ORIGINAL

19-8443

NO.20-_____

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE R.YOUNG
Petitioner,

v/s

STATE OF OHIO
Respondent,

On Petition for a Writ of Certiorari
to the United States Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION (S) PRESENTED FOR REVIEW

Does the State have the authority to commence prosecution after the twenty-year statute of limitations has expired when the alleged suspect is not known pursuant to R.C.2901.13(A)(1).

Did extending the Six-Year statute of limitations that was in effect in 1993 to Twenty-Years violate Due Process under the Ex Post Facto Clause. R.C.2151.421.

The issue presented in this case is,whether an inmate's awareness of a pending indictment and of his right to request trial on the pending charges satisfies the notification requirements of R.C.2941.401. (Tr.196-201,234-238).

The Ohio Supreme Court in State v.Dillon,114 Ohio St.154, 2007-Ohio-3617,held that it does not. R.C.2941.401 requires a Warden or prison Superintendent to notify a prisoner "in writing of the source and contents of any untried indictment and of his right "to make a request for final disposition thereof."

The Warden's failure to provide notification of the pending indictment makes Dillon and Hairston inapplicable to this case. Assistant Prosecutor Steven McIntosh misstated the law in this case,when he stated R.C.2941.401 does not have control in this case. (Tr.200,at ¶ 15-24-201).

Assistant Prosecutor Denise J.Salerno stated in Appellee's Brief that there is no indication that petitioner was even aware of the charges before his indictment and detention. See(Doc#:12-1,pg.ID#:426-427 ¶ 2).

By enacting R.C.2941.401,the General Assembly has obligated the State to notify "in writing an accused person who is incarcerated of both the accused's right to demand Speedy disposition of pending indictments and of the source and contents of the indictment. "

An inmate's awareness of a pending indictment and of his right to request trial on the pending charges does not satisfy the notification requirements of R.C.2941.401. The Court further stated,Oral notification does not satisfy the statutory mandate that a defendant receive written notice. (Tr.731,735,at ¶ 10-17,770,at ¶ 4-25). citing also State v. Brown,131 Ohio App.3d 387 (Ohio Ct.App.1998);State v.Miller 113 Ohio App.3d 606 (Ohio Ct.App.1996).

PARTIES TO THE PROCEEDING

George Young v.Wanza Jackson-Mitchell Originating Case No. 1:18-cv-01398

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully request that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix D to the petition and is reported at Case No. 19-3904.

The opinion of the United States district court appears at Appendix C to the petition and is reported at Case No.1:18-CV-1398.

For cases from State Courts:

The opinion of the highest State Court to review the merits appears at Appendix B to the petition and is reported at State v.Young,2017-1333 Supreme Court of Ohio 151 Ohio St.3d 1512 2018-Ohio-365; State v.Young,2018 WL 63829,W/O published opinion.

The opinion of the Eighth District Court of Appeals court appears at Appendix A to the petition and is reported at State v.Young,No.104627,2017 WL 343655 (Ohio Ct.App.Aug.10, 2017).

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was February 12,2020. No petition for rehearing was filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

For cases from State Courts:

The date on which the highest state court decided my case was January 31,2018. A copy of that decision appears at Appendix B.Jurisdiction declined at 2018-Ohio-365.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

PRE-INDICTMENT DELAY

The statute of limitations for a criminal offense constitutes a defendant's primary protection against overly stale criminal charges. United States v.Marion(1971) 404 U.S.307,322. To establish that pre-indictment delay violated the Due Process Clause,a defendant must first show that the delay caused actual and substantial prejudice to his right to a fair trial and,second,that the state delayed prosecution to gain a tactial advantage or slowed the process down for some other impermissable reason. See State v.Owens,2015-Ohio-3881,102276 (OHCA8) ¶2.

In State v.Whiting,84 Ohio St.3d 215,the Ohio Supreme Court held that the second element of the test requires the State to produce evidence of a justifiable reason for the delay. Id. at 217. Decisions granting or denying a motion to dismiss for pre-indictment delay are reviewed for an abuse of discretion. State v.Darmond(2013),135 Ohio St.3d 343.

The State's failure to exercise due diligence and proper police work resulted in a denial of petitioner's ability to properly defend the allegations made against him,that resulted in actual prejudice. (Tr.312,372,399,406-408,769).

STATUTE OF LIMITATIONS

Petitioner contends that at the time of the alleged incident,the criminal statute of limitations for rape was six-years.H 511 eff.1-1-74. On March 9,1999,the statute of limitations was amended from six-years to twenty-years,at H 49 eff.3-9-99. The statutes are plain and without ambiguity. If a prosecution is not commenced within the statute of limitations,a prosecution is barred. See R.C.§2901.13(A)(3)(a); R.C.2151.421(A)(1)(b).

In this case,the State failed to timely commence a prosecution within the twenty-year statute of limitations that was in effect prior to the expiration of the statute of limitations on April 21,2013.

The Court's have held that retroactive application of the extended statute is proper given the remedial nature of the statute. See State v.Koerner(OHCA2),2004-Ohio-457 at ¶14; State v.Swint(OHCA5),2004-Ohio-614 at ¶24-25.

Notwithstanding the current state of the law,a retroactive extension of a criminal statute of limitations is not "remedial." The very purpose of a criminal statute of limitations is to offer repose to the accused. Retroactive application of a statute to extend a criminal statute of limitations and create uncertainty,rather than repose,is hardly "remedial."

The notion that an extended criminal statute of limitations is remedial in nature runs contrary to the primary purpose of a criminal statute of limitations. The very purpose of a criminal statute of limitations is not to benefit the State,but to protect the accused by limiting exposure to prosecution to a certain fixed period of time following the occurrence of those acts the General Assembly has decided to punish by criminal sanctions. State v. Climaco(1999),85 Ohio St.2d 582,586;Citing Toussie v. United States(1970),397 U.S.112.

The purpose of criminal statutes of limitations is to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Id. Criminal statutes of limitations are desirable to reduce the possibility of blackmail and promote repose by giving security and stability to human affairs. Model Penal Code Section 1.06,commentary at 1 (1985).

Climaco was a 5-2 decision. The dissent,written by Justice Moyer,felt that the statute of limitations had been satisfied. Not a contention with the majority was Justice Moyer's assertion that a Court is constitutionally mandated to interpret and apply the statute of limitations in effect at the time of the criminal acts were allegedly committed. Id. dissent at 290.

R.C.§2901.13 expressly states that the period of limitation for an offense begins "after an offense is committed," not after a suspect is identified.

Rather, State v.Epps(Dec.10,1998),Cuyahoga App.No.73308, unreported,1998 WL 855627,directly addresses and trumps the state's contention that identification of a specific suspect triggers the running of a criminal statute of limitations for that party. Such an interpretation would effectively defeat a stated purpose of criminal statutes of limitations, which is to ensure prompt investigation and resolution of contemplated prosecution of a given defendant. It is also clear from the text of R.C.§2901.13 and the historical concept of a crime's corpus delicti,that the policy behind the tolling of a criminal statute of limitations,pursuant to R.C.§2901.13(F),is to make sure that the limitation period does not run until it becomes apparent that a criminal act has been committed and those who would enforce the law are on notice of the need to investigate the facts of the crime. See(Original Disc.80-83,89-90)(State's Ex.24-25).

In the case sub judice,agent of the State Denise J.Salerno assistant prosecutor presented false and misleading evidence to the court claiming petitioner caused the delay in the prosecution by giving a fake name to K.A.mother Kim Alexander in '1993.'(Doc#:12-1,Pg.ID#:419 ¶ 2. Here,the state relied on R.C.§2901.13(G),alleging petitioner actively avoided prosecution by claiming he was [Randy Spivey]. The state presented no evidence or witnesses to show petitioner ever used an alias or was ever addresed as such. See(Tr.Pg.ID#: 965),testimony of Kim Alexander who was asked,he never said that his last name was Spivey,did he? Kim Alexander replied, No,he did not.See (Original Disc.P.389)(Tr.189,at ¶ 1-23).

Assistant Prosecutor Denise J.Salerno further stated,as law enforcement spun its wheels,however,petitioner sat back benefiting from the statute of limitations. Thus,under R.C.§2901.13(G),the period of limitation did not begin to run until petitioner was confirmed to be the owner of the DNA profile in KA's rape kit on September 17,2013.(Doc#:12-1,Pgs.ID#:419-420).

R.C.§2901.13(A)(1),provides that a prosecution shall be barred unless it is commenced within the applicable limitations period. R.C.§2901.13 is intended to "discourage inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct." State v.Climaco,Climaco,Seminatore,Lefkowitz & Garofoli Co.,85 Ohio St.3d 582,586,1999 Ohio 408,709 N.E. 2d 1192 (1999). "'The rationale for limiting criminal prosecutions is that they should be based on reasonably fresh,and therefore,more trustworthy evidence."' Id.,quoting State v.Hensley,59 Ohio St.3d 136,571 N.E.2d 711 (1991).

Petitioner contends that the indictment in this case was filed on April 9,2013,twelve(12) days prior to the expiration of the twenty-year statute of limitations. In this case,petitioner was not indicted in name but rather the investigator for the Cuyahoga County Prosecutor's Office in the CODIS Task Force Nichole Disanto deceived the grand jury by presenting it with a DNA profile,not a named person. See (Doc#:12-5,Pg.1283,at 13-25;Pg.1284).

A DNA profile was indicted which failed to serve as notice in compliance with the statute of limitations. The mere filing of an indictment prior to the expiration of the statute of limitations does not commence a prosecution.

Petitioner was never arrested prior to the filing of an indictment. The matter was charged by way of direct presentment to the grand jury of a DNA profile,not a named individual. (Tr.723). The plain unambiguous language of the statute provides that the April 9,2013 filing of the indictment did not commence this prosecution as reasonable diligence was not exercised to issue and execute process on the indictment. See R.C.§2901.13(E).

Petitioner further contends Nichole Disanto presented the grand jury with hearsay evidence on April 9,2013,as there is nothing in the record to show K.A.,or her mother Kim Alexander presented any testimony to the grand jury, there is a particularized need to inspect the grand jury testimony. State v,Greer(1981),66 Ohio St.2d 139[20 O.O.3d 157].

As the Court held in United States v,Estepa,471 F.2d 1132, 1136-37 (2d Cir.1972),this court stated,we have previously condemed the casual attitude with respect to the presentation of evidence to a grand jury manifested by the decision of the Assistant United States Attorney to rely on testimony of the law enforcement officer who knew least... See United States v.Arcuri,405 F.2d 691,692 (2d Cir.1968), Cert.denied,395 U.S.913,89 S.Ct.1760,23 L.Ed.2d 227 (1969).

This Court further stated,'the grand jury must not be "mislead into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed...." citing United States v.Leibowitz,420 F.3d 39,42 (2d Cir.1969). That is what happened in this case. (Tr.723).

There is "a high probability that without hearsay testimony the grand jury would not have indicted."(Tr.162) (Tr.144;original discovery pg.143-148,188).(Doc#3,Doc#5).

PROCEDURAL DUE PROCESS,GRAND JURY REQUIREMENT

To allow the State to amend the indictment after the (20) twenty-year statute of limitations unquestionably constitutes a denial of due proces,because the amendment was substantive and because petitioner was prejudiced by the amendment.

"[U]nder the Fifth Amendment's provision that "no person shall be held to answer for a capital crime unless on the indictment of a grand jury,it has been the rule that after an indictment has been returned its charges may not be broadened except by the grand jury itself,"Stirone v. United States,361 U.S.212,4 L.Ed.252,80 S.Ct.270 (1960); Ex Parte Bain ,121 U.S.1,30 L.Ed.849,7 S.Ct.781 (1887).See Russell v.United States,369 U.S.749,770,8 L.Ed.2d 240,82 S. Ct.1038 (1962); United States v.Norris ,281 U.S.619,622,74 L.Ed.1076,50 S.Ct.424 (1930).

In the case sub judice,the grand jury was never presented with any evidence that the DNA profile matched a particular person. (Tr.179,at ¶ 16-24,183,at ¶ 1--24,193,at ¶ 8-21, 723,at ¶ 13-25,724,at ¶1-25). The indictment in this case was amended because the special investigator for the Prosecutor's Office in the CODIS Task Force presented the evidence to Judge Russo. Judge Russo made the factual findings as to person,invading the province of the grand jurors. (Tr.181,at¶ 8-17).

The State never presented any evidence to the proper trier of fact,the grand jurors that petitioner committed the alleged offenses. The grand jury standard of probable cause is of no consequence when,as in this case,the State intentionally failed to present any evidence to the grand jurors to show that petitioner was the particular person who committed the offenses.

This court is called upon to determine whether the trial court erred in allowing the State to amend the indictment after the statute of limitations had expired,and whether petitioner's right to grand jury presentation was violated when the trial court permitted the State to amend the indictment to include an alias without presenting any factual evidence to show petitioner ever used an alias. The amendment was a violation of petitioner's right to grand jury presentment under the Ohio/United States Constitution.(Tr.67;disc.pg.389).

In 1887,the Supreme Court in Bain,supra,121 U.S.at 9-10, held that a defendant could only be tried upon the

indictment found by the grand jury and that language in the charging part could not be changed without rendering the indictment invalid. In Stirone,supra,361 U.S.at 217, the Supreme Court stated that Bain "stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."

On January 31,2014,the State filed a motion to "amend" the indictment naming petitioner as the defendant.(State's Ex. 2,Doc#:12-1,PgID#:199-202). The motion was mailed to petitioner,pro se,at Lake Erie Correctional Institution.

On February 10,2014,prior to petitioner's arraignment,the State's motion was granted. (Tr.155;State's Ex.4,Doc#:12-1 Pg.ID#:205).

On February 11,,2014,without further written motion,the common Pleas Court Judge Pamela Barker entered a second order further amending the indictment to "include aliases George R.Young and A.K.A.Randy Spivey." (Tr.160,State's Ex. 5,Doc#:12-1,Pg.ID#:206).

The State delayed greater than Seven months (June 18,2013-January 31,2014) before moving to amend the indictment.(Tr. 155). This was nine months after the expiration of the statute of limitations.

RIGHT TO SPEEDY TRIAL

The right to speedy trial originates in the Sixth Amendment to the Constitution of the United Statesband is applicable to the State of Ohio by virtue of the Fourteenth Amendment. Article I,Section 10,of the Ohio Constitution provides a seperate right to speedy trial. State v.Stapleton,41 Ohio App.2d 219,325 N.E.2d 243 (1974) See also State v.Meeker, 26 Ohio St.2d 9. These constitutional provisions have also been suplemented by Ohio statutory provisions and by court rule although the right exists independently of statute or rule. See for example R.C.2945.71;R.C.2941.401;Rule VIII, Supreme Court Rules of Superintendence.

In Smith v.Hooey,393 U.S.374,89 S.Ct.575,the Supreme Court of the United States rejected the view that a man already confined under a lawful sentence is hardly in a position to suffer from the delay of trial of another charge.

In State v.Meeker,supra,at 16,justice Leach of the Ohio Supreme Court said,"considering the basic purposes of the Constitutional right to a 'speedy trial,'we conclude that such constitutional guarantees are applicable to unjusti-

fiable delays in commencing prosecution as well as to unjustifiable delays after indictment." He reiterated the holding of Partsch v.Haskins,175 Ohio St.139,that the right to speedy trial is not self-executing,or "intended as a shield to the guilty,the protection of which might be invoked by sitting silently back and allowing the prosecution to beleive that the accused is acquiescing in the delay,"but "is a right which must be claimed or it will be held to have been waived."

In State ex rel.Hodges v.Coller,19 Ohio St.2d 164,the Supreme Court said:
" The question is whether under the circumstances of this case he has been denied a speedy trial. The fact that one is in jail in another county for trial on a different charge does not affect his right to a speedy trial on this charge."

" The right to a speedy trial is often said to be a relative one to be judged by all the surrounding circumstances.' See Modern Constitutions Law,Antieau,336,Section 5:50."

In Klopfer v.North Carolina,386 U.S.213,this court held th that,by virtue of the Fourteenth Amendment,the Sixth Amendment right to a speedy trial is enforceable against the State's as "one of the most basic rights preserved by our Constitution." Id.,at 226.

SPEEDY TRIAL R.C.2941.401

As set forth above,the right to speedy trial does not disappear because one is incarcerated in prison. Smith v. Hooey,supra;State v.Ondrusek,2010-Ohio-2811 at ¶ 6 citing State v.Smith(2000),140 Ohio App.3d 81,89;State v.Stewart, 2006-Ohio-4164 at ¶ 22(the great weight of authority support[s] the proposition that once a person under indictment has begun serving a prison sentence in another case, the provision of R.C.2941.401 applies to the exclusion of R.C.2945.71,so that the running of speedy trial time under the latter statute is tolled).

R.C.2945.71 et seq.works quite well for the imprisoned. Rather than serve an indictment pursuant to R.C.2941.49 upon a personal residence,the indictment is served upon a prison,a place where the defendant is guaranteed to be located 24 hours a day,7 days a week, R.C.2941.49;R.C. 2941.40. 'In this case,the prosecutor's office witnessed petitioner being sentenced to prison for 32-years.'(Tr.57-69 ¶ 1-6).

Criminal law-Notice of pending charges-R.C.2941.401- An Inmate's awareness of new charges in pending indictment does not satisfy notification requirements of R.C.2941.401. Inmate must be notified in writing of indictment's source and contents and of his right to request final disposition.

In this case,petitioner's substantial due process rights were prejudiced by the prosecutor's office failure to notify the warden of the institution where petitioner was being held,of a pending indictment and of petitioner's right to request final disposition thereof. Due Process requires that a criminal defendant be given fair notice of the charge(s) against him. In re Oliver(1948),333 U.S.257, 68 S.Ct.499,92 L.Ed.682. (Tr.234-237,at ¶ 1-18;238,at ¶ 13-17).

Assistant Prosecutor Denise J.Salerno,stated in Appellee's Brief at Doc#:12-1,Pg.ID#:426 ¶ 2;427 ¶ 2,that petitioner had no knowledge of a direct indictment involving any allegations from '1993 and 1996.'(Doc#:12-1,Pg.ID#:395 ¶ 2).

Sectio 10,Article I of the Ohio/United States Constitution guarantees every defendant the right to know the nature and cause of the accusation against him. State v.Burgun(1976), 49 Ohio App.2d 112; Wong Tai v.United States(1927),273 U.S. 77; Hicks v.Franklin,546 F.3d 1279 (10th Cir.2008).

"[T]he United States Supreme Court has clearly established the rule that a defendant must receive'real notice of the true nature of the charge against him'that is the first and most universally recognized requirement of procedural due process."' Henderson v.Morgan(1976),426 U.S.at 645(quoting Smith v.O'Grady,312 U.S.329,334,61 S.Ct.572,85 L.Ed.2d 859 (1941);also Bradshaw v.Stumpf,545 U.S.175,183,125 S.Ct.2399, 162 L.Ed.2d 143 (2005).

STATEMENT OF THE CASE

On April 9,2013,a Grand Jury charged John Doe #1,Unknown Male,with Matching Deoxyribonucleic Acid (DNA) profile at genetic locations: D8S1179 (13,14) D21S11 (29,30) CSF1PO (10,11) D3S1358 (15,17) TH01 (7,9,3) D13S317 (11,12) D16S539 (9,10) D2S1338 (18,19) D19S433 (11,12.2) VWA (16,17) TPOX (8,9) D18S51 (12,19) AMEL. (X,Y) D5S818 (7,10) FGA (24,25) ("john Doe 1-DNA") with two counts of rape in violation of R.C.2907.02(A)(2),two counts of kidnapping in violation of R.C.2905.01(A)(4) and two counts of kidnapping in violation of R.C.2905.01(A)(2) as it related to Jane Doe I and Jane Doe II,for a total of six counts. A warrant and capias were

issued on that same date. (See,Cuyahoga County Court of Common Pleas,CR13-573242).(Doc#:12-1,pg.ID#:194-197,Ex.1).

On March 11,2013,Petitioner was convicted by a jury in CR12-566461. (See Cuyahoga County Court of Common Pleas, CR12-566461;Tr.57). He was sentenced on March 21,2013,and transported to Lorain Correctional Institution on March 28, 2013,where he remained for thirty-days. (Tr.57-58). While he was there,an offender DNA sample was taken. (Tr.58-59).

On June 13,2013,that sample was entered into the CODIS database and on June 18,2013,the Ohio Attorney General's Bureau of Criminal Investigation (BCI)indicated that the offender sample hit to forensic samples in two rape kits. (Tr.24-34,38,554-555,725;State's Ex.40). There was no real chain of custody for the offender sample,so BCI requested that a known evidentiary sample be taken since the regulations in a DNA lab are different "when you're running forensic samples versus running a database lab." (Tr.34-35, 39). They are two seperate entities with different rules that have to be followed. (Tr.39-40,694-697 ¶ 1-8).

On September 12,2013,Petitioner's known DNA sample was submitted to BCI to be compared to the forensic samples.(Tr. 39-40,46-48,49-56). Analysis was done and petitioner could not be excluded as a source of the DNA profile on the victim's vaginal swab;"the statistical value of finding this profile on that vaginal swab again in the general population" was 1 in 23 quintillion 750 quadrillion (Tr.37-39).

Based on this new information,on January 31,2014,the State filed a Motion to amend the indictment under Crim.R.7(D) to change John D6e 1-DNA,to George Young. (State's Ex.2,Doc#: 12-1,Pg.ID#:199-202). A warrant was issued on that same date,and on February 7,2014,petitioner was in custody. See (Doc#:12-1,Pg.ID#:197;Doc#:12-1,Pg.ID#:198). Petitioner was arraigned on February 11,2014,and plead not guilty and was assigned Attorney James J.McDonnell. (State's Ex.6,Doc#:12-1,Pg.ID#:207). Thereafter,numerous pretrials were held and motions filed,and on April 22,2015,trial was called,trial rescheduled,pretrial held 04/23/2015,pretrial continued to 05/04/2015.

Following more pretrials and filing of motions,on April 6,2016,a hearing was held on several defense motions.During the hearing,it was noted that petitioner's mother's name was hand written on a police report. (Tr.68-70).Petitioner admitted that his mother would not have known who Randy Spivey was and would not have identified him as such,also petitioner's name did not appear anywhere on the report.

On April 11,2016,a second motion hearing was held: the trial court denied petitioner's Motion to Suppress, Motion to Dismiss for Statute of Limitations, Motion to Dismiss and Objection to Amended Indictment, Motion to Dismiss for Retroactive Statute of Limitations,and Motion to Dismiss for lack of Speedy Trial. (See,Cuyahoga County Court of Common Pleas Court Docket,Case No.CR-13-573242).(Tr.80).

Finally,on April 25,2016,after more than two-years,and at least fifty pretrials; thirty-nine defense motions, twenty of which was Pro Se,and five different attorney's, trial was held to the bench. (See, Cuyahoga County Court of Common Pleas Court Docket,Case No.CR-13-573242).

Before trial,petitioner renewed his motion to dismiss pre-indictment delay. Petitioner argued that he suffered actual prejudice because he found no witness who was able to say where he was on April 21.1993,at about 2:00 in the afternoon. Petitioner was gainfully employed at Reserve Iron And Metal on West 130th Street. Reserve Iron and Metal is no longer in business,preventing him from collecting relevant employment records. The employment records would have helped petitioner verify his whereabouts,thereby bolstering his defense. (Tr.248-249). Since so much time has passed petitioner is unable to assist in his defense. citing Barker v.Wingo,407 U.S.514,530,92 S.Ct.2182,33 L.Ed. 2d 101 (1972); Doggett v.United States(1992),505 U.S.647,1 112 S.Ct.2686,120 L.Ed.2d 520; State v.Selvage,80 Ohio St. 3d 465,467,1997 Ohio 287,687 N.E.2d 433 (1997).

STATEMENT OF THE FACTS

On April 21,1993,discovery provided by the State in this case reveals K.A. told [Belinda Johnson] the reporting person that she was sexually assaulted by her mother's boyfriend. (original discovery pg.80-83)(Tr.534). Original discovery further reveals the police responded and K.A. was transported to Rainbow Babies & Children Hospital where a SANE examination was performed collecting evidence which was not tested at that time. (Tr.23). K.A.described the alleged rape in detail to Dr.Julia Brown,who wrote a narrative account of the incident in K.A.'s chart. (Tr.477 -482,485,491,493,495,506-511;original discovery pg.45-47).

In the original discovery K.A.stated she was punched in her face '3-times.' Although hospital records failed to reveal any bruises or abrasions,the chart clearly states vital signs are normal. Officer Mark Peoples testified he and his partner officer Rodriguez responded to 2586 Central at 2:15 in the afternoon. (Tr.442-446). No photo's taken.

Officer Mark Peoples testified that according to the report,the complainant or victim was K.A.,and the reporting person would have been Belinda Johnson. (Tr.446). Officer Mark Peoples further testified there was a suspect listed and the name is [Randy Spivey]. Officer Peoples further testified the only discription they were given was,that he was a black male,he had black hair,brown eyes,wearing a Chicago Bulls baseball cap,checkered shirt and blue jeans. (Tr.447). Officer Peoples testified that Belinda Johnson was the first person he talked to. (TR.454-455-456).

Officer Peoples testified that if he and his partner had the proper information,it would have helped them look for the suspect,Randy Spivey. Information on what kind of car he was driving and most of all a discription of what he looked like. (Tr.462).

On April 21,1993,discovery reveals K.A. reported the alleged incident to social workers Barbara Mumins. Lynn R. Seese, and Ann Hall (original discovery pg.46,198,198,200, 203-204,208,221,225). When the victim of a sex offense is a child,the corpus delicti generally is deemed to be discovered when the child reaches the age of majority.See State v.Elsass(1995),105 Ohio App.3d 277,280,663 N.E.2d 1019,and cases cited therein. However,when the child tells a "responsible person" who is required by law to report the events to a peace officer or children's service agency pursuant to R.C.2151.421(A)(1),the statute of limitations begins to run as of that time even if the child has not attained the age of majority. State v.Hensley(1991),59 Ohio St.3d 136,571 N.E.2d 711.

Accordingly,nowhere in the narrative report written by Dr. Julie Brown,or reports written by social worker's is there any mention of 'oral sex.' (Tr.295)(original discovery pg. 45-47;State's Ex.24;Tr.304).

On May 1,1993,K.A. and her mother Kim Alexander gave written statement's to Detective's Pamela Berg,Muriel Craig at the Cleveland Justice Center(original report pg.89-90), (State's Ex.24-25). In their statement's Both K.A. and her mother stated they KNEW [Randy Spivey] for one or two month's and at no time did either K.A. or her mother give the detective's a physical discription of the person they KNEW for one or two month's . (Tr.312,318,340,350,385-386,397).

After giving the inconsistent statements to the detectives despite NUMEROUS attempts,neither K.A. or her mother would return to the Justice Center to assist with identifying

the person they identified as [Randy Spivey] through photographs pursuant to R.C.2933.83,the State's identification procedure. See generally Neil v.Biggers,409 U.S.188,34 L.Ed. 2d 401,93 S.Ct.375 (1972); Simmons v.United States,390 U.S. 377,19 L.Ed.2d 1247,88 S.Ct.967 (1968).

Finally,police reports provided to defense counsel in this case,indicate that "NUMEROUS ATTEMPTS" for assistance was made to get K.A. and or her mother to return to the Cleveland Justice Center to assist the investigator's with identifying the alleged suspect through photographs,NEITHER K.A. or her mother cooperated. No attempt was made to see K.A. or her mother at their home (which is the required protocol),and on December 27,1994,Detective Pamela Berg issued her ruling,until victim is willing to come forward to assist with identifying the alleged suspect through photographs,the caseeis closed."Exceptional Cleanup." See (original discovery pg.85).(Tr.270-273,403-410).

In State v.Mack,8th Dist.No.100964,2014-Ohio-4817,the Eighth Appellate District considered this "failure to cooperate" was a sufficient basis to dismiss the case; 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.

Inefficient and dilatory law enforcement was the reason the statute of limitations expired in this case. Because the State barely investigated the case and closed it when K.A. and her mother failed to return back to the Justice Center to assist investigator's with identifying the person they referred to as "Randy Spivey" petitioner's claimsof actual prejudice should be evaluated in terms of basic concepts of due process and fundamental justice.

The trial court erred in dismissing the case due to preindictment delay because the State failed to take action for a substantial period. After that inaction of the State, requiring petitioner to demonstrate that any missing evidence or unavailable witness testimony would have been exculpatory was violative of his due process rights. State v.Jones,8th

Dist.Cuyahoga No.101258,2015-Ohio-2853,35 N.E.3d 606,at ¶ 41-42,this court revisited its approach to establishing actual prejudice. Moore v.Arizona(1975),414 U.S.25.

The Supreme Court has emphasized that,in order to establish a due process violation,the defendant must show that the delay "caused him actual prejudice in presenting his defense." United States v.Schaffer,586 F.3d 414,425 (6th Cir.2009)(quoting United States v.Gouveia,467 U.S.180, 192,104 S.Ct.2292,81 L.Ed.2d 146 (1984)(emphasis added); See Lovasco,431 U.S.at 789("[P]roof of actual prejudice makes a due process claim concrete and ripe for adjudiciation not---automatically valid.");Marion,404 U.S.at 326(Events of trial may demonstrate actual prejudice. (Tr.240-241,947).

CAUSE OF DELAY

Like any other criminal investigation,without cooperation the government's case against a known suspect became an impossibility. (discovery(original report pg.85). The State effectively ceased the active investigation of the case and later decided to commence prosecution upon the same "DNA" evidence that was available to it at the time that its active investigation was ceased,it is unjustified. citing State v.Dixon,8th Dist.Cuyahoga No.100332,,2014-Ohio-2185, (pre-indictment delay of 20-years caused actual and sub-stantial prejudice to Dixon as his due process rights were violated)(se also State v.Willingham,2019-Ohio-1892 * 2019 Ohio App.Lexis 1969 ** 2019 WL 21516881.

Additionally,although "Tina Stewart"(Tr.620),the State's witness testified at trial that the police department did not conduct "DNA" testing in 1993,this fact alone does not render the "DNA" evidence "new." "DNA" testing was available in 1993,and the State did not point to any reason the police department would have been unable to send the evidence to a third party for testing. Even if that were a feasible option for the department at that time,the State;s own witness testified that the department began doing "DNA" testing in 1999 or 2000. If this is accurate,the State would still be unable to justify the 20-year delay in prosecution. (Tr.623-626,658-663).

Records reveal on April 26,1993,laboratory report says there was a 'rape kit and blankets that were submitted that belonged to K.A. which was submitted by Officer Mark peoples badge #1295. (Tr.627). No clothing was submitted for K.A. that she may have been wearing. (Tr.662-663,670-671). No photo's were taken of K.A. at the hospital.

In State v.Owens,8th Dist.Cuyahoga No.102276,2015-Ohio-3881,¶ 5,this court explained that a high bar is set to proving prejudice caused by preindictment delay because the statute of limitations(in effect at that time)unquestionably gave the State 20-years in rape cases to commence a timely prosecution. Therefore,"[t]he law requires a defendant to do more than offer mere speculation as to how he was actually prejudiced by any delay because requiring less would undermine the statute of limitations. Id.

The statute of limitations for rape is 20-years regardless of whether the identity of the alleged offender was known or should have been known upon investigation of the alleged incident. "Whether the statute of limitations should be changed with regard to known or unknown offenders is a matter for the legislature to consider."State v.Shivers,8th Dist.Cuyahoga No.105621,2018-Ohio-99,¶ 13.

'R.C.2901.13 provides for seven tolling exceptions. None of the seven tolling exceptions allows for tolling because chapter 2907 or chapter 2905 has been alleged to have been violated. None of the seven exceptions allows tolling because of the nature of the scientific evidence involved. The statute does not allow distinctions between "known" or "unknown" suspects.'" Further,R.C.2901.13 expressly states that the period for an offense begins"after an offense is committed,'not 'after a suspect is identified.'"

Because the corpus delicti of the alleged crime was then discovered in '1993' and the statutory tolling provisions did not apply,it is clear that a "responsible adult" was notified of the alleged incident,namely officer Mark Peoples social workers,and Detective's Muriel Craig,Pamela Berg. see original discovery pgs.45-47,80,89;Tr.260,357-358,State's Ex.24-25. Pursuant to R.C.2151.421(A)(1)(b),a "responsible adult" includes a 'person engaged in social work or the practice of professional counseling.'"

WHETHER THE TRIAL COURT ERRED IN FAILING TO DISMISS THE INDICTMENT ASHAVING BEEN TIME-BARRED BY THE SIX-YEAR STATUTE OF LIMITATIONS IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS.

The complexity of this case is due to the amendment of R.C.2901.13 on March 9.1999. At the time,the ligislature amended R.C.2901.13 to extend the time in which a defendant may be brought to trial for certain offenses,such as rape, from Six to Twenty-Years. As the Court noted in State v. Crooks,152 Ohio App.3d 294,787 N.E.2d 678,2003-Ohio-1546,

P.11, the amendment of R.C.2901.13 under Section 3 of H.B. 49 "applies to offenses committed prior to the effective date of this act if prosecution for the offense was not barred under Section 2901.13 of the Revised Code as it existed on the day prior to the effective date of this act." See also State v.Barker,Lucus App.No.L-01-1290,2003-Ohio-5417,P.15. If that is the case,on April 21,1999,the Six-Year statute of limitations would have expired,because the corpus delicti of the crime was discovered in '1993.' See R.C.2151.421(A)(1)(b),See also State v.Hensley(1991),59 Ohio St.3d 136,571 N.E.2d 711.

The record in this case reveals Melissa Zielaskiawicz testified K.A.'S rape kit was submitted to BCI on August 3,2012 by Michael Viancourt for testing. (Tr.534,658-659).

The record further reveals that Melissa Zielaskiawicz testified that she generated a report on November 21st 2012 stating that K.A.'s vaginal swabs contained semen and a single DNA profile from an unknown male.526-532)See

State's exhibit "37" was aletter authored by BCI on November 27,2012,which identified an unknown male DNA profile that was said to match each other. (Tr.704-705).At that time,no other male profile was available to match the results to the kits. (Tr.706).

K.A.'s "rape kit" sat untested in the Cleveland Police property room where it was stored for decades,from 1993, until the Ohio Attorney General decided to begin testing samples for DNA in the Rape Kit Initiative 20-years later. (Tr.525-526,658-659,694-697,700-703).

Discovery provided by the State reveals the case was reopened and it was originally assigned to the Cleveland Police Department to Detective Christina Cottom.(Tr.266, 705,708-712;original discovery pg.140,188).(Tr.146-147).

The mere lack of additional efforts to locate K.A. and or her mother Kim Alexander for almost 20-years is indicative of the State's failure to exercise any diligence much less the requisite "reasonable diligence." Accord State v.Jackson,Cuyahoga App.No.86755,2006-Ohio-2468, Also State v.King(1995),103 Ohio App.3d 210,658 N.E.2d 1138, ('reasonable diligence was not found where the State made only one attempt to serve a summons); See State v.Myers, Cuyahoga App.No.1-25-07,2007-Ohio-279 at P 14.

K.A. was not absent,as she has a criminal record in

Cuyahoga County. She has charges stemming from "VSDL" also receiving stolen property and several traffic tickets in Cuyahoga County Common Pleas Court. She also has numerous misdemeanor cases out of Cleveland Municipal Court.(Tr.713)

On December 18,2012,Detective Cottom met with K.A.'s mother Kim Alexander at her place of employment and during the interview she stated to Detective Cottom that she did not know anything about her daughter being raped,nor did she know anything about a police report. (discovery P.188), See(original discovery pgs.143-148). (Tr.146-147).

Kim Alexander testified she remembers speaking with Detective Christina Cottom. (Tr.254-255,266,335-336,386, 387). K.A. testified she does not remember speaking with Detective Cottom.

On December 19,2012,Detective Cottom met with K.A. at the Cuyahoga County Sex Crimes Unit where Detective Cottom recorded the interview. In that interview Detective Cottom asked K.A. specifically,did he put his penis in your vagina? K.A. answered with expression,No! that never happened. K.A. was asked,'did he ejaculate in your vagina? again K.A. responded, No!'that never happened. (Tr.266,335-336,348,-349,351-353,356-358,361-363). At the time of this interview Detective Cottom was investigating past events related to a criminal prosecution.(discovery pg.140,188).

"[T]he trial court's failure to allow K.A.'s 'recorded' DVD interview to be played in open court during her cross-examination violated petitioner's Sixth Amendment right of confrontation which caused substantial and actual prejudice and denied him of a fair trial."(Tr.887 ¶¶24-25,947,950). Crawford v.Washington,541 U.S.36,124 S.Ct.1354,158 L.Ed.2d 177 (2004); State v.Stahl,111 Ohio St.3d 186,2006-Ohio-5482,855 N.E.2d 834,at ¶ 25. (Tr.818-820,826-830).

Pursuant to EVid.R.613(B),a patty may introduce extrinsic evidence of a witness's prior inconsistent statement to impeach his or her credibility. However,when extrinsic evidence of a prior inconsistent statement is offered into evidence pursuant to Evid.R.613(B),the proponent of the evidence must lay a foundation through direct or cross-examination in which (1) the witness is presented with the former statement,(2) the witness is asked whether she made the statement,(3) the witmess is given an opportunity to admit,deny,or explain the statement,and (4) the opposing party is given an opportunity to interrogate the witness on the inconsistent statement. State v.Mack,73 Ohio St.3d 502,

515,1995 Ohio 273,653 N.E.2d 329 (1995).

The trial court abused its discretion when Judge Matthew J.McMonagle stipulated with assistant prosecutor's Denise J.Salerno,Steve McIntosh,and defense counsel John F.Corrigan to exclude K.A.'s recorded DVD interview to be used while cross-examining her during trial. (Tr.98-101, 146-147,947-948). Mattox v.United States,156 U.S.237,15 S. Ct.337,39 L.Ed.409 (1895). The foundation was laid.

A trial court is vested with broad discretin to determine the admissibility of evidence,so long as that discretion is exercised in accordance with the rules of procedure and evidence. State v.Sage,31 Ohio St.173,31 Ohio B.375,510 N. E.2d 343 (1987),paragraph two of the syllabus; Rigby v. Lake Cty.,58 Ohio St.3d 269,271,569 N.E.2d 1056 (1991). An appellate court,therefore,generally reviews a trial court's decision pertaining to the admission of evidence for an abuse of discretion. State v.Finnerty,46 Ohio St.3d 104,107,543 N.E.2d 1233 (1989); State v.Gale,8th Dist.Cuy. No.94822,2011-Ohio-1236, ¶ 12.

An abuse of discretion means more than a mere error of law or judgment,it implies that the trial court's attitude is unreasonable,arbitrary or unconscionable,and the Supreme Court defines "unreasonable" as having "no sound reasoning process that would support that decision." State v.Adams, 62 Ohio St.2d 151,157,404 N.E.2d 144 (1980); Blakemore v. Blakemore,5 Ohio St.3d 217,219,5 Ohio B.481,450 N.E.2d 1140 (1983);County of Sacramento v.Lewis,523 U.S.833,140 L.Ed.2d 1043,118 S.Ct.1708,1716 (1998). The trial court's decision was lacking in a sound reasoning process. (Tr.947-948).

Evid.R.401-402

All relevant evidence is admissable,except as otherwise provided by the Constitution of the United States,by the Constitution of the State of Ohio,by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio,by these rules,or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.(Tr.146-147,266,947-948).

This was a bench trial and the trial court is presumed to know the applicable law and apply it accordingly. See State v.Lloyd,12th Dist.Warren Nos.CA2007-04-052 and CA2007 -04-053,2008-Ohio-3383.

VICTIM'S PRIOR INCONSISTENT STATEMENTS

In this case,the victims inconsistent statements amount to evidence that "tends to"negate the guilt or lessen the level of the offense and the punishment under DR-7-103(B). The recorded "DVD" interview should have been disclosed in order to impeach K.A.'s credibility. (Tr.1146-147,266;see original discovery pg.140,143-148,266;Tr.335-336,344-345, 347-358,360-363).

A witness's prior statements may still be admitted if the statement has sufficient "indicia of reliability." citing Ohio v.Roberts,448 U.S.56,66,65 L.Ed.2d 597,100 S.Ct.2531, 17 Ohio Op.3d 240 (1980). If the statement does not fall within a firmly rooted hearsay exception,then it must show "particularized guarantees of trustworthiness" in order to be admitted. Idaho v.Wright,497 U.S.805,815,111 L.Ed.2d 638,110 S.Ct.3139 (1990). (Tr.146-147,266).

If the statement does not fall within a firmly rooted hearsay exception,then'reliability can be inferred without more." Id. Petitioner attacks K.A.'s out-of-court interview recorded by Detective Cottom December 19,2012.as Detective Cottom was investigating past events related to a criminal prosecution. Petitioner was protected by the Sixth Amendment Confrontation Clause during his criminal trial,and has the right to be "confronted with the witness against him." U.S. Const.amend.VI. Crawford at 52.

The absence of proper Confrontation by an accused of a witness against him at his trial,as guaranteed under the Sixth Amendment,calls into question the ultimate integrity of the fact-finding process. Ohio v.Roberts,448 U.S.56 (1980). (Tr.887 ¶ 24-25).

When presenting the prior inconsistent statement,counsel is not required to show the prior statement or disclose its contents to the witness at the time he/she is interrogating the witness. Evid.R.613(A);State v.McQueen,8th Dist.Cuyahoga No.44990,1983 Ohio App.Lexis 13740,fn.6 (Feb.3,1983). If a witness denies making the statement,extrinsic evidence of the statement is generally admissable if it relates to "a fact of consequence to the determination of the action." Evid.R.613(B)(2)(a); State v.McKinney,8th Dist.Cuyahoga No. 99270,2013-Ohio-5730,¶ 14. A statement the witness"does not remember"is equivalent to a denial for purposes of establishing the requisite foundation for impeachment of a witness with a prior statement. State v.Wilbon,8th Dist.Cuyahoga No. 82934,2004-Ohio-1784,¶ 26. (Tr.308-311,335-336,339-358,361-363).

In fact,the record of K.A.'s testimony was so replete

with responses such as "I don't know"or"I can't recall" to be credible as a witness. Every single one of her 'I don't recalls,'or'I don't know'or 'I don't remember,'which is 99.99 percent of the questions asked,were feigned. Her body language and her tone of voice were incredibly hostile. She admits she didn't want to be here. (Tr.308-311,335-336,339-358,361-363,897). K.A.'s "Idon't recalls" and "I don't knows" and I don't remember" undermined her credibility. Tibbs v.Florida,457 U.S.31,102 S.Ct.2211,72 L.Ed.2d 652 (1982). These answers,like numerous "I don't remember" answers givwn that morning,were unbelievable and thereby demonstrated a willingness to give false testimony known to the prosecutor.(Tr.335-336).

Assistant Prosecutor Denise J.Salerno's failure to correct false testimony of K.A. (alleged victim),that assistant prosecutor knew to be false violated the due process clause of the Fourteenth Amendment,even though other testimony regarding witness's credibility was introduced. K.A.claimed she did not remember meeting with detective cottom or any social workers. (Tr.335-336-358,361-363). Naupe v.Illinois, 360 U.S.264 (1959);Mooney v.Holohan,294 U.S.103 (1935).

"It is of no consequence that the falsehood bore upon the credibility of K.A. rather than directly upon petitioner's guilt. A lie is a lie,no matter what its subject,and,if it is in any way relevant to the case,as it was,the judge and assistant prosecutor had the responsibility and duty to correct what he/she knew to be false and elicit the truth. That the judge,Matthew McMonagle,assistant prosecutor's silence was the result of guile and a desire to prejudice matters,as it did preventing a trial that could in any sense be termed fair." (Tr.349-363).

Ex Post Facto Clause

The Ex Post Facto Clause,prohibits the federal government and the States from enacting laws with certain retroactive effects. U.S.Const.art.I,§9.Cl.3(federal government);U.S. Const.art.I,§10.Cl.1(states).

The expansion of the statute of limitations from Six-Years to Twenty-Years March 9,1999,violates Due Process and Ex Post Facto Clauses of the United States Constitution because the expansion permitted a prosecution that the passage of time had previously barred. The underlying events allegedly occured in '1993','the judge improperly denied the motion to dismiss on statute of limitations grounds after Six-Years, and the judge's decision violated Ex Post Facto and Due

Process Clause. The statute of limitations expired in this case April 21,1999,Six-Years after the alleged incident pursuant to R.C.2151.421(A)(1)(b). See **Stogner v.**California, 539 U.S.607,156 L.Ed.2d 544,123 S.Ct.2446,2451 (2003).((holding retroactive extension of statutes of limitations for serious sexual offenses against minors was ex post facto law and stating in dicta that the law would alter the quantum of proof by effectively eliminating an existing conclusive presumption forbidding prosecution).

Article I,Section 10 of the constitution prohibits the states from passing any ex post facto law. Carmell v.Texas, 529 U.S.513,520,146 L.Ed.2d 577,120 S.Ct.1620 (2000). The Ex Post Facto Clause incorporates a term of art into a meaning already established when the constitution was framed. Id.at 521-22. The clause is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts. Id. at 522.

The prescription against ex post facto laws was derived from English Common law and applies to four categories of criminal laws: (1) a law that makes an action done before the passing of the law,and which was innocent when done, criminal,and punishes such action; (2) a law that aggravates a crime,or makes it greater than it was,when committed; (3) a law that changes the punishment,and inflicts a greater punishment,than the law that existed when the crime was committed;and a law thatalters the legal rules of evidence, and requires less or different testimony to convict the offender,than the law required at the time of the commission of the offense.

Records reveal Detective Cottom spoke with K.A. and her mother regarding [Randy Spivey],she presented photographs to both K.A. and her mother of [Randy Spivey] they were unable to pick anyone out of the photographs. (Tr.711-712).

Nichole Disanto was assigned to the case March,2013,who took over the case from Detective Cottom. (Tr.705-706,708-709-712). Nicole Disanto testified she provided K.A. and her mother with photo line-ups on March 25,2013. (Tr.715-719). Both K.A. and her mother Kim Alexander recalled investigator's showing them photo arrays on March 25,2013, the same procedure the investigator's were requesting for assistant with in 1999in which 'Neither would respond to assist with pursuant to R.C.2933.83. (original discovery pg. 85).

Again on June 21,28,2013,K.A. and her mother were shown

photo arrays and at neither time could either of them identify "Randy."(Tr.322-330,387-393,714-719,726-729).

At trial,Nichole Disanto of the Cuyahoga County Prosecutor's office CODIS Task Force testified(Tr.699).She explained that the Task Force was created in January 2013,to deal with the DNA testing results from the hundreds of 'rape kits' previously stored for decades,untested,in the Cleveland Police property room.(Tr.700-703).

State's Exhibit "37"is a letter authorized by BCI on November 27,2012,which was addressed to Detective Cottom of the Cleveland Police Department.(Tr.705-706).See original discovery pg.63,absent semen).(Tr.807-808,818-819).

Accusatory Instruments,Warrants,Indictment

On April 9,2013,two weeks before the expiration of the 20-year statute of limitations,Nicole Disanto deceived the Grand Jury by presenting it with a DNA profile rather than a named individual.(Tr.162-163,183,193,723-724). This is the first time the Task Force had indicted a DNA profile rather than a named suspect which is unconstitutional.(Tr. 723). (Doc#:12-1,pg.ID#:194-196,Ex.1).

The indictment itself named John Doe#1,Unknown Male,with Matching Deoxyribonucleic Acid (DNA) profile at Genetic locations:...., Clearly,this indictment does not properly serve notice upon anyone much less petitioner that a proceeding has been initiated against him. See(Complaint Summary and Bond Report pg.1of1,dated April 9,2013;also Doc#:12-1,pg.ID#:194-196,Ex.1;Doc#:12-1,pg.ID#:197,the Warrant dated April 9,2013,signed by JUDGE STEVEN E.GALL).

There is concern that because a DNA profile is not apparent to the naked eye;a warrant or indictment cannot be readily executed. For example,one State has held that a Criminal Complaint that names and describes the defendant only as "John Doe'Steve,"a White Male,in his thirties with address unknown" is insufficient to toll the statute of limitations.'" Commonwealth v.Laventure,(Pa.Supreme Court 2006),586 Pa.348,894 A.2d 109.

The issuance was disingenous,a sham legal poocess under R.C.§2921.52(B) which expressly states that "[N]o person shall knowingly commit or facilitate the commission of an offense using sham legal process." A sham legal process is an instrument that:(a)...is not lawfully issued;(b)...it purports to do any of the following:(i) To be a summons,a subpoena,Judgment,or order of a Court,a law enforcement

officer,or a legislative,executive,or administrative body (ii) To assert Jurisdiction over or determine the legal equitable status,rights,duties,powers,or privileges of any person,or property,[or] (iii) To require,or authorize the search,seizure,indictment,arrest,trial,or sentencing of any person,or property,[and] (C)...is designed to make another person believe it is lawfully issued.

Ohio Rev.Code Ann.§2921.52(A)(4),(West). The statute defines 'lawfully issued'as "adopted,issued,or rendered in occordance with the United States Constitution,the Constitution of a State,and ordinances of the United States,the applicable statutes,rules,regulations,and a State and the political subdivisions of a State."

The Warrant and Indictment were invalid to confer subject matter Jurisdiction on the trial court. The Cuyahoga County Sheriff was instructed to arrest John Doe#1 at 1200 Ontario Street Cleveland,Ohio 44113-0000. No date of birth,or any other identifying information was provided.(Doc#:12-1,pg. ID#:194-196,Ex.1;Doc#:12-1,pg.ID#:197).

Crim.R.4(A)(2) expressly states:"[N]o alias warrant shall be issued unless the defendant fails to appear in response to the summons,or unless subsequent to the issuance of a summons it appears improbable that the defendant will appear in response to the summons."(Doc#:12-1,pg.ID#:197).

The warrant requirement exists in order to permit a neutral magristrate to make the decision whether to order, or authorize arrest,rather than leaving this decision up to the prosecutor or officer. Even where an indictment has been handed down and there is a presumption of probable cause,a warrant requirement remains. See Crim.R.4(C)(1)(2); Crim.R.9(A)(B)(1);Fed.R.Crim.P.9(b)(1).

If the prosecution were permitted to arrest on the basis of "John-Doe" warrents supplemented by extrinsic evidence, the requirement for a particularized warrant,issued by a magistrate,would become a nullity. To comply with Fed.R. Crim.P.4(C)(1) and U.S.Const.amend.IV the name or a particularized description of the person to be arrested must appear on the face of the "John Doe" warrant. The warrant on which the State filed April 9,2013 was not a valid warrant. As stated in Brown v.Texas,443 U.S.47,99 S. Ct.2937,61 L.Ed.2d 357 (1979),almost,always,the means of identification is a person's prpper name.

Crim.R.4(C) and Crim.R.9(B) requiring the warrant to contain a name or description in which law enforcement can

identify the subject with reasonable certainty. citing United States v,Jarvis,560 F.2d 494,497 (2d Cir,1977; West v.Caball,153 U.S.78,86,14 S.Ct.752,754,38 L.Ed.643 (1894). The requirement of the Fourth Amendment,is that a warrant must "particularly describe" the person to be seized.

This non-existent issuance did not constitute reasonable diligence,as a prosecution cannot be said to have commenced upon the filing of the indictment,or the issuance of the warrant. (Doc#:12-1,pg.ID#:194-196,Ex.1;Doc#:12-1,pg.ID#: 197).

Issuance and execution of process upon a direct indictment normally takes place in short order. R.C.§2941.49,which instructs the Clerk of Court to make and deliver a copy of the warrant and indictment to the sheriff within three-days after the filing of the warrant/indictment. The statute also further commands that the sheriff serve a copy on the defendant. Like a plaintiff in a civil case,the statute necessarily relies on the prosecution to provide the accused person's location. (See Crim.R.9). (Tr.137-138,144).

Petitioner contends the alleged offense occured on April 21,1993,and the warrant and indictment was filed in error on April 9,2013,twelve(12) days prior to the expiration of the 20-year statute of limitations naming the DNA strand "John Doe"not a named person who could have received actual notice of the warrant/indictment. (Tr.162-163,172-180,723).

On June 18,2013,BCI sent the State a letter stating they had made a preliminary association with the Richfield CODIS Laboratory and the London CODIS Laboratory State's Exhibit 40. (Tr.29-30-31-32-33-34,39,48-49,54-56,725).

On June 18,2013,some fifty-eight (58) days after the statute of limitations had expired in this case,the State was aware that they had probable cause to believe that petitioner committed the crime. (Tr.84-88).

The most undisputed fact in this case is,that on April 21, 2013,this case remained unsolved. Twenty-Years had passed from the date of the alleged offense and the State had not identified the person associated with the DNA strand.(Tr. 723-725).

Agent of the State,Denise J.Salerno,presented the trial court with false testimony claiming an inmate subpoena was issued to have petitioner transported to the Cuyahoga County jail on August 9,2013. (Tr.152). Investigator Nicole Disanto also made a false statement in a report and in open court

stating that an inmate subpoena was issued to Lake Erie Correctional Institution to have petitioner brought back to the Cuyahoga County jail so that they could confront him. (Tr.730)(original discovery pg.308;Doc#:5).

On September 05,2013, petitioner was transported to the Cuyahoga County Jail from Lake Erie Correctional Institution under false pretense. The Sheriff's Office Booking History Report claims as a witness using R.C.2945.48 case #918637. (Tr.59)(see Doc#:3,and Doc#:13).

On September 11,2013,petitioner was removed from his cell on the pretense of going on a regular visit to end up in a basement area where no one else is around in an unfamiliar atmosphere. Petitioner was lead into a room handcuffed and shackled to the floor. (Tr.59-61). Petitioner was approached by two investigator's who showed petitioner a force search warrant. (Tr.62-63). Petitioner was not provided with a consent form violating his fourth amendment right to be free from unreasonable searches and seizure.(Tr.731,735,741, 772-779,782,786). (Tr.852-855).

On September 27,2013,petitioner was sent back to Lake Erie Correctional Institution.(Tr.64)(See Doc#:3 and DOc#13).

SPEEDY TRIAL R.C.2941,401

The right to speedy trial does not disappear because one is prison. The Supreme Court of the United States has specifically rejected the view that a man already confined under a lawful sentence loses his right to speedy trial on another pending charge. Smith v.Hooey,supra.

As of April 9,2013,the prosecutor's office knew petitioner was incarcerated in the Ohio Department of Corrections. see (Tr.27-28;see Doc#:12-1,pgID#:197,signed by Judge Steven E. Gall April 9,2013).

The Prosecutor's Office intentionally failed to notify the Warden of Lake Erie Correctional Institution of a pending indictment where the State knew petitioner was incarcerated violating his right to request final disposition pursuant to R.C.2941.401. There is no evidence in the record that the R.C.2941.401 statute was invoked therefore the trial court lacked subject-matter jurisdiction.

Reason For Granting The Writ

" The Eighth District Court of Appeals' decision was an unreasonable application of clearly established federal law."

§2254(d)(1).The State Court's decision was contrary to,or involved an unreasonable application of clearly established federal law.

The trial court erred in denying petitioner's motion to dismiss speedy trial on the basis of R.C.2941.401. The State failed to notify the warden of pending indictment where the State knew petitioner was incarcerated violating his due process rights to request final disposition under R.C.2941.401. (Tr.194-200,207-209 ¶ 1-5,234-241).

Speedy Trial,Statutory Right

The State cannot avoid the requirements of Ohio Rev.Code Ann§2941.401 by neglecting or refusing to send a copy of the indictment to the warden of the accused institution of incarceration.

Because the State did not notify the warden of a pending indictment and notice to request final disposition,"the 180-day speedy trial clock pursuant to R.C.2941.401 never began to run." The State has the burden of insuring that institutions comply with R.C.2941.401 It has the burden to keep track of defendant's whereabouts and availability.

The State's lack of initiative cannot be used to "circumvent the purpose of the statute and relieve the State of its legal burden to try cases within the time constraints imposed by law. Dillon,supra. See also State v.Fitch,37 Ohio App.3d 159,524 N.E.2d 912,and State v.Cepac,2007 WL 2874315 (Ohio App.5 Dist.).

The Court in Dillon,in interpreting,section 2941.401 of the Revised Code,ruled a warden's failure to promptly inform the inmate in writing of the indictment and his right to request trial violated the statute requiring "the warden or prison superintendent to notify a prisoner in writing of the source and contents of any untried indictment and of his right to make a request for final disposition thereof violates due process.

The Dillon Court concluded that the speedy trial calculation commenced when the warden was requested to serve the indictment on the defendant and,because of the speedy trial violation,Dillon'sacase was dismissed. Fex v.Michigan(1993) 507 U.S.43,52,113 S.Ct.1085,1091,122 L.Ed.2d 406.

An understanding of R.C.2941.401 requires a reading of the Ohio Supreme Court cases of State v.Dillon,2007-Ohio-3617 and State v.Hairston,2004-Ohio-969. The facts of this

case fit neither Dillon nor Hairston. In the instant case, it is clear that petitioner was incarcerated on another charge at the time the instant indictment was filed April 9,2013. (Tr.27-28). It is also clear that the State had knowledge that petitioner was incarcerated at Lake Erie Correctional Institution. (Tr.152,730)(see Doc#:3 and Doc#:13), (Doc#:12-1,pg.ID#:264-266).

However,there is nothing in the record which indicates that the indictment was sent to the warden. (Tr.208). It is also clear that there is nothing in the record which so indicates that the warden received notice of the indictment or that the warden informed petitioner of an indictment and of his right to make a request for final disposition pursuant to R.C.2941.401. "[T]he application of O.R.C.2941.401 was thwarted by the State's inaction. [Petitioner] never had an opportunity to assert his speedy trial rights under O.R.C. section 2941.401." Moore v.Arizona,Supra.

Petitioner had no knowledge of a direct indictment that involved allegations from 1993 and 1996. The warden's lack of knowledge was because of the party prosecuting the case. The Cuyahoga County Prosecutor's Office,actively hid the fact of a pending indictment from him in order to satisfy their "cannibalistic appetite."

As previously stated,petitioner's burden of making a request for final disposition does not devolve upon him until he is notified by the warden of the pending indictment. The State cannot circumvent the application of R.C.2941.401 by neglecting/failing to notify the warden of the pending charges,where,as here,the State clearly knew that the accused was imprisoned in this State. Petitioner was actually prejudiced by the State's failure to comply with the its duty to notify the warden pursuant to R.C.2941.401.

Aditionally:

"Although section 2941.4501 does not explicitly require the State to give notice of an indictment to an accused who is incarcerated on a different charge,the statute would have no meaning if the State could circumvent its requirements by not sending notice of an indictment to the warden of the institution where the accused is imprisoned."

As of June 18,2013,petitioner was a suspect. (Tr.30-31, 139,725;State's Exhibit 40). Petitioner was the subject of an official prosecution. In State v.Meeker,26,Ohio St.2d 9, 268 N.E.2d 589 (1971),paragraph three of the syllabus,the Ohio Supreme Court held that "[t]he constitutional

guarantees of a speedy trial are applicable to unjustifiable delays in comencing prosecution,as well as to unjustifiable delays after indictment." However,shortly after Meeker, the United States Supreme Court held that a defendant's constitutional right to a speedy trial attaches only when a defendant is "indicted,arrested,or otherwise officially accused" of a crime or crimes. See United States v.McDonald 456 U.S.1,6,102 S.Ct.1497,71 L.Ed.2d 696 (1982),citing United States v.Marion,404 U.S.307,312,92 S.Ct.455,30 L.Ed. 2d 468 (1971); see also Doggett v.United States,505 U.S. 647,655,112 S.Ct.2686,120 L.Ed.2d 520 (1992).

As Magistrate Judge Kathleen Burks stated in its R&R at (Doc#:18-1,pg.ID#:1698),[t]o the extent that [Young] has presented a cognizable federal constitutional claim,as established by the United States Supreme Court,"[t]he speedy-trial right does not apply until the defendant is 'accused."citing Brown v.Romanowski,845 F.3d 703,712 (6th Cir.2017)(citing Marion,404 U.S. at 313). Further stating, and,generally, "the right usually attaches when the defendant is arrested or indicted,whichever is earlier." Id.at 712-713.

As of April 9,2013,petitioner was accused and indicted according to the State. (Tr.730),and by the issuance of a warrant. (Doc#:12-1,pg.ID#:197).

When a defendant asserts a pre-indictment delay violated his due process rights,prejudice may not be presumed. See United States v.Crouch(C.A.5,1996),84 F.3d 1497,1514-1515.

The Ohio Supreme Court held that a delay in the commencement of prosecution by the state would be found unjustifiable when it is done in an attempt to gain a tactical advantage over the defendant,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 its active investigation was ceased." Luck,15 Ohio St.3d at 158.

Investigator Nicole Disanto testified she was asked to prepare evidence in this case to be sent off for further testing at the request of the defense. (Tr.761). She also testified she was requested to send items to a company called "DDC" on August 19,2015 and they were returned on December 22,2015. (Tr.762).

OPPRESSIVE PRE-TRIAL DELAY

The State's delay in proceeding to trial was an intentional device to gain a decided tactical advantage in its prosecution. United States v.Marion,404 U.S.at 324,92 S.Ct.,at 465.

Nicole Disanto testified on February 25,2014,she sent items to BCI for testing.(State's Exhibit 32,is other items submitted for testing on July 10,2014. (Tr.756-760).

The Court also held that the length of delay would also normally be a key factor. The defendant has the burden of demonstrating prejudice. E.g., United States v.Lawson(6th Cir.1985),780 F.2d 535,541-42. A lengthy delay in prosecuting the defendant,by itself,does not constitute actual prejudice. The defendant must demonstrate how the length of the delay has prejudiced his ability to have a fair trial. United States v.Norris(SD OH 2007),501 F.Supp.2d 1092,1096.

On January 31,2014,after Richard A.Bell announced on the News,Channell 5 that an indictment had been amended to include petitioner's name,petitioner was placed in the hole (administrative segregation),after the broadcast. (Tr.235, 236;see Doc#:13),creating excessive stress and anxiety.

On February 7,2014,petitioner was transported to the County Jail without notice. (Doc#:12-1,pg.ID#:289). On February 10, 2014,arraignment previously scheduled for 04/23/2014 on Wednesday is rescheduled for 02/11/2014 at 08:30 AM is canceled:Reason :Unknown. (Doc#:12-1,pg.ID#:289).

On February 11,2014,defendant declared indigent.Court - assigned James J.McDonnell as counsel. The States assigned James J.McDonnell as counsel was a devise to delay court proceedings. The State was aware that James J.McDonnell misrepresented petitioner in Case#:CR-12-566464.(Tr.27-28).

On February 11,2014,the court amended the indictment for a second time prejudiceing petitioner by adding an alias to the indictment. Entry taken by Judge Pamela Barker. (Doc#: 12-1,pg.ID#:206;Ex.5). The State presented no evidence that petitioner ever was refered to as [Randy Spivey]. (Tr.67, 189,407;discovery pg.389).

Investigator Nicole Disanto was asked,you were using your experience to fetter out a Randy? Do you recall whether you specifically asked K.A. or her mother,'how did you meet this Randy Spivey? She testified she did not ask them that question. (Tr.787-788). Investigator Nicole Disanto further testified she was reviewing old reports and there was no mention of an [Annette] Kim Alexander's said to be

best friend who knew [Randy] well. (Tr.403,405-408).

Investigator Nicole Disanto was asked did she presonally ask Kim Alexander how is it that she met this individual named [Randy]. Nicole responded,I was not able to go to that length with her because her memory didn't serve back to even dating Randy. Nicole was asked,You never asked her specifically about somebody named [Annette?].Nicole then responded,It never came up. There was no cause to ask her. (Tr.768-769). Nicole Disanto's investigation cannot be labeled as due diligence,as she did not ask the right questions. This constituted dilatory law enforcement.

On February 27,2014,the Court assigns Steve W.Canfil as counsel. (Doc#:12-1,pg.ID#:288). Steve W.Canfil blatantly refused to advocate petitioner's case,stating ,he wasn't going to do it. (Tr.240). Mr.Canfil continued to file continuances up until July 15,2014,while Investigator Nicole Disanto testified she was asked to prepare evidence in the case to be sent off forfurther testing at the request of the defense. (Tr.756-762). Petitioner was represented by counsel in name only. Cuyler v.Sullivan,446 U.S.335,341-42, 64 L.Ed.2d 333,100S.Ct.1708 (1980).

On May 21,2014,pre-trial set for 09:30 AM is reset for 05/29/2014 Reason:Both Parties Unavailable. See Journal Entry dated 05/21/2014. (Doc#:12-1,pg.ID#:287).

On April 17,2014,petitioner filed a Motion For Dismissal For Denial of Speedy Trial,Pro Se as Mr.Steve Canfil stated he was not going to do it. (Tr.240;See Doc#:12,Petitioner's Motion For Dismissal of Charges.

On July 15,2014,hearing held on issues he was having with Mr.Canfil before Judge Ronald Suster. Court reporter Carla Kuhn present,counsel present. Petitioner was referred to psychiatric clinic causing stress and anxiety. (Doc#:12-1, pg.ID#:286).

Mr.Steve W.Canfil continued to file pre-trials which was a conflict of interest. Defense Counsel delayed trial filing multiple continuances up until December 2,2014. (Doc#:12-1, pg.ID#:284).

On December 3,2014,petitioner filed a Motion to recuse Mr.Steve W.Canfil because Mr.Canfil told petitioner maybe he needed a Black Attorney,because he was not going to advocate my case. (Tr.240)(See Pro Se Motion to recuse counsel 12/03/2014). The issue was addressed in court with Judge Ronald Suster on December 8,2014. Judge Ronald Suster

stating,'He didn't mean it that way' attempting to justify Mr.Canfil's statement. Court Reporter Susan Ottogalli was present. The Court assigns Donald Butler as counsel. (Doc#: 12-1,pg.ID#:284)(Tr.240).

Once the Court assigned Donald Butler,he did not visit petitioner for (4) four-months. When Mr.Butler did visit he was verbally abusive stating that's why you are in jail now,when he was asked why he did not visit petitioner in (4) four-months. (Tr.240).

On March 25,2015,Donald Butler and prosecutor present at pre-trial,Plea Negotiations. (Doc#:12-1,pg.ID#:287). Petitioner was never escorted to the Courtroom for any pre-trials. He was taken to the Bull-Pen and left to sit alday until 4pm.

On January 4,2015,Donald Butler in trial in another court-room. Unavailable for pre-trial. See Journal Entry dated 01/29/2015-02/04/2015. (Doc#:12-1,pg.ID#:283).

On April 23,2015,the prosecutor claim petitioner refused to be transported to the courtroom. (Tr.17-20). I have never refused to be escorted to the courtroom. I was always escorted by SRT for some reason or another. I was always escorted to the Bull-Pen and left to sit until the day was over. I had no control in going to the courtroom. (Doc#:12-1,pg.ID#:282)(See Defendant's Motion filed 04/15/2015 Pro Se).

On April 23,2015,the Court assigns Russell Tye as counsel. Russell Tye kept lying to petitioner claiming he was going to disclose the 'DVD'interview of K.A. taken by Detective Cottom yet he refused to disclose the contents,so I filed a motion to recuse him on July 14,2015. (Doc#:12-1,pg.ID#: 281)(Tr.240-241). On November 20-23,2015,Russell Tye with-draws as counsel.

On November 20-23,2015,the Court assigns John F.Corrigan as counsel. All assigned counsel refused to disclose the contents of the 'DVD'interview of K.A. recorded by the investigator Detective Cottom on December 19,2012 at the Cleveland Justice Center. (original discovery pg.140,143-148,188;Tr.240-241,266,335-336,348-349-350-351,353,356-358, 361-363,818-820,826-830).

Prior to the time of arrest,or indictment,an accused may suffer anxiety,but he does not suffer the special form of anxiety engendered by public accusation. "Arrest is a public act that may seriously interfere with the defendant's

liberty,and may disrupt his employment,drain his financial resources,curtail his associations,subject him to public obloquy,and create anxiety in him,his family and friends.

Prosecutor Richard A.Bell stating on national tetevision referring to petitioner as a "rapist" and a "coward" subjected him to public obloquy and slander. Also placing an ad in the plain dealer has created social anxiety. My life has been disrupted by the allegations. (Tr.856).

The ongoing comprehensive investigation subjected petitioner to severe stress and anxiety and other adverse consequences. "On its face,the protection of the Sixth Amendment is only activated when a criminal prosecution has begun and extends only to those persons who have been accused in the course of that prosecution.'These provisions would seem to afford no protection to those not yet accused nor would they seem to require the Government to discover,investigate,and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him."'

The State,in pursuit of its own agenda"allowing the doctrinaire concepts...to submerge the pratical demands of the constitutional right to a speedy trial by stating O.R.C. 2941.401 does not control in this case. Then further stating, '[i]t doesn't matter if they knew where petitioner was,it doesn't matter--nothing matters,other than that the initial duty that is placed upon the defendant."' (Tr.200-201).

CONCLUSION

Considering the foregoing,petitioner has demonstrated that the State Court's adjudication was contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts in light of the evidence presented in State Court.

Furthermore,petitioner[Young],has shown that the Eighth District Court of Appeals determination 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Additionally,during trial,neither K.A. or her mother Kim Alexander identified petitioner in the courtroom as the perpetrator. (Tr.331,394). Harrington v.Richter,131 S.Ct.770,786-87 (2011)(quoting,Bobby v.Dixon, 132 S.Ct.26,27 (2011).

A State Court's determination of facts is unreasonable if its findings conflict with clear and convincing evidence to the contrary. This analysis mirrors the "presumption of correctness"afforded factual determinations made by a State Court which can only be overcome by clear and convincing evidence. 28 U.S.C.§2254(e)(1); See also Mitchell v.Mason, 325 F.3d 732,737-38 (6th Cir.2003; Clark v.O'Dea,257 F.3d 498,506 (6th Cir.2001).

Recently,this court in State v.Martin,8th Dist.Cuyahoga No. 100753,2015-Ohio-761,also held that dilatory law enforcement was the reason the statute of limitations expired prior to indictment. In that case,the state argued that the statute of limitations should have tolled during the time the defendant lived out of state. However,similar to the instant case,the State knew petitioner's whereabouts at the time of receiving a "hit notification"indicating that there was a named suspect in K.A.'s case. (Tr.725,State's Ex.40). Also at the time of the alleged rape Kim Alexander testified she met "Randy"when she attended a party at her longtime friend Annette's home(Tr.312),but she failed to tel the police about her bestfriend Annette,because they didn't ask her about all that. (Tr.407-408). See(State's Exhibit's 24-25).

The case was closed due to K.A. and her mother Kim Alexander failure to return to the justice center to assist detectives with identifying the alleged suspect through photographs. (original discovery pg.85,Tr.146-147).

It was not until the rape kit was tested twenty-years later, and the DNA matched the defendant's DNA,that the police indicted the defendant. It appears there was a pattern in the early '1990's of law enforcement not continuing to investigate a sex crime once the victim failed to respond. This dilatory behavior should not constitute an exception for indicting people after the statute of limitations has expired. State v.Gulley,2015-Ohio-3582,4Link to the location of the note in the document.

Relief

Pursuant to the preceding issues presented for review,said petitioner respectfully request this Honorable Court accept and grant his Petition for a Writ of Certiorori.

Respectfully Submitted,

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