

[Cite as *State v. Jones*, 2015-Ohio-2853.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101258

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DEMETRIUS JONES

DEFENDANT-APPELLEE

**DECISION EN BANC:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577686-A

BEFORE: The En Banc Court

RELEASED AND JOURNALIZED: July 16, 2015

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LARRY A. JONES, SR., J.:

{¶1} Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, this court determined that a conflict existed between the proposed majority panel decision in this case and the released decision in *State v. Mack*, 8th Dist. Cuyahoga No. 100965, 2014-Ohio-4817,¹ on the standard for proving that a defendant was prejudiced by preindictment delay.

I.

{¶2} Plaintiff-appellant, the state of Ohio, appeals from the trial court's judgment granting the motion to dismiss the indictment against defendant-appellee, Demetrius Jones, because of preindictment delay.

{¶3} On August 30, 2013, Jones was charged with rape and kidnapping in a two-count indictment. The alleged crimes occurred on September 1, 1993. Jones filed a motion to dismiss on the ground of preindictment delay, and the trial court held a hearing. Numerous exhibits were entered into evidence at the hearing and, along with counsel's summations, the following was established.

{¶4} On the evening of the alleged crimes, the victim, who had been acquainted with Jones, went with him to his mother's house. The victim stated that Jones's mother and brother were at the residence. After some time, the victim told Jones that she had to leave, to which Jones responded that she was not going anywhere. The victim alleged

¹*Mack* is pending in the Ohio Supreme Court. See *State v. Mack*, Supreme Court No. 2014-2149.

that Jones locked her in his bedroom and forcibly raped her. According to the victim, the incident was combative with the victim screaming and fighting Jones and, during the course of it, some of her clothing ripped. The victim also stated that Jones had a “rambo knife,” which he put to her throat.

{¶5} After the alleged attack, the victim went home where she and her mother called the police. Two officers responded to the victim’s house. The victim was transported to the hospital, where a rape kit was administered. Both the police report and the medical records indicate that the victim identified “Demetrius Jones” as her attacker. She also reported that he held a knife to her throat. No photos of the victim were taken.

{¶6} The medical records also indicate that the victim was wearing the same clothing at the hospital that she had on at the time of the alleged attack. The 911 call made after the alleged rape, as well as the victim’s clothing she was wearing at the time of the incident, were not available at the time of indictment.

{¶7} The police went to the victim’s house two times after her September 1, 1993 rape report: once on September 3, 1993, and once on September 6, 1993. They were unable to locate her, deemed the address to be “bad,” and “closed the case unless the victim comes forward.”

{¶8} At the hearing, it was demonstrated that Jones has an extensive criminal history. That history predates the alleged rape here, and continued after this alleged crime; in the time since the alleged rape in 1993, Jones has had 22 other felony cases in Cuyahoga County. In 2005 or 2006, a DNA sample from Jones was obtained as a result

of one of his other criminal cases.

{¶9} The victim also has a criminal history. She had a 2003 criminal felony case in Cuyahoga County that was active through September 2010. She also had numerous criminal misdemeanor cases out of Cleveland Municipal Court dating from 1998 through 2013.²

{¶10} The 1993 rape kit was not sent out for testing until September 2011. It was returned to the Cleveland Police Department on June 20, 2012. The case was reopened on July 20, 2013, and Jones was indicted on August 30, 2013, which was one day before the running of the 20-year statute of limitations. The special agent from the Ohio Bureau of Criminal Investigation who testified before the grand jury that issued the indictment stated that the victim “knew [her alleged attacker] by his first name of Demetrius.” The special agent further testified that the victim “only knew him as Demetrius. She did not know his last name.”³

{¶11} Jones maintained that he and the victim had engaged in consensual sex. According to Jones, he was interviewed by the police in 1993, and told them that he and the victim had had consensual sex. The state contends, however, that there is no evidence that the police interviewed Jones and it is the state’s belief that he never was interviewed.

{¶12} Jones’s mother passed away in February 2011. According to Jones, his

²We mention the victim’s criminal history only to indicate that she was not missing or unavailable.

³The grand jury proceeding was transcribed and made part of the record.

mother would have been able to testify that he and the victim were more than just acquaintances, that they spent time together, and that she did not hear anything unusual at the home on the night in question.

II.

{¶13} The sole issue in this appeal is whether Jones demonstrated that he was actually prejudiced by the state’s delay in prosecuting him. The issue that we consider en banc is the standard for demonstrating actual prejudice.

{¶14} The panel majority in this case proposed that to demonstrate prejudice, Jones must show that missing or unavailable evidence would have been exculpatory, as opposed to merely attacking the credibility of the state’s evidence. This court has previously used the “exculpatory evidence standard.”⁴ For example, in *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415, a case involving a 1993 rape and a 2013 indictment, the defendant contended that he suffered actual prejudice because of the near 20-year delay in charging him. The defendant cited the following to demonstrate prejudice: (1) the death of the initial investigator; (2) the unidentified ambulance driver; (3) two neighbors who observed the victim immediately after the rape who had since died; and (4) the examining physician’s lack of independent recollection of the exam.

{¶15} This court held that “in order to establish actual prejudice, the defendant must demonstrate the exculpatory value of the evidence of which he was deprived due to

⁴ See, e.g., *State v. Smith*, 8th Dist. Cuyahoga No. 100501, 2014-Ohio-3034; *State v. Dixon*, 8th Dist. Cuyahoga No. 100332, 2014-Ohio-2185; *State v. Clemons*, 8th Dist. Cuyahoga No. 99754, 2013-Ohio-5131; *State v. Kemp*, 8th Dist. Cuyahoga No. 97913, 2013-Ohio-167; and *State v. Ennist*, 8th Dist. Cuyahoga No. 90076, 2008-Ohio-5100.

the delay,” and found that the defendant had not done so. *Id.* at ¶ 11. In regard to the death of the initial investigator, this court rejected the defendant’s contention that he suffered actual prejudice because the victim’s trial testimony differed from the statement she gave to the investigator. This court noted that the victim’s statement and trial testimony were “generally consistent, and both * * * unequivocally described a rape beside a house adjacent to a vacant lot.” *Id.* at ¶ 12.

{¶16} In regard to the physician’s lack of independent recollection, the deceased neighbors, and the unidentified ambulance driver, this court held “[t]hat these witnesses would have offered exculpatory evidence is purely speculative since [the defendant] cannot identify any specific evidence they would have provided that might have helped his defense.” *Id.* at ¶ 14.

{¶17} In the conflict case, *Mack*, 8th Dist. Cuyahoga No. 100964, 2014-Ohio-4817, this court utilized a less stringent standard than the “exculpatory evidence standard” for demonstrating actual prejudice. The defendant in *Mack* was charged in 2013 with an alleged 1993 rape. At the time of the alleged crime, the defendant and alleged victim knew each other. The named victim immediately reported the alleged crime and went to the hospital where a rape kit was administered. At that time, she identified the defendant as the perpetrator. Three detectives were assigned to investigate the allegation, but the case went “cold” because the alleged victim did not cooperate.

{¶18} In June 2013, the defendant was charged with rape after the state received notification from the Bureau of Criminal Investigations that it matched the defendant’s

DNA to the hospital specimen the alleged victim provided. The defendant filed a motion to dismiss the indictment because of preindictment delay. After a hearing, the trial court granted the defendant's motion and the state appealed.

{¶19} In affirming the dismissal, this court did not utilize the “exculpatory evidence standard,” but, rather, relied on the concepts of due process and fundamental justice. This court also cited its prior holding in *State v. Doksa*, 113 Ohio App.3d 277, 680 N.E.2d 1043 (8th Dist.1996), that prejudice may be established by a defendant's contention that the state's preindictment delay resulted in the loss of witness testimony, lost memory, or spoiled or destroyed evidence. *Mack* at ¶ 10, citing *Doksa* at 280. *Doksa* similarly did not utilize the “exculpatory evidence standard” in affirming the trial court's dismissal of the indictment against the defendant five years after the alleged drug crimes were committed, finding that the record demonstrated that “[i]n short, the state made a late attempt to proceed upon evidence in existence at the time the investigation ceased.” *Id.* at 281.

{¶20} Three Ohio Supreme Court cases address the issue of due process violations based on preindictment delay: (1) *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984); (2) *State v. Whiting*, 84 Ohio St.3d 215, 702 N.E.2d 1199 (1998); and (3) *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829. None of these cases advance the “exculpatory evidence standard.”

{¶21} In *Luck*, the first case the court considered, the victim was killed in 1967 and the police immediately began an investigation, which resulted in collection of evidence from the crime scene and interviews of potential suspects and witnesses. The

defendant was identified as a potential suspect and interviewed in late 1967 and early 1968. After not gaining momentum, the police and prosecutor's office stopped their investigation, and it was not until March 1983 that the defendant was indicted.⁵ The indictment was based on the same evidence that the state had in 1967.

{¶22} The defendant claimed that the 15-year delay between the offense and the indictment resulted in actual prejudice to her, thereby violating her right to due process of law. She cited the following as grounds for showing prejudice: (1) the deaths of two key witnesses; (2) the fading of memories and changes in appearance; and (3) the loss of evidence.

{¶23} The court, following United States Supreme Court precedent,⁶ established the following two-part test for determining whether a due process violation occurred because of preindictment delay: (1) first, the defendant must demonstrate actual prejudice from the delay; (2) if demonstrated, then the prejudice must be weighed against the state's reasons for the delay.

{¶24} The Ohio Supreme Court did not evaluate the defendant's claim of actual prejudice in terms of whether the unavailable evidence and deceased witness testimony would have been exculpatory. Rather, the court evaluated it as follows:

The prejudicial factors enumerated by defense counsel (the deaths of witnesses, the fading memories, and the loss of evidence), when balanced against the other admissible evidence in this case, show that the defendant

⁵The record was silent as to what prompted the state to pursue the case again in 1983.

⁶See *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), and *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

has suffered actual prejudice by the fifteen-year delay in prosecution. Although the state is in possession of circumstantial evidence which may link the defendant to [the victim's] death, it cannot be said that the missing evidence or the dead witness would not have minimized or eliminated the impact of the state's circumstantial evidence. * * * [T]he defendant * * * is obviously prejudiced by not being able to seek verification of her story from [a deceased witness] and thereby establish mitigating factors or a defense to the charge against her.

Luck at 157-158.

{¶25} The court went on, under the second prong of the test, to find that there was no justifiable reason for the 15-year delay, stating, “[f]ifteen years later, the prosecutor sought an indictment based upon the same evidence that had been available in 1968. In fact, the deaths of witnesses and the loss of taped interviews had significantly *reduced* the available evidence by the time that the prosecutor sought the indictment of [the defendant].” (Emphasis sic and footnote omitted.) *Id.* at 158.

{¶26} In *Whiting*, 84 Ohio St.3d 215, 702 N.E.2d 1199, the second Ohio Supreme Court case on the issue of actual prejudice, the victim was found dead in 1981, and the police thereafter began investigating the circumstances surrounding her death and the defendant became a suspect. Fourteen years later, the defendant was indicted on a murder charge in connection with the death. The court, utilizing its standard as set forth in *Luck*, found that the defendant suffered actual prejudice, and the state did not present a justifiable reason for the delay. Again, the court did not use the “exculpatory evidence standard.”

{¶27} *Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, is the third Ohio Supreme Court case on this issue. In *Walls*, the defendant was charged with

aggravated murder 13 years after the crime. The victim was found dead in her home in March 1985. It was determined that she had been stabbed nine times and bled to death. The coroner who performed her autopsy opined that she died no earlier than 4:00 p.m. the day preceding the discovery of her body. It appeared that someone had forcibly entered her home, and in some areas the home had been ransacked. Latent fingerprints were recovered from the scene and compared with various suspects, but no matches were revealed.

{¶28} In 1998, a new online automated fingerprint identification system became available and some of the prints from the crime scene were entered into the system. The system identified the defendant's fingerprints as a good match. After further investigation, it was determined that the defendant's fingerprints matched those found on several personal items of the victim and on a storm door to her house.

{¶29} Investigators located the defendant for questioning. The defendant, who, at the time of the murder, had been a student at a school close to the victim's house, denied ever having been at the victim's house.

{¶30} He was indicted in 1998 for aggravated murder. He filed a motion to dismiss based on preindictment delay, which the trial court denied. His case proceeded to trial, and he was convicted of aggravated murder and sentenced to life imprisonment.

{¶31} On appeal, the defendant contended that because of the passage of time he lost substantial "exculpatory" evidence. Specifically, at the time of indictment, the original coroner was deceased. The defendant contended that if the coroner had been alive to testify, he could have placed the time of death during school hours rather than

around 4:00 p.m. The defendant contended he was at school on the afternoon of the death, but school attendance records were missing.

{¶32} The defendant further contended that there was an unavailable witness who could have supplied evidence implicating another person as the murderer. Additionally, the lead investigator was also deceased by the time of indictment and, according to the defendant, only that investigator knew why the defendant was considered a suspect. Moreover, the defendant contended that the following items of evidence had disappeared: (1) a tape made by a neighbor describing a person she saw entering the victim's house, (2) a faucet handle from the victim's house that had a blood stain on it, and (3) an anonymous letter that apparently discussed who committed the murder.

{¶33} The state contended that the defendant was not prejudiced because the evidence he complained of was either not missing, unhelpful, or duplicative. In regard to the initial coroner, another coroner testified extensively about the time of death. And, although the attendance records from individual classes were missing, the state produced a document showing that the defendant was in school on the day of the murder. With regard to the person who allegedly had evidence about someone else being the murderer, the police had interviewed that person but deemed her unreliable because she had given inconsistent statements. The state also contended that scientific testing revealed that a bloodstain on a "missing" pillow found in the other alleged suspect's home did not match the victim's DNA.

{¶34} The Ohio Supreme Court stated that

[i]n addition to the state's substantial arguments refuting [the defendant's]

contentions, we must also consider the fingerprint evidence implicating [the defendant]. Though [the defendant] stated that he had never been to the victim's home, his fingerprints were found in incriminating locations around the house, including on the storm door and on items scattered about the ransacked home. Furthermore, the fingerprints found in the home did not match those of * * * the individual who [the defendant] claims actually committed the crime.

Walls, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829 at ¶ 55.

{¶35} The court reasoned that “[a]lthough some prejudice may have occurred from evidence lost over the years, we conclude that [the defendant’s] claims of prejudice are speculative at best.” *Id.* at ¶ 56, citing *Marion*, 404 U.S. at 326, 92 S.Ct. 455, 30 L.Ed.2d 468. Further, the court was “firmly convinced that the delay was justified” because the defendant was indicted “only a couple of months after new computer technology made it possible to match the fingerprints at the murder scene to those of [the defendant].” *Id.* The court reasoned that this situation is “distinctly different from cases in which the state has compiled evidence but simply fails, or refuses, to take action for a substantial period.” *Id.*

III.

{¶36} In determining what standard — the “exculpatory evidence standard” or the “conceptions of due process and fundamental justice standard” — should be used in this case to determine whether Jones suffered actual prejudice due to the preindictment delay, we are guided by three considerations.

{¶37} First, we consider the stage of the proceedings at which the matter is being reviewed. The majority of the cases on this issue involve post-trial/conviction review. For example, of the five cases from this district cited in the fourth footnote, only two

involved pretrial/preconviction review.⁷ The state cites 12 cases in its supplemental briefing on this issue, all of which were reviewed posttrial/conviction.⁸

{¶38} The stage of the proceeding is relevant because evaluation of the likely effect of any missing evidence is much easier in a posttrial/postconviction review, than in pretrial/preconviction cases where we do not have the benefit of all the evidence that the state will present against the defendant. It would seem that in the pretrial type of cases, the negative effect of the delay on the defendant's ability to prepare a defense should be a consideration.

{¶39} Second, we consider the nature of the state's case against the defendant and the effect of the lost or missing evidence on the pertinent issues. For example, in cases where the identity of the perpetrator is not at issue, lost DNA evidence will generally be less important than lost or missing photos of the crime scene and lost witnesses.

{¶40} Third, we consider the question of whose problem should it be when we really do not know what the lost or missing evidence would have shown? Is requiring a

⁷Those two cases are *Dixon*, 8th Dist. Cuyahoga No. 100332, 2014-Ohio-2185, and *Clemons*, 8th Dist. Cuyahoga No. 99754, 2013-Ohio-5131.

⁸The state cites one case from each of the 12 Ohio appellate districts. The cited cases are as follows: *State v. Mizell*, 1st Dist. Hamilton Nos. C-070750 and C-070751, 2008-Ohio-4907; *State v. Kaminski*, 2d Dist. Montgomery No. 12447, 1991 Ohio App. LEXIS 4039 (Aug. 21, 1991); *State v. Mapp*, 3d Dist. Union No. 14-10-34, 2011-Ohio-4468; *State v. Flickinger*, 4th Dist. Athens No. 98 CA 09, 1999 Ohio App. LEXIS 225 (Jan. 19, 1999); *State v. Bruce*, 5th Dist. Richland No. 02 CA 40, 2003-Ohio-1714; *State v. Robinson*, 6th Dist. Lucas No. L-06-1182, 2008-Ohio-3498; *State v. Christman*, 7th Dist. Monroe No. 786, 1999 Ohio App. LEXIS 2486 (May 28, 1999); *State v. McFeeture*, 8th Dist. Cuyahoga No. 100434, 2014-Ohio-5271; *State v. Malone*, 9th Dist. Lorain No. 10CA009754, 2011-Ohio-2445; *State v. Tullis*, 10th Dist. Franklin No. 04AP-333, 2005-Ohio-2205; *State v. Ware*, 11th Dist. Lake No. 2007-L-154, 2008-Ohio-3992; and *State v. Walls*, 12th Dist. Butler No. CA99-10-174, 2000 Ohio App. LEXIS 5779 (Dec. 11, 2000).

defendant to prove that it would have been exculpatory an exercise in futility? Do we account for the fact that, from a systemic perspective, the search for the truth is diminished when potentially relevant evidence is lost or missing, even if we do not know what it would have shown?

IV.

{¶41} We now apply the above-mentioned three considerations to this case. First, this case was disposed of pretrial and, therefore, the only proceeding that we have to rely on for our review is the hearing on the motion to dismiss. The record from that proceeding, in sum, established that Jones and the victim were acquainted and it was Jones's position that they engaged in consensual sex. The victim reported that two other people were present in the home at the time of the attack — the defendant's mother and brother. By the time of indictment, the mother was deceased and the record is silent as to the availability of the brother.

{¶42} The physical and forensic evidence was scant: it consisted of the match of the defendant's DNA to the sample taken from the victim as part of the rape kit administration. But from the beginning, the victim identified the defendant as her rapist and, according to the defendant, he was interviewed in 1993, and told the police that he and the victim had had consensual sex. Therefore, the identity of the defendant was not an issue in this case, and the forensic evidence did not advance the case.

{¶43} This record segues into the second consideration: the nature of the case. With identity not being an issue, and with the lack of physical evidence, the case was bound to be a credibility determination. Much of the "missing/unavailable" evidence

was so because it was never even collected — no photographs of the alleged victim were ever taken, no photographs of the alleged crime scene were taken, and the victim’s clothing was not retained. Thus, to require the defendant to demonstrate that that missing or unavailable evidence would have been exculpatory would have been a near impossibility.

{¶44} The last piece of missing evidence was Jones’s mother, and we discuss her unavailability while addressing our final consideration: whose problem is it when we do not know what the lost or missing evidence would have shown? Jones’s mother was never questioned or interviewed and, therefore, anything that she might have said about the incident is speculation. The issue with the mother’s unavailability cannot be cured on this record with the testimony of Jones’s brother. What he would testify to is as speculative as what the mother would have testified to. That he was even available was speculation. Who he even is was speculative.⁹

{¶45} How did it come to be that there is an alleged rape in 1993, scant physical or forensic evidence, deceased and possibly unidentified witnesses but an identified perpetrator, and an indictment in 2013? It came to be because within one week of the alleged rape, after two attempts to contact the victim, the police “closed the case unless

⁹The parties refer to the other person who was alleged to have been in the home at the time of the rape as Jones’s brother (as the victim had stated), but there is an indication in the record that this other person was not the defendant’s brother, without an indication as to exactly who this other person was or is. See transcript of the hearing on the motion to dismiss at page 57, where defense counsel argued that the “other individual was not his brother, it was another individual, so now [Jones is] forced to * * * identify who the other individual was, and [the other individual] has an absolute right not to testify.”

the victim comes forward.” The victim never came forward. But, on the eve of the running of the 20-year statute of limitations, the state took the case to a grand jury and represented that the victim did not know the defendant’s last name. She did know his last name, and she identified him by first and last name from the beginning to both the police and the medical personnel.

{¶46} Moreover, both the victim and the defendant had been involved in the criminal justice system in Cuyahoga County for years. In other words, the record here demonstrates that the state merely failed to take action for a substantial period. After this inaction of the state, requiring Jones to demonstrate that any missing evidence or unavailable witness testimony would have been exculpatory is simply violative of his due process rights.

V.

{¶47} In conclusion, in this case, where the identity of the defendant as the accused perpetrator was known from the beginning, where the state barely investigated the case and closed it within one week of the start of its investigation, and where no further investigation or technological advances occurred in the time between the initial investigation and the indictment, we evaluate Jones’s claim of actual prejudice in terms of basic concepts of due process and fundamental justice.

{¶48} In so evaluating his claim, we find that he suffered actual prejudice in the near 20-year delay in prosecuting him. This is the type of case the Ohio Supreme Court warned of in *Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, where the state “simply fails, or refuses, to take action for a substantial period.” *Id.* at ¶ 56.

{¶49} In light of the above, the trial court properly granted Jones’s motion to dismiss.

{¶50} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be set to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedures.

LARRY A. JONES, SR., JUDGE

PATRICIA ANN BLACKMON, J.,
MARY J. BOYLE, J.,
EILEEN A. GALLAGHER, J.,
MARY EILEEN KILBANE, J.,
ANITA LASTER MAYS, J., and
MELODY J. STEWART, J., CONCUR

KATHLEEN ANN KEOUGH, J., RECUSED

SEAN C. GALLAGHER, J., DISSENTS WITH SEPARATE OPINION with FRANK D. CELEBREZZE, JR., A.J., EILEEN T. GALLAGHER, J., and TIM McCORMACK, J., CONCURRING

SEAN C. GALLAGHER, J., DISSENTING:

{¶51} I do not agree with the application of a less stringent standard for assessing actual prejudice in preindictment delay claims. This new so-called “due process and

fundamental justice” standard offered by the majority is in conflict with the long-standing actual or substantial prejudice standard that has been in play over the past three decades in Ohio. See *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984); *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829; *State v. Mizell*, 1st Dist. Hamilton Nos. C-070750 and C-070751, 2008-Ohio-4907; *State v. Kaminski*, 2d Dist. Montgomery No. 12447, 1991 Ohio App. LEXIS 4039 (Aug. 21, 1991); *State v. Mapp*, 3d Dist. Union No. 14-10-34, 2011-Ohio-4468; *State v. Flickinger*, 4th Dist. Athens No. 98 CA 09, 1999 Ohio App. LEXIS 225 (Jan. 19, 1999); *State v. Bruce*, 5th Dist. Richland No. 02 CA 40, 2003-Ohio-1714; *State v. Robinson*, 6th Dist. Lucas No. L-06-1182, 2008-Ohio-3498; *State v. Christman*, 7th Dist. Monroe No. 786, 1999 Ohio App. LEXIS 2486 (May 28, 1999); *State v. McFeeture*, 8th Dist. Cuyahoga No. 100434, 2014-Ohio-5271; *State v. Malone*, 9th Dist. Lorain No. 10CA009754, 2011-Ohio-2445; *State v. Tullis*, 10th Dist. Franklin No. 04AP-333, 2005-Ohio-2205; *State v. Ware*, 11th Dist. Lake No. 2007-L-154, 2008-Ohio-3992; *State v. Walls*, 12th Dist. Butler No. CA99-10-174, 2000 Ohio App. LEXIS 5779 (Dec. 11, 2000). A violation of due process does not result from an unjustifiable delay unless it results in actual prejudice to the defendant. *Luck* at paragraph two of the syllabus.

{¶52} I acknowledge that certain cases present a unique challenge in assessing preindictment delay. These cases involve situations where the defendant’s identity was known at the time of the alleged offense, but the authorities failed to pursue charges. Nevertheless, the statute of limitations provides no exception for such situations. Reading “actual prejudice” into these cases based on speculative claims of what might

have been defeats the statute of limitations. Concepts like due process and fundamental fairness are interwoven in the second prong of the preindictment delay standard, and while important to our sense of justice, any such notions are nevertheless elusive and subject to differing interpretations given the myriad of facts that exist from case to case. This is why a defendant must demonstrate actual prejudice free of speculation before a court considers whether there is a justifiable reason for the delay.

{¶53} Moving away from the actual prejudice standard to a less stringent “due process and fundamental fairness” standard, which allows defendants to demonstrate prejudice with speculative, self-serving claims of lost evidence, will result in inconsistent and unfair results when evaluating preindictment delay claims.

{¶54} Here, Jones has no way of demonstrating to what his mother would or would not have testified. There is no dispute the victim claimed that Jones’s brother was also present, and his whereabouts were undetermined. Presumably, in light of the absence of evidence to the contrary, the brother could testify. Jones’s claim is pure speculation. Further, what the clothing or other “missing” items would or would not have revealed is a red herring. There is no evidence that the supposed missing evidence existed or was preserved by the police investigation. The missing evidence may be evidence of an incomplete investigation, but that defense would have existed regardless of the passage of time.

{¶55} In most instances, the passage of time works against the prosecution. The state will have to account for the failure to pursue the claim and deal with the effect of purported “missing” evidence. In any event, shifting the burden to the state to

demonstrate a justifiable reason for delay without a showing of actual prejudice circumvents an extended statute of limitations period, invariably defeating legislative intent.