, that he has "struggled with paranoia" for much of his life, that "[i]n **1993**, Mr. Winlock suffered a psychiatric breakdown and was diagnosed with suffering from paranoia," that Winlock's diagnosis is "clinical paranoia," that Winlock has been receiving disability benefits since 1993 because of his mental illness, and that Winlock has had multiple hospitalizations because of his mental illness. (FFCL, Exhs. 4 and 5.)

Keenan also presented evidence that the following witnesses are dead: **(1)** Edward Espinoza, **(2)** Lee Oliver, the "attorney" who was in jail with Winlock and Keenan, **(3)** Angelo Crimi, **(4)** James "Lightfoot" Russell, and **(5)** Det. Timothy J. Horval. (PT at 420, 493.) With the exception of Espinoza, there is no reference in Judge Katz's opinion of April 24, 2012, to any of these other State witness being deceased or any indication that Judge Katz was aware that any of these other State witness were deceased.

One final important fact that is missing from the State's Brief: When alleged rape victim

Christopher Longenecker heard about Klann's September 1988 murder, he again called police and/or the prosecutor's office, and voiced his concerns regarding what he considered a "strange" connection between Klann's murder and Klann's involvement in the Lewis rape case as its only third-party witness. (Keenan, 2012 U.S. Dist. LEXIS 57044, *88.) The prosecutors never returned the call. (Id.) Lewis's rape charges were "no-billed" on October 20, 1988 (id. at *88-89), a mere two weeks after Keenan and D'Ambrosio's indictment.

LAW AND ARGUMENT

I. REPSONSE TO PROPOSITION OF LAW NO. 1: The Trial Court Properly Applied This Court's Precedent, and Did Not Abuse its Discretion, in Dismissing the Indictment with Prejudice. No "Less Severe Sanction" Was Requested by the State, Nor Was One Required Under the Circumstances.

A. The State Has Waived Its Claims of Alleged Error Because It Invited the Alleged "Error" and/or Failed to Preserve the Issue for Appeal.

In an about-face from the position it took in the trial court, the State argues that the trial court supposedly did not actually have the authority to dismiss the indictment because it was required to impose the "least severe sanction." Yet, in the trial court, the State explicitly conceded that the trial court did indeed have the authority to dismiss the indictment,[1] and it never **once** made the "least severe sanction" argument that it has now sought to make the centerpiece of its appeal.

The State's "least severe sanction" argument has been waived both because it was never raised in the trial court and because the State made concessions to the contrary thereby inducing the alleged (but non-existent) "error" it now complains about.

It is axiomatic that arguments not raised in the trial court are waived for purposes of appeal.

[1]PT at 317, 406; State's Opposition to Motion to Dismiss at 26 ("While this Court plainly

State v. Williams, 55 Ohio St. 2d 112 (1977). Moreover, under the invited error doctrine, "a party is not entitled to take advantage of an error that he himself invited or induced." State v. Doss, 2005 Ohio 775, ¶ 5 (Ohio App. 2005). The doctrine of invited error is a corollary of the principle of equitable estoppel. It precludes an appellant from attacking a judgment "for errors committed by [the appellant]; for errors that the appellant induced the court to commit; or for errors into which the appellant either intentionally or unintentionally misled the court, and for which the appellant is actively responsible." State v. Minkner, 194 Ohio App. 3d 694, 700-01 (Ohio App. 2011).

For either or both of these reasons, the State's "least severe sanction" argument is waived on appeal. The State never raised the issue in the trial court. Moreover, it explicitly conceded that the trial court had the discretion to dismiss the case in its entirety. The State instead made the strategic choice to oppose dismissal on the basis of the alleged preclusive effect of the federal court's writ and on the State's contention that Keenan could not show the necessary "prejudice" entitling him to dismissal, both of which arguments were properly rejected, PT at 488-96, and the preclusion argument the State has now abandoned. Not only did the State thus not seek or even suggest that a lesser sanction was required, it actively resisted any suggestion that anything less than the entire case (aggravated murder, kidnapping, aggravated burglary) be pursued. (PT at 415-18; State's FFCL at 10 ("The State, in good faith, avers . . . there is sufficient evidence and available witnesses to proceed on all counts as charged against Keenan.").)

B. The Trial Court Properly Applied This Court's Precedent, and Did Not Abuse its Discretion, in Dismissing the Indictment with Prejudice. All Three Parson Factors Were Easily Met.

It is well settled that review of a trial court's dismissal of an indictment under Crim. R. 16 and/or Crim. R. 48(B) is for an abuse of discretion. See, e.g., State v. Wiles, 59 Ohio St. 3d 71, 78-79 (1991) (Rule 16); State v. Larkins, 2006 Ohio 90, ¶¶ 42, 52 (Ohio App. Jan. 12, 2006) (Rule 16);

State v. Siemer, 2007 Ohio 4600, ¶9 (Ohio App. Sept. 7, 2007) (Rule 16); State v. Busch, 76 Ohio St. 3d 613, 616 (1996) (Rule 48(B)); State v. Bales, 2012 Ohio 4426, ¶12 (Ohio App. Sept. 28, 2012) (Rule 48(B)); State v. Elqatto, 2012 Ohio 4303, ¶17 (Ohio App. Sept. 20, 2012) (Rule 48(B)). See also City of Lakewood v. Papadelis, 32 Ohio St. 3d 1, 3 (1987).

Therefore, the trial court's decision will not be overturned unless it was unreasonable, unconscionable, or arbitrary. State v. Engle, 166 Ohio App. 3d 262 (2006); Siemer, 2007 Ohio 4600, ¶9. The result must be "so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." State v. Glenn, 2011 Ohio 3684, ¶26 (Ohio App. 2011) (citing Nakoff v. Fairview Gen. Hosp., 75 Ohio St. 3d 254, 256-57 (1996)). "An appellate court is not permitted to find an abuse of discretion merely because it would have arrived at a different result if it had reviewed the matter de novo." Spitz v. St. Luke's Med. Ctr., 2007 Ohio 1448, 11 (Ohio App. 2007). See also Elqatto, 2012 Ohio 4303, ¶17.

The lower appellate court correctly concluded that the dismissal with prejudice was not an abuse of discretion and was not made in contravention of any of this Court's precedent. The State's reliance on State v. Darmond, 135 Ohio St. 3d 343 (2013), is a red herring. Darmond, which was decided 6 months after the trial court's ruling, confirms that Lakewood's[2] holding – that a trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery – "applies equally to discovery violations committed by the state and to discovery violations committed by a criminal defendant." Darmond, 135 Ohio St. 3d 343.

The trial court did precisely what the State claims Darmond requires. In fact, the trial

[2]City of Lakewood v. Papadelis, 32 Ohio St. 3d 1 (1987).

court cited, addressed, and evaluated all three of the Parson[3] factors approved by the Court in Darmond: **(1)** whether the discovery violation was willful; **(2)** whether foreknowledge would have benefitted the defendant; and **(3)** whether the defendant suffered prejudice as a result of the State's failure to disclose the information. Darmond at ¶¶ 36-41 (citing Parson). And, the trial court expressly recognized its obligation to impose the least severe sanction consistent with the discovery rules, and it then proceeded to impose that sanction: "**Therefore, while the Court is aware that it has an obligation to impose the least severe sanction that is consistent with the purposes of the rules of discovery, I find that Keenan's case is the unique and extraordinary case where the prejudice created cannot be cured by a new trial.**" Keenan, 2013 Ohio 4029, ¶ 27 (quoting trial court's on-the-record findings).

The dismissal here was a careful and thoughtful exercise of the trial court's discretion. It clearly satisfies the three Parson factors, and is the least severe sanction, given the circumstances of this case and the egregious and prolonged constitutional violations, just as both lower courts held. (PT at 488-96; Keenan, 2013 Ohio 4029, ¶¶ 38-42.)

1. Parson Factor One: The State repeatedly violated Keenan's constitutional rights and these violations were willful, egregious, and unconscionable.

First and foremost, the State repeatedly violated Keenan's constitutional rights and these violations were willful, egregious, and unconscionable. The State prefers the quaint and misleading term "discovery violation," but the misconduct that plagued this prosecution deserves to be called what it is: **the repeated and deliberate violation in a capital case, and over two prior trials, of the accused's constitutional rights**.

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[3]State v. Parson, 6 Ohio St. 3d 442 (1983).

These many constitutional violations have been fully and finally adjudicated by state and federal courts reviewing Keenan's 1989 and 1994 convictions, as detailed more fully earlier in this Brief, and their existence is beyond dispute. The trial court relied upon them in dismissing this case. (PT at 490 ("As to the first prong, it is without question, based on the egregious history of the prosecutorial misconduct and the Brady violations outlined in detail by both the Ohio Supreme Court and the Northern District Court of Ohio in this case that the State willfully withheld exculpatory evidence from Keenan and his attorneys.").)

The State is not at liberty to ignore the binding legal and factual findings of the federal habeas court or the federal court's binding conclusion that Keenan's constitutional rights were violated as a result of the State's own prolonged misconduct. See, e.g., Keenan, 2012 U.S. Dist. LEXIS 57044 at *134 ("The State failed to fulfill [its Brady] obligations at Keenan's trial and continued to stonewall for nearly twenty years after."). The State did not appeal Judge Katz's ruling, perhaps in part because the State's appeals in D'Ambrosio's habeas case were all unsuccessful. And, it is manifest that the final judgment of a federal court granting a writ of habeas corpus in a criminal case is **binding** on the State in any subsequent retrial that it elects to conduct in that criminal case in compliance with that federal habeas judgment, and the federal court retains jurisdiction to ensure that the State complies. See, e.g., Collins v Loisel, 262 U.S. 426, 430 (1923); People v. Frazier, 733 N.W.2d 713, 719-20 (Mich. 2007), cert denied sub nom, Michigan v. Frazier, 552 U.S. 1071 (2007); In re Crow, 483 P.2d 1206, 1214 (Cal. 1971); Abels v. State, 804 P.2d 454, 455-56 (Okla. Crim. App. 1991).

Stated simply, the 1989 and 1994 trials were unconstitutional trials. And, to make it worse, the constitutional infirmities that plagued both trials were of the State's own making and due to its own prolonged misconduct. D'Ambrosio, 688 F. Supp. 2d at 731 ("that the State's inequitable

conduct led to material prejudice against D'Ambrosio's ability to defend himself at a new trial shocks the conscience.").

2. Parson Factor Two: Knowledge of the suppressed material would have benefited Keenan prior to his 1989 and 1994 trials.

There is also no question that Keenan would have substantially benefited had the suppressed material been provided prior to his 1989 and 1994 trials. As the trial court correctly held:

> Looking at the second prong, the knowledge of this material prior to trial would have clearly benefited Mr. Keenan's case. It would have allowed for more effective Cross-Examination of witnesses, especially Edward Espinoza, the Co-Defendant, and the alleged sole eyewitness to this crime.
>
> The evidence that Paul Lewis had been indicted for the rape of Christopher Longenecker, that Anthony Klann, the decedent, had some knowledge of this rape, and that Paul Lewis had never been prosecuted for it would have also been beneficial for Keenan. This evidence could have strengthened Keenan's case by establishing a motive of someone other than Keenan for the murder of Anthony Klann.
>
> For the same reasons, the evidence that Paul Lewis was the anonymous caller who called police and identified Anthony Klann as the murder victim, and had information regarding the murder that was not publicly known could also have benefited Mr. Keenan's case.
>
> The evidence that the initial responding detectives believed the murder to have occurred somewhere other than Doan's Creek would have allowed a more effective questioning of the police investigation, impeachment of Espinoza, and could have cast doubt on the State's theory of the case.
>
> The cassette tape that was made by Angelo Crimi that may have implicated others in the murder would have been obviously beneficial to the Keenan case. The disclosure of the existence of this tape and its subsequent disappearance could have held significant impeachment value towards the impeachment of the police and Edward Espinoza.
>
> James "Lightfoot" Russell's relocation request could have been used by Keenan's defense counsel to question the State of Ohio regarding his unavailable status in the second trial.
>
> The statements made by the neighbors, Theresa Farinacci, and the older couple who was not identified, would have strengthened the initial detective's conclusion that the murder occurred somewhere else or somewhere other than Doan's Creek.

> It could have also been used to question the thoroughness of the police investigation, and Paul Lewis' involvement in the crime since the statements were overheard by neighbors near Mr. Lewis' apartment.
>
> It is clear to this Court that the exculpatory evidence would have strengthened and been beneficial to Keenan's case as outlined in prong two.

(PT at 490-92.)

The State cannot, and does not, dispute the trial court's conclusions. The court's conclusions are also fully consistent with those of Judges O'Malley and Katz with respect to the many ways in which the Brady evidence would have been beneficial to the defense in this case. See Keenan, 2012 U.S. Dist. LEXIS 57044, *121-35; D'Ambrosio v. Bagley, 2006 U.S. Dist. LEXIS 12794, *95-106. See also State v. Larkins, 2006 Ohio 90, ¶¶ 13, 51 (Ohio App. Jan. 12, 2006).

3. Parson Factor Three: Keenan was prejudiced by the suppression and a retrial would further substantially prejudice him because he cannot now obtain a fair trial.

A retrial would substantially prejudice Keenan in precisely the ways recognized by courts as mandating a dismissal with prejudice and/or a bar to any further prosecution.

a. The passage of time has prejudiced Keenan and has severely hampered his ability to defend himself.

It has been more than 25 years since the events of September 1988, which are alleged by the State to have resulted in Klann's murder. The prolonged passage of time has at least three impacts: **(1)** many important witnesses are dead; **(2)** witnesses that are still alive will be forced to remember events that occurred more than 25 years ago; and **(3)** protestations of lack of memory on critical points, even if false, will be impossible to challenge.

Espinoza, Russell, Crimi, Oliver, and Horval are all dead. Separate and apart from the

inability to now confront these witnesses with all the suppressed evidence (discussed below), Keenan will never have the chance to have his jury see these witnesses and evaluate their credibility. (PT 493.) The entire case hinged on Espinoza. Being able to have the jury see him and evaluate his demeanor, veracity, and credibility is essential to a fair trial in this particular case, as both lower courts clearly realized. (PT at 488-96; Keenan, 2013 Ohio 4029, ¶31.) That will now never happen, through no fault of Keenan's. D'Ambrosio, 688 F. Supp. 2d at 728 ("[T]he critical State's witness – the man around whom the entire theory of the State's case revolved – is no longer available for trial, a fact the State knew but withheld from D'Ambrosio, the state court, and this Court. To fail to bar retrial in such extraordinary circumstances surely would fail to serve the interests of justice. Indeed, it would pervert those interests.").

There is no magic number of witnesses that must have died or be unavailable in order for there to be sufficient prejudice to support a dismissal. It is thus not at all relevant to the inquiry that the Larkins case had eight witnesses that were deceased whereas this case has five (at least). Larkins 2006 Ohio 90, ¶51. Each case depends on its own facts as do all matters of discretion. Here, Espinoza is so singularly important to the State's case that his death alone, coupled with the other evidence of actual prejudice, would be more than sufficient to support the exercise of discretion. But here, Russell, Crimi, Oliver, and Horval are also dead. Given that the State was evidently planning to use the snitch, Winlock, as a witness, Oliver's testimony would have been vitally important to Keenan receiving a fair trial, but Oliver's death prevents that. Russell, Crimi, and Horval would also have been important, especially given the suppressed evidence.

The passage of time has also invariably dimmed, if not totally darkened, in whole or in significant parts **relevant to Keenan's ability to defend**, the memories of those witnesses that are still alive, including, for example: (1) "Stoney" Lewis, (2) Robert L. Winlock, (3) the other persons

at Coconut Joe's on Thursday night/Friday morning September 22/23, 1988, (4) the various Little Italy residents who allegedly heard or saw Keenan, D'Ambrosio, and Espinoza in the Little Italy neighborhood at 3:00 AM, or thereabouts, Friday night/Saturday morning September 23/24 (Dendak, Flanik, Rosell), and (5) the witnesses revealed in the suppressed evidence (Therese Farinacci, Carmen Pinzone, the "older couple"). See, e.g., Barker v. Wingo, 407 U.S. 514, 532 (1972) (speedy trial case) ("Loss of memory . . . is not always reflected in the record because what has been forgotten can rarely be shown."). Keenan was powerless to do anything about the impairment to his ability to defend resulting from the faded memories of these living witnesses given that he was in prison and on death row for all relevant times from 1988 until 2012, **some 24 years**. See, e.g., Smith v. Hooey, 393 U.S. 374, 380 (1969) ("And, while evidence and witnesses disappear, memories fade, and events lose their perspective, a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.").

Moreover, what is just as prejudicial to Keenan, any expressions by any such witnesses of an alleged lack of memory on key points relevant to Keenan's ability to defend, even if those expressions are false, would be believed by jurors given the passage of time and the juror's lack of familiarity with the many factual nuances that undermine the State's case (e.g., whether it was the wee hours of Friday **or** Saturday morning, whether Flanik was on the roof **or** at street level, etc.). See, e.g., D'Ambrosio, 688 F. Supp. 2d at 730 ("To a jury unfamiliar with Espinoza's testimony, it would appear quite unremarkable that a murder committed more than 20 years in the past might have occurred on either a Thursday or a Friday, but this point is actually highly material, particularly in light of the Brady evidence.").

To the extent some of these witnesses testified or gave statements in the previous trials in 1989 and 1994, the testimony of such witnesses at a trial in 2013-14, because nearly a quarter

century has passed, would be a regurgitation of what the transcripts or written statements revealed they had said some 20-25 years ago. That is hardly a fair trial and it prevents effective cross-examination, circumstances that are all of the State's own making. See, e.g., Schoenauer v. United States, 759 F. Supp. 2d 1090 (S.D. Iowa 2010) (dismissing with prejudice where "[t]he government's actions were at least partially the cause of the need to invalidate the convictions and the passage of time makes re-trial impractical for many reasons. The memories of witnesses will be unreliable, and one prosecution witness has died since the trial.").

b. The State's misconduct has denied Keenan any meaningful opportunity to confront the State witnesses with the seven categories of suppressed Brady evidence.

The State's prolonged misconduct has denied Keenan any meaningful opportunity to confront the State witnesses with the seven categories of suppressed Brady evidence, found by Judge Katz, and this is devastatingly prejudicial to Keenan. (PT at 488-96.)

It is true, as to those State witnesses who are evidently still alive (e.g., Adam Flanik, Mimsel Dendak, Paul Lewis, Carolyn Rosell, Robert Winlock, Leo Allen), that Keenan's counsel would theoretically be able to "question them" at a retrial about some of the various categories of suppressed Brady evidence potentially relevant to such witnesses or to the police investigation.

However, any such confrontation will be futile and is totally inadequate for a fair trial. In the first place, Keenan will **never** be able to confront any of **these** witnesses with whatever might have been revealed to the defense as a result of confronting **Espinoza** or any of the other deceased witnesses with the suppressed evidence, because the witness's deaths have forever precluded any such confrontation. D'Ambrosio, 688 F. Supp. 2d at 730 ("Espinoza would have helped D'Ambrosio impeach the State's other witnesses."). Moreover, even the limited confrontation that could occur

will not be nearly as effective as it would have been back in **1989** and/or **1994** when the witness's memories were fresh, and, what is just as important to Keenan's right to a fair trial, when any claims by such witnesses of a lack of memory on key points revealed in the suppressed evidence could be credibly challenged as false or incredible. Now, however, at a trial in **2013-14**, if such State witnesses claim an inability to recall facts relevant to or revealed in the suppressed evidence, even if those claims are false, Keenan has no recourse whatsoever because a jury will believe any such professed lack of memory given the passage of time.

In other words, Keenan's ability to receive a new trial that **fairly engages with the suppressed evidence**, and that is not merely a hollow replay of witness testimony locked into transcripts and statements made 20-25 years ago has been severely impaired, if not entirely denied, by virtue of the State's prolonged unlawful suppression. And, this result benefits the State because, having prevailed in the earlier trials, the State is perfectly content to have a "new" trial that remains locked into earlier transcripts in which the suppressed evidence played no part. (See PT at 415-16.)

This aspect of prejudice is entirely due to the State's prosecutorial misconduct and its prolonged unlawful suppression of the seven categories of Brady evidence. In any retrial that proceeded now, under these circumstances and more than two decades after the relevant events, the State would be allowed to unfairly and unconscionably benefit from its own prolonged unconstitutional misconduct. Such a result is intolerable and unjust.

But the obvious actual prejudice the State's prolonged misconduct has imposed upon Keenan's ability to fairly confront the State witnesses that are **still alive** with the suppressed evidence, which might alone have justified granting Keenan's motion to dismiss, is compounded here many times over by the actual prejudice apparent because of all the important witnesses that are **now dead**.

This prejudice is especially acute insofar as it pertains to Espinoza. Indeed, because Espinoza is the sole witness that linked Keenan to the murder and kidnapping, the ability to confront him effectively with the suppressed evidence is a prerequisite to a fair trial in a case whose retrial was necessitated because of the constitutional violations resulting from that suppressed evidence. Espinoza's death makes that required confrontation impossible and thus alone fully supports the trial court's decision to dismiss the case.

Most of the seven categories of Brady evidence, had they all been provided to the defense when they should have been in 1988-89, would have enabled Keenan to confront and challenge Espinoza's story as to how, when, and where the kidnapping and murder occurred, and also Espinoza's relationship with Lewis, Longenecker, Klann, Crimi, Flanik, Russell, and Espinoza's wife, and Espinoza's knowledge of the relationships between and among those persons. For example, Espinoza's knowledge of the Lewis rape case and of that case's connection to Klann is vitally important to Keenan's defense, especially given the rape's homosexual nature, Espinoza's own conflict-filled relationship with Klann, and the provocative claim by Espinoza that D'Ambrosio allegedly said after the murder: "I killed the little faggot." (T2 at 1374.) The trial court certainly recognized that these and related issues would have provided important opportunities for cross-examination of Espinoza. (PT at 280-84, 324-32, 335-36, 362-64, 488-96.) The Winlock statement, about the murder occurring because Klann was having an affair with **Espinoza's "wife"**, also provides fertile opportunities for confronting Espinoza which are enhanced with the suppressed evidence.

Keenan has always maintained that he was not involved in the murder and that Espinoza likely killed Klann by himself or was involved in doing so with Lewis and/or perhaps others, and for totally different reasons than the facially farcical one about Klann not revealing Lewis's

whereabouts. This defense theory is magnitudes stronger with the suppressed evidence. However, in order for Keenan to credibly inculpate Espinoza with the suppressed evidence, he must be able do so **in Espinoza's presence** so as to allow the jury to evaluate Espinoza's demeanor and responses. He cannot do that now, to Keenan's extreme prejudice. See, e.g., D'Ambrosio, 688 F. Supp. 2d at 729-30 ("It would be difficult for D'Ambrosio to credibly inculpate Espinoza without Espinoza's presence. . . .").

Keenan would have also been able to use Espinoza, and the results of confronting him with the suppressed evidence, to substantially undermine the reasonableness of the investigating detective's reliance on Espinoza's version of events to the exclusion of all other suspects, particularly Espinoza and Lewis. The less credible Espinoza's testimony is revealed to be, by effective cross-examination with the suppressed evidence, the more unreasonable is the police's singular reliance upon him and thus its entire investigation. This would have been especially important here given the conclusions of experienced detectives, Goldstein and Hughes, that the murder likely occurred elsewhere and the body was **moved** to Doan Creek, the evidence that Klann had no shoes or underwear when found, the evidence of the witnesses who heard someone near Lewis's apartment say late Friday night/early Saturday morning "let's dump the body in the basement," and the evidence of Lewis's motive to kill Klann because he was a witness in the rape case. See D'Ambrosio, 688 F. Supp. 2d at 729-30 ("In light of the many discrepancies between Espinoza's story and the Brady evidence, D'Ambrosio may well have been able to use Espinoza to substantially undermine the reasonableness of the investigating detective's reliance on Espinoza's version of events to the exclusion of all others."); Keenan, 2012 U.S. Dist. LEXIS 57044 at *123.

The confrontation of Espinoza, essential to providing Keenan a fair trial, can now never occur because Espinoza is dead, exactly as the lower court found. Keenan, 2013 Ohio 4029 at ¶31

("Espinoza was the state's only eyewitness to Klann's murder. Based solely on the state's knowingly withholding the exculpatory material, Keenan is forever barred from effectively using the material to cross-examine or impeach Espinoza because Espinoza is dead. Keenan is prejudiced because he cannot confront a living Espinoza with the exculpatory material because he did not have it when Espinoza testified at his first and second trials."). See also Larkins, 2006 Ohio 90, ¶51 ("Ordinarily, those witnesses who previously testified but are now unavailable could have their prior testimony presented under Evid.R. 804(B)(1). But to do so in a retrial of this case would be useless as none of the witnesses who gave the prior testimony could be questioned about the exculpatory evidence withheld in the case."); United States v. Fitzgerald, 615 F. Supp. 2d at 1161 (dismissing with prejudice and noting that because "of the Brady violation, Defendant was denied an adequate opportunity to impeach [the key government witness]. Now, due to the death of [that witness], Defendant will never be able to confront him with the tapes, or any of the other recently discovered documents.").

The suppressed evidence also includes evidence that would have enabled Keenan, had it been provided in 1988-89, to impeach Russell on important matters relevant to Russell's credibility and motives for testifying, and also Russell's relationship with Lewis, Longenecker, Klann, Crimi, Flanik, Espinoza, and Espinoza's wife, and Russell's knowledge of the relationships between and among those persons, including why Russell went with Lewis and Flanik to the morgue on Monday, September 26, 1988, to see if Klann's body was there. (T2 at 1699-1700, 1703-05, 1740-43, 1769, 1794-95.) The suppressed evidence includes evidence that Russell had requested police protection during the 1989 trial because he believed he had been threatened by D'Ambrosio's brothers, and that he requested assistance from police in relocating himself and his family to another city after the trial because of alleged fears for his safety. That confrontation of Russell, essential to providing Keenan a

fair trial, will now never occur because Russell is dead.

The suppressed evidence also includes evidence that would have enabled Keenan, had it been provided in 1988-89, to question Angelo Crimi and Detective Tim Horval about the allegedly missing cassette tape that contains conversations with Crimi in which Crimi may have implicated other persons in Klann's murder, and also about Crimi's relationship with Lewis, Longenecker, Klann, Russell, Flanik, Espinoza, and Espinoza's wife, and Crimi's knowledge of the relationships between and among those persons. That confrontation of Crimi and Horval, essential to providing Keenan a fair trial, will now never occur because both Crimi and Horval are dead.

It is thus simply not possible to restore Keenan to the position he would have been in 1989 had the suppressed evidence been timely provided. Keenan, 2013 Ohio 4029, ¶ 36 ("We agree that the prejudice caused by the state's refusal to divulge exculpatory evidence has now made it impossible to restore Keenan to the position that he should have been in at the time of the first and second trials had he been made aware of the exculpatory evidence."). See also Larkins, 2006 Ohio 90 at ¶1 ("We agree that the prejudice caused by the state's refusal to divulge exculpatory evidence has now made it **impossible to restore Larkins to the position that he should have been in at the time of the first trial had he been made aware of the exculpatory evidence.**"); Morales v. Portuondo, 165 F. Supp. 2d 601, 611-12 (S.D.N.Y. 2001).

Moreover, just as, for example, in United States v. Fitzgerald, 615 F. Supp. 2d 1156 (S.D. Cal. 2009), it is no answer to say that the new evidence can simply be considered by a new jury along with the earlier transcribed testimony of Espinoza. Admitting Espinoza's prior testimony is not a viable option here because doing so would deny Keenan's confrontation and other constitutional rights, and would thereby result in yet a **fourth** unconstitutional trial, as the trial court correctly recognized in its pretrial in limine ruling barring that evidence. Moreover, a new jury would never be

face to face with Espinoza "in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Fitzgerald, 615 F. Supp. 2d at 1162. See also id. at 1161. As the United States Supreme Court has long recognized, cross-examination means the accused must have the "opportunity, not only of testing the recollection and sifting the conscience of the witness, but of **compelling him to stand face to face with the jury** in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-43 (1895) (stating the defendant should "never lose the benefit of any of these safeguards even by the death of the witness"). See also Crawford, 541 U.S. at 57 ("The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.").

As the Eighth District put it in Larkins, a retrial after the exposure of Brady violations and the death of key witnesses would be "useless" because the State's star witness cannot be questioned with the suppressed evidence. Larkins, 2006 Ohio 90 at ¶51. This is particularly true here because the case turned so heavily on Espinoza's accusations and credibility.

c. The State's case against Keenan is relatively weak to begin with.

The State's case against Keenan is relatively weak to begin with, and this further supports the trial court's finding that Keenan was prejudiced. The weaker the case, the easier the showing of prejudice. Fitzgerald, 615 F. Supp. 2d at 1162; United States v. Chapman, 524 F.3d 1073, 1087 (9th Cir. 2008) (trial court is in "the best position to evaluate the strength of the prosecution's case and to gauge the prejudicial effect of a retrial").

This Court itself summarized some of the weaknesses in the State's Espinoza-reliant case when it reversed Keenan's 1989 convictions for prosecutorial misconduct, and noted that "[c]redible

evidence contradict[ed] Espinoza's testimony." State v. Keenan, 66 Ohio St. 3d at 411.

The federal courts also found that the State's case was relatively weak, and that Espinoza's testimony "strains credulity" and is plagued by numerous contradictions and inconsistencies. See, e.g., D'Ambrosio, 688 F. Supp. 2d at 731 ("There is also great reason to believe that a reasonable jury would find D'Ambrosio not guilty of the crimes with which he has been charged."); Keenan, 2012 U.S. Dist. LEXIS 57044 at *128 ("Espinoza's testimony . . . was rife with inconsistencies and contradicted numerous witnesses on key points."); id. at *124 (Espinoza's account of the murder, even in the absence of the suppressed evidence, "already strains credulity").

d. Retrial would also be prejudicial to Keenan because it would allow the State to revise its case strategy.

In Fitzgerald, the court noted an additional aspect of prejudice to the defendant that supported dismissal with prejudice and a bar to retrial: "the Court finds that Defendant would be prejudiced by a retrial because it will allow the Government to revise its case strategy. This is an advantage the Government should not be permitted to enjoy, especially in light of the fact that the retrial was necessitated by the Government's conduct." Fitzgerald, 615 F. Supp. 2d at 162; see also Chapman, 524 F.3d at 1087 (noting mistrial remedy would advantage the government by giving it "a chance to try out its case[,] identify[] any problem area[s], and then correct those problems in a retrial").

This same prejudice is also apparent here. Indeed, this type of prejudice is precisely what Judge O'Malley was referring to when she noted that, with Espinoza's death, the defense "has now lost a critical witness who would have limited the State's theory of the case." D'Ambrosio, 688 F. Supp. 2d at 729-30. So now, with five important witnesses dead and Keenan unable to confront them with suppressed evidence that would reveal the absurdity of Espinoza's account, the State believes it is free to reframe its theory around the exposed weaknesses.

The State's evident willingness to now resort to the likes of "informant" Robert Winlock (PT at 413), with Keenan's claimed 1993 jailhouse admission to him that the murder occurred because Klann was having an affair with Espinoza's "wife" (and not because Klann would not reveal Lewis's location), is evidence that the State is willing to revise its strategy if that will help it obtain a conviction. So too is its new suggestion on appeal that the case can be prosecuted as "only" an aggravated burglary of Lewis and kidnapping of Klann, ignoring that a jury would never in a million years have convicted on **any** of those lesser counts (and no reasonable prosecutor would have pursued them) if Espinoza's story about Klann's kidnapping and murder was determined to be incredible and unworthy of belief, as it would have been had Keenan been able to confront Espinoza with the benefit of the suppressed evidence. Keenan, 2013 Ohio 4029, ¶36 ("The aggravated murder, kidnapping, and aggravated burglary crimes with which Keenan were charged were part of one continuous course of conduct over several hours and, despite the state's arguments to the contrary, dependent upon Espinoza's allegations. The state fails to accept responsibility for its intentional inactions, and thus fails to recognize these inactions over the span of more than two decades resulted directly in the trial court's dismissal of the **entire** indictment." (emphasis supplied)).

C. Dismissal With Prejudice Was the Only Appropriate "Sanction" for the State's Misconduct in this Shameful Prosecution. Anything Less Would Have Exposed Keenan to a Third Unconstitutional Trial.

Not only are all three of the Parson factors easily met on this record, but the dismissal with prejudice was the only appropriate course in the circumstances of this shameful prosecution, a prosecution which involved prolonged State misconduct over more than two decades and in **four** prior trials (counting the 2009-10 D'Ambrosio retrial that was finally barred in March 2010 when Judge O'Malley issued an unconditional writ).

The "least severe sanction" requirement does not exist in a vacuum. It is a case specific

requirement that the sanction be the least severe sanction that is consistent with the circumstances surrounding the discovery violation and the impact of the discovery violation in that case. Darmond. The sanction thus satisfies Darmond, Lakewood, and related cases if it is reasonably related to the offensive or non-compliant conduct and the impact of that conduct upon the ability of the accused to present a defense and to receive due process.

Indeed, there is not a clearer example **than this case** of a situation where dismissal with prejudice is the only appropriate course. More than a **quarter century** has passed since someone murdered Anthony Klann in September 1988. Five witnesses are dead, including the co-defendant who also happens to be the **sole** witness who claimed that Keenan and D'Ambrosio committed the murder and that he allegedly saw them both do it. For some two decades, and over three prior trials, the prosecutor's office withheld significant discoverable information to which Keenan and D'Ambrosio were entitled under the law and which would have enabled them to create reasonable doubt about the State's theory of the case and impeach its key witnesses, misconduct that persisted **and would have continued** had the federal courts not stepped in and said "enough!" Keenan, 2012 U.S. Dist. LEXIS 57044 at *83 ("Throughout the twenty-three years of his case, Keenan persistently has sought discovery from the State, and was thwarted at every stage. He only obtained most of the information as a result of his co-defendant's highly contentious and hard-won habeas discovery."); id. at *134 ("The State failed to fulfill [its Brady] obligations at Keenan's trial and continued to stonewall for nearly twenty years after."); Keenan, 2013 Ohio 4029, ¶36 ("Were it not for D'Ambrosio's habeas hearing and the discovery of this 'new' evidence, Keenan would most likely still be without it.").

Even after D'Ambrosio first won habeas relief in 2006, and that decision was affirmed by the Sixth Circuit in 2008, D'Ambrosio v. Bagley, 527 F.3d 489 (6th Cir. 2008), the misconduct by the

prosecutor's office continued, including the failure, during D'Ambrosio's retrial in 2009 to disclose Espinoza's death and other continued abuses, all as detailed, chapter and verse, in the federal court's opinion of March 3, 2010, granting D'Ambrosio an unconditional writ and forever barring his re-prosecution. D'Ambrosio, 688 F. Supp. 2d 709. Even then, the State continued to resist Keenan's habeas action for another two years, forcing Keenan to remain in prison under a sentence of death, until Keenan finally obtained relief on April 24, 2012, when Judge Katz issued the writ of habeas corpus in Keenan's favor.

So now, a quarter century after Klann's murder, and all because of the **State's own misconduct**, Keenan has been denied any chance to use any of the suppressed evidence with the deceased co-defendant Espinoza and the other deceased witnesses, and denied any meaningful chance to do so with the living witnesses too because of the prolonged passage of time. D'Ambrosio is a free man. Yet Keenan, at the age of 64, still labors under the burden of this shameful prosecution, knowing that he was forced to spend the prime of his life in prison and on death row.

Darmond makes clear "we do not hold that a discovery violation committed by the state can never result in the dismissal with prejudice of a criminal case. That option remains available when a trial court, after considering the factors set forth in Parson and in Lakewood, determines that a lesser sanction would not be consistent with the purposes of the criminal discovery rules." Darmond, 135 Ohio St. 3d at 352. The trial court here made precisely that determination, and it was the correct decision on this record. If **this case** does not represent a proper exercise of a trial court's discretion to dismiss with prejudice, then no such case would ever exist and Darmond's assurance to the contrary would be illusory.

D. The State Has Not Been Sanctioned "Multiple Times" for the Same "Discovery Violation."

The State frivolously asserts, at least eleven times in its Brief (see Brief at 1, 2, 5, 6, 10, 11,

12, 13), that it was sanctioned "multiple times" for the same "discovery violations," supposedly including once by the federal court in granting habeas relief to Keenan and again when the state trial court granted Keenan's pretrial motions in limine concerning the admissibility of previous testimony and statements of Espinoza, Keenan, and D'Ambrosio. The State's argument is legally and factually unsound. **None of these rulings in Keenan's favor were "discovery sanctions."** Moreover, the trial court's pretrial evidentiary rulings are, in any event, totally irrelevant to the separate issue of whether the indictment should be dismissed and the trial proceed at all.

To begin with, the grant of habeas relief is not a "discovery sanction," and to suggest that it is grievously miscomprehends the purpose of federal habeas corpus. In granting habeas relief, the federal court determined that the State's conviction and death sentence of Keenan were obtained in violation of Keenan's federal constitutional rights, and what's more, that the federal constitutional violations that occurred, i.e., multiple and prolonged Brady violations, were committed **by the State itself**. The federal constitution thus compelled, at the State's election, Keenan's release or his retrial in accordance with the constitution. A federal habeas grant which thus invalidates a state court criminal conviction is not a "discovery sanction," but results from an exercise of the federal court's co-equal role with the state courts to ensure that a state court criminal conviction and/or death sentence has not been secured in violation of the accused's federal constitutional rights. The State's mischaracterization of the federal court's order in such quaint terms, as a "discovery sanction," demonstrates that the State still fails to recognize that it committed egregious misconduct over two decades and spanning three trials (including D'Ambrosio's) and in doing so repeatedly violated the constitutional rights of Keenan and D'Ambrosio and sent them to death row for a murder they denied committing.

Moreover, the federal court's grant of habeas relief did **nothing** to preclude the state trial

court, once retrial was elected, from making any pretrial rulings deemed necessary or appropriate by the state court including a motion to dismiss the indictment. See, e.g., Crim. R. 33(D); R.C. § 2945.82 ("when a new trial is granted . . . the accused shall stand for trial upon the indictment or information as though there had been no previous trial thereof."); State v. Keenan, 2013 Ohio 4029, at ¶¶ 15-16. See also D'Ambrosio, 688 F. Supp. 2d at 732 n.27 ("Of course, [the state] court could obviously consider the impact of Espinoza's death on its [retrial] proceedings and might, if presented with the question, even conclude that the trial should not proceed.").

Similarly, the state trial court did not impose a "discovery sanction" when it granted Keenan's pretrial motions in limine as to the prior testimony of Keenan, D'Ambrosio, and Espinoza. The trial court's journal entry and on-the-record explanation of its evidentiary rulings, as well as Keenan's motions in limine and the legal arguments he offered in support, all dispel any such false contention the State is now advancing about "discovery sanctions." The evidentiary rulings in Keenan's favor were, instead, all compelled by a proper application of the evidence rules and relevant constitutional principles, all of which confirmed that the State's proposed admission of such prior testimony would, in the circumstances of this case, violate the rules of evidence and Keenan's constitutional rights to due process and a fair trial and, in the case of Espinoza and D'Ambrosio's prior testimony, would also violate Keenan's right under the Confrontation Clause to confront the witnesses against him. It was the evidence rules and controlling constitutional principles that compelled the trial court to grant the pretrial motions in limine, nothing to do with discovery rules or "discovery sanctions."

Moreover, the trial court's pretrial evidentiary rulings are, in any event, totally irrelevant to the separate issue of whether the indictment should be dismissed and the trial proceed at all. As in any case, pretrial evidentiary rulings proceed on one track and are concerned with clarifying the

evidence that would be permitted, applying the evidence rules and relevant constitutional provisions, in the event a trial goes forward. Indeed, such pretrial in limine evidentiary rulings are provisional and not even final, as this Court has made clear. See, e.g., State v. Grubb, 28 Ohio St. 3d 199, 201-02 (1986) ("[A] motion in limine, if granted, is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue."); Gable v. Gates Mills, 103 Ohio St. 3d 449 (2004). Also, as in any trial, the trial court has authority, on another track, to consider a motion to dismiss with prejudice, which is addressed to different issues including, in this case, whether the defendant's ability to receive a fair trial was prejudiced to such an extent by the State's prolonged misconduct that another trial could not constitutionally proceed. See, e.g., Keenan, 2013 Ohio 4029, ¶16 ("[O]nce the district court remanded the case and the state elected to proceed with a new trial, 'matters stood in the same position they did before any trial had been conducted. It follows that the court possessed all authority to reopen discovery or entertain any pretrial motions available at law.' Therefore, Keenan was within his rights to file a motion to dismiss and the trial court could consider said motion."). A trial court's pretrial evidentiary rulings are legally, factually, and analytically distinct from any pretrial ruling on a motion to dismiss with prejudice.

Adopting the State's argument here would actually **reward** the State for the most egregious forms of prosecutorial misconduct, such as occurred here, because prolonged suppression of evidence over decades and multiple trials will **always** have ramifications under the evidence rules, and the State will thus always claim that those ramifications are "enough," even though they are not "sanctions" of any kind and involve issues that are legally, factually, and analytically distinct from a motion to dismiss. That has never been the law. Indeed, when the State's own prolonged misconduct over 20+ years has so seriously threatened a defendant's ability to receive a fair trial, such that careful vigilance by the trial court at every stage is constitutionally required **before** any retrial can

fairly occur, this Court must not allow the **wrongdoer** to dictate that the trial court's vigilance may extend **only** to the stage of pretrial evidentiary rulings, and may not also include a dismissal with prejudice when that course is permitted under the relevant law. Yet that is precisely the rule the wrongdoer is seeking here with its frivolous contention that it has been "sanctioned" enough.

E. The Trial Court's Decision Was Not Only Proper Under Crim. Rule 16, But Can Also Be Affirmed On Other Grounds Too.

The trial court's dismissal with prejudice was not only a proper exercise of discretion under Crim. R. 16, but it was also expressly premised on Crim. R. 48(B). It can be affirmed on that ground too, and also on the basis of the trial court's inherent power in the interest of justice to ensure due process and/or protect against double jeopardy, all as guaranteed by the Ohio and U.S. Constitutions. See Ohio Const., Article I, Sections 10, 16; U.S. Const., Fifth and Fourteenth Amendments.

In State v. Busch, 76 Ohio St. 3d 613, 615 (1996), this Court held that Rule 48(B) "does not limit the reasons for which a trial judge might dismiss a case, and we are convinced that a judge may dismiss a case pursuant to Crim. R. 48(B) if a dismissal serves the interests of justice." The Court explained: "trial courts are on the front lines of administration of justice in our judicial system, dealing with the realities and practicalities of managing a caseload and responding to the rights and interests of the prosecution, the accused, and victims. A court has the 'inherent power to regulate the practice before it and protect the integrity of its proceedings.'" Id. at 615. See also State v. Dixon, 14 Ohio App. 3d 396 (1984); State v. Sutton, 64 Ohio App. 2d 105 (1979); State v. Tyren, 91 Ohio Misc. 2d 67, 697 N.E.2d 293 (CP 1998); State v. Latorres, 2001 Ohio App. LEXIS 3533 (Aug. 10, 2001); Larkins, 2006 Ohio 90, ¶26.

The authority of an Ohio trial court under Rule 48(B) and the court's inherent power to dismiss with prejudice is closely analogous to, and reliant upon the same basic factors as those applicable to, a federal court's power to dismiss an indictment with prejudice in a federal criminal

case under the court's supervisory power and/or under Fed. Crim. R. 48(b) in order to ensure due process. The factors are similar to the Parson factors addressed above: (1) whether the defendant's constitutional rights have been violated; (2) whether the State's violations are willful, egregious and/or unconscionable; and (3) whether defendant has suffered substantial prejudice. See, e.g., Fitzgerald, 615 F. Supp. 2d at 1159. See also United States v. Struckman, 611 F.3d 560, 574 (9th Cir. 2010); United States v. Goodson, 204 F.3d 508, 514 (4th Cir. 2000); United States v. Aguilar Noriega, 831 F. Supp. 2d 1180, 1210 (C.D. Cal. 2011).

The due process and/or double jeopardy provisions of the Ohio and/or U.S. Constitutions are also themselves proper bases upon which to dismiss with prejudice in the appropriate case, as here. A court may dismiss an indictment "on the ground of outrageous government conduct if the conduct amounts to a due process violation." United States v. Chapman, 524 F.3d 1073, 1084 (9th Cir. 2008). See also State v. Larkins, 2006 Ohio 90, ¶26; Morales v. Portuondo, 165 F. Supp. 2d 601 (S.D.N.Y. 2001); People v. Miller, 100 Ill. App. 3d 122, 426 N.E.2d 609, 614 (1981).

Double jeopardy under the federal constitution will generally not bar retrial, and thus not provide grounds for dismissal with prejudice, unless the prosecutorial misconduct was intended to cause a mistrial. Oregon v. Kennedy, 456 U.S. 667 (1982). However, at least under the constitutions of states that have interpreted the state constitution to provide greater protection than the federal constitution, double jeopardy can provide for dismissal with prejudice not only when prosecutorial misconduct is intended to cause a mistrial but also when intentional prosecutorial misconduct denies the defendant a fair trial. See, e.g., Commonwealth v. Smith, 615 A.2d 321, 325 (1992) ("double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point

of the denial of a fair trial"); State v. Rogan, 984 P.2d 1231, 1249 (Haw. 1999) ("under the double jeopardy clause of . . . the Hawai'i Constitution . . . reprosecution of a defendant after a mistrial or reversal on appeal as a result of prosecutorial misconduct is barred where the prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial"). Ohio's constitutional protection against double jeopardy should be construed in a similar manner.

All of these grounds, in addition to Crim. R. 16, are independent bases upon which the trial court's decision may be affirmed as a proper exercise of its discretion.

II. REPSONSE TO PROPOSITION OF LAW NO. II: Whatever Showing of Prejudice May Be Necessary Before An Indictment Can Be Dismissed With Prejudice on Due Process Grounds Was Easily Met in The Circumstances of this Case.

As addressed above in Section I.B.3 of this Brief (supra at pp. 22-33), and incorporated here, Keenan easily satisfies whatever requirement of "prejudice" is necessary in order to be entitled to dismissal with prejudice. The prejudice in this case is overwhelming and palpable. This is not a case where there was any need to "presume" prejudice. **The prejudice is actual and overwhelming.**

The prejudice to Keenan begins with the fact that he was forced to spend 24 years of his life in prison and on death row, all as a result of convictions the State was able to obtain **only** because of repeated and prolonged prosecutorial misconduct, misconduct that would have almost certainly continued, to and including Keenan's execution, save only for the intervention of the federal courts. See, e.g., Morales v. Portuondo, 165 F. Supp. 2d at 612 (finding that the "prejudice" resulting from the State's misconduct includes that "[defendants have] served almost 13 years in prison, for a crime I do not believe they committed. They went to prison as teenagers and lost critical years of their lives."). Make no mistake, the State in Keenan and D'Ambrosio's cases never came "clean" about its misconduct, or tried to make things right, but, instead, fought tooth and nail for years to avoid the

judgments that finally came down upon its shameful prosecution. And yet it now has the audacity to claim that Keenan cannot show "prejudice." Old habits die hard.

It is a **fact** that five witnesses are dead, including the key witness Espinoza. No "presumptions" were sought or needed as to the actual prejudice resulting from those **facts**. It is also a **fact**, requiring no "presumptions," that Keenan is now forever barred, solely because of the State's prolonged misconduct and protracted stubborn resistance to his meritorious claims, from ever confronting Espinoza or any of the other deceased witnesses with the seven categories of suppressed evidence.

Espinoza died in **April 2009**. Yet it was a full **three years** earlier, in March **2006**, that Judge O'Malley had found in D'Ambrosio's favor and granted him a conditional writ of habeas corpus because of the State's Brady violations, the very same Brady violations that plagued co-defendant Keenan's trials. Rather than accept the federal court's carefully-considered 2006 judgment made after a three-day evidentiary hearing, and voluntarily seek to re-try both men then, the State continued to defend the indefensible. **Every court to which it turned rejected its arguments and affirmed the lower courts**. Indeed, that remains true to this day: since the first grant of habeas relief in 2006, every court, state and federal, has rejected the State's efforts to avoid in the criminal case the consequences of its egregious and prolonged misconduct, including both lower courts here.[4] So it is unquestionably the **State's** own defiant misconduct that placed the parties in the situation where – once retrials were finally able to occur, first for D'Ambrosio and then for Keenan – the State's key

[4]See D'Ambrosio v. Bagley, 2006 U.S. Dist. LEXIS 12794 (N.D. Ohio Mar. 24, 2006), aff'd, 527 F.3d 489 (6th Cir. 2008); D'Ambrosio v. Bagley, 619 F. Supp. 2d 428 (N.D. Ohio 2009); D'Ambrosio v. Bagley, 688 F. Supp. 2d 709 (N.D. Ohio 2010), aff'd, 656 F.3d 379 (6th Cir. 2011), cert. denied, Bobby v. D'Ambrosio, 132 S. Ct. 1150 (2012); Keenan v. Bagley, 2012 U.S. Dist. LEXIS 57044 (N.D. Ohio Apr. 24, 2012); State v. Keenan, Case No. CR-232189, Order (Cuyahoga CP Sept. 6, 2012), aff'd, 2013 Ohio 4029 (Ohio App. Sept. 19. 2013).

witness, and other witnesses, were now dead and were thus unavailable to be confronted with all the suppressed evidence the State had been resisting judgment upon for so many years. Keenan's jury will never be able to look those important witnesses, including Keenan's **actual accuser**, in the eyes and assess whether they are worthy of belief. This is **actual**, not presumed prejudice, and it was exclusively the State's own making.

It is also actual prejudice that Keenan has already **twice** before been forced to run the gauntlet of a capital trial, and **both times** the State committed egregious misconduct that prejudiced his rights and denied him a fair trial. There is no reason to give the State a **third** chance; its prolonged defiant misconduct has proven it is not entitled to one, a point most recently demonstrated by the confounding misrepresentations throughout its Brief that its misconduct only involves "discovery violations," that it has already been "sanctioned" for them by the pretrial evidentiary rulings, and that it should not be "sanctioned" again.

It is also **actual** prejudice that 25 years have elapsed and such a prolonged passage of time destroys Keenan's ability to receive a trial that fairly engages with all of the suppressed evidence, the discovery of which led to the invalidation of the prior convictions on constitutional grounds and necessitated the retrials in the first place. Keenan has detailed earlier in this Brief the many ways in which such a prolonged passage of time prejudices him even with the witnesses that are still alive. He can never confront the **living** witnesses – such as the police investigators, and Lewis and his "Little Italy" neighbors – with the responses of the **deceased** witnesses, and especially Espinoza, to the suppressed evidence. And, when these living witnesses are unable or unwilling to recall details and nuances as revealed by the suppressed evidence, Keenan will be powerless to do anything about that, even if the witnesses are lying, because claimed lack of memory more than a **quarter century** after the events will be believed by a jury, and, indeed, expected. In sum, it is a fact, and requires no

presumptions, that the State's prolonged misconduct has denied Keenan any ability to receive a trial that **fairly engages with the suppressed evidence**, and which is not merely a hollow replay of witness testimony locked into transcripts and statements made 20-25 years ago.

Finally, the State's reliance on "pre-indictment delay" cases is groundless and unsupported. (State Brief at 15.) This case is not about "pre-indictment delay." It is about prosecutorial misconduct extending over two decades and two prior trials, and which caused the accused to be forced to spend 24 years in prison and then face a third trial 24 years after the events. As already addressed throughout this Brief, Keenan has shown the many ways the State's misconduct has caused him **actual** prejudice and has made it impossible for him to now receive a fair trial. In the circumstances here, Keenan easily meets whatever standard might be derived from different contexts including cases involving pre- and/or post-indictment delay. See, e.g., United States v. Sabath, 990 F. Supp. 1007, 1014 (N.D. Ill. 1998) (**PRE-INDICTMENT DELAY**: "There is no question that Defendant has established severe, actual prejudice [from delay of five and one-half years]. We recognize that witness deaths alone may meet the required showing of prejudice. . . . [T]he lost evidence, impaired memories of fact witnesses, flawed governmental reports, and deceased key witnesses have combined to plague Defendant with just the kind of concrete and substantial prejudice that the Due Process Clause was designed to remedy."); United States v. Knox, 2006 U.S. Dist. LEXIS 16913, *23-28 (E.D. Va. Apr. 5, 2006) (**POST-INDICTMENT DELAY:** dismissal with prejudice because delay was in excess of five years, the government repeatedly failed to produce exculpatory evidence, and there was "threat that the extraordinary delay has tainted or rendered effectively useless the late production of [the] exculpatory evidence").

In any event, because Keenan was indicted in **1988**, any "delay" here is all **post**-indictment, thereby making cases involving post-indictment delay more roughly analogous to his situation than

the pre-indictment cases cited by the State. Actual prejudice is not even required in cases involving excessive post-indictment delay. See, e.g., Doggett v. United States, 505 U.S. 647, 655-56 (1992); Barker v. Wingo, 407 U.S. 514, 532 (1972); Moore v. Arizona, 414 U.S. 25, 26 (1973); United States v. Knox, 2006 U.S. Dist. LEXIS 16913, *23-28 (E.D. Va. Apr. 5, 2006).

And, although Keenan has demonstrated sufficient actual prejudice without the need for presumed prejudice (as would be expected when the delay is almost a quarter century), it is not correct that prejudice can never be presumed. To the contrary, there is at the very least a sliding scale, with courts willing to presume prejudice in circumstances, for example, where government negligence and/or bad faith caused the delay and/or the passage of time is substantial.[5] All of those factors easily favor Keenan and would entitle him to a presumption of prejudice too.

At its core the constitutional inquiry under the due process clause is whether compelling a defendant to stand trial "violates 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'. . . ." United States v. Lovasco, 431 U.S. 783, 790 (1977). **In this case** –

> where the State obtained two prior capital convictions against Keenan that were infected by unfairness and ultimately set aside, and
>
> where Keenan was forced by the State's misconduct to spend 24 years, and the prime of his life, in prison and on death row for a crime he denied committing, and
>
> where the State for nearly 15 years resisted production of the Brady material and only finally revealed the suppressed evidence when ordered to do so by federal courts, and

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[5]See, e.g., United States v. Bergfeld, 280 F.3d 486, 489-91 (5th Cir. 2002) (five year and three month delay was presumptively prejudicial where reason for the delay was governmental negligence); United States v. Cardona, 302 F.3d 494, 499 (5th Cir. 2002) (five year and six month delay was presumptively prejudicial where Government was negligent); United States v. Brown, 169 F.3d 344, 350 (6th Cir. 1999) (same); United States v. Shell, 974 F.2d 1035, 1036 (9th Cir. 1992) (six-year delay was presumptively prejudicial where government was negligent).

where the State continued resisting judgment against its flawed convictions for many years after the first grant of habeas relief in 2006, and

where the State's intransigence and continued defiant misconduct allowed for even more time to pass and Keenan's chief accuser and other witnesses to die, and

where Keenan's co-defendant has been freed and the federal courts have barred his re-prosecution because of the State's continued misconduct, and

where the death of so many witness and the passage of nearly a quarter century have made it impossible for Keenan to make any meaningful use of the suppressed evidence, and

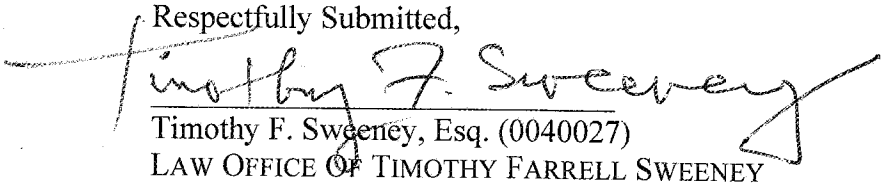
where the prior convictions were constitutionally flawed precisely because the suppressed evidence had been hidden from the defense and could not be used –

any retrial of Thomas Michael Keenan, age 64, some twenty-five years after the events of September 22-24, 1988, would violate the fundamental conceptions of justice which lie at the base of our civil and political institutions. The trial court wisely exercised its discretion in mercifully ending this shameful prosecution.

CONCLUSION

For all of these reasons, and in the interest of justice, this Court should affirm the lower courts in all respects.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the MERIT BRIEF OF APPELLEE THOMAS M. KEENAN was served upon Timothy J. McGinty, County Prosecutor, and Katherine Mullin, Assistant Prosecuting Attorney, The Justice Center, 1200 Ontario Street Cleveland, Ohio 44113, COUNSEL FOR APPELLANT STATE OF OHIO on this 23rd day of June 2014, by regular U.S. Mail, first class postage prepaid.

Timothy J. Sweeney

Counsel for Defendant-Appellee Keenan

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Oh. Const. Art. I, § 10 (2014)

§ 10. Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

History:

(As amended September 3, 1912.)

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Oh. Const. Art. I, § 16 (2014)

§ 16. Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

History:

(As amended September 3, 1912.)

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT V

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution

AMENDMENT XIV

SECTION 1.

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

SECTION 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

OHIO RULES OF COURT SERVICE

Ohio Rules Of Criminal Procedure

Ohio Crim. R 48 (2014)

Rule 48. Dismissal

(A) Dismissal by the state.

The state may by leave of court and in open court file an entry of dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate.

(B) Dismissal by the court.

If the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal.

OHIO RULES OF COURT SERVICE

Ohio Rules Of Criminal Procedure

Ohio Crim. R 33 (2014)

Rule 33. New trial

(A) Grounds.

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

(5) Error of law occurring at the trial;

(6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

(B) Motion for new trial; Form, Time.

Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

(C) Affidavits required.

The causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth, and may be controverted by affidavit.

(D) Procedure when new trial granted.

When a new trial is granted by the trial court, or when a new trial is awarded on appeal, the accused shall stand trial upon the charge or charges of which he was convicted.

(E) Invalid grounds for new trial.

No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

(1) An inaccuracy or imperfection in the indictment, information, or complaint, provided that the charge is sufficient to fairly and reasonably inform the defendant of all the essential elements of the charge against him.

(2) A variance between the allegations and the proof thereof, unless the defendant is misled or prejudiced thereby;

(3) The admission or rejection of any evidence offered against or for the defendant, unless the defendant was or may have been prejudiced thereby;

(4) A misdirection of the jury, unless the defendant was or may have been prejudiced thereby;

(5) Any other cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.

(F) Motion for new trial not a condition for appellate review.

A motion for a new trial is not a prerequisite to obtain appellate review.

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2945. TRIAL

NEW TRIAL

ORC Ann. 2945.82 (2014)

§ 2945.82. New trial

When a new trial is granted by the trial court, or when a new trial is awarded on appeal, the accused shall stand for trial upon the indictment or information as though there had been no previous trial thereof.

History:

GC § 13449-4; 113 v 123(196), ch 28, § 4; Bureau of Code Revision. Eff 10-1-53.