IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	Case No. 2015-1427
Appellant,	:	
	:	On Appeal from the
v.	:	Cuyahoga County Court
	:	of Appeals, Eighth
Demetrius Jones,	:	Appellate District
	:	
Appellee.	:	Court of Appeals Case
	:	No. 101258
	:	

BRIEF OF *AMICI CURIAE* JOYFUL HEART FOUNDATION, AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, RAPE ABUSE INCEST NATIONAL NETWORK, OHIO ALLIANCE TO END SEXUAL VIOLENCE, AND NATIONAL ALLIANCE TO END SEXUAL VIOLENCE ON BEHALF OF APPELLANT STATE OF OHIO

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INTEREST OF *AMICI CURIAE*

Amicus Joyful Heart Foundation ("Joyful Heart") is a national organization whose mission is to heal, educate, and empower survivors of sexual assault, domestic violence, and child abuse. Joyful Heart delivers its mission through a program portfolio that includes the three integrated areas of this healing, education, and advocacy. Comprehensive rape kit reform and the elimination of the backlog of untested rape kits in the United States is the focus and top priority of the organization's advocacy work.

Amicus AEquitas: The Prosecutors' Resource on Violence Against Women ("AEquitas") works to improve the quality of justice in sexual violence, intimate partner violence, stalking, and human trafficking cases by developing, evaluating, and refining prosecution practices that increase victim safety and offender accountability. AEquitas is a training and technical assistance partner on the Department of Justice-funded 2015 National Sexual Assault Kit Initiative.

Amicus Rape Abuse Incest National Network (RAINN) is the largest anti-sexual violence organization in the United States. RAINN carries out programs to prevent sexual violence, help victims, and ensure that rapists are brought to justice. RAINN creates and operates the National Sexual Assault Hotline and operates the Department of Defense Safe Helpline.

Amicus Ohio Alliance to End Sexual Violence ("OAESV") is a statewide coalition in Ohio that advocates for comprehensive responses to and rape crisis services for survivors and empowers communities to prevent sexual violence. OAESV aims to improve services and responses to survivors, increase public awareness about sexual violence, and inform and shape public policy with the ultimate goal of ending sexual violence.

Amicus National Alliance to End Sexual Violence ("NAESV") is a national organization comprised of leaders from state anti-sexual violence organizations, joining with local rape crisis

centers and national advocates. NAESV's mission is to provide a voice in Washington for state and local programs that advocate and organize against sexual violence and for assistance to survivors. NAESV educates the policy community about federal laws, legislation, and appropriations impacting the fight to end sexual violence.

The *amici* present this brief based on their shared interest in preventing sexual violence, assisting victims of sexual violence, and bringing offenders of sexual violence to justice.

INTRODUCTION

Amici curiae Joyful Heart, AEquitas, RAINN, OAESV, and NAESV (collectively, the "*amici*") submit this brief on behalf of Appellant the State of Ohio (the "State"). The State appeals the Ohio Court of Appeals' decision affirming the grant of Appellee Demetrius Jones' motion to dismiss charges of rape and kidnapping based on pre-indictment delay.

Appellee's case involves the testing of a previously backlogged rape kit as part of an initiative undertaken by many U.S. jurisdictions, including Ohio – an initiative advocated for and supported by Joyful Heart and the other *amici*. In its decision, the Court of Appeals applied a so-called "due process and fundamental justice" standard instead of the traditional exculpatory evidence test. *Amici* submit that the Court of Appeals misapplied this Court's precedents with respect to the doctrine of pre-indictment delay in a manner that would undermine the significant public interests implicated in the testing of backlogged rape kits in cold cases.

Rape kit testing is of critical importance to law enforcement, victims, and the public, and Ohio has dedicated significant resources to ensure the processing of backlogged kits. The Court of Appeals' decision would undermine these efforts. Additionally, the Court of Appeals' decision obscures the proper standards to evaluate a claim of unconstitutional pre-indictment delay and provides little guidance to trial courts on how to evaluate pre-indictment delay claims going forward. For these reasons, this Court should reverse the Court of Appeals' decision.

STATEMENT OF THE CASE AND FACTS[1]

This case concerns a rape that occurred in Cleveland in 1993. According to the evidence gathered by the Cleveland Police Department, on September 1, 1993, the victim, S.W., went with Defendant-Appellee Demetrius Jones to his mother's apartment. *State v. Jones*, 2015-Ohio-2853, 35 N.E.3d 606, ¶ 4 (8th Dist.). After some time, S.W. indicated a desire to leave the apartment, but Appellee told her that she "was not going anywhere" and locked her in his bedroom. *Id.* S.W. screamed and fought with Appellee. *Id.* Appellee placed a knife to S.W.'s throat and proceeded to vaginally rape S.W. *Id.* S.W. reported the rape to the Cleveland Police Department ("CPD"). *Id.* at ¶ 5. She also informed members of CPD that Appellee's mother and brother were present in the home at the time of the rape, but that they did not come to her aid. *Id.* at ¶ 4.

After reporting the rape, S.W. was treated at a hospital and a rape kit was collected, which included vaginal swabs, pubic hair combings, fingernail scrapings, a head hair standard, a saliva sample, a nasal mucous sample, and a DNA standard. (*See* State's Response to Defendant's Motion to Dismiss ("State's Resp."), *State v. Jones*, Case No. CR-13-577686 (Dec. 18, 2013) at 2.) The medical records still exist and were provided to Appellee during discovery in this matter. (*See* Motion to Dismiss Hearing Transcript ("Hearing Tr.") at 6.)

In 1993, the case was assigned to Cleveland Police Sex Crimes Unit Detective Gregory King. (Hearing Tr. at 7.) CPD attempted to make contact with S.W. on two occasions but were unsuccessful in reaching her. *Jones*, 2015-Ohio-2853, 35 N.E.3d 606, at ¶ 7. As a result of the

[1] For a more complete recitation of the facts and procedural history, please see the Appellant-State of Ohio's Merit Brief, filed on January 19, 2016.

lack of contact with S.W.[2] and with no other leads in the case, Appellee was no longer "wanted" in connection with the investigation and the case was held in abeyance pending further investigative leads. (*See* Hearing Tr. at 7.)

On April 15, 2011, Appellee was indicted for rape in a separate case.[3] In the course of post-arrest processing in that case, a buccal sample was taken from Appellee and provided to the Bureau of Criminal Investigation ("BCI") for DNA testing. (State's Resp. at 2-3.) BCI identified Appellee as the contributor of DNA in samples collected from the victim in that case, and thereafter submitted Appellee's forensic DNA profile to the Combined DNA Index System ("CODIS") database, the Federal Bureau of Investigation's national DNA database.[4] (*Id.* at 3.)

Meanwhile, in the spring of 2011, CPD and the Ohio Attorney General began an initiative to forward a backlog of rape kits from CPD to BCI for DNA testing. (*Id.*) S.W.'s rape kit was forwarded to BCI for analysis on September 21, 2011, as part of the initiative. (*Id.*) On August 1, 2012, BCI issued a report that identified Appellee as the source of DNA on the items contained in S.W.'s rape kit. *Id.* Based on the DNA identification of Appellee, BCI Special Agent John Saraya re-opened an investigation of this case and located and interviewed S.W. (*Id.*) During her first formal interview with detectives concerning this crime, S.W. supplemented

[2] "Victim non-cooperation has been found to be the single most important reason for dismissals of felonies, excluding homicide. Rapists are most likely to go unpunished as a result of a victim's decision not to report a rape to the police, or not to cooperate as a prosecution witness." Hansen, *Testing Justice: Prospects for Constitutional Claims by Victims Whose Rape Kits Remain Untested*, 42 Colum. Hum. Rts. L. Rev. 943, 960 (2011).

[3] CR-11-548671.

[4] "Authorized by Congress and supervised by the Federal Bureau of Investigation, the Combined DNA Index System (CODIS) connects DNA laboratories at the local, state, and national level. Since its authorization in 1994, the CODIS system has grown to include all 50 States and a number of federal agencies." *Maryland v. King*, 133 S. Ct. 1958, 1968 (2013).

her 1993 statement by explaining, for the first time, that Appellee tore her clothing when he attacked her and that she tore Appellee's curtains during the struggle. (*Id.*)

With the new DNA evidence and new information provided by S.W., the State indicted Appellee on August 30, 2013, on one count of rape and one count of kidnapping. (*Id.*) On December 2, 2013, Appellee filed a Motion to Dismiss with Prejudice alleging unconstitutional pre-indictment delay, to which the State responded on December 18, 2013. (Journal Entry 12/02/2013; Journal Entry 12/18/2013.) On March 6, 2014, the trial court held a hearing on Appellee's motion to dismiss.

At the hearing, defense counsel argued that Appellee had suffered prejudice because, in the time it took for the State to indict him, his mother (a potential witness) had passed away. (Hearing Tr. at 10.) Appellee had no evidence of what his mother might have said at trial, other than his own self-interested assertions that she would have cleared him. Specifically, he asserted that his mother would have testified that he and S.W. had an ongoing consensual sexual relationship and that she never heard S.W. screaming on the night of the rape. (*Id.* at 12.) Appellee further argued that S.W.'s clothing from the time of the crime no longer existed, and thus he could not show that the clothing was not ripped (contrary to S.W.'s statement, which she gave after the investigation was re-opened as a result of the DNA test results).[5] (*Id.* at 57.)

On April 4, 2014, the trial court granted Appellee's motion and dismissed the case with prejudice. (Journal Entry 04/04/2014.) In reaching its decision, the trial court concluded that

[5] Significantly, the information regarding the torn clothing was not available to the State during the initial investigation in 1993; investigators only became aware of this fact when interviewing S.W. after the case had been re-opened in 2012. (State's Resp at 2-3.) Additionally, the torn curtains were presumably in the possession and control of Appellee since the time of the rape, putting him in the best position to photograph or preserve that evidence, especially given that Appellee contended he was interviewed by police in 1993 in connection with S.W.'s allegations. (*See* Hearing Tr. at 8-9.)

Appellee had been prejudiced by pre-indictment delay in three respects: (1) the loss of clothing and the lack of photographs of the victim and crime scene; (2) the unavailability of Appellee's mother as a witness; and (3) the natural fading of witness memory due to the passage of time. (Journal Entry 04/04/2014 at 5.) The State appealed.

After briefing and oral argument, the Court of Appeals convened for *en banc* review of the case, observing that the proposed decision conflicted with an already-approved opinion by a different panel with respect to the standard for establishing prejudice based upon pre-indictment delay.

The Court of Appeals issued its opinion on July 16, 2015. Rather than applying the established "exculpatory evidence" test for evaluating claims of pre-indictment delay, the Court of Appeals instead considered three factors in evaluating whether that test should apply: (1) the stage of the proceeding; (2) the nature of the State's case; and (3) the question of whose problem it should be "when we really do not know what the lost or missing evidence would have shown[.]" *Jones*, 2015-Ohio-2853, 35 N.E.3d 606, at ¶¶ 36-40.

Upon consideration of these factors, the court determined that it would apply what it characterized as a "due process and fundamental justice standard" instead of the traditional exculpatory evidence test. *Id.* at ¶¶ 36, 47. The court noted that the case at issue was disposed of pre-trial, and so the only record for review was the evidence presented at the hearing on Appellee's motion to dismiss. *Id.* at ¶ 41. Additionally, the court observed that although there was now a positive DNA match, S.W. had already identified Appellee as her attacker and therefore Appellee's identity was not at issue. *Id.* at ¶ 42-3. Furthermore, the Court of Appeals found that much of the evidence that was missing or unavailable had never been collected; no photographs were taken and S.W.'s clothing had not been retained. *Id.* at ¶ 43. Under these

circumstances, the court believed, "the case was bound to be a credibility determination." *Id.* The court acknowledged that Appellee's contention that his mother would have provided favorable evidence was purely speculative. *Id.* at ¶ 44.

In addressing the "whose problem is it" question, the court stated that the "victim never came forward" and that despite both S.W. and Appellee being known to the criminal justice system, "the state merely failed to take action for a substantial period." *Id.* at ¶ 45-46. According to the court, these considerations required an evaluation "in terms of basic concepts of due process and fundamental justice" and not under the "exculpatory evidence" test. *Id.* at ¶ 47. In announcing that it would apply this new standard to evaluate Appellee's claim of pre-indictment delay, the Court of Appeals did not fully articulate the contours of that standard, focusing instead on the precise facts of this case.

This appeal followed.

ARGUMENT

***Amici Curiae* Proposition of Law:**

> The Court of Appeals misapplied this Court's precedents with respect to the doctrine of pre-indictment delay, thereby undermining the significant public interests implicated in the testing of backlogged rape kits in cold cases.

I. THE IMPORTANCE OF RAPE KIT TESTING AND OHIO'S SEXUAL ASSAULT KIT TESTING INITIATIVE

A sexual assault kit, more commonly referred to as a "rape kit," is a set of DNA samples, along with other biological or trace evidence, collected from a rape victim.[6] When the victim reports a sexual assault, a doctor or nurse will conduct an exhaustive examination of the victim's body to collect DNA and other evidence obtainable by physical examination, including by use of photographs, trace evidence, and swabs taken from locations on the victim's body where an

[6] *See* National Institute of Justice, *Sexual Assault Kits*, http://www.nij.gov/unsubmitted-kits/Pages/default.aspx (accessed Jan. 12, 2016).

assailant's DNA might have been deposited.[7] The process of conducting a rape kit examination is so extensive that it takes several hours to complete.[8]

Rape kit testing is of critical importance to the investigation and prosecution of sexual violence.[9] Benefits of testing include not only identification of a perpetrator, but exoneration of any innocent suspects.[10] DNA evidence can corroborate the victim's account of the attack, corroborate the identification of a known suspect, identify an unknown suspect, and/or discredit a suspect's denial of engaging in a sex act with the victim.[11] Devoting resources to rape kit testing sends a message to would-be rapists that law enforcement agencies will spare no expense to hold perpetrators accountable for their crimes and communicates to victims that their cases matter, which can play a significant role in the healing process.[12] The effort makes communities safer by increasing the likelihood that rapists will be caught and confined before more victims

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[7] *See id.*

[8] *Id.*

[9] *See King*, 133 S. Ct. at 1966 ("[T]he utility of DNA identification in the criminal justice system is already undisputed.").

[10] *See* DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932, 74,933-34 (Dec. 10, 2008) (to be codified at 28 C.F.R. pt. 28) (DNA testing "help[s] to bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused, through the prompt and certain identification of the actual perpetrators."); *King*, 133 S. Ct. at 1966 ("[L]aw enforcement, the defense bar, and the courts have acknowledged DNA testing's unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices." (internal quotations omitted)); Hansen, 42 Colum. Hum. Rts. L. Rev. at 943-44 ("Rape kits help identify unknown assailants, confirm the presence of a known suspect's DNA, corroborate a victim's version of events in a contested assault, and exonerate innocent suspects.").

[11] *See* DNA-Sample Collection, *supra* note 10, 73 Fed. Reg. at 74,933-34; *King*, 133 S. Ct. at 1966; Hansen, 42 Colum. Hum. Rts. L. Rev. at 943-44.

[12] *Cf.* Prevost O'Connor, *Eliminating the Rape-Kit Backlog: Bringing Necessary Changes to the Criminal Justice System*, 72 UMKC L. Rev. 193, 199-200 (2003) ("The rape-kit backlog negatively affects women's perceptions of justice by implying that the system does not care enough about them to provide the resources necessary to apprehend the person who raped them.").

are brutalized.[13] For these reasons, rape kit testing is important in all cases, even cases in which the victim may already have identified a suspect.

Testing of rape kits is particularly important given recidivism rates among rapists and the tendency of repeat rapists to commit other violent crimes.[14] "Although there is considerable variation in estimates of recidivism rates among convicted rapists, studies that use long-term follow-up periods tend to show alarming rates of sexual reoffending among rapists," as high as 39%.[15] What is more, reported recidivism rates are generally considered to underestimate true recidivism because a high number of sexual assaults are never reported.[16] One study suggests that rapists whose crimes went unreported committed higher rates of recidivist activities, with 63.3% of these admitted rapists confessing to having committed multiple rapes[17]; Detroit's rape

[13] *See generally*, Lisak & Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17(1) Violence and Victims 73 (2002), *available at* http://www.davidlisak.com/wp-content/uploads/pdf/RepeatRapeinUndetectedRapists.pdf (study of self-reported rapists not charged or convicted for those acts, showing that a majority of the subjects had committed multiple rapes as well as other acts of interpersonal violence).

[14] *See* DNA-Sample Collection, 73 Fed. Reg. at 74,934 ("[C]ollecting DNA samples at the time of arrest or at another early stage in the criminal justice process can prevent and deter subsequent criminal conduct—a benefit that may be lost if law enforcement agencies wait until conviction to collect DNA.").

[15] Lisak & Miller, 17(1) Violence and Victims at 74 (citations omitted); *see also* Prevost O'Connor, 72 UMKC L. Rev. at 194 ("The average rapist commits between eight and sixteen sexual assaults before being caught . . .").

[16] Lisak & Miller, 17(1) Violence and Victims at 74; *see also* Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 Iowa L. Rev. 1197 (2014); RAINN, *Reporting Rates*, https://rainn.org/get-information/statistics/reporting-rates (accessed Dec. 31, 2015) (for every 100 rapes: 32 are reported to police; 7 lead to arrest; and only 2 rapists will spend a day in prison (citing Department of Justice, *National Crime Victimization Survey: 2008-2012*; FBI, *Uniform Crime Reports, Arrest Data: 2006-2010*; Department of Justice, *Felony Defendants in Large Urban Counties: 2009*)); Prevost O'Connor, 72 UMKC L. Rev. at 196 (noting that "84% of rapes go unreported").

[17] Lisak & Miller, 17(1) Violence and Victims at 78-79. Repeat rapists were also more likely to have committed other violent crimes. *Id.* at 79.

kit testing initiative, for its part, uncovered 477 serial rapists out of 2,616 suspects.[18] Data shows that sexual offenders will often go on to rape, burglarize, or kill other victims.[19] This evidence regarding repeat offenders aligns with the experience of Cuyahoga County officials. Cuyahoga County has projected that it will indict suspects in over 1,000 cases based on the testing of existing kits, approximately one-third of which will involve a serial offender.[20]

Because rapists can be habitual, violent offenders, testing DNA evidence even where the perpetrator is known can provide invaluable data that will allow law enforcement to identify, arrest, and prosecute offenders who commit additional crimes.[21] Testing the rape kit in every

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[18] Egan, *With most rape kits tested, focus turns to prosecutions*, Detroit Free Press (Sept. 2, 2015), available at http://www.freep.com/story/news/local/michigan/detroit/2015/09/02/rape-kit-testing/71561958/.

[19] Cuyahoga County Office of the Prosecutor, *Cuyahoga County Sexual Assault Kit Task Force: History of the Task Force*, http://prosecutor.cuyahogacounty.us/en-US/DNA-cold-case-task-force.aspx (accessed Dec. 30, 2015) (quoting Cuyahoga County Prosecutor Timothy McGinty: "By putting them in prison, these habitual offenders will not be able to rape, burglarize or kill others – which our data proves they otherwise would. This Task Force will have a surprisingly significant impact on the safety of the community and on public confidence as we remove hundreds of one-man crime waves from the streets.").

[20] End the Backlog, *Test Rape Kits. Stop Serial Rapists.*, http://endthebacklog.org/blog/test-rape-kits-stop-serial-rapists (accessed Dec. 31, 2015); *see also* Dissell, *DNA identifies suspects in more than 37 percent of 8,000 tested Ohio rape kits*, Cleveland Plain Dealer (Aug. 5, 2015), available at http://www.cleveland.com/rape-kits/index.ssf/2015/08/dna_identifies_suspects_in_mor.html ("More than a third of the suspects identified as part of the testing are believed to be serial rapists.").

[21] *See King*, 133 S. Ct. at 1973 ("In considering laws to require collecting DNA from arrestees, government agencies around the Nation found evidence of numerous cases in which felony arrestees would have been identified as violent through DNA identification matching them to previous crimes but who later committed additional crimes because such identification was not used to detain them."); Hansen, 42 Colum. Hum. Rts. L. Rev. at 957 ("DNA in an acquaintance rape case in which the identity of the assailant is uncontested may match rape kit evidence in another, seemingly unrelated case."). DNA testing of a known offender may also deter the offender from committing future crimes, thereby advancing the public interest in reducing recidivism rates. *See United States v. Kriesel*, 508 F.3d 941, 949 (9th Cir. 2007).

case thus presents "an unprecedented opportunity to take a large percentage of [Cuyahoga County's] most dangerous criminals off the street all at the same time."[22]

Unfortunately, many U.S. jurisdictions have large backlogs for rape kit testing – backlogs attributable to a variety of causes, including lack of sufficient resources.[23] Many older rape cases were not investigated with the vigor and thoroughness that they are today, as recent research has increased our understanding of victim responses and behaviors during and after a sexual assault. Many cases – including, perhaps, the present case – languished in part due to the failure of law enforcement to recognize the reasons for victim behaviors such as delayed reporting and reluctance to participate in the criminal justice process.[24] Whatever the cause, the dimension of the backlog problem is staggering. In some jurisdictions, these backlogs have totaled in the tens

[22] Cuyahoga County Office of the Prosecutor, *supra* note 19 (quoting Cuyahoga County Prosecutor Timothy McGinty).

[23] Hansen, 42 Colum. Hum. Rts. L. Rev. at 949 ("When law enforcement officers were asked why they elected not to submit rape kits for testing, almost a third of the respondents identified a lack of funding for DNA analysis as a barrier to processing DNA evidence from unsolved homicides and rapes. Approximately half pointed to the backlog as a barrier to the laboratory's ability to produce timely results."); *see also* End the Backlog, *Why the Backlog Exists*, http://www.endthebacklog.org/backlog/why-backlog-exists (accessed Dec. 30, 2015).

[24] Law enforcement is not immune from the effect of widespread myths about how "real" victims of rape respond during an attack or behave in its aftermath. The harmful effect of these myths among the general population has been studied and recognized by courts throughout the country as a basis for permitting expert testimony to explain common victim behaviors so that jurors can consider the victim's behavior in its proper context as a response to traumatic violation of their bodily integrity and safety. *See, e.g.*, *State v. Obeta*, 796 N.W.2d 282 (Minn. 2011); *Bostic v. State*, 722 P.2d 1089 (Alaska Ct. App. 1989); *State v. Moran*, 728 P.2d 248 (Ariz. 1986); *People v. Leon*, 263 Cal. Rptr. 77 (Cal. Ct. App. 1989); *State v. Spigarolo*, 556 A.2d 112 (Conn. 1989); *Wheat v. State*, 527 A.2d 269 (Del. 1987); *Allison v. State*, 353 S.E.2d 805 (Ga. 1987); *People v. Server*, 499 N.E.2d 1019 (Ill. App. Cir. 1986); *State v. Tonn*, 441 N.W.2d 403 (Iowa Ct. App. 1989); *State v. Black*, 537 A.2d 1154 (Me. 1988); People v. Beckley, 456 N.W.2d 391 (Mich. 1990); *State v. Garden*, 404 N.W.2d 912 (Minn. Ct. App. 1987); *Smith v. State*, 688 P.2d 326 (Nev. 1984); *State v. Bailey*, 365 S.E.2d 651 (N.C. Ct. App. 1988); *People v. Benjamin R.*, 481 N.Y.S.2d 827 (N.Y. 1984); *State v. Middleton*, 657 P.2d 1215 (Or. 1983); *Duckett v. State*, 797 S.W.2d 906 (Tex. Crim. App. 1990); *State v. Hicks*, 535 A.2d 776 (Vt. 1987); *State v. Madison*, 770 P.2d 662 (Wash. Ct. App. 1989); *State v. Jensen*, 415 N.W.2d 519 (Wis. Ct. App. 1987); *Griego v. State*, 761 P.2d 973 (Wyo. 1988).

of thousands of rape kits.[25] Recognizing the many benefits of testing all outstanding kits, many jurisdictions have undertaken initiatives to clear the backlog of untested kits and to ensure that all new kits are processed in a timely fashion.[26]

Ohio is one such jurisdiction. Ohio has engaged in a statewide Sexual Assault Kit Testing Initiative (the "Initiative") aimed at eliminating the backlog of untested rape kits.[27] Cuyahoga County law enforcement joined that statewide effort beginning in 2011. The goal of the Initiative is to submit all backlogged rape kits for testing by BCI. By November last year, 4,845 untested kits had been submitted to BCI by Cuyahoga County agencies, 4,374 of which were submitted by the Cleveland Police Department.[28] As of December last year, 4,296 kits had been tested, resulting in 2,583 CODIS matches.[29]

In conjunction with the Initiative, the Cuyahoga County Prosecutor's Office formed the DNA Cold Case Task Force, dedicating significant resources to the investigation of cases for

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[25] Prevost O'Connor, 72 UMKC L. Rev. at 194 (noting backlogs of 20,000 untested rape kits in California, New York, and North Carolina).

[26] End the Backlog, *Federal Responses*, http://www.endthebacklog.org/ending-backlog-government-responses/federal-responses (accessed Jan. 4, 2016); End the Backlog; *State Responses*, http://www.endthebacklog.org/ending-backlog-government-responses/state-responses (accessed Jan. 4, 2016); End the Backlog, *Local Responses*, http://www.endthebacklog.org/ending-backlog-government-responses/local-responses (accessed Jan. 4, 2016).

[27] *See* Ohio Attorney General, *More Than 9,000 Sexual Assault Kits Tested as Part of Attorney General DeWine's Sexual Assault Kit Testing Initiative*, http://www.ohioattorneygeneral.gov/Media/News-Releases/November-2015/More-than-9-000-Sexual-Assault-Kits-Tested-as-part (accessed Dec. 30, 2015) (providing background on the Initiative).

[28] End the Backlog, *Fact Sheet: Spotlight on Cities Addressing the Rape Kit Backlog*, http://www.endthebacklog.org/sites/default/files/FactSheet-SpotlightonCitiesAddressingtheRapeKitBacklog_201509%03%08%08%08%08%08.pdf (accessed Dec. 30, 2015).

[29] End the Backlog, *The Backlog: Cleveland*, http://www.endthebacklog.org/Cleveland (accessed Dec. 30, 2015).

which new evidence was developed as a result of the testing of previously backlogged rape kits.[30] To date, the county-wide testing initiative has resulted in the indictment of 430 defendants, including 293 suspected serial offenders.[31] Cuyahoga County's efforts have received significant support at both the state and federal levels. On November 21, 2014, Ohio Attorney General Mike DeWine announced that $450,000 in funding would be provided to facilitate and expedite Cuyahoga County's testing of all backlogged kits.[32] In September 2015, the Bureau of Justice Assistance at the United States Department of Justice awarded $1,993,741 in funding to further assist the Cuyahoga County Prosecutor's Office with the testing of backlogged rape kits, the investigation and prosecution of these cases, and to provide support and assistance to survivors.[33]

Ohio's policy in favor of fully investigating and, as appropriate, prosecuting rapes for which there is a backlogged rape kit is reflected in a recent amendment to Ohio's statute of

[30] Cuyahoga County Office of the Prosecutor, *supra* note 19.

[31] End the Backlog, *The Backlog: Cleveland*, http://www.endthebacklog.org/Cleveland (accessed Dec. 30, 2015).

[32] Ohio Attorney General, *$450,000 grant announced for Cuyahoga County SAK Task Force*, http://www.ohioattorneygeneral.gov/Media/Newsletters/Criminal-Justice-Update/February-2015/$450-000-grant-announced-for-Cuyahoga-County-SAK-T (accessed Dec. 30, 2015); Cuyahoga County Office of the Prosecutor, *Attorney General DeWine Announces $450,000 Grant for Cuyahoga County Sexual Assault Kit Task Force*, http://prosecutor.cuyahogacounty.us/en-US/2014-11-12-PR-attorney-general-announces-grant.aspx (accessed Dec. 30, 2015); Associated Press, *Mike DeWine gets help for rape DNA backlog*, The Morning Journal (Nov. 21, 2014), available at http://www.morningjournal.com/article/mj/20141121/NEWS/141129909.

[33] United States Attorney's Office, Northern District of Ohio, *Justice Department awards Cuyahoga County Prosecutor's Office nearly $2 million to bring rapists to justice*, http://www.justice.gov/usao-ndoh/pr/justice-department-awards-cuyahoga-county-prosecutors-office-nearly-2-million-bring (accessed Dec. 30, 2015).

limitations for sexual battery and rape, which was increased from 20 years to 25 years.[34] As Representative Robert Sprague, a co-sponsor of the legislation, explained, the extension of the statute of limitations "supplement[ed] the great work that Attorney General DeWine has done to process [Ohio's] backlogged rape kits."[35] The extension of the statute of limitations thus confirms the State's substantial interest in prosecuting sexual offenders linked to a rape through a rape kit, even in cold cases.

II. THE COURT OF APPEALS' DECISION OBSCURES THE PROPER STANDARDS TO EVALUATE PRE-INDICTMENT DELAY

The Court of Appeals held that unlawful pre-indictment delay occurs when a rape victim identifies a suspect, the State "merely failed to take action for a substantial period," and a defendant can point to some conceivable theory under which he was prejudiced by evidence lost to the passage of time, even if he cannot prove that the lost evidence would have been exculpatory – indeed, even if the content of the evidence is entirely "speculative." *See Jones*, 2015-Ohio-2853, 35 N.E.3d 606, at ¶¶ 44, 46.

That holding, which appeared to be driven by the Court of Appeals' disapproval of what it perceived to be inexcusable inaction on the part of law enforcement in this case, does not faithfully apply this Court's precedents concerning pre-indictment delay. Moreover, the Court of Appeals' decision has the potential to do great damage to Ohio's efforts to prosecute cases in which additional evidence is obtained as a result of the clearing of the rape kit backlog.

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[34] *See* Ohio Rev. Code Ann. § 2901.13(A)(4) (amended July 16, 2015). Other states, including Arkansas, California, Florida, Illinois, Nevada, and New Jersey, have extended or eliminated their statutes of limitations for rape. Prevost O'Connor, 72 UMKC L. Rev. at 202-03.

[35] Ohio House of Representatives, *Rep. Sprague Votes to Extend Statute of Limitations for Prosecuting Rape and Sexual Battery*, http://www.ohiohouse.gov/robert-sprague/press/rep-sprague-votes-to-extend-statute-of-limitations-for-prosecuting-rape-and-sexual-battery (accessed Jan. 6, 2016).

This Court has established a two-part "exculpatory evidence" test for evaluating a claim of pre-indictment delay: (1) the defendant must first present evidence showing substantial prejudice caused by the delay; and (2) if the defendant satisfies that burden, *then* the burden shifts to the State to establish a justifiable reason for the delay. *E.g.*, *State v. Adams*, 2015-Ohio-3954, 2015 WL 5728458, ¶¶ 98-99; *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 51. Delay, no matter how unjustified, does not require dismissal of a charge unless a defendant first can demonstrate that he actually suffered some prejudice. For example, in *Adams*, a defendant charged with the rape and murder of a college sophomore claimed that the 22-year delay before his indictment was unconstitutional where: (1) a witness had died prior to the indictment; (2) some of the records in the case, including records of grand jury proceedings, had been lost; (3) witnesses' memories had faded; and (4) the defendant claimed he had forgotten the names of potential alibi witnesses. *Adams* at ¶¶ 102-106. This Court never even considered the reasons for the delay because, *inter alia*, Adams failed to prove that the now-deceased witness would in fact have offered exculpatory evidence, and the defendant had failed to prove that any exculpatory evidence would be gained from other lost documents. *Id.* Based upon the defendant's failure to establish actual prejudice, this Court found that the reasons for the delay were irrelevant. *Id.* at ¶ 107.

In the present case, the Court of Appeals ignored this Court's precedent and instead evaluated Appellee's claim "in terms of basic concepts of due process and fundamental justice," *see Jones*, 2015-Ohio-2853, 35 N.E.3d 606, at ¶ 47, a standard that effectively and intentionally writes the first part of the "exculpatory evidence" standard – placing the burden on the defendant to prove "substantial prejudice" – out of the law. As applied by the Court of Appeals, a trial court can skip directly to the second part of the test, putting the State to the burden of

"establishing a justifiable reason for the delay." *See id.* at ¶ 48. If there is no justifiable reason, then the delay – even though still within the statute of limitations – will effectively be presumed to have prejudiced defendant and to require dismissal. Indeed, the Court of Appeals rhetorically asked: "[W]hose problem is it when we do not know what the lost or missing evidence would have shown?" *Id.* at ¶ 44. Apparently the answer in cases of unjustified delay is, "always the prosecuting authorities."

As Judge Gallagher correctly observed in dissent, the "'due process and fundamental fairness' standard . . . allows defendants to demonstrate prejudice with speculative, self-serving claims of lost evidence" and "will result in inconsistent and unfair results when evaluating pre-indictment delay claims." *Id.* at ¶ 53. This is contrary to the jurisprudence of both the Eighth District and other Ohio appellate districts, which have all rejected self-serving attempts by defendants to rely on speculative claims of prejudice to avoid prosecution or conviction. *See* Appellant-State of Ohio's Merit Brief at 17-18.

There are several other flaws in the Court of Appeals' reasoning. First, the exculpatory evidence standard already provides sufficient protection from undue prejudice to the defendant, particularly when the State has no valid basis for the delay. *See Jones*, 2015-Ohio-2853, 35 N.E.3d 606, at ¶¶ 36-40. Under the existing exculpatory evidence test, once a defendant has established substantial prejudice, the burden shifts to the State to establish a reasonable justification for the delay. *E.g.*, *Adams*, 2015-Ohio-3954, 2015 WL 5728458, at ¶¶ 98-99. Thus, where the defendant would actually be prejudiced, the case will not survive if the State's asserted reasons for the delay are weak or non-existent. *See State v. Whiting*, 84 Ohio St.3d 215, 218, 702 N.E.2d 1199 (1998) ("[The trial court] found . . . that Whiting had demonstrated actual

substantial prejudice. With that finding and with no evidence from the state explaining the delay, the defendant was entitled to a dismissal.").

Second, the Court of Appeals suggested that the stage of the proceedings should influence which standard to apply when evaluating a pre-indictment delay claim. *Jones* at ¶¶ 37-38, 41-42. According to the Court of Appeals, "[t]he stage of the proceeding is relevant because evaluation of the likely effect of any missing evidence is much easier in a posttrial/postconviction review, than in pretrial/preconviction cases where we do not have the benefit of all the evidence that the state will present against the defendant." *Id.* at ¶ 38. No doubt that is true, but that hardly means that it should be easier to prevail on pre-indictment delay claims raised pre-trial rather than post-trial. The Court of Appeals provided no reason why the timing question should govern the outcome, and no good reason exists. Applying a lax standard to pre-trial claims of pre-indictment delay will simply encourage more defendants to bring such claims earlier, before the strength of the case against the defendant is fully developed at trial.

Finally, it cannot escape attention that the Court of Appeals' holding is extraordinarily fact-bound and result-driven on its face. The opinion concludes:

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

Id. at ¶ 47. In this way, the Court of Appeals' decision provides little guidance to trial courts as to how to evaluate claims of pre-indictment delay going forward; it instead introduces only confusion.

If the standard adopted by the Court of Appeals here is applied widely in all cases resulting from the testing of a backlogged rape kit, many identified rape suspects – including those who are serial rapists – will successfully evade prosecution based upon bare self-serving allegations of prejudice, thwarting the public policy behind Ohio's long limitations period and the Initiative. *Jones*, 2015-Ohio-2853, 35 N.E.3d 606, at ¶ 52 (Gallagher, J., dissenting) ("Reading 'actual prejudice' into these cases based on speculative claims of what might have been defeats the statute of limitations."). For, under the Court of Appeals' logic, defendants in any of these cases can argue that the very existence of the backlog was due to the State's "fail[ing] to take action for a substantial period," at which point the existence of actual prejudice becomes effectively irrelevant. *See id.* at ¶ 46.

III. THE COURT OF APPEALS' DECISION THREATENS THE PROSECUTION OF ALL COLD CASE RAPES AFFECTED BY THE RAPE KIT BACKLOG, DEFEATING STRONG PUBLIC POLICY INTERESTS

In many cases involving a rape kit, unlike the situation here, no positive identification of the perpetrator was available at the time the rape was committed. In as many as one-third of all sexual assaults, the victim will not know the perpetrator's identity.[36] While rape kit testing is important in all cases, it is often the *only* way to identify the perpetrator where the assailant is unknown to the victim. The Court of Appeals was obviously troubled by the limited investigative efforts at the time of the original report in this case. *Amici* do not suggest that the investigators in this case did everything reasonably possible to bring it to an appropriate resolution in a timely fashion. However, the legitimate public interest in resolving cold rape cases far outweighs the interest in sanctioning the State for the errors of law enforcement – errors

[36] *See* Prevost O'Connor, 72 UMKC L. Rev. at 194.

that Ohio is working mightily to correct – in cases where the defendant cannot articulate any real prejudice resulting from the delay.

Only recently have resources become available in Ohio to examine the large backlog of untested kits. As a result, many rape kits are finally being tested for crimes that were committed many years ago. New evidence resulting from the testing of backlogged rape kits – not only the DNA results themselves, but additional evidence and witnesses discovered as a result of a renewed investigation – may now provide prosecutors with probable cause for indictment that did not exist at the time of the rape in many cases or with additional evidence sufficient to prove the case beyond a reasonable doubt. Delay in testing the rape kits should not permit defendants, unable to demonstrate actual prejudice from the delay, to escape justice.

Even in cases where the victim can identify the rapist, unsubstantiated claims of prejudice should not be permitted to defeat the 25-year statute of limitations. The reluctance of victims to participate in the criminal justice system is most often not a matter of "non-cooperation," but rather a product of fear (that their privacy will be invaded, that they will not be believed, or that they will be embarrassed or humiliated on the stand), unwarranted shame or self-blame, a desire to block out what happened to them, or other valid and understandable concerns.[37] The Court of Appeals' decision, which held S.W.'s apparent initial reluctance to participate in the criminal justice process in Appellee's favor with no evidence of the reasons for her reluctance, fails to account for this widely-recognized social science research, and unfairly precludes prosecution in many cases in which doing so is unjustified.

[37] *See* Cohn, *Correlates of Reasons for Not Reporting Rape to Police: Results From a National Telephone Household Probability Sample of Women with Forcible or Drug or Alcohol Facilitated/ Incapacitated Rape*, 28(3) J. Interpers. Violence 455-73 (2013); Richardson, *Violence and Help-Seeking Among LGBQ and Heterosexual College Students*, 6(1) Partner Abuse 29-46 (2015); Patterson, *The Linkage Between Secondary Victimization by Law Enforcement and Rape Case Outcomes*, 26(2) J. Interpers. Violence 328-47 (2010).

CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeals decision and reinstate Appellee's indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing, *Brief of* Amici Curiae *Joyful Heart Foundation, Aequitas: The Prosecutors' Resource on Violence Against Women, Rape Abuse Incest National Network, Ohio Alliance to End Sexual Violence, and National Alliance to End Sexual Violence on Behalf of Appellant State of Ohio*, was served by First Class United States Mail, postage prepaid, upon the following this 19th day of January, 2016:

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