Rel: September 11, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-19-0187

State of Alabama

v.

Karen Pridgen Stafford

Appeal from Jefferson Circuit Court
(CC-19-644)

COLE, Judge.

Karen Pridgen Stafford was indicted on a charge of first-degree assault, a violation of § 13A-6-20(5), Ala. Code 1975, for causing serious physical injury to Steven Wayne Edmondson

with a motor vehicle while she was driving "under the influence of alcohol." Stafford moved the trial court to dismiss the indictment because the Alabama Department of Forensic Sciences ("ADFS"), pursuant to its internal policies and procedures, destroyed a blood sample. Stafford alleged that the destruction of the blood sample "permanently deprived [her] of the use of said crucial evidence thereby violating [her] constitutional rights to due process and a fair trial." After a hearing on Stafford's motion, the trial court dismissed the indictment. The State appeals the trial court's ruling pursuant to Rule 15.7, Ala. R. Crim. P.

Facts and Procedural History

The State has alleged that, on March 4, 2017, at about 9:00 p.m., Stafford, while driving northbound in a southbound lane, struck Edmondson's vehicle, causing him serious physical injury. At the University of Alabama at Birmingham ("UAB") hospital that night, Stafford told the first responder to the scene of the accident, Homewood Police Officer Kerah Hyatt, that, at the time of the accident, she was on her way home after drinking a margarita at a local restaurant. Stafford also admitted to Officer Hyatt that she knew that she had

struck something with her vehicle, but she did not know what she had hit. Stafford's blood sample was drawn pursuant to a search warrant that Officer Hyatt obtained; testing of that blood sample by the ADFS revealed Stafford's blood-alcohol content ("BAC") to be .158 g/100ml, approximately two hours after the accident, which is almost twice the legal limit.[1]

Stafford was arrested for first-degree assault on June 21, 2017. In April 2018, Stafford moved the Jefferson District Court to order the State to preserve any biological and physical evidence collected during the investigation of the collision and to suppress the blood sample taken pursuant to the search warrant. No order was entered ruling on Stafford's original motion to preserve and to suppress evidence. Stafford was indicted in February 2019. On March 8, 2019, Stafford moved the trial court to order the State to preserve all physical evidence collected during the investigation of the collision. On March 14, 2019, the trial court issued a standing general discovery order, which included a provision allowing for inspection of all tangible

[1]Section 32-5A-191(a)(1), Ala. Code 1975, provides: "A person shall not drive or be in actual physical control of any vehicle" if "[t]here is 0.08 percent or more by weight of alcohol in his or her blood."

objects in the State's custody within 14 days of a request to inspect. On April 5, 2019, Stafford moved to compel the production of discoverable materials. On April 9, 2019, the trial court ordered the State to produce to Stafford all discoverable materials by April 12, 2019. On April 12, 2019, the State provided Stafford discovery materials, including the ADFS toxicology report. On April 17, 2019, Stafford filed a motion to suppress the ADFS blood-alcohol evidence because, she alleged, it was "obtained as a result of [a] search warrant based on a bare bones and factually deficient affidavit." (C. 142.)

On April 30, 2019, the State subpoenaed Stafford's hospital records pertaining to her treatment at UAB hospital the night of the accident. Stafford's medical records from UAB hospital that night are included in the clerk's record on appeal. According to the physician who initially treated Stafford at 10:00 p.m., approximately one hour after Stafford collided with Edmondson, Stafford was "intoxicated, endorses drinking tonight." (C. 166.) The UAB lab records further stated that the ethanol level in Stafford's blood upon her arrival at UAB hospital at 9:47 p.m., almost one hour after

the accident, was "234 mg/dL," which translates to a BAC of .23, almost three times the legal limit.[2] Another physician was consulted in treating Stafford that evening and also wrote in his notes that Stafford's BAC was .234 upon her arrival at the hospital and that Stafford "does not remember exactly what happened but does not think she lost consciousness." (C. 178.)

On September 16, 2019, Stafford filed an addendum to her motion to suppress the ADFS blood-alcohol evidence, arguing that the search warrant for that evidence lacked probable cause and/or that the search warrant was granted because of a false statement in the affidavit in support of the search warrant. Stafford alleged that Officer Hyatt's statement in the affidavit regarding Stafford's pupils was false because it was contradictory to the responding paramedic's report.

At the September 23, 2019, motion hearing, Officer Hyatt testified that she arrived at the scene of the accident at

[2]Officer Hyatt testified at a motion hearing that she had not ordered anyone at UAB hospital to take and test Stafford's blood sample and that she did not arrive at UAB hospital to take Stafford's blood sample with the law-enforcement kit, pursuant to the search warrant she had obtained, until about 11:00 p.m. that night, after UAB hospital had already conducted its own blood test in the process of providing Stafford medical treatment. (R. 58-59.)

about 9:14 p.m. and that Emergency Management Services arrived at about 9:16 p.m. Officer Hyatt first approached Edmondson, who was trapped inside his vehicle but "appeared to be calm" even though he was injured. Officer Hyatt then went to Stafford's vehicle and saw that Stafford was the only occupant and was sitting in the driver's seat. Officer Hyatt did not observe any injuries that Stafford had sustained. However, Stafford was "screaming uncontrollably." (R. 13.) Officer Hyatt tried to calm Stafford down, but Stafford "was unable to answer [her] questions." (R. 13, 19.) Stafford also repeatedly asked Officer Hyatt "if everything was going to be okay," and then, Officer Hyatt stated, Stafford "would begin screaming again." (R. 13, 19.)

During her interaction with Stafford, Officer Hyatt noticed that Stafford's pupils were "constricted" even though they were in a "pretty dim area." (R. 15.) Officer Hyatt compared Stafford's pupils to the pupils of a man standing next to her, and Stafford's pupils "were much smaller than his." (R. 15.) Officer Hyatt also used her flashlight to observe Stafford's pupils' reaction, which, she testified, "was very slow." (R. 15.) Officer Hyatt further testified

that she had received training in assessing whether an individual is impaired, including observing "the pupil reaction" and "the size of the pupil." (R. 16-17.) According to Officer Hyatt, pupil constriction is an indicator of drug or alcohol consumption. Officer Hyatt testified that, as a patrol officer, she uses her training in recognizing drug and alcohol use every day. Based on that training, Officer Hyatt believed that Stafford was impaired. (R. 18.) Officer Hyatt also noted that there is "a concrete median that separates the northbound and southbound lanes" where the accident occurred (R. 22) and that Stafford had been traveling in the "wrong direction" when she hit Edmondson head on. (R. 19.) Officer Hyatt also testified that, according to witnesses she spoke to at the scene, Stafford was traveling at a high speed "southbound in the northbound lane into oncoming traffic" for "approximately 200 yards" and "did not appear to slow down" before striking Edmondson's vehicle, which "was traveling northbound in the northbound lane." (R. 22, 25, 38, 52 (emphasis added).)

Stafford was taken by paramedics to UAB hospital for evaluation and treatment. Edmondson could not be immediately

transported because his car doors had to be removed for him to be extricated from his vehicle. Based on her own observations and her conversations with witnesses, Officer Hyatt obtained a search warrant to have Stafford's blood drawn. Officer Hyatt did not immediately charge Stafford with a driving-under-the-influence offense because she was waiting for Stafford's blood to be drawn and tested pursuant to the search warrant.

After Officer Hyatt testified at the motion hearing, Stafford's counsel asked about the blood sample tested by ADFS. (R. 67.) The prosecutor told the court that he could attempt to obtain it the next week and was told by the court that "there is no rush, I would think." (R. 68.) The trial court then gave the parties, after Stafford's counsel's agreement, six weeks to "exchange whatever information" and discovery materials. (R. 69.) The trial court then continued the suppression hearing until November 12, 2019.

In October 2019, Stafford's counsel received an e-mail from the prosecutor stating that he had discovered that the blood-sample kit sent to ADFS "was destroyed after the two-year holding period" but that "photographs of the kit and the

case file" were available. (C. 28.) On October 25, 2019, Stafford moved the trial court to either exclude any evidence or testimony regarding the blood test conducted by ADFS or dismiss the indictment. On October 31, 2019, after receiving photographs of the ADFS blood-sample kit from the State, Stafford amended her motion to exclude the blood-sample evidence, arguing that the photographs showed that the kit used to take her blood sample had expired in November 2010 and that the ADFS blood-test results were, thus, unreliable.

The suppression hearing was reconvened on November 12, 2019. At that hearing, Stafford argued that the indictment should be dismissed because, due to "some standard operating procedure," the ADFS had destroyed the blood sample. (R. 77.) Stafford argued that she needed to retest the blood sample "to determine whether the results are inaccurate" because of the expiration of the kit and further argued that, because the sample was destroyed, either the evidence should be excluded or her indictment should be dismissed. (R. 80.) The prosecutor told the trial court that the use of expired vacuum tubes in the test kit did not invalidate the ADFS findings but only "reduce[d] the volume of specimen collected and

accordingly limit[ed] the scope of the analyses which may be conducted." (R. 83.) The prosecutor also explained that he did not start working on the case until July 11, 2019, and that, when he was asked for the kit by Stafford's counsel, he contacted the ADFS and found out that the kit had been destroyed on July 3, 2019. The prosecutor also explained that the ADFS provided all the photographs and data it collected and argued that the destruction of the kit went to the weight not the admissibility of the ADFS blood-test results. The trial court stated that it was granting Stafford's "motion to exclude and dismiss the indictment." (R. 89.)

On November 18, 2019, six days after the trial court granted Stafford's motion to dismiss, the State moved for reconsideration, arguing, as it does on appeal, that Stafford offered no evidence that the State acted in bad faith and did not allege that the results of the blood-alcohol analysis were exculpatory. The State further argued in its motion, as it does on appeal, that, even if the court excluded the blood-alcohol evidence, Stafford's indictment should not have been dismissed because the State had other evidence from which to establish a prima facie case. Stafford replied to the State's

motion the same day and asserted in her reply that the State had waived all arguments included in the State's motion for reconsideration that were not raised at the motion hearing before the trial court's original decision to dismiss the charge. The following day, November 19, 2019, the trial court issued a written order dismissing the indictment. The State's notice of appeal was filed the same day.

Standard of Review

> "'"Where the evidence before the trial court was undisputed the ore tenus rule is inapplicable, and the [appellate] Court will sit in judgment on the evidence de novo, indulging no presumption in favor of the trial court's application of the law to those facts."' State v. Hill, 690 So. 2d 1201, 1203 (Ala. 1996), quoting Stiles v. Brown, 380 So. 2d 792, 794 (Ala. 1980). '"'[W]hen the trial court improperly applies the law to the facts, no presumption of correctness exists as to the court's judgment.'"' Ex parte Jackson, 886 So. 2d 155, 159 (Ala. 2004), quoting Hill, 690 So. 2d at 1203, quoting in turn Ex parte Agee, 669 So. 2d 102, 104 (Ala. 1995). A trial court's ultimate legal conclusion on a motion to suppress based on a given set of facts is a question of law that is reviewed de novo on appeal. See State v. Smith, 785 So. 2d 1169 (Ala. Crim. App. 2000)."

State v. Hargett, 935 So. 2d 1200, 1203-04 (Ala. Crim. App. 2005). Here, "because the issue presented involves a review of the circuit court's conclusion of law and its application of the law to undisputed facts, this Court applies a de novo

standard of review." Burt v. State, 149 So. 3d 1110, 1113 (Ala. Crim. App. 2013).

Discussion

On appeal, the State argues that the trial court erred when it dismissed the indictment because, it says, Stafford "failed to show that the State acted in bad faith or that [the ADFS blood-test] evidence was so critical to her defense that her trial would be rendered fundamentally unfair." (State's brief, p. 10.) Stafford, on the other hand, argues that the State's argument was "not properly advanced in the trial court" (Stafford's brief, p. 11), and that, regardless, the "trial court properly exercised its discretion in dismissing the charges against Stafford" because "[t]he State acted in bad faith in failing to preserve the blood draw kit" and the State's failure "denied Stafford due process that would have made a trial fundamentally unfair" (Stafford's brief, pp. 17-25). The State also argues that dismissal of the indictment was inappropriate as a sanction for a discovery violation under Rule 16.5, Ala. R. Crim. P. (State's brief, p. 20.)

I. Preservation

Before we address the State's arguments on appeal, we first address Stafford's argument that the State did not preserve for our review the argument it makes on appeal about Stafford's failure to show that the ADFS blood-test evidence was critical to her defense. According to Stafford, although the State argues on appeal that, in the absence of bad faith, Stafford had "to show that her trial would be rendered [f]undamentally unfair by the absence of the blood evidence" (State's brief, p. 14) and that she "'failed to show ... that [the blood-draw kit] was so critical to her defense that the trial would be fundamentally unfair'" (Stafford's brief, pp. 12-13 (quoting State's brief, p. 10)), the State did not make those specific arguments in the trial court. Stafford contends that the State's arguments on appeal "embrace[] new legal questions or issues" (Stafford's brief, p. 11); thus, Stafford concludes, the State cannot assert them as a basis for challenging the trial court's order dismissing the indictment. We disagree.

Although Stafford casts the State's arguments on appeal as presenting this Court with "new legal questions or issues"

(Stafford's brief, p. 11 (emphasis added)), the State's arguments do not raise new issues. Rather, the State's arguments concern the same legal questions or issues that were presented to the trial court--i.e., whether the destruction of the ADFS blood-test evidence violated her right to due process and required dismissal of the indictment. Stafford's preservation argument confuses the general rule that a party may not present a new legal question or theory on appeal with the rule that a party may present a higher court with additional specific reasons or authorities as to an issue that was presented to the trial court.

In Ex parte Jenkins, 26 So. 3d 464 (Ala. 2009), the Alabama Supreme Court, addressing the dissenting opinion's view that the State's argument on appeal was not preserved for appellate review, explained the difference between these two rules as follows:

> "[The] dissent criticizes the State, and by extension this opinion, for reliance on what it describes as an 'argument' made for the first time to this Court. Specifically, the dissent notes that the State argues that '"since an officer could search in all the same places whether the warrant specified a search for 'marijuana' or 'illegal drugs' or 'drugs' or any similar term, the warrant in this case does not increase the likelihood of an unauthorized rummaging through Jenkins's personal

effects." State's brief, at 21–22.' 26 So. 3d at 485. The dissent asserts that this argument, not having been made by the State in its brief to the Court of Criminal Appeals, comes too late. The dissent relies in this regard on the proposition stated in Avis Rent A Car Systems, Inc. v. Heilman, 876 So. 2d 1111, 1124 n.8 (Ala. 2003), that '"[a]n argument not made on appeal is abandoned or waived."' 26 So. 3d at 485.

"Properly viewed, however, the rule upon which the dissent attempts to rely is one that generally prevents an appellant from raising on appeal a question or theory that has not been preserved for appellate review, not the provision to a higher court of an additional specific reason or authority for a theory or position asserted by the party in the lower court. The fundamental rule in this regard, as stated in Corpus Juris Secundum, is that a 'higher court normally will not consider a question which the intermediate court could not consider.' 5 C.J.S. Appeal and Error § 977 (2007). However, '[a]lthough on appeal from an intermediate court the higher court may be limited to the questions of law raised or argued at the trial, it is not limited to the arguments there presented.' 5 C.J.S. Appeal and Error § 978 (2007) (emphasis added). In other words, '[n]ew arguments or authorities may be presented on appeal, although no new questions can be raised.' 4 C.J.S. Appeal and Error § 297 (emphasis added).

"In Kerbs v. California Eastern Airways, Inc., 33 Del. Ch. 69, 80, 90 A.2d 652, 659 (1952), for example, the court put it this way:

> "'It should be noted that the plaintiffs did not call Section 9 of the General Corporation Law to the [trial court's] attention, but argued solely that the presence of interested directors could not be ignored in determining whether the

> plan received a majority favorable vote at the Board's meeting. While the plaintiffs did not urge this precise reason for the illegality of the directors' act upon the Chancellor, they did, however, argue its illegality. We will not permit a litigant to raise in this court for the first time matters not argued below where to do so would be to raise an entirely new theory of his case, but when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation the argument should not be considered. We think the point falls within the class of additional reasons supporting the plaintiffs' theory.'

"(Emphasis added.) See also Board of Comm'rs of Orleans Levee Dist. v. Shushan, 197 La. 598, 611, 2 So. 2d 35, 39-40 (1941) ('The rule [that an appellate court will not consider, for the first time, matters not raised in the court of original jurisdiction] has reference only to controversies arising under the pleadings or the evidence and not to contentions urged in the argument of counsel. The Supreme Court decides a case on the issues presented by the pleadings or the evidence, and not on the argument of counsel in the court below, or even on the reasons assigned by the trial judge.').

"In the earlier case of Persky v. Bank of America National Ass'n, 261 N.Y. 212, 185 N.E. 77 (1933), the Court began by noting that

> "'"it is well settled that this court will not, for the purpose of reversing a judgment, entertain questions not raised or argued at the trial, or upon the intermediate appeal."'

"261 N.Y. at 217, 185 N.E. at 79 (quoting Martin v. Home Bank, 160 N.Y. 190, 199, 54 N.E. 717 (1899) (emphasis added)). The court thereafter explained that this rule was not applicable in the case before it:

> "'In our review we are confined to the questions raised or argued at the trial but not to the arguments there presented. "Nor is it material whether the case was well presented to the court below, in the arguments addressed to it. It was the duty of the judges to ascertain and declare the whole law upon the undisputed facts spread before them; and it is our duty now to give such judgment as they ought to have given." (Oneida Bank v. Ontario Bank, 21 N.Y. 490, 504 [(1860)].)'

"261 N.Y. at 218, 185 N.E. at 79 (all but first emphasis added).

"The foregoing principles have been recognized in Alabama cases. Although not dealing with the precise appellate review issue presented here, the case of Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 960 (Ala. 2004), addressed the possibility of a litigant 'miscalculat[ing] the applicability of the appropriate rule of law.' The Court cited Williams-Guice v. Board of Education of Chicago, 45 F.3d 161, 164 (7th Cir. 1995), for the proposition that

> "'litigants' failure to address the legal question from the right perspective does not render [the appellate court] powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties' circumstances.'

"Also in Hodurski, this Court quoted with approval from another federal decision:

> "'"'Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility.'"'

"Hodurski, 899 So. 2d at 960 (quoting Forshey v. Principi, 284 F.3d 1335, 1357 n.20 (Fed. Cir.), cert. denied, 537 U.S. 823, 123 S. Ct. 110, 154 L. Ed. 2d 33 (2002), quoting in turn Empire Life Ins. Co. of America v. Valdak Corp., 468 F.2d 330, 334 (5th Cir. 1972)).

"In Home Indemnity Co. v. Reed Equipment Co., 381 So. 2d 45, 50 (Ala. 1980), the Court explained that '[t]he rule requiring adherence to the theory relied on below ... does not mean the parties are limited in the appellate court to the same reasons or arguments advanced in the lower court upon the matter or question in issue. 5 Am. Jur. 2d, Appeal and Error, § 546 at 32.' (Emphasis added), relied upon in Associated Gen. Contractors Workers Compensation Self Ins. Fund v. Williams, 982 So. 2d 557 (Ala. Civ. App. 2007). See also Alabama Medicaid Agency v. Beverly Enters., 521 So. 2d 1329, 1333 (Ala. Civ. App. 1987) (apparently stating the general rule discussed above, albeit using different terminology, namely 'that an appellant may present new theories in support of its position for the first time on appeal' (emphasis added)).

"In the present case, the question whether the language of the warrant describing the object of the search was specific enough to satisfy the 'thing-to-be-seized' requirement within the

> so-called 'particularity clause' of the Fourth Amendment to the United States Constitution has existed throughout. In response to a motion to suppress, the trial court decided this issue against the State and in favor of Jenkins. The trial court's order analyzed the issue in-depth and concluded that the language of the warrant did not satisfy the particularity clause of the Fourth Amendment. The State timely sought review of this order in the Court of Criminal Appeals pursuant to Rule 15.7(a), Ala. R. Crim. P., maintaining that the trial court had erred in its ruling against the State on this issue. The State, by its citation to this Court of the Montana and South Carolina Supreme Court cases quoted in the text, is simply giving this Court the benefit of an additional 'precise reason' and authority as to why, as a matter of law, the trial court wrongly decided this issue."

Ex parte Jenkins, 26 So. 3d at 473 n.7. Recently, in Ex parte Knox, 201 So. 3d 1213 (Ala. 2015), the Alabama Supreme Court reaffirmed its holding in Jenkins, explaining that "Jenkins did not alter the general principle of issue preservation; it merely allowed an appellant to provide additional precise reasons and authorities in support of a theory or position properly raised below." 201 So. 3d at 1217.

Here, Stafford presented the trial court with the following legal question: Whether the destruction of Stafford's blood sample violated her right to due process and a fair trial. In her motion to dismiss, Stafford argued that, "regardless of whether the State acted in bad faith," "[t]he

loss of or destruction of evidence by the State in a criminal prosecution can be a denial of an accused person's constitutional rights to due process and a fair trial as guaranteed by the Fifth, Sixth[,] and Fourteenth Amendments to the Constitution of the United States." (C. 296.) To support her argument, Stafford pointed the trial court to the Alabama Supreme Court's decision in Ex parte Ginqo, 605 So. 2d 1237 (Ala. 1999), and quoted the following excerpt from that opinion:

> "...although to show bad faith, for the purpose of showing a due process violation, the defendant must show that the State had knowledge of the exculpatory value of the destroyed evidence, 'there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.' [Arizona v.] Youngblood, 488 U.S. [51] at 61, 109 S. Ct. [333] at 339 (Stevens, J., concurring in the result)."

(C. 297.)

In short, Stafford argued that dismissal of the indictment was appropriate because the ADFS destroyed her blood sample, which, she said, was so critical to her defense that proceeding with the case would make the trial fundamentally unfair.

At the hearing on her motion, Stafford argued that, although she had moved to exclude the blood-sample evidence,

> "it goes beyond the motion to suppress now, Your Honor. It goes to a motion to dismiss the case.
>
> "And this is why: If the State has lost the most crucial evidence in the case and that evidence is now untestable or unusable by the defense, then at that point in time there is only one sanction. Continuance doesn't help. Exclusion doesn't help. There's no way--and exclusion doesn't help because it deprives us of our ability to say that not only was the blood kit--I mean, would not only the blood evidence be incorrect, but it excludes our ability to show why.
>
> "One of the reasons a blood kit--when it expires after the warranty goes by is the seal which holds the blood and keeps the contaminants out of the seal loses its integrity. It loses integrity virtually every day.
>
> "....
>
> "... What's the remedy? Is the remedy to continue it? No. Is the remedy to say we should exclude? Well, then there wouldn't be a case anyway.
>
> "....
>
> "I think the cumulative effect of all of this has deprived Ms. Stafford of a fair trial, due process, and quite frankly for any way to give her effective assistance of counsel. And quite frankly, there is no reason why.
>
> "Once a motion to preserve, and they're on notice and they get it, they're under a duty to preserve it; not just turn their heads and just say,

> well, you know, we forgot or whatever, especially when we specifically asked for that evidence.
>
> "And I don't think there is any other remedy. And I think the case law that we presented to the Court shows that under certain circumstances this is the only remedy."

(R. 79-83.)

In response, the State admitted that the blood sample had been destroyed by the ADFS, but it explained that it had attempted to remedy the situation by providing Stafford with "everything [the ADFS] gave to [the State] ... regarding the photographs that [the ADFS] took and regarding [the ADFS's] case file and all of their data that they collected as a result of their analyses." (R. 85.) The State argued that the case could "still go forward, that the blood is still admissible, and any challenges that the defense wants to make as to the reliability of that test ... goes to the weight and not to admissibility." (R. 85.)

The trial court then asked the State: "So my question would be, if you're saying that the State is able to go forward with its prosecution, what remedies does Ms. Stafford have that are consistent with due process and her ability to confront this evidence in a constitutionally sound way?" (R.

85-86.) The State responded: "These are issues and matters that can be raised at trial; that if they want to challenge that set of circumstances and present that in front of a jury and have them to decide and weigh and to determine what weight they would place on the results that the [ADFS] had concluded." (R. 86.) In other words, the State argued that the blood sample could still be challenged by Stafford at trial, where she could point out the alleged deficiencies with the sample; thus, the State asserted, the sample itself was not critical evidence and its destruction did not render a trial fundamentally unfair.

Stafford maintained that the only remedy available was dismissal of the indictment because, she pointed out, "the case law is really clear when it's a piece of crucial evidence like this and it's destroyed." (R. 87.) According to Stafford, "the case law stands for the proposition that if they're on notice and they allow it to be destroyed, then they suffer the consequences of that action or inaction." (R. 88.)

Without asking for a response from the State, the trial court concluded:

> "I cannot ignore the fact that [Stafford] is entitled to due process. That is absolutely

> paramount and the very foundation of our criminal justice system.
>
> "And so, therefore, based on the information presented, the case law that's presented, I don't see anything that the State has presented that counters the precedence that has been set by appellate authority and/or statutory authority and/or constitutional authority. Therefore, [Stafford's] motion to exclude and dismiss the indictment is granted."

(R. 89.)

On appeal, the State raises the same legal argument that was raised in the trial court--that, in the absence of bad faith, an indictment may not be dismissed when evidence has been destroyed unless a defendant shows that the evidence was so critical that a trial would be rendered fundamentally unfair without the evidence. Additionally, the State's motion for reconsideration raised that argument, stating that

> "Stafford offered no evidence that the State acted in bad faith, for the purposes of the Due Process Clause, with knowledge of the exculpatory value of the evidence at the time it was destroyed. Mrs. Stafford did not allege in any way that the results of the blood alcohol analysis was exculpatory. Arizona v. Youngblood, 488 U.S. 51 (1988)."

(C. 313.)[3]

[3]Stafford also argues that the State's motion for reconsideration does not preserve for appellate review the State's arguments on appeal because, she says, there "is

To be sure, the State's argument on appeal provides this Court with additional authorities that were not presented to the trial court and with additional specific reasons as to why the trial court answered that question of law incorrectly. But the State (or a defendant for that matter) is not bound by the authorities or reasons it presented to the trial court on the question of law the trial court is asked to answer. As the Alabama Supreme Court explained in Ex parte Jenkins, "'"'[a]ppellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below. Our duty is to enunciate the law on the record facts. Neither the parties nor the

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nothing in the record before this Court to indicate that the trial court exercised its discretion to consider any new arguments in the motion to reconsider." (Stafford's brief, p. 16.) Because we hold that the State's arguments at the hearing on Stafford's motion to dismiss preserved the arguments it raises on appeal, it is unnecessary to throughly address Stafford's argument about the State's motion for reconsideration. However, even if the trial court did not consider the State's motion for reconsideration, the State's motion preserved for appellate review the arguments raised therein when it was denied by operation of law 30 days after the trial court entered its final judgment. See, e.g., Walker v. State, [Ms. CR-18-0098, March 13, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (holding that Walker's motion to reconsider, which was denied by operation of law, preserved for appellate review the issues Walker raised in that motion).

trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility.'"'" 26 So. 3d at 473 n.7 (quoting Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 960 (Ala. 2004), quoting in turn Forshey v. Principi, 284 F.3d 1335, 1357 n.20 (Fed. Cir.), cert. denied, 537 U.S. 823 (2002), quoting in turn Empire Life Ins. Co. of America v. Valdak Corp., 468 F.2d 330, 334 (5th Cir. 1972)). Nor does it matter that the State's argument on appeal is better articulated than it was in the trial court. Ex parte Jenkins, 26 So. 3d at 473 n.7 ("'"Nor is it material whether the case was well presented to the court below, in the arguments addressed to it."'") (quoting Persky v. Bank of America National Ass'n, 261 N.Y. 212, 218, 185 N.E. 77, 79 (1933), quoting in turn Oneida Bank v. Ontario Bank, 21 N.Y. 490, 504 (1860)) (emphasis omitted))). Rather, for an argument to be preserved for appellate review, the appellant must present this Court with the same legal question that was presented to the trial court. When a party presents the trial court with a legal question, "'"[i]t [is] the duty of the [court] to ascertain and declare the whole law upon the undisputed facts spread before [it],"'" and when that same

legal question is presented on appeal "'"it is our duty now to give such judgment as [the trial court] ought to have given."'" Ex parte Jenkins, 26 So. 3d at 473 n.7 (quoting Persky, 261 N.Y. at 218, 185 N.E. at 79, quoting in turn Oneida Bank, 21 N.Y. at 504) (emphasis omitted).

Because the State's argument on appeal presents this Court with the same legal question presented to the trial court, the State's argument is properly before this Court for appellate review. Accordingly, we now turn to the State's argument on appeal.

II. Due Process

As set out above, the State argues that the trial court erred when it dismissed the indictment because, it says, Stafford "failed to show that the State acted in bad faith or that [the ADFS blood-test] evidence was so critical to her defense that her trial would be rendered fundamentally unfair." (State's brief, p. 10.) Stafford argues, as she did below, that the State's failure to preserve her ADFS blood sample was not only a discovery violation to be sanctioned but also a violation of her constitutional right to due process. Specifically, Stafford argues that the State acted in "bad

faith" by its failure to preserve her blood sample and that her right to due process was violated because the sample was so "critical" to her defense that its destruction renders a trial "fundamentally unfair."[4] (Stafford's brief, p. 17.) The trial court agreed that a due-process violation occurred and dismissed the indictment, explaining:

> "The loss of or the destruction of critical evidence by the State in a criminal prosecution can be a denial of an accused person's constitutional rights to due process and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States regardless of whether the State acted in bad faith. The Alabama Supreme Court has consistently affirmed this

[4]Stafford cites three cases to support her due-process argument: Warren v. State, 292 Ala. 71, 288 So. 2d 826 (1973); Ex parte Harwell, 639 So. 2d 1335 (Ala. 1993); and Ex parte Baker, 144 So. 3d 1285 (Ala. 2013). Those cases, however, are not directly on point because none of them concerns the circumstance of lost or destroyed evidence, as in this case. Rather, all three cases address the trial court's denial of defense motions to inspect and conduct independent tests of evidence. See Warren, 292 Ala. At 74-76, 288 So. 2d at 829-30 (holding that the trial court denied the defendant due process by denying his motion to examine and independently test the substance that the State used to prove he was selling marijuana); Harwell, 639 So. 2d at 1236-38 (holding that the trial court denied the defendant due process by denying his discovery request seeking to allow him to perform an independent test of the blood sample); and Baker, 144 So. 3d at 1291 (holding that "the trial court exceeded its discretion when it denied Baker's motions for independent testing and evaluation of the substance purported to be marijuana" and thus violated Baker's right to due process).

principle same in several decisions. In Ex parte Gingo, 605 So. 2d 1237, 1241 (Ala. 199[2]), the Alabama Supreme Court citing Arizona v. Youngblood, 488 U.S. 51, 19 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988), acknowledged,

> "'...[A]lthough to show bad faith, for the purpose of showing a due process violation, the defendant must show that the State had knowledge of the exculpatory value of the destroyed evidence, 'there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.'

"Youngblood, 488 U.S. at 61, 109 S. Ct. at 339 (Stevens, J., concurring in the result). We think that this is such a case.' (Emphasis added.)

"Six years before the decision in Ex parte Gingo in Ex parte Dickerson, 517 So. 2d 628, 630 (Ala. 1993),[5] the Alabama Supreme Court held, 'It is not in the interest of justice to permit the prosecution, in its unfettered discretion, to determine the favorable or unfavorable nature of potentially exculpatory evidence, and then allow the prosecution to destroy the evidence, thereby forcing the defendant to establish the favorable nature of evidence that no longer exists.' Id. at 630. (Emphasis added.)

"In this case, the State had in its possession biological evidence taken from Mrs. Stafford, specifically her blood which was drawn for the specific purpose of toxicological examination by the

[5]Ex parte Gingo, 605 So. 2d 1237 (Ala. 1992), was actually decided in 1992, approximately five years after Dickerson, which was decided in 1987, not 1993.

> Alabama Department of Forensic Science. Once tested and the results were received the Department subsequently permanently destroyed the evidence despite the fact that the defense had asked for its preservation several times and the Court had issued its standing discovery order concerning evidence. No parenting sample of blood appears to have been retained so the defense has been permanently deprived of its ability to conduct independent testing. The decision to destroy that evidence was intentionally and unilaterally made by the State's agent despite the State's prior notice to preserve the evidence. There are no other legal remedies available to the Court to protect and preserve Mrs. Stafford's constitutional rights to due process and a fair trial, to uphold the integrity of judicial orders and to hold the State accountable for its actions and inactions when it unilaterally and intentionally chooses to destroy crucial evidence other than a dismissal of the indictment."

(C. 32-33 (some emphasis added).)

In short, the trial court found that the destroyed ADFS blood sample was so critical to Stafford's defense as to render her criminal trial "fundamentally unfair." Although the trial court's order correctly recognized that the Alabama Supreme Court has rejected the single-element bad-faith test established in Arizona v. Youngblood, 488 U.S. 51 (1988), finding that bad faith is not always necessary for a due-process violation, the trial court did not apply the three-part balancing test used in Ex parte Gingo, 605 So. 2d 1237

(Ala. 1992), and Ex parte Dickerson, 517 So. 2d 628 (Ala. 1987), to evaluate Stafford's due-process claim.

In Gurley v. State, 639 So. 2d 557, 565 (Ala. Crim. App. 1993), this Court recognized that, in Gingo, the Alabama Supreme Court "aligned itself with the 'materiality and prejudice analysis' advocated by Justice Stevens, several commentators, and a growing minority of other courts that have rejected Youngblood's single 'bad faith' standard." According to Gurley, in Gingo the Alabama Supreme Court implicitly adopted a "three-part analysis--which weighs culpability, materiality, and prejudice" in evaluating due-process claims based on lost or destroyed evidence. Gurley, 639 So. 2d at 567. Those three factors are "'"[t]o be evaluated in the context of the entire record."'" Id. (quoting Hammond v. State, 569 A.2d 81, 87 (Del. 1989), quoting in turn United States v. Agurs, 427 U.S. 97, 112 (1976)). As this Court explained, "Ex parte Gingo requires us to review a claim of loss or destruction of evidence by weighing the culpability of the State for the loss of the evidence, the materiality of the lost evidence, and the prejudice to the accused." Gurley, 639 So. 2d at 567-68 (emphasis added). Moreover, this three-part

test, articulated in Gurley, has been used repeatedly by this Court to assess due-process claims based on lost or destroyed evidence. See, e.g., Cooner v. State, 272 So. 3d 206, 222 (Ala. Crim. App. 2018) (applying the Gurley three-part test and finding no due-process violation); Pickering v. State, 194 So. 3d 980, 985 (Ala. Crim. App. 2015) (same); Scott v. State, 163 So. 3d 389, 445-48 (Ala. Crim. App. 2013) (same); and Grimsley v. State, 678 So. 2d 1197, 1206 (Ala. Crim. App. 1996) (same). See also Ex parte Rieber, 663 So. 2d 999, 1014-15 (Ala. 1995) (holding that "the police did not destroy any evidence," but also noting that, even if they had, the Alabama Supreme Court would not find a due-process violation based on its determinations that there was no indication of bad faith, that the evidence was exculpatory, or that the defendant had been prejudiced, implicitly confirming Alabama's three-part test for evaluating due-process claims based on lost or destroyed evidence as explained in Gurley).

A. Culpability of the State

Applying the now well settled balancing test for evaluating a due-process claim based on lost or destroyed evidence, which was articulated in Gurley, we find no evidence

of bad faith on the part of the State in this case. The most Stafford alleges is "that the State wilfully failed to do what it knew it was supposed to do, namely, ensure that the blood draw kit was not destroyed." (Stafford's brief, p. 19.) In fact, it appears that the trial court found a due-process violation without regard to "whether the State acted in bad faith." The record contains no allegation of "official animus" toward Stafford or of a "conscious effort to suppress exculpatory evidence." California v. Trombetta, 467 U.S. 479, 488 (1984). Although the trial court noted the State's intentional destruction of the blood sample by the ADFS, there has been no allegation that the ADFS destroyed the evidence, as the police did in Dickerson, after making its own determination as to the exculpatory nature of the evidence.[6]

[6]Although Dickerson was decided before either Youngblood or Gingo, it also appeared to apply the three-part balancing test, which was later clearly articulated in Gurley. The Dickerson Court found that the State acted in bad faith in destroying the evidence and that the defendant was prejudiced by the destruction. The only element that Dickerson could not establish was the favorable or exculpatory character of the evidence, and that was because "the police officers intentionally destroyed the videotape after making their own determination as to its favorable or unfavorable nature." Dickerson, 517 So. 2d at 631 (emphasis added). In contrast, here, there is neither evidence nor an allegation that the State--the prosecutor, law enforcement, or ADFS--intentionally

Rather, the record indicates that, without any instruction by the prosecution, the ADFS destroyed the blood-test kit pursuant to its own "two-year holding period." (C. 28.) In fact, Stafford's trial counsel acknowledged that the ADFS destroyed it according to what "appears to be some standard operating procedure." (R. 77.) The record further indicates that the case had been reassigned[7] within the District Attorney's office so that the prosecutor who appeared at the November 12, 2019, hearing had not even been involved with Stafford's case until after the kit had already been destroyed. Specifically, the prosecutor at the November 12, 2019, hearing told the court that he did not start working on

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destroyed the blood sample after making a determination as to its favorable or unfavorable nature. Rather, it appeared to be normal ADFS protocol to destroy such evidence after two years, and the evidence had been destroyed before the newest prosecutor was assigned Stafford's case. We also note that, unlike in Gingo, the test results were not "necessary to convict." 605 So. 2d at 1240. In this case, there is other evidence of Stafford's guilt, making the ADFS blood-test results unnecessary for conviction. Thus, we find Gingo and Dickerson distinguishable from this case.

[7]Stafford's counsel acknowledged that Stafford's case had been "passed" around the District Attorney's office. (R. 87.) The trial court even noted that the prosecutor who had "inherited" the case had attempted through "due diligence" to get the case to where it should have been regarding discovery. (R. 89.)

Stafford's case until July 11, 2019, and that, when he was contacted via e-mail by Stafford's counsel, who wanted the blood sample, the prosecutor "contacted the Homewood Police Department" who directed him to the ADFS, who then confirmed "that the kit was destroyed on July the 3rd of 2019." (R. 84.) The prosecutor had neither reviewed the file nor seen the motion to preserve the evidence until he was contacted by Stafford's counsel via e-mail. Thus, the record does not show any evidence of bad faith by the State. Rather, the State appears to have been negligent in not preserving the requested ADFS blood sample.

B. Materiality of the Lost Evidence

We also do not find the ADFS blood sample to be material to Stafford's defense because there is no evidence indicating that the sample itself would be exculpatory. Indeed, it is highly unlikely, based on this record, including Officer Hyatt's observations and, most persuasively, UAB hospital's independent test confirming Stafford's level of intoxication, that the results of another test on Stafford's blood sample from the night of the accident would have been anything other than inculpatory, making the sample itself immaterial to

Stafford's defense. In fact, Stafford has repeatedly alleged that the ADFS results are unreliable because the blood-test kit had expired. According to Stafford's own arguments, if she had been able to conduct an independent test on the ADFS blood sample, any results would not have been reliable because the kit used to take her blood sample was "unreliable."[8] (R. 78.) Stafford's counsel explained:

> "One of the reasons a blood kit--when it expires after the warrant goes by is the seal which holds the blood and keeps the contaminants out of the seal loses its integrity. It loses integrity virtually every day.
>
> "So we compound that by seven years. And what happens is when the seal doesn't work, bacteria, anything can get in. Certain types of bacteria, when it gets in, will feed on the sugar in the blood. And the byproduct of bacteria that feeds on sugar in the blood is to create alcohol."

(R. 79-80 (emphasis added).) Thus, according to Stafford's own arguments, the results from an expired kit are not only unreliable but also prone to a finding of alcohol, indicating

[8]We note that, according to the State, "[u]se of expired tubes will not invalidate findings ... however, vacuum within the tube may be reduced ... and limit the scope of the analyses." (R. 83.) Thus, although the State believes that results from the expired kit are reliable, it is not clear that there would have been enough of a blood sample to conduct another test, had the sample not been destroyed, because of the expired collection tubes in the kit.

that, if anything, more testing would yield an even higher blood alcohol content. For all of these reasons, we find that the blood sample itself is minimally material to Stafford's defense. What is material to Stafford's defense, however, is the photographs of the kit showing its expiration date, which the State has provided to the defense. Stafford has full use of those photographs to challenge the integrity of the ADFS test results at trial.

C. Prejudice to the Accused

Although the blood sample itself was destroyed by the ADFS, the State provided all the photographs and data that the ADFS "collected as a result of their analyses." (R. 85.) Thus, Stafford still has access to some of the evidence necessary to challenge and impeach the reliability of the State's ADFS blood-alcohol results at trial. In addition, Stafford can challenge the State's destruction of the sample, which has prevented her from testing it. The fact that Stafford's blood sample itself is no longer available, at worst, minimally prejudices Stafford, particularly when, according to her own arguments, any additional test conducted on the sample would have also been unreliable and, most

likely, inculpatory as well. It is also highly unlikely that the results of another test on Stafford's now destroyed ADFS sample would have been exculpatory based on the results from the test at UAB hospital, which showed Stafford's blood alcohol content to be almost three times the legal limit and which Stafford does not contend are incorrect. Had Stafford been provided the ADFS blood sample to conduct her own test, there is no "reasonable probability that the result ... would have been different." Dickerson, 517 So. 2d at 630.

Stafford's situation is perhaps most similar to that presented in Pickering v. State, 194 So. 3d 980, 985 (Ala. Crim. App. 2015), in which this Court found no due-process violation based on the admission of test results for which the samples had been destroyed, holding:

> "The test results of the samples from an independent hospital were not exculpatory but instead indicated Pickering's guilt. Thus, the indication that the samples would have rendered different results if tested independently was unlikely and therefore any prejudice to Pickering caused by their destruction is likewise unlikely. Moreover, although the trial court determined that the results could be admitted at trial, Pickering could confront and cross-examine the witnesses concerning the tests and results and the weight to be given that evidence would be a matter for the jury. The prosecutor further proffered that the State would present other witnesses to testify ....

> Under these circumstances, the trial court did not abuse its discretion in determining that the destruction of the urine samples did not mandate that the test results of those samples be suppressed from evidence."

(Emphasis added.)

In sum, we hold that there is no indication of bad faith exercised by the State in destroying Stafford's ADFS blood sample and that the blood sample itself was unlikely to be material to Stafford's defense because it was most likely inculpatory and, according to Stafford, the results from any additional testing from that blood sample would have been unreliable anyway. Because the evidence was highly unlikely to be exculpatory, because there exist other means of challenging the destroyed evidence, and because there was ample other evidence of guilt, Stafford's inability to conduct an independent test of the ADFS blood sample could not have prejudiced her defense to the point that dismissal of the charge was required. Applying the three-part balancing test articulated in Gurley, the ADFS blood sample was simply not "critical" to Stafford's defense. Thus, the trial court erred in dismissing Stafford's indictment.

III. Discovery Sanction

Finally, we turn to the State's argument that the trial court erred in dismissing Stafford's indictment as a sanction under its supervisory discovery powers because Stafford showed neither willful misconduct by the State nor such prejudice that dismissal was the only possible sanction. We hold that the trial court erred by applying the most extreme discovery sanction, dismissing the indictment against Stafford, when other means are available that better serve the interests of both the defendant, who is entitled to a fair trial, and our society, which has a legitimate interest in obtaining just verdicts in criminal prosecutions and combating drunk driving.

The trial court's written order dismissing the indictment states, in part, as follows:

> "There are no other legal remedies available to the Court to protect and preserve Mrs. Stafford's constitutional rights to due process and a fair trial, to uphold the integrity of judicial orders and to hold the State accountable for its actions and inactions when it unilaterally and intentionally chooses to destroy crucial evidence other than a dismissal of the indictment. ...
>
> "....
>
> "Based on the facts in this case, the dismissal of the indictment is the only legal sanction left for the Court to impose. The Court cannot impose

> any other sanctions to remedy or undo the prejudice to Mrs. Stafford's constitutional rights resulting directly from the State's actions or inactions in allowing evidence to be destroyed by one of its agents. The Court cannot compel the State to produce evidence that has been permanently destroyed. Further, a continuance of the case will not resurrect destroyed evidence. The Court is left with no real remedy; that is to say the Court cannot recreate or replace the critical evidence that no longer exists because of the State's intentional and unilateral actions and inactions."

(C. 32-33 (emphasis added).)

In issuing this order, the trial court partially relied on Rule 16.5, Ala. R. Crim. P., which provides, in pertinent part:

> "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; may grant a continuance if requested by the aggrieved party; may prohibit the party from introducing evidence not disclosed; or may enter such other order as the court deems just under the circumstances."

(Emphasis added.) Instead of using sanctions expressly mentioned in the rule, the trial court exercised its supervisory power to "enter such other order as the court deems just under the circumstances" and dismissed the indictment. Although cited by the trial court, State v.

Moore, 969 So. 2d 169 (Ala. Crim. App. 2006), as well as State v. Hall, 991 So. 2d 775 (Ala. Crim. App. 2007), and State v. Martin, 287 So. 3d 384 (Ala. 2018), both of which cited Moore and applied the standard it articulated, all demonstrate that the trial court erred in dismissing the indictment as a discovery sanction. All three of those decisions hold that, in order to justify dismissal of charges for a discovery violation, a defendant must show both willful misconduct and prejudice. Moreover, even in cases in which prosecutorial misconduct and prejudice are demonstrated, both this Court and the Alabama Supreme Court have held that trial courts must balance the interests of both defendants and society in determining how to best address prejudice and apply the least extreme sanction possible, favoring the impeachment of evidence over its exclusion and showing great disfavor of the extreme sanction of dismissal.

In Moore, 969 So. 2d at 182, this Court stated that the same standard applicable to the dismissal of an indictment for a Brady v. Maryland, 373 U.S. 83 (1963), violation applies to the dismissal of an indictment because of a discovery violation. This Court explained that, "[u]nder any analysis,

to warrant dismissal of the charges the defendant must show intentional or willful misconduct and prejudice." Id. at 184 (emphasis added). This Court then reversed the trial court's dismissal of the indictment against Moore. This Court reasoned that, even if willful misconduct had been established by the State's withholding of 245 pages of documents (which the State had falsely told the trial court that it did not have), the prejudice Moore suffered could still be corrected by a new trial because Moore now had full access to all the documents not disclosed before his trial. Id. Thus, this Court held, the trial court "erred in imposing the extreme sanction of dismissal." Id.

In Hall, the trial court dismissed the indictments against the Halls because, despite repeated requests for a videotape that they alleged was inculpatory, "[t]he videotape was never produced." 991 So. 2d at 777. It had been "'accidentally destroyed'(R. 4-5)" and "no longer existed." Id. The trial court dismissed the indictments because, it determined, the videotape was "instrumental" to the defense and the State's false representations that it had the

videotape were "inappropriate."[9] Id. at 777-78. This Court noted that, "[r]egardless of whether the government's conduct was intentional or inadvertent, the fact remains that the Halls have been deprived of viewing a key piece of evidence that the State apparently intends to rely upon in its case against them." Id. However, this Court held that "lesser sanctions than the dismissal of the Halls' indictments were available to the trial court for the government's failure to produce the videotape as promised." Id. at 781. Specifically, this Court held that

> "the Halls have the opportunity to make use of the government's destruction of possibly exculpatory evidence--whether such destruction was intentional or inadvertent--during their original trials. They can question law-enforcement officials about how and when the officials became aware of the destruction of the videotape, the fact that the Halls were never allowed to view the videotape despite repeated requests--some of which were made even before they were arrested, and can then allow the jury to draw its own inferences regarding the videotape's destruction. Such a solution provides a better balance between the competing interests of the defendants and society than the trial court's extreme decision to dismiss the indictments outright--a decision that summarily forecloses society's right to seek justice."

[9]The State had promised the Halls the videotape in exchange for their waiving the preliminary hearing. Hall, 991 So. 2d at 777.

Id. (Emphasis added.) Thus, as in Moore, this Court held in Hall that "the trial court erred in imposing the extreme sanction of dismissing the indictments." Id. (Emphasis added.)

More recently, in Martin, the Alabama Supreme Court explained that "the dismissal of an indictment is an extreme sanction that should be used only when a lesser sanction would not achieve the desired result." 287 So. 3d at 396. The Alabama Supreme Court held that "[t]o warrant dismissal of the indictment the defendant must establish intentional or willful misconduct by the State and irreparable prejudice." Id. Applying this standard to Martin's case, the Alabama Supreme Court found that, although 16 years had passed since Martin's trial and one of the witnesses's whose statements had been suppressed by the prosecution had memory loss, that witness could still testify at the new trial and be "impeached with his prior statements." Id. at 398. Thus, the Alabama Supreme Court held that "[t]here is no reason the prejudice suffered by Martin at his first trial cannot be corrected by a new trial." Id. at 398. Regarding the allegedly suppressed evidence from deceased witnesses, the Martin Court held that

"if, in a new trial, certain evidence is offered that violates the Confrontation Clause, a lesser sanction is available, i.e., the trial court can simply exclude that particular evidence. Dismissing the indictment is unnecessary." Id.

In sum, these cases instruct that, for a trial court to impose the most severe sanction of dismissing an indictment for a discovery violation, a defendant must establish both that the State engaged in "willful misconduct" in withholding, losing, or destroying evidence and that the lack of the evidence resulted in "irreparable prejudice" to the defendant. Moreover, a lesser sanction must be used if there is any other lesser sanction available to correct or prevent the prejudice. Finally, if the absence of the evidence cannot be used for impeachment purposes, then, at most, the evidence should be excluded rather than the indictment dismissed.

In this case, we share the trial court's concern that Stafford's counsel made several requests that her blood-sample evidence be preserved and provided to her and that, before the State sought to produce that evidence, it was destroyed. We do not condone what appears to be prosecutorial negligence in failing to secure the ADFS's preservation of the blood-sample

evidence sooner. However, the State's failure to act sooner is not "willful misconduct." Likewise, contrary to the trial court's finding that only dismissal could rectify possible prejudice to Stafford from the destruction of the ADFS blood sample, there were numerous lesser sanctions available to the trial court.

As in Hall, at trial Stafford may "question law-enforcement officials about how and when the officials became aware of the destruction" of her ADFS blood sample and about the fact that she was never provided the sample "despite repeated requests." Accordingly, Stafford would be permitted to "allow the jury to draw its own inferences regarding [the ADFS blood sample's] destruction." 991 So. 2d at 777. In addition, the State provided photographs of the ADFS blood-test kit to Stafford, and those photographs show the kit's expiration date, which Stafford may also use to challenge the ADFS test results at trial. These means of addressing any potential prejudice caused by the destruction of the ADFS blood sample "provide[] a better balance between the competing interests of the defendants and society than the trial court's extreme decision to dismiss the indictment[] outright--a

decision that summarily forecloses society's right to seek justice." Id. Accordingly, the trial court erred in dismissing the indictment as a discovery sanction when the potential prejudice could be remedied by lesser means, such as a thorough cross-examination and impeachment of the ADFS blood-test results or suppression of the blood-test results.

Because both this Court and the Alabama Supreme Court have made clear that "the dismissal of an indictment is an extreme sanction that should be used only when a lesser sanction would not achieve the desired result," Martin, 287 So. 3d at 396, the trial court erred in imposing the extreme sanction of dismissing the indictment.

To be clear, although this Court holds that, under the facts of this case, dismissal of the indictment was error, this Court expresses no opinion as to whether the trial court should impose a lesser sanction on the State or, if it chooses to do so, what the appropriate lesser sanction for the State's discovery violation should be.

Conclusion

For the above-stated reasons, the trial court's order dismissing the indictment against Stafford is reversed, and

this case is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Windom, P.J., and Kellum and McCool, JJ., concur. Minor, J., concurs in the result, with opinion.

MINOR, Judge, concurring in the result.

I concur in the Court's judgment holding that the Jefferson Circuit Court should not have dismissed the indictment against Karen Pridgen Stafford. I write separately to express my concern that the first two factors of the three-part test set out in Gurley v. State, 639 So. 2d 557 (Ala. Crim. App. 1993)--the culpability of the State and the materiality of the lost evidence--should, under these circumstances, be weighted more heavily against the State.

Addressing the culpability of the State, the main opinion twice notes that the State "appears" to have been negligent in not preserving the requested blood sample tested by the Alabama Department of Forensic Sciences ("ADFS"). I would not give the State the benefit of "appears" as a hedging to its negligence.

The State first knew in April 2018 that Stafford wanted preserved all biological and physical evidence collected during the investigation of the collision when she moved the Jefferson District Court to order the State to preserve that evidence. The district court did not rule on Stafford's motion, but, when Stafford was indicted in March 2019, she

again requested preservation of that evidence, moving the circuit court to order the State to preserve all physical evidence it had collected. On March 14, 2019--2 years and 10 days after the collision--the circuit court ordered the State to produce for inspection all tangible objects in the State's custody. The next month Stafford moved to compel production of the State's discovery materials, and the circuit court ordered the State to produce to Stafford all discoverable materials. The State produced discovery to Stafford on April 12, 2019, including the ADFS toxicology report showing Stafford's blood-alcohol content on the night of the collision. A few days later Stafford moved to suppress the ADFS blood-alcohol evidence because, she said, the State obtained it with a search warrant that relied on an insufficient affidavit.

At the September 2019 hearing on Stafford's motion to suppress the blood-alcohol evidence, Stafford's counsel asked about the ADFS blood sample, and the prosecutor told the circuit court he would try to get it the next week. But, the next month, Stafford learned from the prosecutor that ADFS had destroyed the blood-sample kit on July 3, 2019.

Before the blood-sample kit was destroyed, then, the State had two requests from Stafford--one in April 2018 and one in March 2019--asking that the evidence be preserved, and it had two court orders directing it to produce all discoverable material to Stafford. Yet at no time before October 2019 did the State ask ADFS to preserve Stafford's blood-alcohol evidence. Had the State done so after Stafford's first request in district court--or even after her request in circuit court that came a few days after the two-year mark from the date of the collision--then, even given ADFS's apparent policy of destroying evidence after two years, the State would have prevented ADFS's destroying Stafford's blood evidence. As it was, though, the State's failure to contact ADFS to request that it preserve the blood evidence denied Stafford access to evidence she timely requested.

The main opinion points out that Stafford's case had been "'passed' around the District Attorney's office," ___ So. 3d at ___ n.7, and that the prosecutor who "inherited" the case on July 11--eight days after ADFS destroyed the blood-sample kit--had "neither reviewed the file nor seen the motion to preserve the evidence until he was contacted by Stafford's

counsel via e-mail." ___ So. 3d at ___. But that a new prosecutor within the same District Attorney's office is assigned the case does not excuse any earlier prosecutor's negligence in not requesting the blood evidence, nor does it excuse the newly assigned prosecutor from knowing what work another prosecutor did--or did not do--on an inherited file. Although the State's actions fall short of bad faith, I cannot condone the State's failure to act when, as here, it receives a request to preserve evidence, makes no attempt to request preservation of that evidence, and then, when its inaction surfaces, points its finger at ADFS's two-year routine

evidence-destruction policy.[10] That does not "appear" to me to be negligence; it is negligence.

As to the second Gurley factor--the materiality of the lost evidence--I am concerned with the main opinion's finding that the ADFS blood sample is not material to Stafford's defense. The main opinion reasons--based on Stafford's argument that the expired blood-sample kit is unreliable and prone to contamination, which, Stafford argues, would mean that if retested the ADFS blood sample might show a higher alcohol content than on the night of the collision--that more testing of Stafford's blood sample from the night of the

[10]From the record it appears the parties agree that ADFS has a routine "two-year holding policy" after which evidence is destroyed. Although our legal system values the speedy resolution of criminal proceedings, sometimes--for reasons not the fault of the State or the defendant--cases cannot be resolved within two years from the date of an offense. The current COVID-19 pandemic our country is facing comes to mind as one of those situations in which, if ADFS continues its policy of routinely destroying evidence after two years, a defendant who makes a timely request for the preservation of evidence may find his request still came too late. Whether ADFS changes its evidence-destruction policy, I believe the best practice for State and local prosecuting agencies is to enact evidence-preservation procedures so that when a prosecutor receives a preservation request, that request is transmitted promptly to ADFS, regardless how many times or how often a case shuffles between prosecutors.

collision would, if anything, be inculpatory, not exculpatory. Maybe so; but maybe not.

If Stafford had the chance to retest the ADFS blood sample, the new test might show, as Stafford argues, a higher blood-alcohol content now than it did on the night of the collision. This Court says that such a result would be inculpatory, and so it dismisses the materiality of the ADFS blood sample. But Stafford could use those disparate test results to urge the jury to question whether it should trust the results of either test, and, in doing so, she could cast doubt on the earlier ADFS blood-test result. And if a retesting of the ADFS blood sample showed a different blood-alcohol content than the hospital sample, Stafford could cast doubt on the reliability of the hospital sample. I hesitate to say, then, that a retesting of the blood sample could only be inculpatory, and for that reason I would not find that the ADFS blood sample is immaterial to Stafford's defense.

But even weighing the first two Gurley factors more heavily against the State, I agree that the circuit court should not have dismissed the indictment against Stafford.

Whatever sanction is appropriate--and I believe one is--under our caselaw it is not dismissal of the indictment.