IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	
-vs-	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth
CORNELIUS LYNCH,	:	Appellate District
Appellant,	:	Court of Appeals Case Number 105122

MEMORANDUM IN SUPPORT OF JURISDICTION - CORNELIUS LYNCH, APPELLANT

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY LEAVE TO APPEAL SHOULD BE GRANTED

In *State v. Storch*, 66 Ohio St.3d 280, 612 N.E.2d 305 (1993), this Court emphasized the fundamental point: Lower courts are bound by the rulings of higher courts:

> We know that, as a lesser appellate court for purposes of federal questions, we ignore the words of the United States Supreme Court at our peril just as the "lesser" courts of Ohio ignore our words at their peril as to questions of state law.

Id. at 191.

The Eighth District apparently is not convinced.

It requires more of a defendant claiming the protections of the Double Jeopardy Clause than do the Supreme Courts of the United States and of Ohio. It requires more of a defendant complaining that he was prejudiced by pre-indictment delay than does this Court. It requires less of the integrity of prosecutors than does the Supreme Court of the United States.

Cornelius Lynch was charged with the most heinous of crimes – the rape of his soon-to-be stepdaughter. The extreme nature of the crime demands extreme protection for the rights of the accused. That is how we measure the worth of our justice system. It is how we measure the worth of our society.

Our lower courts are too often ready to mouth the words of those principles while ignoring their substance. This Court should accept jurisdiction over Mr. Lynch's case to remind them.

STATEMENT OF THE CASE AND FACTS

On May 26, 1994, 12-year-old M.H. told her mother, Sandra Pickett, that Cornelius Lynch, Pickett's live-in boyfriend, had sexually assaulted her. They had a "family meeting about it," after which they went to the hospital. At the hospital, "they did a little kit on [her]," and she spoke with doctors, nurses, and police officers.

Although M.H. testified that Mr. Lynch performed cunnilingus and then vaginal intercourse, Dr. Keith Lim who examined M.H. at the hospital and who gathered the rape kit on her, checked the box indicating that she said her assailant performed vaginal intercourse. He did not check the box indicating cunnilingus.

Medical records at the hospital indicate that Ms. Pickett told the doctor that M.H.'s allegations could not be true. Specifically, she said that she and Mr. Lynch were in bed together during the night when M.H. claimed he attacked her. Further, Pickett said that M.H. likely made up the story because she did not want her mother to marry Lynch but wanted her, instead, to get back together with her natural father. She said that the day M.H. made the allegations against Mr. Lynch was the day the wedding invitations arrived.

From the hospital, M.H. went to her grandmother's home where she stayed for about a month. On June 8, two weeks after M.H. told her mother that Mr. Lynch raped her, and while M.H. was still living at her grandmother's, Sandra Pickett married Cornelius Lynch. What must have been about two weeks later, M.H. recanted. She left her grandmother's and returned to the house where she resumed living with Lynch and her mother.

The rape kit taken by Dr. Kim was transported to the Fourth District station and from there to the main police property room. And there it sat for over 18 years. In August 2012, a detective took it from the property room to BCI. Testing at BCI revealed semen on a vaginal swab from the rape kit, and further testing showed DNA from the semen sample to be consistent with Mr. Lynch's DNA.

In May 1994, just under 20 years after the alleged rape, the Cuyahoga County grand jury returned a three-count indictment charging Mr. Lynch with two counts of rape of a person under 13, R.C. 2907.02(A)(1)(b) (one count charging vaginal intercourse and one charging cunnilingus), and with a single count of kidnapping for sexual activity, R.C. 2905.019A)(4). The first count, charging vaginal intercourse, was accompanied by a furthermore specification alleging that Mr. Lynch purposely compelled M.H. to submit by force or threat of force.

Less than a month later, Ms. Pickett died.

On February 17, 2016, the trial court denied Mr. Lynch's motion to dismiss based on pre-indictment delay.

Trial before a jury began on March 7, 2016. On March 10, during jury deliberations, at the request of counsel but over the specific objections of Mr. Lynch, the court declared a mistrial.

On September 9, 2016, and through new counsel, Mr. Lynch filed a motion to reconsider the court's February 17 denial of his motion to dismiss for pre-indictment delay. The motion was denied on September 13.

Trial before a jury was held beginning September 14, 2016. On September 20, the jury returned its verdicts finding Mr. Lynch guilty on all counts.

On October 20, 2016, the court held a sentencing hearing. By agreement of the parties, Mr. Lynch was determined to be a sexually oriented offender and told of his registration requirements. The court determined that the kidnapping charge would merge with the count of vaginal rape. The State elected to proceed on the rape count. The court imposed sentence of 15 years to life on each of the rape counts and ran them concurrently.

In a timely appeal, Mr. Lynch raised four assignments of error:

1. Mr. Lynch's rights to due process and a fair trial were violated when the trial court denied his motion to dismiss for pre-indictment delay and then denied his motion to reconsider that ruling.
2. Prosecutorial misconduct in encouraging the jury to convict based on sympathy for M.H. violated Mr. Lynch's constitutional rights to a fair trial and due process and to be convicted based only on the evidence against him.
3. Counsel provided constitutionally ineffective assistance when he failed to object to the prosecutor's improper argument as set forth in the Second Assignment of Error and failed to move for dismissal of the charges based on double jeopardy as set forth in the Fourth Assignment of Error.
4. Because there was no manifest necessity for the trial court to grant a mistrial, the constitutional protection against being twice put in jeopardy for the same offense required that the charges against Mr. Lynch be dismissed.

On March 22, 2018, the Eighth District Court of Appeals overruled Mr. Lynch's assigned errors and affirmed his convictions and sentence. *State v. Lynch*, 8th Dist. Cuyahoga No. 105122, 2018-Ohio-1078.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A trial court violates a defendant's rights against double jeopardy by trying him a second time when, without manifest necessity, it had previously declared a mistrial over his personal and explicit objection.

When the trial court declared a mistrial, on March 10, 2016, it did so over Mr. Lynch's personal and explicit objection. The court's reason was that it determined (1) to

dismiss Juror No. 7 as he "is unable to follow the instructions given by the Court, is unable to live up to his oath as a juror," and (2) that the alternate juror had apparently been discharged.

Mr. Lynch insists, as he insisted before the Eighth District, that there was no manifest necessity for the mistrial and that, therefore, the second trial for the same offense violated his right against double jeopardy as protected by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 of the Ohio Constitution.

Could the alternate have been brought back despite having been discharged? The court apparently did not investigate the question. More importantly, the jury deliberations could have gone forward with 11 jurors rather than 12.

Like the right of trial by jury itself, the rule providing for trial by 12 jurors may be waived and trial may proceed with fewer. *State ex rel Warner v. Baer*, 103 Ohio St. 585, 134 N.E. 786 (1921), paragraph two of the syllabus ("accused person may, with the approval of the court, consent to be tried by a jury composed of less than twelve men").

And, again, Mr. Lynch explicitly and personally - albeit in disagreement with his counsel - specifically objected to a mistrial. The Eighth District said that his objection could not be heard because he "was represented by counsel." *Lynch*, *supra*, at ¶ 55. But as a defendant cannot enter a guilty plea without personally acknowledging that he is waiving his right to a jury trial, see, *e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *State v. Nero*, 56 Ohio St.3d 106, 107, 564 N.E.2d 474 (1990), so his right to continue a jury trial even when counsel wishes otherwise should be deemed personal.

Accordingly, there was no manifest necessity for a mistrial and double jeopardy precluded a retrial. *See generally, State v. Gunnell*, 132 Ohio St.3d 442, 2012-Ohio-3236, 973 N.E.2d 243.

The proposition of law should be adopted and the charges against Mr. Lynch dismissed.

> Proposition of Law No. 2: This Court must be presumed to mean what it says and that a defendant will be found to suffer "actual prejudice" for purposes of determining a constitutional violation due to pre-indictment delay when he can offer "an explanation" of what no longer available evidence would likely have provided and how it would "minimize or eliminate the impact of the state's evidence and bolster the defense." *State v. Jones* 148 Ohio St.3d 167, 2016-Ohio-5105, 69 N.E.3d 688, ¶ 28.

There is a two-part, burden-shifting test for determining whether pre-indictment delay violates a defendant's right to due process. First, the defendant must show that the delay was actually prejudicial. If he makes that showing, the burden shifts to the government to demonstrate that the delay was, nevertheless, justifiable. *State v. Jones*, 148 Ohio St.3d 167, 2016-Ohio-5105, 69 N.E.3d 688, ¶ 13 (citing cases.

The nearly 20-year delay in bringing the charges in this case has caused Mr. Lynch actual prejudice. And there was no justifiable reason for the delay.

A. Prejudice due to the death of Sandra Pickett

Mr. Lynch was prejudiced by the death of Sandra Pickett, the mother of M.H. We know much of what she would have testified to from her statements as they appear in her daughter's medical record from the hospital at the time they took the rape kit. The record reveals not just that she had questions about M.H.'s claim but that she knew it could not be true.

Specifically, she said that she and Mr. Lynch were in bed together during the night and at the time when M.H. claimed he attacked her. Further, she said that M.H. likely made up the story because she did not want her mother to marry Lynch but wanted her, instead, to get back together with her natural father. She said that the day M.H. made the allegations against Mr. Lynch was the day the wedding invitations arrived.

That last claim is particularly important as it is the impending wedding that inspired M.H. to make her claims, and Pickett's testimony would clearly support Mr. Lynch's on that point. He insisted that the wedding invitations arrived then. M.H. was equally adamant that they did not and that she had no idea that he and her mother would be getting married until they did.

Moreover, Ms. Pickett could have confirmed Mr. Lynch's testimony about throwing his used condoms into the wastebasket. And she might have testified that M.H. was familiar with the film *Presumed Innocent* in which a condom containing sperm was used to implicate an innocent man. She would, thereby, have provided an explanation for how M.H. might have obtained a sample of Mr. Lynch's semen and inserted it into her own vagina.

B. Prejudice due to the loss of Child and Family Services Records

There is no question that Child and Family Services (CFS) investigators were involved in this case. M.H. testified that from the time she was at the hospital through the month she lived with her grandmother, she (and apparently other members of her family) was repeatedly interviewed by counselors. Mr. Lynch testified about being interviewed by CFS and of CFS inspectors making "pop-up visits." Yet there are no records.

Deangelo Royster, manager of the CFS Records Department, testified that they have records going back as far as 1930. And Royster explained that "Social workers keep these notes and make it part of the record." Yet for this case, and for whatever reason, there is nothing but an incident report stating that the "disposition" was "unsubstantiated."

Those notes would contain further information tending to throw doubt on M.H.'s claims.

The court of appeals found none of this established prejudice because it was speculative. It was not. It was, rather, precisely the sort of evidence this Court said in *Jones* could show actual prejudice. This Court is clear on the fundamental point: Its holdings count.

> We know that, as a lesser appellate court for purposes of federal questions, we ignore the words of the United States Supreme Court at our peril just as the "lesser" courts of Ohio ignore our words at their peril as to questions of state law.

Storch, *supra*, at 191.

The Eighth District ignored that warning.

The Eighth District also said that the DNA evidence was new and justified the delay. But while the DNA may have been newly obtained, what it showed was not the dispute. Yes, there was semen. And yes it was Mr. Lynch's. The question was how it got there. Mr. Lynch's defense to that question was the issue, and he was actually prejudiced by the delay.

Accordingly, the proposition of law should be adopted and the charges against Mr. Lynch dismissed.

Proposition of Law No. 3: A prosecutor's comments during closing argument that are designed to inflame the prejudices and passions of the jury are improper and may require reversal.

As the jury was instructed in this case, as juries are always instructed, they were to determine whether the accused was guilty based exclusively on the evidence. They were not to be swayed by "considerations such as sympathy." It follows, of course, that the prosecutor is not supposed to encourage the jury to convict based on sympathy. But that is exactly what the prosecutor did in this case.

During closing argument, the prosecutor directed the jury's attention to "what happened to [M.H.] as a result of her disclosing what the Defendant did to her." Unless "what happened to" her was something the Defendant was said to have done, it is irrelevant. More, it was in this case prejudicial. The prosecutor continued.

> She had to go to the hospital. As a 12-year-old girl, she had to have her legs up in stirrups with her knees apart, a speculum inserted into her vagina, swabs stuck five to six centimeters into her vagina, swabbing her vagina, and swabbing her cervix. That's what happened as a result of [M.H.] telling her mom what the Defendant did to her.

There was no purpose for that except to inflame the jurors. And, lest they were not sufficiently moved, the prosecutor repeated it.

> At the hospital [M.H.] says who did this to her. Cornelius Lynch. And he puts her in the stirrups, and he has her spread her legs. He has to insert a speculum into a child, all things [M.H.] had to endure for telling people what Cornelius did to her . . . ."

There was no proper reason, no justification for those gratuitous statements to the jury. Their purpose, their only purpose, was to inflame, to prejudice, to create sympathy for M.H. And that is an improper purpose.

The prosecutor's argument might actually have been proper argument if there were evidence that M.H. *knew* those things would happen when she accused Mr. Lynch.

Then, it could be argued, she must have been telling the truth or she would never have subjected herself to the examination. It was on that theory that the Eighth District held the prosecutor's remarks proper. *Lynch*, *supra*, at ¶42. But the Eighth District was wrong. There was no evidence that M.H. knew anything of the sort. The prosecutor's statements were simply gratuitous.

In *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 LEd. 1314 (1935), Justice Sutherland explained the role and duty of the prosecutor.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Id.*at 88.

What is true of the United States Attorney is no less true of the Cuyahoga County Prosecutor. "[W]hile [she] may strike hard blows, [she] is not at liberty to strike foul ones." In this case, the prosecutor did. Those blows were not merely foul. They were prejudicial.

The misconduct deprived Mr. Lynch of his rights to a fair trial and due process as protected by the Due Process Clause, the Sixth and Fourteenth Amendments and by Article I, Sections 10 and 16 of the Ohio Constitution.

The proposition of law should be adopted and the case remanded.

CONCLUSION

For the reasons set forth above, this Court should accept jurisdiction, sustain Mr. Lynch's propositions of law, reverse the decision of the Eighth District Court of Appeals, and dismiss the prosecution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by e-mail to Edward R. Fadel, Assistant Cuyahoga County Prosecutor and counsel for appellee, at efadel@prosecutor.cuyahogacounty.us, this 2nd day of August 2017.

/s/ Jeffrey M. Gamso
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