IN THE

SUPREME COURT OF THE UNITED STATES

August 20, 2019

No. 19-5847

ORIGINAL

DENNIS WHITE,
PETITIONER,

Vs.

PEOPLE OF THE
STATE OF OHIO et al.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO
THE
APPELLATE COURT OF THE STATE OF
OHIO TENTH JUDICIAL DISTRICT

DENNIS WHITE
Inmate No. 718016
Chillicothe Correctional Institution
15802 State Route 104 N
PO. Box 5500
North Chillicothe, Ohio 45601

QUESTIONS PRESENTED

Was the State Appellate court decision contrary to, or involved an unreasonable application of, clearly established federal law, *Strickland v. Washington, 466 U.S.668 (1984)*, pursuant to *Williams v. Taylor 529 U.S. 362* and *Hardy v. Chappell, 849 F.3d 803.(9th Cir. 2015)* and in violation of Petitioner, Mr. White right to due process as secured by the Fourteenth Amendment to the United States Constitution?

Was Petitioner, Mr. White's trial counsel, was ineffective in negligent failing to file a Motion to dismiss the indictment due to the pre-indictment delay and seek the complainants' hospital record that can not be deemed speculative and failure to established a reasonable probability in the light of clear and convincing evidence proving that petitioner supports his claims with material evidence and demonstrates a reasonable probability and in violation of Mr. White right to effective assistance of counsel as secured by the Sixth Amendment to the United States Constitution?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
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Vs.

PEOPLE OF THE
STATE OF OHIO et al., - Respondents;

PETITION FOR WRIT OF CERTIORARI

Petitioner, Dennis White, respectfully prays that a writ of certiorari issue to review the judgment and order of the Appellate Court of the State of Ohio, Tenth Judicial District, entered on March 07, 2017

OPINIONS BELOW

The Judgment Entry of the Appellate Court of the State of Ohio, Tenth Judicial District, on March 07, 2017, which affirms the Mr. White claims ineffective counsel, is attached hereto as Appendix "A." (A-1). A Copy of Entry of the Supreme Court of Ohio, dated July 26, 2017, which declines to accept jurisdiction of the appeal pursuant to Supreme Court Rule 7.08(B)(4), is attached hereto as Appendix "B" (B-1).

JURISDICTION

Jurisdiction is conferred upon his court by 28 U.S.C.A., Section 1257(3) to review by Writ of certiorari a final Judgment rendered by the state appellate court in which a decision could be had.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the United States Constitution are involved: U.S. Const. Amends. V, VI, XIV. The test of said provisions are attached hereto as Appendix "F" (F-1).

STATEMENT OF THE CASE

On April 17, 2014, upon Grand Jury indictment, Petitioner, Dennis White, was charged In Franklin County, Ohio of one count of vaginal rape, one count of oral rape, and one count of kidnapping of Ms. Velinda Green on October 5, 1995 (Count 1,2, and 3) and one count of vaginal rape, oral rape, and kidnapping of Ms. Tonya Holston Ligon on November 13, 1995 (Count 4, 5, and 6).

On April 21 -22, a bench trial was conducted. (The transcripts of the trial testimony consists of two volumes, labeled "Volume I of IV" (pp. 1-236 and Volume II of IV" (pp. 237-400).) On May 11, the trial court rendered its verdict from the bench, finding Petition, Mr. White guilty on all six counts. (Tr. 394-399)) On May 11, the State disclosed "supplemental discovery" consisting of medical records related to Ms. Green's visit to the hospital on the night of her encounter with Mr. White. (R. P. 85). These documents constitute State's Exhibit 1A, which was introduced into evidence at the subsequent July 8, 2015 hearing on Mr. White's Motion for mistrial and new trial.

On June 2, Mr. White filed a "Motion for Mistrial and for New Trial." (R. p. 80) On July 8, the trial court conducted a hearing on Mr. White's motion. (The transcript is labeled "Volume III of IV.") On July 31, the trial court overruled Mr. White's Motion for Mistrial and for New Trail. (R. p. 63, Entry Denying Defendant's Motion for Mistrial and for a New Trial. (July 31, 2015).)

On August 5, the trial court conducted a sentencing hearing. (The transcript is labeled "Volume IV of IV.") The trial court sentenced Mr. White under the 1995 statutes. The sentence is an indeterminate sentence of 11 to 25 years on each of the six counts, with Counts 2 and 5 running consecutive to each other, and the other counts running concurrently.(Tr. Sent. Hrg., Vol. IV of IV, 4:20-5:3, 18:16-19:6.) On August 11, the trial court filed the sentencing judgment entry, which is the final appealable order in this case. (R. p. 26.) On August 27, Mr. White filed his Notice of Appeal and appealed his conviction to the Appellate Court of Ohio, Tenth District, on the ground, among others, that Mr. White was deprived of effective assistance of trial counsel and violated her right to Due Process by failing to file a Motion to dismiss the Indictment due to the nearly twenty-years pre-

indictment delay and to seek the complainants' hospital records under *Strickland v. Washington, 466 U.S. 668 (1984).* On March 07, 2017, the Appellate court affirmed Mr. White's conviction. *State v. White, 10th Dist. No. 15AP-815, 2017-Ohio-810 ¶ 86.(March 07, 2017)*

Thereafter, the Ohio Supreme Court declined to accept jurisdiction of the appeal on July 26, 2017. *State v. White, 2017 Ohio LEXIS 1567.* Petitioner filed Petition for a writ of habeas corpus and Traverse pursuant to 28 U.S.C. § 2254 in United States District Court for the Southern District of Ohio, Eastern Division. The Magistrate Judge filed Report and Recommendation and recommended that this action be DISMISSED because petitioner has failed to establish the denial of the effective assistance of counsel under Strickland based on his attorney's failure to file a motion to dismiss the Indictment for excessive preindictment delay. *White v. Warden, Chillicothe Corr. Inst., case no. 2:18-cv-193, 2018 U.S. Dist. LEXIS 115878 (July 12, 2018).* On Aug. 15, 2018, Pursuant to 28 U.S.C. § 636(b), the District Court has conducted a de novo review and overruled Petitioner objection and adopted and affirmed the R&R. and denied COA. *White v. Warden, Chillicothe Corr. Inst., 2018 U.S. Dist. LEXIS 138169 *2.* Petitioner filed Application for COA in United States Court of Appeals For Sixth Circuit. The Court denied COA on March 28, 2019. He petitions for rehearing en banc of the court's order entered on March 28, 2019. On May 28, 2019, the Court denied his petition. *White v. Warden, case no. 18-3946, 2019 U.S. App. LEXIS 15821.*

Mr. White currently remains incarcerated in Chillicothe Correctional Institution.

Petitioner, Dennis White was indicted on April, 17, 2014, within the twenty-years limitations period. The six counts of the indictment allege:

. Vaginal rape, oral rape, and kidnapping of Ms. Velinda Green on October 5, 1995 (Count 1, 2, and 3), and

. Vaginal rape, oral rape, and kidnapping of Ms. Tonya Holston Ligon on November 13, 1995 (Counts 4, 5, and 6) (Indictment, R. p. 204; Bill of Particulars, R. p. 152.)

On April 21-22, 2015, a bench trial was conducted. (The transcript of the trial testimony consists of two volumes, labeled "Volume I of IV" (pp. 1-236) and "Volume II of IV" (pp. 237-400).) On May 6, the trial court rendered its verdict from the bench, finding Mr. White guilty on all six counts. (Tr. 394-399) On May 11, the State disclosed "supplemental discovery" consisting of medical records related to Ms. Green's visit to the hospital on the night of her encounter with Mr. White. (R. P. 85). These documents constitute State's Exhibit 1A, which was introduced into evidence at the subsequent July 8, 2015 hearing on Mr. White's Motion for mistrial and new trial.

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On August 5, the trial court conducted a sentencing hearing. (The transcript is labeled "Volume IV of IV.") The trial court sentenced Mr. White under the 1995 statutes. The sentence is an indeterminate sentence of 11 to 25 years on each of the six counts, with Counts 2 and 5 running consecutive to each other, and the other counts running concurrently.(Tr. Sent. Hrg., Vol. IV of IV, 4:20-5:3, 18:16-19:6.) On August 11, the trial court filed the sentencing judgment entry, which is the final appealable order in this case. (R. p. 26.) On August 27, Mr. White appealed his conviction to the Appellate Court of Ohio, Tenth District, on the ground, among others, that Mr. White was deprived of effective assistance of trial counsel and violated her right to Due Process by failing to file a Motion to dismiss the Indictment due to the nearly twenty-years pre-indictment delay and to seek the

complainants' hospital records under *Strickland v. Washington, 466 U.S. 668 (1984).* On March 07, 2017, the Appellate court affirmed Mr. White's conviction. (A-1)

Thereafter, the Ohio Supreme Court declined to accept jurisdiction of the appeal on July 26, 2017. (B-1).

INTRODUCTION

It is undisputed that

. On October 5, 1995, Mr. White has sex in his car with Velinda Green, and

. On November 13, 1995, Mr. White had sex in his care with Tonya Holston Ligon.

As to the merits of the indictment, the only issue at trial was whether these encounters were consensual. (See Tr. 365:11-21, 370:21-24 (State's closing argument); Tr. 394:21 – 395:2 (judge announcing verdict).)

Mr. White testified that Ms. Green and Mr. Ligon were two of the prostitutes whom he picked up and with whom he exchanged crack cocaine for sex, as was his habit in 1995. Ms. White testified that in 1995 he was addicted to crack cocaine but that as of trial he had been clean for "[s]eventeen years and six months and a few days." (Tr. 308:17-22.) Ms. Green and Ms. Ligon testified to the effect that they were not prostitutes and that they did not know Mr. White, but that they nevertheless voluntarily got into his car under dubious circumstances. Following a two-day bench trial, the trial judge found Mr. White guilty on all six counts of the indictment.

Because this case involves two unrelated incident, this brief presents the facts and arguments as follows:

. Part 1 presents the facts regarding the allegations of Ms. Green,

. Part 2 presents the facts regarding the allegation of Ms. Ligon.

. Part 3 presents one assignment of error pertaining to the whole Judgment:

- Mr. White's trial counsel was ineffective for

(1) failing to file Motion to dismiss the indictment due to the nearly twenty-years pre-indictment delay, and (2) failing to seek the medical records of two complainants

PART 1: The Case of Ms. Velinda Green

STATEMENT OF FACTS

In October 1995, Ms. Velinda Green worked "at the state office towers doing housekeeping." (Tr. 26:12-15 [Green].) She also worked five nights a week at a "bootleg" – an illegal nightclub-after which she would hang out with her prostitute friends. (Tr. 87:17 - 88:19 [Green].) Ms. Green and her teenage daughter lived with Ms. Green's father in his Columbus house. (Tr. 26:16 - 27:11 [Green].) Ms. Green testified that twenty years earlier, on the evening in October 1995 that she met Mr. White, she was walking in the area of 18th Street and Monroe Avenue in Columbus, looking for her daughter. (Tr. 26:22-23, 30:13 - 31:16) She testified that a stranger –Mr. White – walked up to her and offered her a ride home. She testified that she voluntarily got into Mr. White's car, which she alleges was parked nearby. (Tr. 31:17 - 34:9, 68:9 - 69:19.) Mr. Green testified that they started talking and that Mr. White asked her if she drank. She testified: "I remember saying yes, beer, because I'm a beeraholic. I drink beer a lot." (Tr. 34:10-23.) They drove to a store, where she either waited in the care or entered the store with Mr. White as he purchased at least two 40-ounce bottles of Old English 800 malt liquor. She testified that they then drove to her home, where they sat on the porch and drank all the Old English 800. (Tr. 27:1-11, 35:5 - 37:8, 70:23 - 72:15.) Ms. Green testified that she still did not know Mr. White's name at that point and that she may have given Mr. White a fake name for herself. "[b]ecause I usually do." (Tr. 27:9-38:4.)

Mr. Green began using crack cocaine in 1988 and became addicted to it in 1991. She was still using crack regularly in October 1995. She does not remember when she stopped using crack. (Tr. 78:14 - 79:14 [Green].) Ms. Green testified that, at some point on the October 1995 evening, she and Mr. White smoked crack together- "[m]ore than likely" in the car and "[p]ossibly" at her home. (Tr.

79:24 - 80:7.) She does not remember whether she had used crack earlier that day, before meeting Mr. White. (Tr. 78:18-21.) Ms. Green testified that this was the one and only time in her life that she got into a car with a stranger and smoked crack with him. (Tr. 82:5-19.) Ms. Green testified that she was not a prostitute but that her friends who were prostitutes but that her friends who were prostitutes paid her to record that license-plate numbers of cars of strangers that prostitutes entered. Ms. Green's habit was to writ the license-plate numbers on her body. (Tr. 83:14 - 84:20 [Green].) On the night in question, Ms. Green wrote Mr. White's license-plate number on her leg. (Tr. 49:7 - 50:19 [Green].)

Green testified that "maybe after 12:00 [midnight]," after she and Mr. White had drunk all the Old English 800, the two of them got into Mr. White's car and "[p]robably left to go get more beer" and "to pick up some more money." Ms. Green is not sure but thinks they did stop somewhere to get more money. (Tr. 38:5 - 39:16, 81:16-25.) Ms. Green testified that Mr. White then "got very violent" and drove east on Livingston Avenue. Ms. Green testified that she became fearful and hoped that Mr. white would stop the car so that she could exit the car and flee. (Tr. 41:13-25.) But she also testified that she did not flee when (according to her) she had a chance. She testified that when Mr. White parked the car in a schoolyard, she just sat in the front passenger seat while Mr. White exited the car through the driver-side door; walked to the back of the car and opened the trunk; walked to the passenger side; and opened the front, passenger-side door and pulled her out of the car. (Tr. 43:2-16) She testified that Mr. White attacked her in the care:

> He had stopped the car, coming over there to the side saying something. I don't know. And, like I said, sexually picking my clothes off and entering me, my leg off, you know, forcing yourself inside someone. You're laying there trying to look and think something to get away and you can't.

(Tr. 53: 19-25.) Then, she alleges, she just sat in the car while Mr. White exited the car, opened the trunk, and dragged her from the car:

> I just remember going like in the schoolyard or something. Pulled back to a schoolyard. Remember him opening the door to the passage side. Pulling at me. Trying to tear my clothes and stuff. Then he went into the trunk of the car. He had a belt. Forced himself on me sexually. Then was headed by a tree. Put a belt around my neck and just trying to make me suck his dick and stuff. And I remember biting it and taking off running and screaming. And I guess

must have, you know, made him nervous or something because I remember him running back. Getting in the car.

And I went knocking on people's doors but they didn't answer their doors so laid on this person's porch until I just felt the car was gone. And then I remember coming and going to the corner store. Somewhere right there was a phone booth. Back then we had phone booths. We don't have phone booths now, and calling the police.

(Tr. 42:3-42:23.) Ms. Green called the police and was examined at a hospital, where a "rape kit" of evidence was collected and photographs of bruises to her neck, arms, knees were taken. (Tr. 44:20 – 51:16, 55:16 – 56:25 [Green].)

Mr. White testified that he met Ms. Green when she stopped his car for her, believing her to be a prostitute. He testified that they agreed to exchange sex for crack, which was Mr. White's habit, and that no force was involved. He testified that they parted company when Mr. White ordered her out of the car, angrily accusing her of having smoked his share of the crack. (Tr. 302:4 – 316:11.)

FIRST REASON FOR GRANTING THE PETITION

THE STATE APPELLATE COURT'S DECISION WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, *Strickland v. Washington, 466 U.S.668 (1984),* pursuant to *Williams v. Taylor 529 U.S. 362* and *Hardy v. Chappell, 849 F.3d 803.(9th Cir. 2015*) AND IN VIOLATION OF PETITIONER, MR. WHITE RIGHT TO DUE PROCESS AS SECURED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The question now is whether the State Appellate Court decision was contrary to, or involved an unreasonable application of, clearly established federal law or not?

In *Hardy v. Chappell, 849 F. 3d 803,* Nine Circuit Court states that the "clearly established federal law" for an ineffective assistance of counsel claim under the Sixth Amendment derives from *Strickland v. Washington. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*; see *Cullen v. Pinholster, 563 U.S. 170, 189, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)* ("There is no dispute" that Strickland is clearly established federal law). Strickland established a two-part test: the defendant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland, 466 U.S. at 687.* A conviction will be reversed for ineffective assistance of counsel when counsel's performance is below an objective standard of reasonable representation, causing prejudice such that there is a "reasonable probability" that, were it not for counsel's errors, the result of the trial might have been different. *Strickland v. Washington, 466 U.S. 668 (1984);* under § 2254(d)(1), "contrary to" means "substantially different from the relevant precedent" of the Supreme Court. *Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (200*0).

Petitioner, Mr. White, contends that the State appellate court's decision was contrary to, or involved an unreasonable application of, clearly established federal law for the following two reasons: First, even though the State Appellate court recited the proper Strickland prejudice Standard, it failed to apply it properly; and Second, even though Appellant-Petitioner, Mr. White clearly established the prejudice prong of Strickland and the court recognized that Mr. White in this case did not have the benefit of the decision in *Jones II* at the time of briefing before this court, State appellate court employed a prejudice test that was "significantly harsher than the clearly established test from Strickland creating a much higher bar for Mr. White than the law require(s).

First, even though the State Appellate court recited the proper Strickland prejudice Standard, it failed to apply it properly. In the present case, the State Appellate court began its prejudice analysis by reciting the *Strickland* Standard verbatim, setting forth the reasonable probability" test without addressing the first prong of Strickland. *State v White, 10th Dist. No.15AP-815, 2017-Ohio-810 ¶. 53.* It then proceeded to conduct the issues of pre-indictment delay inquires derived from the Eight Appellate court in *State v. Jones, 8th Dist., 2015-Ohio-2853, 35 N.E.3d 606 ("Jones I")* and Ohio Supreme Court's decision in *State v. Jones, 148 Ohio St. 3d 167, 2016-Ohio-5105, 69 N.E.3d 688 ("Jones II") White, 10th Dist. No. 15AP-815, 2017-Ohio-810 ¶. 53 – ¶ 68.* And then it proceeded to conduct its prejudice analysis by reciting *State v. Stricker, 10th Dist. No. 03AP-746, 2004-Ohio-3557, ¶ 36,* states that proof of actual prejudice "must be specific, particularized and non-speculative." *White, 2017-Ohio-810, ¶ 70.* The court concluded that that on review of the record of proceedings and relevant case law, including *Jones II*, the court found that appellant-petitioner has not established a reasonable probability of success had trial counsel filed a motion to dismiss on the basis of pre-indictment delay. As such, appellant was not prejudiced as a result of his trial counsel's alleged ineffectiveness. Further, because appellant has failed to establish the prejudice prong of Strickland, we need not consider the state's reasons for the pre-indictment delay. *Adams at ¶ 107. White, 2017-Ohio-810, ¶ 73.* Thus, Ms. White contends that even though the State Appellate court recited the proper Strickland prejudice Standard, it failed to apply the proper standard, and thus the decision in not protected from review for 28 U.S.C. § 2254(d) purposes.

Second, even though Appellant-Petitioner, Mr. White clearly established the prejudice prong of Strickland and the court recognized that Mr. White in this case did not have the benefit of the decision in *Jones II* at the time of briefing before this court, State appellate court employed a prejudice test that was "significantly harsher than the clearly established test from Strickland creating a much higher bar for Mr. White than the law require(s). In the present case, Mr. White asserted on appeal that his trial counsel was ineffective in two ways: (1) failing to file a Motion to dismiss the Indictment due to the nearly twenty-years pre-indictment delay, and 2) failing to seek the complainants' hospital record.

Trial counsel's failure to file a motion to dismiss, by itself, justifies remand. Trial counsel's failure to seek the complainants' hospital record is further justification. It was objectively unreasonable for his trial counsel to not file a motion to dismiss the Indictment due to the pre-indictment delay, and there is a reasonable probability that such motion would have been granted. He contends that his burden on appeal, under *Strickland,* is not only to show "a reasonable probability" that he would have prevailed on a motion to dismiss. His argument that he need only demonstrate the "slightest prejudice" in order to tip the balance in favor of dismissal based on his assertion that the State's reasons for the pre-indictment delay is worthy of zero weight as follows:

The record at it stands –before the defense has even attempted to prove prejudice from the two-decades delay – shows such reasonable probability of success. The record shows that Mr. White's defense was prejudiced in at least five respects.

1. Witness credibility and reliability was the only issue at trial. Ms. Green in 1995 was a long term crack addict and a sefl-described "beeraholic." By the time of trial she was no longer a crack addict. (Tr. 34:22-23, 78:14 – 79:3 [Green].) She almost certainly presented herself as a more credible and reliable witness in 2015 than she would have in 1995.

2. Similarly, Ms. Ligon's trial testimony indicates that she had an alcohol problem in 1995. (Tr. 121:22-24, 126:24-25, 149:9-15, 154:1-25.) She probably presented herself as a more credible and reliable witness in 2015 than she would have in 1995. She probably presented herself as a more credible and reliable witness in 2015 than she would have in 1995.

3. Facing accusers of such dubious character, Mr. White if prosecuted in 1995 almost certainly would not have waived his constitutional right to a jury trial in which the State would have needed to persuade twelve persons, rather than one, of guilt beyond a reasonable doubt.

4. The passage of two decades influences how Mr. White's credibility is viewed. In 1995, the crack-cocaine epidemic in the country's poor neighborhoods was only beginning to wane. See Barbara C. Wallace, A Chronology of Crake Cocaine and the Nexus of Seven Repercusions that Reverberate from the Crack Epidemic into the New Millennium, 3 J. Equity in Health 12, 13, 17 (Feb.

2014). To modern ears, Mr. White's account of cruising the City of Columbus, looking to exchange crack for sex sounds less plausible than it would have sounded to a finder of fact twenty years ago.

5. The passage of years inevitably affects memories. And the material evidence in this case consists almost entirely of memories.

. Ms. Green "do[es]n't remember a lot." (Tr. 28:11 [Green].)

. Ms. Green does not remember why she did not exit Mr. White's car when (according to her) she had the opportunity. (Tr. 87:1-16 [Green].)

. Ms. Ligon does not remember whether she was going to work or to shop when she entered Mr. white's car(Tr. 121:20 – 122:11) – an issue that might have influenced the fact-finder's views about both her explanation and Mr. White's explanation for why she chose to enter Mr. White's car.

. Ms. Green does not remember whether she used crack earlier that day, before meeting Mr. White. (Tr. 78:18-21 [Green]. A memory that she had might have influenced the fact-finder's view of her purported memories.

. Ms. Green does not remember when she stopped using crack. (Tr. 78:14 – 79:14 [Green].)

All this is in addition to possible exculpatory evidence that cannot help Mr. White now, twenty years later, because its prior existence is too speculative – such as evidence of whether Ms. Green and/or Ms. Ligon were prostitutes, the means by which Ms. Green fed her crack addiction, and whether Ms. Ligon frequented crack houses.

Mr. White was prejudiced by the trial counsel's failure to file a Motion to dismiss the indictment due to the pre-indictment delay. *White, 10th Dist. No. 15AP-815, 2017-Ohio-810 ¶ 69.*

Mr. White contends that the State Appellate court applied the prejudice prong of Strickland in an unreasonable manner. Here the State Appellate court in *White, 10th Dist. No. 15AP-815, 2017-Ohio-810 ¶ 70* does not apply the prejudice prong of Strickland Standard instead relied upon in *State v. Jones, 148 Ohio St. 3d 167, 2016-Ohio-5105, 69 N.E.3d 688 ¶ 28 ("Jones II")* and *State v.Stricker, 10th Dist. No. 03AP-746, 2004-Ohio-2557, ¶ 3*6 although the court recognized that the parties in this case did not have the benefit of the decision in *Jones II* at the time of briefing before this court.

Actual prejudice exists "when missing evidence or unavailable testimony, identified by the Defendant and relevant to the defense, would minimize or eliminate the impact of the State's evidence and bolster the defense." Jones II at ¶ 28. Further, proof of actual prejudice "must be specific, particularized and non-speculative." *State v.Stricker, 10th Dist. No. 03AP-746, 2004-Ohio-2557, ¶ 36.* The appellate court stated that appellant – Mr. White does not point to any particular missing evidence or unavailable witnesses. To the extent appellant argues there is a possibility that V.G. or T.L. would have presented themselves as more credible witnesses in 2015 than in 1995, or that he almost certainly would not have waived his right to a jury trial in 1995, such claims are speculative and **do not meet the actual or substantial prejudice requirement.** Similarly, whether the passage of time would have influenced "modern ears" to find appellant's account less plausible is also speculative.

The court stated Appellant also contends the passage of time inevitably affects memories, and that both V.G. and T.L. did not remember certain details during their testimony, including V.G.'s testimony that she did not recall what year she stopped using crack, and T.L.'s statement that she did not remember whether she was going to work on the date of the incident. However, "the possibility of faded memories, unavailable witnesses, and lost or destroyed evidence does not, in and of itself, constitute actual prejudice." *State v. Smith, 8th Dist. No. 104203, 2016-Ohio-7893, ¶ 19, citing Jones II at ¶ 21*. The court concluded that in *White, 10th Dist. No. 15AP-815, 2017-Ohio-810 ¶ 72* **on review of the record presented, including the testimony of V.G. and T.L., we do not find that appellant demonstrated substantial prejudice from the fact these witnesses may not have recalled certain details**. *See, e.g., State v. Battiste, 8th Dist. No. 102299, 2015-Ohio-3586, ¶ 51* (nothing in the record to suggest appellant was prejudiced by witnesses inability to recall certain details; defense counsel, in fact, utilized the inability of one witness to recall certain details to appellant's advantage); *Smith, 2016-Ohio-7893 at ¶ 20* (rejecting appellant's claim that memories of the offense were severely compromised by nearly 20-year delay; record belied appellant's assertion as victim's account of rape on reopening of case was consistent account as reported at time of incident); *State v.*

Clark, 12th Dist. No. CA2007-03-037, 2008-Ohio-5208, ¶ 49 ("although appellant argues that he was prejudiced by defense witnesses' faded memories, he has not shown how the witnesses' recollection of the altercation would have changed the outcome of the trial").

Mr. White also contends he was prejudiced by his trial counsel's negligent failure to seek the complainants' hospital records. Ms. Green's medical records would have materially helped Mr. White's defense in two respects.

First: On the "Sexual Assault Care Flowsheet," the phrase "Location of occurrence [:] father's basement" suggests that Ms. Green told the scrivener at the hospital that she was raped in the basement of the home she shared with her father. Such a fact would undermine such of Ms. Green's testimony incriminating Mr. White: that Mr. White got violent while driving them in the car; that she became fearful and hoped that Mr. White would stop the car so that she could exit the car and flee. 9Tr. 41:13-25); that she waited in the car after the first rape (Tr. 43:2-16); and that Mr. White raped her twice inside the car. (Tr. 39:21 – 42:23, 53:19-25). Moreover, if her encounter with Mr. White occurred at her home, that would explain the anormaly at trial of her answering, "I don't remember" when asked why she did not flee when (according to her) she had the chance. (Tr. 87:1-2)

Second: On the "Emergency Treatment Record," the phrase "by known person" suggests that Ms. Green told the scrivener at the hospital that she was sexually assaulted by someone she knew. Such a fact would suggest that Ms. Green lied or mis-remember at trial when she testified that she had never met Mr. White before that day in 1995.

Had Mr. White's trial counsel subpoenaed these records, trial counsel could have used them to show two major inconsistencies between what Ms. Green reported the day of her encounter with Mr. White and what Ms. Green said at trial almost twenty years later. The nature of these inconsistencies – whether the encounter occurred at her home or in Mr. white's car, and Whether she knew Mr. white – go the heart of her account and thus her credibility and reliability.

A finder of fact listening to the same evidence nineteen years earlier would not so understand of the anomalies in the complainants' testimony. Moreover, if the State had timely indicted Mr. White,

there is a reasonable probability that Mr. White could have presented at trial the testimony of the scrivener to whom Ms. Green reported that she was raped in the basement of her home by a "known person" – an independent witness testifying that Ms. Green's trial testimony is materially inconsistent with what Ms. Green told the scrivener a few hours after her encounter with Mr. White. A fact-finder receiving such conflicting evidence within a year of the event surely would have been more suspicious of Ms. Green's trial testimony than was the trial judge in this case.

The State Appellate court stated the hospital records at issue were the subject of appellant's motion for mistrial and for new trial. The trial court considered the notations in the medical records and determined that, even had such evidence been available for trial, the result of the trial would not have been different. The court concluded that on review, we conclude that appellant has not demonstrated a reasonable probability that the result of the trial would have been different but for counsel's failure to subpoena the hospital records of V.G. *White, ¶ 78.*

Summary, Mr. White was deprived of effective assistance of counsel at his trial and has demonstrated Strickland prejudice therefrom. Mr. White's attorney failed him, and the State appellate court failed Mr. White. Its denial of Mr. White claim was both contrary to and objectively unreasonable under Strickland. Accordingly, he is entitled relief under AEDPA and this Honorable court shall reversed the State appellate court's judgment and remanded the case to the District court with instructions to grant the petition for writ of habeas corpus.

SECOND REASON FOR GRANTING THE PETITION

PETITIONER, MR. WHITE'S COUNSEL WAS INEFFECTIVE IN NEGLIGENT FAILING TO FILE A MOTION TO DISMISS THE INDICTMENT DUE TO PRE-INDICTMENT DELAY AND SEEK THE COMPLAINANTS' HOSPITAL RECORD THAT CAN NOT BE DEEMED SPECULATIVE OR FAILURE OF ESTABLISHED A REASONABLE PROBABILITY IN THE LIGHT OF CLEAR AND CONVINCING EVIDENCE PROVING THE PETITIONER SUPPORTS HIS CLAIMS WITH MATERIAL EVIDENCE AND DEMONSTRATES A RESONABLE PROBABILITY AND IN VIOLATION OF MR. WHITE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS SECURED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Introduction

A conviction will be reversed for effective assistance of counsel when counsel's performance is below an objective standard of reasonable representation, causing prejudice such that there is a "reasonable probability" that, were it not for counsel's errors, the result of the trial might have been different. *Strickland v. Washington, 466 U.S. 668 (1984); State v. Bradley, 42 Ohio St. 3d 136 (1989),* Paragraphs two and three of the syallabus.

Mr. White's trial counsel was ineffective in two ways: (1) failing to file a Motion to dismiss the Indictment due to the nearly twenty-years pre-indictment delay, and (2) failing to seek the complainants' hospital records. Trial counsel's failure to file a motion to dismiss, by itself, justifies a remand. Trial counsel's failure to seek the complainants' hospital record is further justification.

B. Mr. White was prejudiced by trial counsel's negligent failure to file a motion to dismiss the indictment due to the pre-indictment delay.

1. The due-process guarantee against prejudicial pre-indictment delay.

The seminal cases establishing citizens' protection against undue pre-indictment delay are *United States v. Marion, 404 U.S. 307, 324-325 (1971),* and *United States v. Lovasco, 431 U.S. 783, 796-797 (1977).* In both cases the Supreme Court's Judgment went against the defendants, but the court established the following principles regarding the due process protection against undue pre-indictment delay.

Statutes of limitations do not fully define defendant's rights with respect to events occurring prior to indictment. *Marion, 404 U.S. at 324.* "[T]he Due Process Clause has a limited role to play in

protecting against oppressive delay." *Lovasco, 431 U.S. at 789.* The Court's duty is to determine whether the pre-indictment delay "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." *Lovasco, 431 U.S. at 790 (quotations marks and citations omitted).*

There is no burden of proof. Rather, the operative rule of pre-indictment delay is that the courts must weigh the prejudice the accused suffers from the delay against the reason for the delay and make a decision that provides the "fundamental fairness" the Due Process Clause requires: "[T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Lovasco, 431 U.S. at 790.*

There are, however, shifting burdens of production:

> [T]he defendant [must] produce evidence demonstrating that the delay has caused actual prejudice to his defense. Then, after the defendant has established actual prejudice, the state must produce evidence of a justifiable reason for the delay. [T]he prejudice suffered by the defendant must be viewed in light of the State's reason for the delay.

State v. Whiting, 84 Ohio St. 3d 215, 217 (1998) (citations and quotation marks omitted).

Each case is unique: "To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstance of each case." *Marion, 404 U.S. at 325.*

The leading Ohio cases on pre-indictment delay are *State v. Luck, 15 Ohio St. 3d 150, 157-59 (1984)* (affirming dismissal due to 15-year pre-indictment delay caused by police "error in judgment"), and *State v. Whiting, 64 Ohio St. 3d 215, 217-18, 1998-Ohio-575* (upholding dismissal and reaffirming Luck's holding state the State bears the burden of demonstrating justifiable reason for prejudicial delay). The Supreme Court's most recent pre-indictment delay decision is *State v. Adams, Slip Op. No. 2015-Ohio-3954, ¶¶ 96-111*. In the first of these cases, Luck, the Supreme court stated:

> [A] delay in the commencement of prosecution can be found to be unjustifiable when the state's reason for the delay is to intentionally gain a tactical advantage over the defendant, see United States v. Marion, supra, or when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased. The length of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable.

Luck, 15 Ohio St. 3d at 158.

2. It was objectively unreasonable for Mr. White's trial counsel to not file Motion to dismiss the indictment due to the pre-indictment delay, and there is a reasonable probability that such motion would have been granted.

a. Summary.

The balancing test for adjudicating a Motion to dismiss for pre-indictment delay tests the prejudice to the accused against the State's reason for delaying the indictment. Here, the reason the indictment was delayed-the State's discretionary choice to drop the case because of the complainants' disinterest-is worthy of zero weight in this balancing test. Thus, had trial counsel filed a Motion to dismiss, Mr. White's burden would have been minimal: to show the slightest prejudice from the nearly twenty-year delay. Mr. White would have made such showing-indeed, the record as it stands, even without a motion or evidentiary hearing, demonstrates such prejudice.

b. The reason the indictment was delaying is worthy of zero weight in the balancing test.

The reason the indictment was delayed more than nineteen years is that Columbus Police in 1995 chose not to pursue the case because neither Mr. Green. (Tr. 255:5-15 [Det. Hedrick]) nor Ms. Ligon. (Tr. 182;20-183:8 [Det. Lawson] wished to have Mr. White prosecuted – at least not enough to cooperate with the police. Columbus Police closed both the Green case and Ligon case in tandem.2 Columbus Police abandoned the case despite:

1. Ms. Green having correctly identified Mr. White in a photo array (Tr. 18:7-9 [State's opening Statement], 58:15-59:24 [Green];

2. Ms. Ligon having partially identified Mr. White, as to skin tone, in photo array. (Tr. 139:23 – 140:16 [Ligon]; 171:17 – 173:14 [Det. Lawson])

3. Ms. Green having recorded and reported the license plate number of Mr. White's car (Tr. 49:7 – 50:19 [Green]; 168:22-25 [Det. Lawson]);

4. Columbus Police, from the license plate, having identified Mr. White's car as being registered to his brother (Tr. 169;5-13 [Det. Lawson]);

therefore not an issue, and the CODIS hit received in 2013 did nothing to advance a case that had been inactive for approaching 20 years.

The alleged victim's decision not to further cooperate in 1993 is likewise insufficient justification for a 20-year delay in prosecution. Although the record contains a number of reasons citied by the alleged victim when she signed the "no prosecution" form. She did, in fact, agree to testify against Dixon within months of the alleged offense at Dixon's parole revocation hearing. Furthermore, there is no evidence that the state ever made an attempt to persuade or compel her testimony at any point in the nearly 20 years since reporting the alleged rape. Likewise, there is no evidence the state pursued any other avenue in the investigation. In fact, the state had considered the case closed, for all intents and purposes, electing not to pursue the mater after Dixon's parole was revoked and he was returned to prison. Where the state effectively ceased the active investigation of this case in 1993 but later decided to commence prosecution upon essentially the same evidence that was available to it at the time that its active investigation was ceased, it is unjustified.

Id. at ¶¶ 32-34 (citations omitted).

Similarly, the indictment in State v. Jones, 8th Dist. No. 101258, 2015-Ohio-2853 (en banc), appeal accepted in S. Ct. No. 2015-1427, certified conflict dismissed in S. Ct. No. 2015-1612, 2015-Ohio-4633 (Nov. 10, 2015), was precipitated by the police deciding to testy an _____.

In State v. Jones, at 2015-Ohio-4633 (Nov. 10, 2015), the Supreme Court of Ohio, in case No. 2015-1427, accepted the State's appeal, which presents two propositions of law:

I. The reasons for the delay in bringing a prosecution are never evidence of actual prejudice to the defendant where the prosecution is commenced within the statute of limitation.

II. In order to prevail on a claim of pre-indictment delay, a defendant must first present evidence establishing that he was substantially and actually prejudiced. Substantial and actual prejudice requires the defendant to demonstrate the exculpatory value of lost evidence or testimony with proof that is specific and non-speculative.

(The Attorney General, as amicus curiae, presented a slightly different proposition of law.) The Supreme Court at the same time determined that no conflict exists within the meaning of S.Ct. Prac.R. 8.02. That determination reversed a determination of the Eight District, which had certified the following question:

Where a defendant claims to have been deprived of due process as a result of preindictment delay, in order to show that the defendant has suffered actual prejudice as a result of the delay, must the defendant demonstrate that he has been deprived of non-speculative, exculpatory evidence before the

eighteen-year rape kit. At ¶ 10. The trial court dismissed the indictment. The court of appeals affirmed, nothing that the police closed its investigation due to the complainant's refusal to cooperate,

> 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 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 ... [¶] In other words, the record here demonstrates that the state merely failed to take action for a substantial period.

Id at ¶¶ 45-46.

Similarly, the indictment in State v. Mack, 8th Dist. No. 100964, 2014-Ohio-4817, was precipitated by the police deciding to test a nearly twenty-year-old rape kit. Id.at ¶ 2. Soon after the encounter, the complainant had identified the accused to police, but "[t]he case went 'cold' because the alleged victim did not cooperate." Id. The trial court dismissed the indictment, and the court of appeals, citing Luck, affirmed. Id at ¶¶ 11-13.

In addition to the rule that a complainant's refusal to cooperate does not justify pre-indictment delay, a second reason why the pre-indictment delay in this case is worthy of zero weight is the fact that the state knew it would benefit strategically by delaying the indictment. In Luck, the Supreme court stated:

> A delay in the commencement of prosecution can be found to be unjustifiable when the state's reason for the delay is to intentionally gain a tactical advantage over the defendant, see United *States v. Marion ...*

Luck, 15 Ohio St. 3d at 158. Here, the State knew that delaying indictment would benefit the State strategically, because the State's case would be much weaker if the State prosecuted Mr. White without the cooperation of the complainants.

For both these reasons, the State's reason for the pre-indictment delay-the State's discretionary choice to drop the case because of the complainants' disinterest-is worthy of zero weight in the balancing test.

c. None of the common justifications for pre-indictment delay exists in this case.

Rightly or wrongly, courts have given at least some weight to multifarious police explainations for pre-indictment delay. See Phyllis Goldfarb, when Judges Abandon Analogy: The problem of Delay in commencing criminal prosecutions, *31 Wm. & Mary L. Rev. 609, 626-27 (1990)* (citing examples from federal courts and California courts). But a casual survey of pre-indictment delay cases suggests which justifications most common, and none of them applies here.

The most common justifiable reason is investigative delay – delay necessary to collect sufficient evidence to prosecute. E.g., *Lovasco, 431 U.S. at 796* ("[T]he delay was caused by the government's efforts to identify persons in addition to respondent who may have participated in the offenses.") Here, the delay was not investigative delay. It was the opposite of that, in two related respects: (1) Columbus Police had completed its investigation except for comparing a known sample of Mr. White's blood to rape-kit sample(s), and (2) Columbus Police made a considered judgment not to pursue the man they had already identified as the perpetrator.

Another common justification for pre-indictment delay is the complainant's failure to report the incident to police. E.g. *Commonwealth v. Berry, 513 A. 2d 410, 414 (Pa. Super. 1986)* ("The delay was attributed solely to the victim's reluctance to report the incidents ... ") *State v. Nadler, 855 A. 2d 490, 493 (N.H. 2004)* ("All of the delay ... can be attributed to the alleged victim."). Here, both complainants reported to police the day of the incident.

New technology that gives police information previously unavailable can justify pre-indictment delay. E. g.,*State v. Walls, 96 Ohio St. 3d 437, 2002-Ohio-5059, ¶ 56* (" [N]ew computer technology made it possible to match the fingerprints at the murder scene to those of Walls."). Here, the DNA-testing technology in 1995 was sufficient to match a known sample of Mr. White's DNA with the DNA collected from at least one of rape kits. (Tr. 183:3-6 ("The [rape-kit] lab results came back saying that there was evidence with which we could work, which is why I prepared a search warrant in anticipation of needing [Mr. White's] blood") [Det. Lawson].) As Detective Hedrick testified, the new DNA technology motivated Columbus Police to re-open its investigation. (Tr. 246:20 – 247:18.) But that is all the new DNA technology did. It did not newly make possible the identification of Mr. White

as the man who had sex with Mr. Green and Ms. Ligon. Columbus Police in 1995 (1) already had enough evidence to indict Mr. White, and (2) knew that if they wished to pursue the case they should obtain a known DNA sample from Mr. White and compare it to the rape-kit DNA. Columbus Police simply chose not to do so. The newer technology is the reason the State reopened its investigation; it did not give the State previously unavailable information.

Delay may be justified by the law enforcement's desire to protect the "cover" of a confidential informant. E.g., *United States v. Russon, 442 F. 2d 498, 502 (2nd Cir. 1971).* This case does not involve a confidential informant.

None of the common justification for pre-indictment delay exists in this case.

d. Mr. White was prejudiced by trial counsel's failure to move to dismiss the Indictment.

Because the State's reason for the pre-indictment delay is worthy of zero weight in the balancing test, a showing of the slightest prejudice to Mr. White's defense would tip the balance in favor of dismissal. Mr. White is entitled to an opportunity in the trial court, with the benefit of effective assistance of counsel, to present evidence that he was prejudiced by the nearly twenty-years pre-indictment delay. Mr. White's burden under this third assignment of error is not to make the proof under the balancing test that his trial counsel failed to even attempt. Such proof requires a trial-court hearing:

> The hearing on a motion to dismiss for pre-indictment delay is an evidentiary hearing. The purpose of the hearing is to determine whether the evidence of prejudice, when balanced against the evidence to be used by the State, reflects that actual and substantial prejudice will be suffered by the defendant at trial.

State v. Winkle, 7th Dist. No. 12MA 162, 2014-Ohio-895, ¶ 26. Mr. White's burden on appeal, under Strickland, is not only to show "a reasonable probability" that he would have prevailed on a motion to dismiss.

The record at it stands –before the defense has even attempted to prove prejudice from the two-decades delay – shows such reasonable probability of success. The record shows that Mr. White's defense was prejudiced in at least five respects.

. Ms. Green does not remember when she stopped using crack. (Tr. 78:14 – 79:14 [Green].) All this is in addition to possible exculpatory evidence that cannot help Mr. White now, twenty years later, because its prior existence is too speculative – such as evidence of whether Ms. Green and/or Ms. Ligon were prostitutes, the means by which Ms. Green fed her crack addiction, and whether Ms. Ligon frequented crack houses.

Mr. White was prejudiced by the trial counsel's failure to file a Motion to dismiss the indictment due to the pre-indictment delay.

C. Mr. White was prejudiced by trial counsel's negligent failure to seek the complainants' hospital records.

1. Facts.

Mr. White's trial counsel never sought the records of the hospital visits of Ms. Green or Mr. Ligon on the nights of their encounters with Mr. White.

Ms. Green's hospital record (Post-Trial Hrg. State Exh. 1A) includes a page titled, "Sexual Assault Care Flowsheet" with a section titled, "Legal Interventions," which includes the following: "Location of occurrence[:] father's basement," Another page of Ms. Green's hospital record, a page titled "Emergency Treatment Record" that includes the following in handwriting:

pt[patient] victim of alleged sexual assault – orally & vaginally – by known person.

Ms. Green's medical records did not come to light until the prosecutor disclosed that after the trial, he received the records pursuant to a subpoena he had issued on the eve of trial. This disclosure prompted Mr. White's trial counsel to file a Motion for Mistrial and for New Trail (R.p. 80). The trial court conducted a hearing on the motion. (Tr. Vol. III of IV), at which Ms. Green's medical records were admitted as State Exhibit 1A. The trial court issued a written decision overruling the Motion. (R.p. 57.) The record contains the State's subpoena for Ms. Green's medical records (R.p. 113) but contains no subpoena for Ms. Ligon's medical records.

2. Argument: Mr. White was prejudiced by the absence of the medical records at trial.

Ms. Green's medical records would have materially helped Mr. White's defense in two respects.

First: On the "Sexual Assault Care Flowsheet," the phrase "Location of occurrence [:] father's basement" suggests that Ms. Green told the scrivener at the hospital that she was raped in the basement of the home she shared with her father. Such a fact would undermine such of Ms. Green's testimony incriminating Mr. White: that Mr. White got violent while driving them in the car; that she became fearful and hoped that Mr. White would stop the car so that she could exit the car and flee. 9Tr. 41:13-25); that she waited in the car after the first rape (Tr. 43:2-16); and that Mr. White raped her twice inside the car. (Tr. 39:21 – 42:23, 53:19-25). Moreover, if her encounter with Mr. White occurred at her home, that would explain the anormaly at trial of her answering, "I don't remember" when asked why she did not flee when (according to her) she had the chance. (Tr. 87:1-2)

Second: On the "Emergency Treatment Record," the phrase "by known person" suggests that Ms. Green told the scrivener at the hospital that she was sexually assaulted by someone she knew. Such a fact would suggest that Ms. Green lied or mis-remember at trial when she testified that she had never met Mr. White before that day in 1995.

Had Mr. White's trial counsel subpoenaed these records, trial counsel could have used them to show two major inconsistencies between what Ms. Green reported the day of her encounter with Mr. White and what Ms. Green said at trial almost twenty years later. The nature of these inconsistencies – whether the encounter occurred at her home or in Mr. white's car, and Whether she knew Mr. white – go the heart of her account and thus her credibility and reliability.

D. Mr. White was prejudiced by the combined effect of the twenty-years delay and the lack of Ms. Green's medical records.

Perhaps the most compelling prejudice to Mr. White's defense is the human instinct of fact-finders to discount or disregard discrepancies and oddities in testimony that purports to recall long-ago events. With twenty years having gone by, it is easy to, as the trial judge did, discount the discrepancy between (1) Ms. Green's reporting on the day of her encounter with Mr. White that it occurred in the basement of her home, and (2) Ms. Green's testifying at trial how she was raped not

at her home but in Mr. White's car. From a distance of twenty years, a finder of fact perhaps attributes even such a fundamental discrepancy to faded memory.

In analyzing pre-indictment delay, one cannot assume that the complainants' sworn trial testimony would have been different twenty years earlier. One must assume that the complainants' actual trial testimony in 2015 is the testimony they would have given had the trial occurred in or around 1996. To appreciate the prejudice to Mr. White's defense of the combined effect of the State's delaying the trial by 19 years and his counsel's failing to obtain the complainants' hospital records, one must imagine how differently a fact-finder would have viewed the actual, 2015 trial evidence had the trial occurred in or around 1996. A finder of fact listening to the same evidence nineteen years earlier would not be so understand of the anomalies in the complainants' testimony. Moreover, if the State had timely indicted Mr. White, there is a reasonable probability that Mr. White could have presented at trial the testimony of the scrivener to whom Ms. Green reported that she was raped in the basement of her home by a "known person" – an independent witness testifying that Ms. Green's trial testimony is materially inconsistent with what Ms. Green told the scrivener a few hours after her encounter with Mr. White. A fact-finder receiving such conflicting evidence within a year of the event surely would have been more suspicious of Ms. Green's trial testimony than was the trial judge in this case.

E. Conclusion

Mr. White was prejudiced by

. Trial counsel's negligent failure to file a motion to dismiss the Indictment due to the pre-indictment delay,

. Trial counsel's negligent failure to see the complainants hospital records, and

. The combined effect of the twenty-years delay and the lack of Ms. Green's medical records.

There is a "reasonable probability" that, but for trial counsel's errors, either (1) the indictment would have been dismissed due to the pre-indictment delay, or (2) the result of the trial would have been different.

CONCLUSION

For all of the reasons set forth above, Petitioner respectfully requests that this Honorable court should grant this petition for a writ of certiorari to address the issues brought forth by Petitioner herein, wherein Petitioner prays that this Honorable court will vacate Petitioner's conviction and sentence thereafter and discharge petition from his custody in the interest of law, justice, equity and good conscience as well as any and all other relief that Petitioner may be entitled to by law and to avoid a miscarriage of justice.

Respectfully submitted
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Date: _____