COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2019 CR 00338**
vs.	:	**Judge Jerry R. McBride**
ROBERT ALLEN CLOWERS	:	**DECISION**
Defendant	:	

Darren Miller and Nick Horton, assistant prosecuting attorneys for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Lara A. Baron, 1 East Main Street, Amelia, Ohio 45102, and Matthew E. Wiseman, 421 South Locust Street, Suite 203, Oxford, Ohio 45056, attorneys for the defendant Robert Allen Clowers.

This cause is before the court for consideration of a motion to dismiss filed by the defendant Robert Allen Clowers on June 17, 2019. Following oral argument on the motion on August 2, 2019, the court took the motion under advisement.

Upon consideration of the motion, the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTUAL AND PROCEDURAL BACKGROUND

The defendant Robert Allen Clowers was indicted in Case No. 2018 CR 00054 on February 8, 2018 on the following counts: (1) kidnapping in violation of R.C. 2905.01(A)(3), a felony of the first degree, (2) felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree, and (3) failure to stop after an accident involving property of others in violation of R.C. 4549.03(A), a misdemeanor of the first degree. The state subsequently dismissed count 3 at trial.

On February 22, 2018, the defendant was indicted on two counts of conspiracy to commit aggravated murder in Case No. 2018 CR 00156. Count 1 was charged under Sections 2923.01(A)(1)/2903.01(A) of the Revised Code, a felony of the first degree. Count 2 was charged under Sections 2923.01(A)(1)/2903.01(C), also a felony of the first degree. Both counts were based on events that allegedly occurred from January 7, 2018 to January 22, 2018 and which involved the same victim (the defendant's pregnant girlfriend) as in Case No. 2018 CR 000054. The defendant was accused of conspiring to murder his girlfriend and his unborn child by hiring another inmate to kill her.

The defendant was served with a copy of his indictment in Case No. 2018 CR 00156 on February 22nd. The defendant was arraigned the following day, February 23rd, and at that time his counsel filed a motion to withdraw due to a conflict. Following a hearing on February 27th on counsel's motion to withdraw, the court granted the motion that same day and indicated in the entry that attorney Cathy Adams had been retained to represent the defendant.

At a pretrial hearing on March 7th, the defense requested a continuance, which the court granted the same day. The hearing was continued until March 22nd, and the continuance noted that the time within which the defendant must be brought to trial was extended under R.C. 2945.72.

On March 22nd, the court continued the case because the defendant's counsel failed to appear at a hearing. Thus, the case was continued to April 5th, and the continuance noted that the time within which the defendant must be brought to trial was again extended under R.C. 2945.72.

The court also issued a case management order on March 22nd, which indicated that if the defendant made a written discovery demand, the prosecution shall provide discovery no later than 14 days of the date of the demand and in any event no later than the second pretrial conference or plea or trial setting. The order continued that if the state requested reciprocal discovery, the defendant must provide discovery within 21 days of the date of the demand and in any event no later than the second pretrial conference or plea or trial setting.

On April 5th, the defense filed a demand for discovery. On a hearing on the same date, the defense requested a continuance until April 18th, which the court granted that day. The continuance notes that the time within which the defendant must be brought to trial was extended under R.C. 2945.72.

On April 16th, the state submitted its discovery response pursuant to the defendant's demand for discovery and requested reciprocal discovery. At an April 19th hearing, the defense again requested a continuance, this time until April 25th, which the

court granted that day. The continuance notes that the time within which the defendant must be brought to trial was extended under R.C. 2945.72.

On May 23rd, the defense requested another continuance until June 25th, at which time the trial was scheduled to begin. The continuance was granted that day, and the entry notes that the time within which the defendant must be brought to trial was extended under R.C. 2945.72. On that same day, the court consolidated for purposes of trial Case Nos. 2018 CR 000054 and 2018 CR 000156.

On the date set for trial, June 25th, defense counsel failed to appear due to a medical emergency. As such, the court found it necessary to continue the trial, and explained in an entry dated July 2nd that the case was continued from June 25th to the date the continued trial would be rescheduled to begin. The court noted that the time within which the defendant must be brought to trial was extended under R.C. 2945.72(C) and (H).

On July 9th, the defense requested a continuance until July 12th, which the court granted that day. The continuance notes that the time within which the defendant must be brought to trial was extended under R.C. 2945.72. During the July 9th hearing, defense counsel indicated that, although she had not notified the court that she could not appear for the trial, she had notified the defendant. The defendant was in agreement that defense counsel needed to withdraw from the case.

On July 12th, the defense requested a continuance until July 16th, which the court granted that day. The entry of continuance notes that the time within which the defendant must be brought to trial was extended under R.C. 2945.72. On July 13th, the court appointed Brian Goldberg as counsel for the defendant.

On July 16th, new defense counsel requested a continuance until October 16, 2018, at which time the trial would begin. The continuance notes that the time within which the defendant must be brought to trial was extended under R.C. 2945.72.

On August 22nd, the defense responded to the state's discovery demand. The response listed one witness, who was an officer from the jail.

A bench trial took place from October 16, 2018 to October 18th, after which the court took the case under advisement. At the close of the state's case, the defense moved for dismissal on the basis that the indictment in Case No. 2018 CR 000156 did not allege substantial, overt acts that were made in furtherance of the conspiracies. The defense raised this argument again in closing statements.

The court rendered a written decision on November 9th. The court found the defendant guilty in Case No. 2018 CR 000054 of kidnapping as set forth in Ct. 1 in violation of R.C. 2905.01(A)(3), a felony of the first degree, as well as felonious assault as set forth in Count 2 in violation of R.C. 2903.11(A)(2), a felony of the second degree.

The court dismissed Counts 1 and 2 of Case No. 2018 CR 000156, in which the defendant was charged with conspiracies to commit aggravated murder in violation of R.C. 2923.01(A)(1) and R.C. 2903.01(A) and (C), felonies of the first degree. The court dismissed these two counts on the basis that the state failed to allege in the indictment that the defendant engaged in a substantial, overt act in furtherance of a conspiracy.

During the trial, and related to Case No. 2018 CR 000156, the state presented the witness testimony of an informant Brent Bergman, who was confined and housed in the same jail block as the defendant. In support of the two charges of conspiracy to commit

aggravated murder in Case No. 2018 CR 000156, Bergman testified that the defendant asked him to kidnap and kill the pregnant victim.

The state failed to disclose to the defense prior to trial that Bergman was charged with unauthorized use of a credit card and obstructing official business, but that it dismissed these charges in August 2018 without prejudice, conditioned upon Bergman cooperating with the state in Case No. 2018 CR 000156. At trial, Bergman was asked by the defense why he wished to cooperate in the case. Bergman testified that it was because his pregnant cousin had recently been murdered. He did not mention the charges that were dismissed without prejudice, and the state did not correct the record at that time and inform the court that the charges had been dismissed in return for the defendant's cooperation in Case No. 2018 CR 00156.

The state indicted the defendant again in Case No. 2019 CR 000338 on two counts of conspiracy to commit aggravated murder on April 4, 2019. Both counts were charged under R.C. 2923.01(A)(1)/R.C. 2903.01(A), felonies of the first degree. These charges are based on the same underlying facts and circumstances that were the basis of the charges in R.C. 2018 CR 000156 that had been dismissed by the court. At the time of the indictment, the defendant was already an inmate at the Southeastern Correctional Institution, having been sentenced to a ten-year stated prison term in Case No. 2018 CR 000054.

On April 23rd, counsel for the defendant moved to withdraw due to a conflict. On May 8th, the court appointed Lara Baron as substitute counsel for the defendant, and on May 9th, the court appointed Matthew Wiseman as co-counsel.

The defense filed a motion to dismiss on June 17th. The court granted a continuance based upon the motion, and the continuance notes "time extended by motion" under R.C. 2945.72 until August 2nd, the date of oral arguments, and "thereafter until a decision is rendered on the motion to dismiss."

The state filed a written response to the motion on July 8th, and the defense filed a reply in support of the motion on July 26th. The court heard oral arguments on the motion on August 2nd, and at the conclusion of the oral arguments, the court took the defendant's motion under advisement.

STANDARD OF REVIEW

Courts are authorized to consider a defendant's motion to dismiss pursuant to Crim.R. 12(C), which allows for pretrial motions.[1] More specifically, under Crim.R. 12(C), before trial "any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue."[2] Further, Crim.R. 12(F) provides that "[t]he court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means."[3] Under Crim.R. 12(F), the court is charged with stating "its essential findings on the record" when a motion involves "factual issues" that must be determined.[4]

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[1] *State v. Gaines*, 193 Ohio App.3d 260, 2011-Ohio-1475, 951 N.E.2d 814, ¶¶ 15-16 (12th Dist.).
[2] Crim.R. 12(C).
[3] Crim.R. 12(F).
[4] Crim.R. 12(F).

"Crim.R. 12(C) 'makes clear that a pretrial motion to dismiss can only raise matters that are capable of determination without a trial on the general issue.'"[5] Accordingly, a motion to dismiss under Crim.R. 12(C) "cannot reach the merits or substance of the allegations."[6] Moreover, when deciding a motion to dismiss, "a trial court is precluded from considering whether the prosecution could prove the elements of the charged offense."[7] Finally, "Crim.R. 12 permits a court to consider evidence beyond the face of the indictment when ruling on a pretrial motion to dismiss an indictment *if the matter is capable of determination without trial of the general issue.*"[8]

LEGAL ANALYSIS

I. DOUBLE JEOPARDY

The defendant argues that his subsequent indictment in Case No. 2019 CR 00338 runs afoul of the Double Jeopardy Clause. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb," and is applicable to the states through the Fourteenth Amendment.[9] Likewise, Section 10, Article I of the

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[5] *Gaines*, 2011-Ohio-1475 at ¶ 16, quoting *State v. Riley*, 12th Dist. Butler No. CA2001-O4-095, 2002 WL 4484, *2.
[6] *Gaines*, 2011-Ohio-1475 at ¶ 16, citing *State v. Peters*, 8th Dist. Cuyahoga No. 92791, 2009-Ohio-5836, ¶ 7.
[7] *Gaines*, 2011-Ohio-1475 at ¶ 16, citing *State v. Palmer*, 1st Dist. Franklin Nos. 09AP-956, 09AP-957, 2010-Ohio-2421.
[8] (Emphasis original.) *Gaines*, 2011-Ohio-1475 at ¶ 17, quoting *Sate v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 3.
[9] *State v. Gustafson*, 76 Ohio St.3d 425, 432, 668 N.E.2d 435 (1996), citing *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Ohio Constitution provides that "[n]o person shall be twice put in jeopardy for the same offense."[10] Ohio courts have historically treated the protections afforded by the Double Jeopardy Clauses of the Ohio Constitution and the United States Constitution as coextensive.[11]

The Double Jeopardy Clause of each Constitution prohibits "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense."[12] However, significantly to the present case: "Where jeopardy has attached during the course of a criminal proceeding, a dismissal of the case may be treated in the same manner as a declaration of a mistrial and will not bar a subsequent trial when: (1) the dismissal is based on a defense motion, and (2) the court's decision in granting such motion is unrelated to a finding of factual guilt or innocence."[13]

In examining the case at hand, double jeopardy does not apply. The court's dismissal of Counts 1 and 2 in Case No. 2018 CR 000156 does not bar a subsequent trial because the dismissal was based upon the defense's motion and the court's decision had no relation whatsoever to the defendant's factual guilt or innocence.

II. PREINDICTMENT DELAY

The defendant maintains that his due process rights were violated by the state's five-month delay in indicting him in Case No. 2019 CR 000338. The Sixth Amendment

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[10] Ohio Constitution, Article I, Section 10.
[11] *Gustafson*, 76 Ohio St.3d at 432.
[12] Id., citing *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989).
[13] *State v. Broughton*, 62 Ohio St.3d 253, 581 N.E.2d 541 (1991), paragraph three of the syllabus.

to the United States Constitution guarantees the accused in a criminal prosecution the right to a speedy trial, but provides no protection to those who have not yet been accused.[14] In other words, the Sixth Amendment does not "require the Government to discover, investigate, and accuse any person within any particular period of time."[15] Instead, statutes of limitations provide the ultimate time limit within which the government must prosecute a defendant, supplying a definite point "beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."[16]

However, "when unjustifiable preindictment delay causes actual prejudice to a defendant's right to a fair trial despite the state's initiation of prosecution within the statutorily defined limitations period, the Due Process Clause affords the defendant additional protection."[17] Preindictment delay violates the accused's due process "only when it is unjustifiable and causes actual prejudice."[18] Therefore, "the delay between the commission of an offense and an indictment, can, under certain circumstances, constitute a violation of due process of law guaranteed by the federal and state constitutions."[19]

Courts employ a burden-shifting framework to claims of due process violations predicated upon preindictment delay.[20] "Once a defendant presents evidence of actual prejudice, the burden shifts to the state to produce evidence of a justifiable reason for the

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[14] *State v. Jones*, 148 Ohio St.3d 167, 2016-Ohio-5105, 69 N.E.3d 688, ¶ 11.
[15] *Jones*, 2016-Ohio-5105 at ¶ 11, quoting *United States v. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).
[16] *Jones*, 2016-Ohio-5105 at ¶ 11, quoting *Marion*, 404 U.S. at 322. *See State v. Fox*, 12th Dist. Fayette No. CA2008-03-009, 2009-Ohio-556, ¶ 39, quoting *State v. Copeland*, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, ¶ 10 ("The statute of limitations provides the 'primary guarantee against bringing overly stale criminal charges.'").
[17] *Jones*, 2016-Ohio-5105 at ¶ 11, quoting *Marion*, 404 U.S. at 322.
[18] *Jones*, 2016-Ohio-5105 at ¶ 12, quoting *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984).
[19] *Fox*, 2009-Ohio-556 at ¶ 36.
[20] *Jones*, 2016-Ohio-5105 at ¶ 13.

delay."[21] As such, unjustifiable delay does not violate due process unless it results in actual prejudice.[22]

"A determination of actual prejudice involves 'a delicate judgment' and a case-by-case consideration of the particular circumstances."[23] As such, a "court must 'consider the evidence as it exists when the indictment is filed and the prejudice the defendant will suffer at trial due to the delay.'"[24] Courts will "scrutinize * * * the claim of prejudice vis-à-vis the particular evidence that was lost or unavailable as a result of the delay and, in particular, consider * * * the relevance of the lost evidence and its purported effect on the defense."[25] "Actual prejudice exists when missing evidence or unavailable testimony, identified by the defendant and relevant to the defense, would minimize or eliminate the impact of the state's evidence and bolster the defense."[26]

Significantly, "speculative prejudice does not satisfy the defendant's burden."[27] The prejudice must be "substantial."[28] In fact, the mere "*possibility* that memories will fade, witnesses will become inaccessible, or evidence will be lost is not sufficient to establish actual prejudice."[29] This is so because there "are 'the real possibilit[ies] of prejudice inherent in any extended delay,' and statutes of limitations sufficiently protect

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[21] Id., citing *State v. Whiting*, 84 Ohio St.3d 215, 217, 702 N.E.2d 1199 (1998).
[22] *Jones*, 2016-Ohio-5105 at ¶ 16, citing *State v. Jones*, 8th Dist. No. 101258, 2015-Ohio-2853, 35 N.E.3d 606, ¶ 51 (S. Gallagher, J., dissenting).
[23] (Internal quotations omitted.) *Jones*, 2016-Ohio-5105 at ¶ 20, quoting *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 52.
[24] *Jones*, 2016-Ohio-5105 at ¶ 20, quoting *Walls*, 2002-Ohio-5059 at ¶ 52.
[25] Jones, 2016-Ohio-5105 at ¶ 23.
[26] Id. at ¶ 28, citing *Luck*, 15 Ohio St.3d at 157-158.
[27] *Jones*, 2016-Ohio-5105 at ¶ 20, quoting *Walls*, 2002-Ohio-5059 at ¶ 56.
[28] *Fox*, 2009-Ohio-556 at ¶ 36, quoting *Walls*, 2002-Ohio-5059 at ¶ 51.
[29] (Emphasis original.) *Jones*, 2016-Ohio-5105 at ¶ 20, quoting *Adams*, 2015-Ohio-3954 at ¶ 105. *See Fox*, 2009-Ohio-556 at ¶ 40, citing *Marion*, 404 U.S. at 325-326 ("The possibility that memories will dim, witnesses will become inaccessible, or evidence will be lost is not enough in itself to establish actual prejudice to justify the dismissal of an indictment.").

against them."[30] Even so, "[t]hat does not mean, however, that demonstrably faded memories and actually unavailable witnesses or lost evidence cannot satisfy the actual-prejudice requirement."[31] "[T]he proven unavailability of specific evidence or testimony that would attack the credibility or weight of the state's evidence against a defendant and thereby aid in establishing a defense *may* satisfy the due-process requirement of actual prejudice."[32] But this is not always the case; "[t]o be sure, the death of a potential witness will not always constitute actual prejudice."[33] Indeed, prejudice will not "be presumed from a lengthy delay."[34] Accordingly, it is incumbent upon the defendant to "show the exculpatory value of the alleged missing evidence."[35]

As mentioned, once the defendant demonstrates actual prejudice, then the state bears the burden of showing that the delay was justifiable.[36] "An unjustifiable delay may occur where it is undertaken intentionally to gain some tactical advantage over the defendant, or when the state is negligent in failing to actively investigate the case."[37] The "key factor in determining whether a delay caused by negligence is justifiable is the length of the delay."[38] The Twelfth District Court of Appeals has characterized a delay of one year as a "short period of delay."[39]

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[30] *Jones*, 2016-Ohio-5105 at ¶ 20, quoting *Marion*, 404 U.S. at 325-326.
[31] *Jones*, 2016-Ohio-5105 at ¶ 20.
[32] (Emphasis added.) *Jones*, 2016-Ohio-5105 at ¶ 25.
[33] Id. at ¶ 26.
[34] *Fox*, 2009-Ohio-556 at ¶ 37, citing *State v. Collins*, 118 Ohio App.3d 73, 77, 691 N.E.2d 1109 (2d Dist. 1997).
[35] *Fox*, 2009-Ohio-556 at ¶ 37, quoting *State v. Gulley*, 12th Dist. Butler No. CA99-02-004, *3 (Dec. 20, 1999).
[36] *Fox*, 2009-Ohio-556 at ¶ 37.
[37] Id. at ¶ 37, citing *Collins*, 118 Ohio App.3d at 77.
[38] *State v. Hubbard*, 12th Dist. Butler No. CA92-03-058, 1992 WL 333642, *2 (Nov. 16, 1992), citing *Luck*, 15 Ohio St.3d at 158.
[39] *Hubbard*, 1992 WL 333642 at *3.

In the present case, any preindictment delay that occurred has not actually prejudiced the defendant. The defendant maintains that the five-month delay between the court's dismissal of Case No. 2018 CR 000156 and his subsequent indictment in Case No. 2019 CR 000338 has caused him to lose potential witnesses. The loss is occasioned, per the defendant, by his move from the Clermont County Jail to the Southeastern Correctional Institution and the passage of time. Because the alleged events constituting conspiracy in Case No. 2018 CR 000156 occurred at the jail, any witnesses to those events are allegedly no longer available to him because they are not at the jail any longer.

This argument, however, amounts to speculative prejudice, at best. The defendant has not identified specific witnesses who could have testified on his behalf, nor has he illuminated what exculpatory testimony such witnesses may have provided.[40] As explained, the mere "*possibility* that memories will fade, witnesses will become inaccessible, or evidence will be lost is not sufficient to establish actual prejudice."[41] Here, there is only a mere possibility that the defendant has been prejudiced, and as such his due process rights have not been violated.

Moreover, even if the defendant did satisfy his burden of demonstrating actual prejudice, there has been no unjustifiable delay. As stated, the Twelfth District Court of Appeals has characterized a delay of one year as a "short period of delay."[42] And in the instant case, the delay was only five months. As such, the defendant has not suffered preindictment delay such that his due process rights have been violated.

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[40] *See State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 103 (finding the defendant could not show actual prejudice by the death of a potential witness where he failed to explain what exculpatory testimony that witness might have offered).
[41] (Emphasis original.) *Jones*, 2016-Ohio-5105 at ¶ 20, quoting *Adams*, 2015-Ohio-3954 at ¶ 105.
[42] *Hubbard*, 1992 WL 333642 at *3.

III. POST INDICTMENT DELAY

The defendant next argues that the state has run afoul of his speedy trial rights. Criminal defendants are guaranteed the right to a speedy trial under state and federal law.[43] The constitutional guarantee of a speedy trial was originally considered necessary to "prevent oppressive pretrial incarceration, to minimize the anxiety of the accused, and to limit the possibility that the defense will be impaired."[44] The Ohio Constitution provides in Section 10 of Article I that criminal defendants are entitled to "a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed * * *."[45] Similarly, the Sixth Amendment to the United States Constitution guarantees the accused in a criminal prosecution "the right to a speedy and public trial."[46] Moreover, the availability of a speedy trial to a person accused of a crime is a fundamental right made obligatory on the states through the Fourteenth Amendment.[47]

In Ohio, both the state and federal constitutional speedy trial guarantees are codified in R.C. 2945.71 et seq.[48] In turn, R.C. 2945.71 provides, in relevant part, that "* * * A person against whom a charge of felony is pending: * * * (2) Shall be brought to trial

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[43] *State v. Martin*, 156 Ohio St.3d 503, 2019-Ohio-2010, 129 N.E.3d 437, ¶ 15.
[44] *Brecksville v. Cook*, 75 Ohio St.3d 53, 55, 661 N.E.2d 706 (1996), citing *State ex rel. Jones v. Cuyahoga Cty. Ct. of Common Pleas*, 55 Ohio St.2d 130, 131, 378 N.E.2d 471 (1978).
[45] Ohio Constitution, Article I, Section 10.
[46] Sixth Amendment to the U.S. Constitution.
[47] *Broughton*, 62 Ohio St.3d at 256.
[48] *Martin*, 2019-Ohio-2010 at ¶ 15, citing *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, 863 N.E.2d 1032, ¶ 11. *See State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319, ¶ 10 ("R.C. 2945.71 implements this guarantee with specific time limits within which a person must be brought to trial.").

within two hundred seventy days after the person's arrest. * * *"[49] Thus, under R.C. 2945.71(C)(2), a person against whom a felony charge is pending must be brought to trial within 270 days from the date of his arrest, not including the date of his arrest.[50] And if a defendant is not tried within this period, then R.C. 2945.73 provides: "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code."[51]

However, "[a]lthough the time limits contained in R.C. 2945.71 must be strictly enforced, R.C. 2945.72 provides a number of events and circumstances that will toll the running of a defendant's speedy-trial time."[52] R.C. 2945.71 "may be tolled whether or not a waiver has been executed."[53] "[T]he automatic tolling of time, under circumstances described in R.C. 2945.72, operates to protect the state's ability to adequately prosecute persons who have committed crimes."[54] Once the statutory limit for speedy trial has expired, the defendant has established a prima facie case for dismissal and the burden shifts to the state to demonstrate any tolling or extension of the time limit.[55]

Pursuant to R.C. 2945.72:

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[49] R.C. 2945.71(C)(2).
[50] *State v. Berrien*, 12th Dist. Clinton No. CA2005-08-018, 2006-Ohio-4563, ¶ 26.
[51] R.C. 2945.73(B).
[52] *Martin*, 2019-Ohio-2010 at ¶ 15, citing *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 24. *See Blackburn*, 2008-Ohio-1823 at ¶ 11, citing R.C. 2945.72 ("A person's speedy-trial time may be waived or the period may be tolled under certain circumstances."); *State v. Adams*, 43 Ohio St.3d 67, 69, 538 N.E.2d 1025 (1989) ("R.C. 2945.72 provides for several ways in which the statutory time periods can be extended.").
[53] *Blackburn*, 2008-Ohio-1823 at ¶ 18.
[54] Id. at ¶ 21.
[55] *State v. Butcher*, 27 Ohio St.3d 28, 31, 500 N.E.2d 1368 (1986). *See State v. Hopkins*, 7th Dist. Mahoning No. 11 MA 107, 2012-Ohio-3003, ¶ 11, citing *State v. Howard*, 7th Dist. No. 08 BE 6, 2009–Ohio–3251, ¶ 18 (holding same).

> "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:
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> * * *
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> (C) Any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law;
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> (D) Any period of delay occasioned by the neglect or improper act of the accused;
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> (E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;
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> * * *
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> (H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion * * *."[56]

In applying R.C. 2945.72, "[r]eviewing courts must focus on the underlying source of the delay."[57] If the "facts and circumstances of the case show that the underlying source of the delay was attributable to the defendant, it would make a mockery of justice to attribute the delay to the state."[58]

R.C. 2945.72(C) allows for tolling periods of delay that were incurred as a result of the defendant's lack of counsel.[59] As such, the speedy trial time tolls when the defendant "lacks counsel after his attorneys [have] requested to withdraw from the case."[60]

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[56] R.C. 2945.73.
[57] *Martin*, 2019-Ohio-2010 at ¶ 25, citing *State v. Bauer*, 61 Ohio St.2d 83, 84, 399 N.E.2d 555 (1980).
[58] *Martin*, 2019-Ohio-2010 at ¶ 25, citing *Bauer*, 61 Ohio St.2d at 84.
[59] *Berrien*, 2006-Ohio-4563 at ¶ 27.
[60] Id. at ¶ 29.

R.C. 2945.72(D) tolls the "period of delay occasioned by the neglect or improper act of the accused * * *." Under R.C. 2945.72(D), the Ohio Supreme Court has found that the "failure of a criminal defendant to respond within a reasonable time to a prosecution request for reciprocal discovery constitutes neglect that tolls the running of speedy-trial time * * *."[61] Moreover, such tolling "is not dependent upon the filing of a motion to compel discovery by the prosecution."[62] And the state need not show that it was prejudiced by the defendant's failure to promptly respond to its reciprocal discovery request in order to be entitled to an extension of speedy-trial time.[63] The court must "determine the date by which the defendant should reasonably have responded to a reciprocal discovery request based on the totality of facts and circumstances of the case, including the time established for response by local rule, if applicable."[64]

R.C. 2945.72(E) tolls any period of delay "necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused." Therefore, the speedy-trial time is tolled during the period when a defense motion is pending.[65] As such, "a motion to dismiss acts to toll the time in which a defendant must be brought to trial."[66] So too, the speedy trial time is tolled by defense motions requesting discovery and a bill of particulars, as well as motions to suppress evidence.[67]

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[61] *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011, paragraph one of the syllabus.
[62] *Palmer*, 2007-Ohio-374 at paragraph two of the syllabus, citing *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987).
[63] *Palmer*, 2007-Ohio-374 at ¶ 21.
[64] Id. at ¶ 24.
[65] *Broughton*, 62 Ohio St.3d at 262.
[66] Id. at 261, citing *State v. Bunyan*, 51 Ohio App.3d 190, 193, 555 N.E.2d 980 (1988).
[67] *Berrien*, 2006-Ohio-4563 at ¶ 29.

R.C. 2945.72(H) allows for tolling the "period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion[.]" In such instances, the continuance granted will not count against the state for speedy trial purposes.[68]

Furthermore, "a court's journal entry need not identify the defendant as the requesting party in order for the speedy-trial time to toll, so long as the record affirmatively demonstrates that the defendant requested the continuance."[69] Importantly, "* * * periods of delay resulting from motions filed by the defendant in a previous case also apply in a subsequent case in which there are different charges based on the same underlying facts and circumstances of the previous case."[70]

The Ohio Supreme Court has held that "the time period between the dismissal without prejudice of an original indictment and the filing of a subsequent indictment, premised upon the same facts as alleged in the original indictment, shall not be counted unless the defendant is held in jail or released on bail pursuant to Crim.R. 12(I)."[71] The defendant's speedy-trial time begins to run again once the charges are filed or the date the defendant is arrested, whichever is later.[72] Moreover, "any time period that has

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[68] Id. at ¶ 27, citing *State v. Barnett*, 12th Dist. Fayette No. CA2002-06-011, 2003-Ohio-2014, ¶ 11.

[69] *Martin*, 2019-Ohio-2010 at ¶ 16, citing *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186, ¶ 54.

[70] *Blackburn*, 2008-Ohio-1823 at the syllabus.

[71] *Broughton*, 62 Ohio St.3d at 259-260. Crim.R. 12(I) is now Crim.R. 12(J). Crim.R. 12(J) provides in pertinent part: "If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. * * * "

[72] *Broughton*, 62 Ohio St.3d at 260, citing *Gamblin v. State*, 568 N.E.2d 1040, 1044 (Ind.App.1991).

elapsed under the original indictment should be tacked on to the time period commencing with the second indictment."[73]

Unlike tolling, which as mentioned, applies from a previous case to a new case when the new case is based on the same underlying facts and circumstances, a waiver from a previous case will not apply to a subsequently filed charge that arose from the same facts as the former charge.[74] This is because a waiver is an intentional relinquishment of a known right, whereas tolling under R.C. 2945.72 occurs irrespective of whether the accused relinquishes any rights.[75]

In the instant case, the speedy-trial statute required the defendant to be brought to trial within 270 days of his original indictment, February 22, 2018, unless tolled for reasons permitted under the statute. In order to determine the exact number of days that should be tallied against the state it is necessary to separate and examine certain relevant periods in order to ensure they are properly characterized as either tolling the speedy trial statute or allowing it to run. The defendant's speedy trial time would begin to run on February 23, 2018, the day following his indictment.

However, on that day, February 23, 2018, defense counsel filed a motion to withdraw as counsel due to a conflict, tolling speedy trial time.[76] New counsel was appointed on February 27th. Thus, up until February 27th, no speedy trial time had yet run.[77]

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[73] *Broughton*, 62 Ohio St.3d at 261, citing *State v. Bonarrigo*, 62 Ohio St.2d 7, 11, 402 N.E.2d 530 (1980).
[74] *Blackburn*, 2008-Ohio-1823 at ¶ 15, citing *Adams*, 43 Ohio St.3d 67.
[75] *Blackburn*, 2008-Ohio-1823 at ¶ 17.
[76] R.C. 2945.72.(C) and *Berrien*, 2006-Ohio-4563 at ¶ 29.
[77] R.C. 2945.72.(C) and *Berrien*, 2006-Ohio-4563 at ¶ 29.

Speedy trial time ran for seven days until it was tolled on March 7, 2018, due to defense counsel's request for a continuance, which was granted the same day.[78] The case was continued until March 22nd, but on March 22nd the defense received another continuance because defense counsel failed to appear. Thus, the defendant's speedy trial time continued to be tolled.[79] The case was continued to April 5th, but at the April 5th hearing, defense counsel requested and was granted another continuance, thus continuing to toll the speedy trial time.[80] The case was continued to April 18th. The hearing was continued, but it is unclear why, from April 18th to April 19th. Therefore one additional day ran of speedy trial time between April 18th and April 19th, for a total of eight days. At the April 19th hearing, the defense again requested a continuance, this time until April 25th, which the court granted the same day.[81] As a result, up to April 25th, only eight days of speedy trial time had lapsed. The defense's next request for a continuance does not occur until May 23rd.

But also during this period, other events occurred which tolled the speedy trial time for additional reasons. On April 5, 2018, the defense filed a demand for discovery. The state produced discovery April 16th and requested reciprocal discovery. According to the court's March 22, 2018 case management order, the defense had to provide discovery within 21 days of the date of the demand. Thus, the reasonable time for the defense to respond to discovery was 21 days. As a result, if the defense did not respond by May 7th, then time would be tolled under R.C. 2945.72(D), irrespective of whether the state filed a motion to compel discovery.

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[78] R.C. 2945.72(H).
[79] R.C. 2945.72(C).
[80] R.C 2945.72(H).
[81] R.C 2945.72(H).

The defendant ultimately provided the state with a response to its discovery request naming one witness. That response clearly could have been prepared and served much earlier than 94 days after it was requested, and it was neglect on the part of the defendant not to have done so. The court therefore tolls the running of speedy trial time after 21 days had passed from service of the state's request.

To summarize, a total of eight days of speedy trial time ran by April 25, 2018. The speedy trial time then ran from April 25th until May 8th, because the defense was required to submit its reciprocal discovery by May 7th, which did not occur, thus tolling the speedy trial time. So as of May 8th, when the speedy trial time was tolled again, a total of 22 days of speedy trial time elapsed.

The defense did not produce discovery to the state until August 22, 2018, and thus time was tolled from May 16th until August 22nd. There are also many other intervening events that occurred during this period, which likewise toll many periods of time, such as additional continuances at the defense's behest and periods of time where the defendant was not represented. However, by and large, the court need not calculate those times, since there is a continual tolling from May 8th to August 22nd.

Speedy trial time would have begun to run against the state again starting August 22nd, when the defense produced discovery, had the defense not requested a continuance on July 16th that was granted the same day and which lasted until the date of the trial, October 16th.[82] In other words, there were overlapping tolling periods resulting in continual tolling from May 16th until October 16th.

[82] R.C. 2945.72(H).

As explained, under R.C. 2945.71(C)(2), a person against whom a felony charge is pending must be brought to trial within 270 days from the date of his arrest. The defendant was brought to trial on October 16th, and only 22 days of speedy trial time had lapsed due to various tolling events.

The defendant remained incarcerated following his trial, due to the guilty verdicts in 2018 CR 000054. He was not indicted in the present case, Case No. 2019 CR 000338, until April 4, 2019. As explained, speedy trial time does not begin to run against the state again until the defendant is subsequently indicted, unless the defendant is held in jail or released on bail pursuant to Crim.R. 12(J).[83] Here, the defendant was still in custody, but not due to a court order that he needed to be held in custody pending a new indictment for conspiracy. Thus, speedy trial time began to run again on April 5, 2019, the day after the defendant's subsequent indictment. At that point, 22 days of speedy trial time had elapsed from Case No. 2018 CR 000156.

The speedy trial time ran from April 5, 2019 to April 23, 2019, at which time counsel for the defendant moved to withdraw due to a conflict, tolling the speedy trial time.[84] Thus, up until April 23rd, a total of 40 days of speedy trial time had run. The defendant received new counsel on May 8th, at which time the speedy trial time began to run again.

The final tolling event occurred on June 17, 2019, when the defendant filed a motion to dismiss. That motion has been pending up until the date of this case, and as

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[83] *Broughton*, 62 Ohio St.3d at 259-260. Crim.R. 12(J) provides in pertinent part: "If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. * * * "

[84] R.C. 2945.72(C)

such it has tolled the speedy trial time period.[85] Between May 8th and June 17th, an additional 40 days of speedy trial time elapsed. Thus, the total amount of speedy trial time that has elapsed at the time of the issuance of this decision is 80 days. Since 80 days is well short of the 270 day period that the state has to bring the defendant to trial, the court finds that there has been no speedy trial violation.

IV. *BRADY* VIOLATION

The defendant further argues that the state committed a *Brady* violation warranting dismissal with prejudice by failing to disclose that Bergman, its witness to the conspiracy events, had received consideration for his testimony and cooperation. The United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), held that due process requires that the prosecution provide defendants with any evidence that is favorable to them whenever the evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[86] The Twelfth District Court of Appeals has succinctly summarized what the defendant must show to demonstrate a *Brady* violation: "(1) the evidence at issue was favorable to [the defendant] because it was either exculpatory or impeaching; (2) the evidence was suppressed by the

[85] R.C. 2945.72(E) and *Broughton*, 62 Ohio St.3d at 261.
[86] *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *See State v. Webb*, 12th Dist. Clermont No. CA2014-01-013, 2014-Ohio-2894, ¶ 17, quoting *State v. Mills*, 12th Dist. Butler No. CA99-11-198, 2001 WL 237096, *4 (Mar. 12, 2001) (holding same).

state, either willfully or inadvertently; and (3) prejudice ensued."[87] Notably, this test is "stringent."[88]

As mentioned, to find that there has been a *Brady* violation, the suppressed evidence must be material to the defense.[89] However, when "determining whether the state improperly suppressed evidence favorable to the accused, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[90] A "reasonable probability" is "a probability sufficient to undermine the confidence in the outcome."[91]

Requiring evidence to be material is not tantamount to requiring that the evidence "would have resulted in the defendant's acquittal," had it been disclosed.[92] Thus, when determining whether evidence is material, "the relevant question 'is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'"[93] As such, the *Brady* rule is violated if the undisclosed

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[87] *State v. Smith*, 12th Dist. Fayette No. CA2015-12-024, 2016-Ohio-5668, ¶ 20, citing *State v. Widmer*, 12th Dist. Warren No. CA2012-02-008, 2013-Ohio-62, ¶ 91. *See State v. Gibson*, 12th Dist. Butler No. CA2007-08-187, 2008-Ohio-5932, ¶ 25, citing *Moore v. Illinois*, 408 U.S. 786, 794, 92 S.Ct. 2562 (1972) (promulgating the same test).

[88] *Smith*, 2016-Ohio-5668 at ¶ 20, citing *State v. Jackson*, 57 Ohio St.3d 29, 33 (1991).

[89] *State v. Iacona*, 93 Ohio St.3d 83, 89, 752 N.E.2d 937 (2001).

[90] *Gibson*, 2008-Ohio-5932 at ¶ 26. *See State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 39, quoting *United Sates v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 Led.2d 481 (1985) (explaining that evidence is material "when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'").

[91] *Smith*, 2016-Ohio-5668 at ¶ 19, citing *State v. Johnston*, 39 Ohio St.3d 48 (1988), paragraph five of the syllabus.

[92] *Brown*, 2007-Ohio-4837 at ¶ 39, citing *United States v. Agurs*, 427 U.S. 97, 111, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

[93] *Brown*, 2007-Ohio-4837 at ¶ 40, quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

evidence "could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict."[94]

The Ohio Supreme Court has observed that as "a rule, undisclosed evidence is not material simply because it may have helped the defendant to prepare for trial."[95] Moreover, the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[96]

In turning to the case at bar, the court concludes that there has been no *Brady* violation warranting dismissal with prejudice because the defendant was not prejudiced by the state's failure to disclose that it had dismissed criminal charges against Bergman before having him testify at trial in Case No. 2018 CR 000156. In applying the test for a *Brady* violation, such information was undoubtedly favorable to the defendant, and it was suppressed by the state. However, to establish a *Brady* violation the defendant must show that "prejudice ensued"[97] due to the violation. However, the court never reached the merits of the conspiracy counts. Instead of rendering guilty verdicts, the court dismissed both counts in Case No. 2018 CR 000156. As such, the court cannot identify how the court's dismissal is not worthy of confidence due to the missing evidence, considering the court never reached the merits of the conspiracy charges. Nor could the court have reached the merits until it dispensed with the motion to dismiss. Accordingly,

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[94] *Brown*, 2007-Ohio-4837 at ¶ 40, quoting *Kyles*, 514 U.S. at 434.
[95] *Brown*, 2007-Ohio-4837 at ¶ 49. *See Webb*, 2014-Ohio-2894 at ¶ 17, quoting *Brown*, 2007-Ohio-4837 at ¶ 49 (holding same).
[96] *Smith*, 2016-Ohio-5668 at ¶ 20, citing *State v. Fulton*, 12th Dist. Clermont No. CA2002-10-085, 2003-Ohio-5432, ¶ 33.
[97] *Smith*, 2016-Ohio-5668 at ¶ 20, citing *Widmer*, 2013-Ohio-62, ¶ 91.

because the defendant was not prejudiced by the state's failure to disclose, there has been no *Brady* violation.

V. CRIM.R. 16 VIOLATIONS

Finally, the defendant maintains that the court should dismiss this case with prejudice as a sanction under Crim.R. 16 due to the state's failure to disclose the consideration Bergman received for his testimony. Crim.R. 16 governs discovery and inspection in criminal cases,[98] and requires the state, upon motion of the defendant, to make available evidence material to the preparation of the defense.[99] "The overall objective of the criminal rules 'is to remove the element of gamesmanship from a trial.'"[100] The purpose of the discovery rules "is to prevent surprise and the secreting of evidence favorable to one party."[101]

Crim.R. 16(A) provides:

> "[A]ll parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures."[102]

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[98] *Palmer*, 2007-Ohio-374 at ¶ 16.
[99] *State v. Johnson*, 12th Dist. Fayette No. CA2018-06-013, 2019-Ohio-754, ¶ 35, citing *State v. Wilson*, 12th Dist. Butler No. CA2012-12-254, 2013-Ohio-3877, ¶ 14.
[100] (Internal quotations omitted.) *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 19, quoting *Lakewood*, 32 Ohio St.3d at 3.
[101] *Darmond*, 2013-Ohio-966 at ¶ 19, quoting *Lakewood*, 32 Ohio St.3d at 3.
[102] Crim.R. 16(A).

The Staff Notes to the 2010 amendment to Division (A) of Crim.R. 16 state that the purpose of the revisions "is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice." To that end, the Staff Notes point out, the current rule "expands the reciprocal duties in the exchange of materials" and "balances a defendant's constitutional rights with the community's compelling interest in a thorough, effective, and just prosecution of criminal acts."

Crim.R. 16(L)(1) provides:

> "The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."[103]

Sanctions for a Crim.R. 16 discovery violation are within the discretion of the trial court.[104] In determining whether a sanction is appropriate, and if so, which sanction is appropriate, courts consider the following factors: "(1) whether the failure to disclose was a willful violation of Crim.R. 16, (2) whether foreknowledge of the undisclosed material would have benefited the accused in the preparation of a defense, and (3) whether the accused was prejudiced."[105] Notably, dismissal with prejudice is considered "extremely severe because it forecloses the possibility of further prosecution."[106] "When deciding on

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[103] Crim.R. 16(L)(1).
[104] *Darmond*, 2013-Ohio-966 at ¶ 20. *See Johnson*, 2019-Ohio-754 at ¶ 36, citing *Parson*, 6 Ohio St.3d at 445 (holding same).
[105] *Darmond*, 2013-Ohio-966 at ¶ 22, quoting *Parson*, 6 Ohio St.3d at the syllabus.
[106] *Darmond*, 2013-Ohio-966 at ¶ 30.

a sanction, the trial court must impose the least severe sanction that is consistent with the purpose of the rules of discovery."[107]

In examining the present case, the court finds that the defendant has not been prejudiced and there is no sanction necessary at this juncture to remove any prejudice to the defendant. As explained when examining the state's failure under a *Brady* framework, the defendant was not prejudiced in Case No. 2018 CR 000156 because the court never reached the merits of the conspiracy charges.

And the defendant has not suffered any prejudice in this case because he has not requested discovery from the state as of yet, and the trial date has not been set. The Supreme Court of Ohio has stated that "[t]he purpose of the discovery rules is to prevent surprise and the secreting of evidence favorable to one party."[108] Here, the defendant will not be surprised at trial because he now knows that the state dismissed certain charges against Bergman, and the defense will have every opportunity to impeach Bergman at trial with that information. Accordingly, no sanction against the state is necessary to further remove prejudice to the defendant and prevent surprise.

CONCLUSION

The court finds the defendant's motion to dismiss is not well-taken and hereby denies it.

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[107] *Johnson*, 2019-Ohio-754 at ¶ 36, citing *State v. Palmer*, 12th Dist. Butler Nos. CA2013-12-243 and CA2014-01-014, 2014-Ohio-5491, ¶ 39.
[108] (Internal quotations omitted.) *State v. Wilson*, 12th Dist. Butler No. CA2012-12-254, 2013-Ohio-3877, ¶ 14, quoting Darmond, 2013-Ohio-966 at ¶ 19.

IT IS SO ORDERED.

DATED: 11-25-19

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Entry have been sent on this 25th day of November 2019 by e-mail to Darren Miller, at dmiller@clermontcountyohio.gov, and Nicholas Horton, at nhorton@clermontcountyohio.gov, and to Lara B. Baron, at lara@williamjrapp.com, and Matthew E. Wiseman, at mwiseman@robinsonjoneslaw.com. A printed copy has been provided to the Prosecuting Attorney's Office, and printed copies have been sent by regular U.S. Mail to Lara B. Baron, Rapp Law Office, One E. Main Street, Amelia, Ohio 45102, and to Matthew E. Wiseman, Robinson & Jones Co., L.P.A., 421 S. Locust Street, Suite 203, Oxford, Ohio 45056.

Judicial Assistant to Judge McBride