[J-072-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 14 MAP 2000
	:	
Appellant	:	Appeal from the Order of Superior Court
	:	entered June 7, 1999 at No. 4778PHL97
	:	which reversed the Judgment of Sentence
v.	:	of the Susquehanna County Court of
	:	Common Pleas, Criminal Division, entered
	:	October 22, 1997 at No. 1996-174CR.
STEPHEN BARRY SCHER,	:	
	:	
Appellee	:	
	:	ARGUED: May 2, 2000
	:	
	:	
	:	

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MADAME JUSTICE NEWMAN **Decided: August 20, 2002**

We granted the Commonwealth's Petition for Allowance of Appeal to decide whether the Commonwealth violated Stephen Barry Scher's (Scher) rights to due process of law under the United States Constitution and Article 1, Section 9 of the Constitution of Pennsylvania by the twenty-year delay in charging Scher with the murder of Martin Dillon (Dillon). We find that the twenty-year delay did not violate the due process rights of Scher and reverse the Superior Court.

FACTUAL AND PROCEDURAL HISTORY

Martin Dillon died of a gunshot wound to the chest on June 2, 1976 at the Dillon family recreational property called "Gunsmoke" in Susquehanna County. Scher was the only other individual present when Dillon died. How Dillon died, and whether that death was an accident or an intentional act of murder, is a story that evolved in fits and starts in the intervening two decades, culminating in murder charges being filed against Scher in 1996 and his conviction for first degree murder following a six-week jury trial in 1997. Resolution of this appeal requires an understanding of how the scene where Dillon lay dead appeared in 1976; what the investigators initially concluded concerning Dillon's death and how that investigation was conducted; what a succession of prosecutors did with respect to this suspicious death; why the Susquehanna County District Attorney's Office finally decided to reopen the case; and, most important, how the lies that Scher related to investigators and his staging of the scene to make it appear that Dillon died accidentally impacted the investigation.

The Scene

Andrew Russin, a neighbor whose house was approximately two miles from Gunsmoke, testified that, on the day Dillon died, Scher appeared at Russin's house with his hands and mouth covered in blood and asked Russin to call the authorities because Dillon had been shot. Scher appeared upset but was not crying. Russin did not know whom to call, so Scher made the telephone call himself. The two proceeded to Gunsmoke, each in his own vehicle, while Russin's son stood by the entrance of the road that leads to Gunsmoke to direct the ambulance and the police when they arrived. After the two arrived at Gunsmoke and parked near the Dillons' trailer, Scher led Russin to the path towards the skeet shooting area, where Russin saw Dillon's body. Russin testified that Dillon's chest

was saturated in blood and that he placed a blanket over Dillon's body. Russin then watched as Scher picked up the gun that was lying near Dillon's body and smashed it against a tree, breaking the barrel from the stock.

Trooper William Hairston of the Pennsylvania State Police, Gibson barracks, arrived at Gunsmoke with John Conarton, the Susquehanna County Coroner, at approximately 7:25 p.m.[1] Trooper Hairston parked his vehicle near the Dillon family trailer and walked up the path that led to a clearing where Dillon's body lay on its back. A pair of hunting goggles and shooting "earmuffs" were on the ground nearby. Trooper Hairston observed that the earmuffs had blood on them. There was a puddle of blood to the left side of Dillon's body.

Trooper Hairston and Coroner Conarton returned to the trailer area where Scher was sitting, with the door open, in the passenger side of a car. Trooper Hairston, with Coroner Conarton present, took a statement from Scher. In his June 2, 1976 statement, Scher told Trooper Hairston: (1) he and Dillon had come to Gunsmoke to skeet shoot; (2) after firing about twenty rounds, they decided to take a break and returned to the trailer for some beer and potato chips; (3) the two sat in the trailer discussing an upcoming murder trial in which Dillon, a lawyer, was representing the defendant; (4) they then went back to the trail towards the clearing where the skeet-shooting trap was set up and fired a few more rounds; (5) Dillon then wanted to go back to the trailer to get cigarettes, so Scher loaded his shotgun, a sixteen-gauge, to be ready for the next round of firing, while Dillon unloaded his twenty-gauge shotgun and placed it on a nearby stump; (6) Scher and Dillon then walked down the trail, and Scher placed his loaded shotgun on a metal gun stand, approximately 120 feet from the skeet-shooting area; (7) as they went further down the trail, Dillon turned around and saw something in the open field that he thought was a porcupine, ran back up

[1] Other individuals, including a Pennsylvania game commissioner and members of the Silver Lake Ambulance corps, were already at the scene when Trooper Hairston -- the first investigating officer at the scene -- and Coroner Conarton arrived.

the trail and grabbed Scher's gun from the stand; (8) Scher heard Dillon cock the gun and heard it fire, but he could not see Dillon; (9) Scher then walked up the trail and found Dillon lying on the ground, face down; (10) Scher, a physician, ran up to Dillon and turned him over, saw that Dillon was bleeding from the chest and tried to stop the bleeding, but knew that Dillon was dead; (11) Scher took the car keys from Dillon's pocket and drove to Russin's house; (12) Scher and Russin returned to the scene, and Scher noticed that the trigger of the sixteen-gauge shotgun had a twig in it; (13) Scher then smashed the shotgun against the tree, and stated, "I know I shouldn't have done that." This June 2, 1976 statement to Trooper Hairston, as Scher's trial testimony more than twenty years later admitted, was a lie.

Carol Gazda, who arrived at Gunsmoke on June 2, 1976, along with her husband and other members of the Silver Lake Ambulance corps who were responding to the report of a hunting accident, testified at the 1996 trial concerning Scher's unusual demeanor at the scene:

> Q: I want you to go on in your own words and tell this jury exactly what you saw and heard.
>
> A: Okay. There was a gentleman in the vehicle in front of me, I believe, standing next to it. And he seemed okay. He was just looking around, you know, normal. And then when someone came near him to talk to him, he would get very emotional and start, you know, like, My [sic] best friend is dead, I can't believe he's dead, my best friend is dead, I can't believe it. When they left, he seemed fine again, like he was previous when he was alone. And when somebody came again, he'd do the same thing. It was kind of strange to me, but I had no idea who he was.
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> ***
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> Q: Now, did you at some point find out who this person was --
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> A: It was--
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> Q: What his name was at least?

A: --later in that hour someone mentioned, I believe, Dr. Scher…."

Notes of Testimony, 9/24/97, pp. 156 - 57.

Trooper Francis Zanin of the Pennsylvania State Police, Dunmore barracks, was the records and identification officer who documented the scene on June 2, 1976. Trooper Zanin observed Dillon's body lying on its back with its arms outstretched. Dillon was wearing eight-inch high boots that had round eyelets for the laces to pass through except at the top, where the laces would pass through three hooks. Trooper Zanin noticed that although the laces at the top of the right-foot boot were untied, the rest of the laces remained pulled tightly against the leg. He also noticed that Dillon's pant leg was pulled up higher than the boot. There were blood droplets on Dillon's boots and face, on the shooting goggles and protective eyewear that lay nearby, and on the tree stump that was approximately five-and-a-half to six feet from Dillon's body. Trooper Zanin observed, however, that there were no blood droplets immediately around Dillon's eyes and ears where the goggles and earmuffs would have been had Dillon been wearing them when he was shot. The barrel of the shattered sixteen-gauge shotgun lay close to Dillon's body, but a subsequent examination of the outside and inside of the shotgun barrel showed no evidence of blood. Inside the chamber of the broken sixteen-gauge shotgun was a discharged number four load high brass magnum shell -- a variety not commonly used in skeet shooting. Beneath Dillon's left hand were unbroken clay pigeons.

The Initial Investigation

On June 4, 1976, at 11:30 a.m., two days after his statement to Trooper Hairston, Scher came to the District Attorney's Office at the Susquehanna County Courthouse in Montrose, at the request of the investigators, and gave a statement. At the interview were Williard Collier, the detective for the Susquehanna County District Attorney's office,

Troopers John Salinkas and John Fekette of the Pennsylvania State Police, and a secretary from the Susquehanna County District Attorney's office. At the commencement of questioning, Trooper Fekette advised Scher of his Miranda rights, which Scher waived and agreed to be questioned without a lawyer present. During this interrogation, Scher repeated essentially the same story that he had related in his June 2, 1976 statement to Trooper Hairston. Scher explained that he and Dillon had gone to Gunsmoke to go skeet shooting, that they were returning to the trailer to get cigarettes, that Dillon thought he saw a porcupine and ran up the path to pursue it, and that Scher heard the shot and followed after, where he found Dillon lying on the ground with a gunshot wound to the chest. One noteworthy difference between this second statement and the June 2, 1976 statement was that Scher said that he had placed the sixteen-gauge shotgun against a tree, whereas his June 2, 1976 statement indicated that he had placed the loaded shotgun on the metal gun stand. When asked whether he and Dillon had any disagreements, Scher said, "No. We were talking about this rumor. I told him I was thinking of leaving town. It was rough on him. He sat and told me I was just a quitter and chicken -- 'don't run away . . . it was just small people talking.'" After giving this answer, Scher became angry, terminated the interview, and left the room.

Edward Little, the District Attorney of Susquehanna County from 1968 to 1980, testified at pretrial hearings on Scher's Motion to Dismiss as to the state of the investigation in June of 1976, and explained why no charges were filed during his tenure in office. Dr. James Grace, a general practitioner who conducted an autopsy[2] of Dillon on June 3, 1976, had issued a report that explained, "[h]istory given of [Dillon's death] having been involved in a hunting accident," and listed the cause of death as "gunshot wound of the chest," but

[2] When Dr. Grace performed the autopsy, the funeral director who had charge of Dillon's body had already sutured the wound to Dillon's chest.

made no determination whether the death was the result of a homicide. Coroner Conarton,[3] who was present when Scher gave his June 2, 1976 statement to Trooper Hairston, had determined that Dillon's death was accidental and had listed this as the manner of death on Dillon's death certificate. Although Detective Collier had a strong belief that Dillon's death may have been a murder rather than an accident, and expressed this opinion in a June 9, 1976 report[4] to Little, Scher was not arrested. Little explained that he, too, was not convinced that Dillon's death was an accident and requested that Coroner Conarton delay issuance of the death certificate in order to allow additional time to conduct the investigation. Little testified, however, that he never brought charges against Scher because he felt that there was insufficient evidence of murder to prosecute the case successfully.

Laurence Kelly succeeded Little as District Attorney of Susquehanna County in 1980, and held that office until 1988. Little testified that he had no discussions with Kelly regarding the investigation into Dillon's death. Kelly confirmed that: (1) he had no conversation with either Little or Detective Collier concerning Dillon's death; (2) he did not know where in the office the investigative file on the Dillon matter was located, nor did he look for it; (3) he did not initiate any investigation concerning the death of Dillon; (4) he

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[3] Coroner Conarton was not a medical doctor. This is not unusual in smaller counties, because there is no requirement that a coroner have formal medical training in order to hold office. See 16 P.S. § 413. Indeed, it was not until 1988 that the legislature prescribed a course of professional education that all newly-elected coroners must complete, which includes training in crime-scene investigation, toxicology, and forensic autopsies. See 16 P.S. §§ 9525.2 - 9525.3.

[4] In this report, Detective Collier explained that "an examination of the scene, the angle of the wound of entrance and information available at present are not satisfactory to this investigator as being caused by a fall on the weapon." Notes of Testimony, 5/7/97 p. 82. Detective Collier also expressed in this report that "the physiognomy of one subject, his partial destruction of the weapon and his explanation of the incident are not satisfactory to this investigator." Id.

gathered no additional evidence into Dillon's death; (5) he conducted no review of the evidence gathered during the initial investigation; and, (6) he never met with anyone from the Pennsylvania State Police regarding the Dillon case. For eight years, therefore, the investigation into the Dillon matter was dormant.

The Reactivated Investigation

Jeffrey Snyder was the District Attorney of Susquehanna County from 1988 until 1996. In 1989, District Attorney Snyder received a telephone call from Al Riemel, a social acquaintance of the Snyder family and the brother-in-law of Martin Dillon, requesting a meeting at the home of Lawrence Dillon, the father of Martin Dillon. Prior to this telephone call, Snyder had not conducted any review of the Dillon case, but had the District Attorney's Office investigative file retrieved from storage in order to review the matter. District Attorney Snyder reviewed the Dillon file, but found that it contained "little to no information" and decided to meet with the state police to discuss the status of the case. At the behest of Lawrence Dillon, Snyder arranged meetings with the original Pennsylvania State Police investigators, Troopers John Salinkas and John Fekette, and reviewed the state police investigative file. District Attorney Snyder agreed to have the facts as developed by the investigation to that point presented to a panel of medical experts who were holding a conference at the University of Pennsylvania, in Philadelphia. In May of 1989, Snyder went to the conference to "get some consensus from those in the forensic field" about whether Dillon died by accident or was murdered. The conference attendees consisted of medical examiners, pathologists, and coroners. Three members of the Pennsylvania State Police accompanied Snyder to the conference, along with Dr. Isadore Mihalikis, a forensic

pathologist who actually presented the case to the conference attendees.[5] Following this presentation, a significant majority of the conference members opined that a self-inflicted gunshot wound, either accidental or intentional, caused Dillon's death. Snyder viewed this vote as "an overwhelming defeat for the prosecution" and concluded that no successful prosecution could be mounted at that time. Although the investigation remained open, the Susquehanna County District Attorney's Office took no substantial steps to advance the investigation for the next five years.

In 1990 and 1991, Lawrence Dillon retained private investigators to look into the case and unsuccessfully petitioned to have Dillon's body exhumed for another autopsy. At that time, Snyder felt that the efforts of the Dillon family were counterproductive to a successful resumption of the investigation.[6] However, in 1994, again at the urging of the Dillon family, two Pennsylvania State Police officers who had no previous involvement in the case were brought in to reexamine the evidence, conduct interviews with witnesses, and, in Snyder's words, "winnow out the rumor, the innuendo, that in my opinion riddled much of the material that was already on file." The "rumor" referred to by Snyder was the report that Scher and Dillon's wife, Patricia,[7] had been having an affair before Dillon's death. These rumors were known to investigators at the time of the incident but, for reasons that do not appear in the record, were not pursued. The officers who were placed in charge of the state police investigation in 1994 reinterviewed witnesses and interviewed

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[5] This presentation included photographs from the autopsy conducted by Dr. Grace in June of 1976.

[6] Snyder feared that the Dillon family's private investigative activities in the early 90s would pressure him into arresting Scher prematurely when there would be little chance of a successful prosecution.

[7] Patricia Dillon is now Patricia Scher, having married Scher in 1978.

additional witnesses who had not been questioned in 1976. Based on this renewed investigation, the Commonwealth finally developed evidence of a motive for Scher to murder Dillon that had not been developed in the earlier investigation: namely, that Scher and Patricia had been having an extramarital affair prior to Dillon's death. In 1995, the Commonwealth successfully petitioned, in spite of the objection of Patricia Scher,[8] to have Dillon's body exhumed for a second autopsy. Following this second autopsy in April of 1995, the Commonwealth obtained support from its expert forensic pathologist, Dr. Mihalikis, for the position that the physical evidence of Dillon's gunshot wound was not consistent with an accidental discharge of a dropped shotgun. The Commonwealth[9] concluded that it possessed sufficient evidence to prosecute murder charges successfully and charged Scher with first-degree murder in June of 1996.

Scher's Trial Testimony

The Commonwealth's theory of the case was that the physical evidence (i.e., the condition of the gunshot wound, the angle of the wound, the appearance of Dillon's body at the scene, blood spatter on Scher's boots) was inconsistent with Scher's story -- and the conclusion of those involved in the initial investigation -- that Dillon died from an accidental gunshot wound. Accordingly, the Commonwealth presented expert testimony to support its

[8] In court proceedings to contest the Commonwealth's exhumation petition, Patricia denied that she and Scher had been having an affair. Indeed, Scher and Patricia called a press conference, at which they denied the rumors that they had been having an affair prior to Dillon's death. These denials were consistent with Scher's sworn statements in 1976 in court papers in the divorce proceedings from Scher's first marriage where Scher denied that he and Patricia had been having an extramarital affair. Scher later conceded at trial that he committed perjury, and that these sworn denials of an affair with Patricia were lies under oath. In fact, as Scher admitted at trial, he and Patricia had been having an affair.

[9] The Attorney General's office assumed prosecution of the case from the Susquehanna District Attorney's Office.

theory that Dillon could not have been shot accidentally by a dropped shotgun. The Commonwealth also presented testimony from witnesses to support its theory of motive that Scher had been having an affair with Patricia and that Dillon knew about it.

Confronted with the Commonwealth's case, Scher took the stand and admitted that his previous statements to the investigators in June of 1976 were false. He proceeded to explain what happened that day at Gunsmoke.

> A: Well, 3:00 [p.m., June 2, 1976] came and I was ready to go. I had my clothes on that I was going to wear to Gunsmoke. And Marty [Dillon] wasn't there….So I got everything out of my house to put into my car. I took hamburger buns and relish and ketchup and mustard and potato chips; and I took my gun, the sixteen-gauge shotgun, and some clay birds and some ammunition to -- and put it in the trunk of my car. I waited for Marty until about 3:15 p.m. when he showed up….
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> And I asked Marty, Do you still want to go?…Marty said, Yeah, I just bought a whole bunch of hamburger meat, let's go.
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> * * *
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> And we drove right up the road into Gunsmoke to the trailer there, the cabin. We got out, and we took out the food things, took out all the food stuff that we had to take up to the trailer.
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> We sat down on the porch, and we had a beer and a cigarette, just unwound. Then from that point on, after finishing the beer, we put a couple beers in our pockets, actually, one each. We went back to the car and got the stuff we were going to shoot with. We got the clay birds and the ammunition and the guns and the bird thrower machine.
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> * * *
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> We got up the trail to where we -- there was a clearing where we shot clay birds. We set up the machine, the machine that throws out the clay birds, spring action.
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> Q: Let me interrupt you a minute, Doctor. When you got out at Gunsmoke and you took the food and stuff up to [sic] trailer and you sat and smoked cigarettes and drank beer, what did you talk about?

A: We talked about quite a couple of things. …we talked about Marty's upcoming trial that he was made a public defender. It was a murder case and he never tried a murder case. He talked to me a little bit about that trial. And that was about it before we finished our beer and went back up the trailer with the guns and --

Q: I'm sorry for interrupting you. What happened after that discussion?

A: Well, that's when we went up to get the shooting paraphernalia. We walked up the Jeep trail to the clearing. And we set up the bird thrower and put down the boxes and started shooting.

* * *

Anyhow, we shot up about five or six rounds of ten. And the guns were hot, so we put them down. And we also ran out of clay birds. So we had to go back down the trail to the cabin and the car to get some more clay birds.

We got to the cabin and we sat down and we drank a couple more beers, had a couple more cigarettes. We opened up some potato chips and ate the chips and talked before going back out there.

Q: What did you talk about this time?

A: Mostly we talked about the murder trial that he was going to be a defendant [sic] for….We talked a little bit about my divorce proceeding. And then we left. We went out shooting again.

So we walked back up the trail to the clearing. This time I shot first. He threw out ten birds for me, and then I threw off ten birds for him. He was still using the same gun, and I was still using the twenty gauge.

Then my second round of ten, at the very end of the last shot, he turned to me, he said, Ann came to me and told me that you told her that you love Pat.

I said, When did that happen? And I put down the twenty gauge and I broke it in half and put it on the log. And I walked over to him to his side.

He said, it doesn't matter when it happened.

I said, Do you believe her?

He said, I don't know. She's crazy. I don't know whether to believe her or not. But with all the rumors and talk and gossip and gossip [sic] in town and my father's breathing down my neck about this gossip, I really -- I need to know. And he stopped and he looked down at the ground and it was like he -- it was like he really didn't want to know, but, you know, but then he looked up. He looked right at me in the eye. He said, I have to know. Are you and Pat having an affair?

And I just had -- I had to tell him the truth. He was looking me in the eye. I could no longer keep it from him. I said, Yes, we're having, not a love affair, but a physical affair.

And then he became very anxious and very, very upset. He was sitting there on the log and he had his hand over his ears and he was rocking down and asked me a whole bunch of questions. And I don't -- I don't remember his exact words, how he phrased the questions. I don't even remember the order that he asked them, but he wanted to know from me, he wanted to know how did this start.

I told him it just happened. Pat and I were close together all the time. It just happened.

* * *

I was embarrassed to talk to him this way, of course. I was looking at the ground. I said to him, You know, this is as much your fault as it is anybody's.

Then I hear a scream, yell. And I look up and he has the sixteen gauge gun in his hand, reached around and I -- I knew -- I just knew I had to get that gun away. I had to get it. I didn't know what he was going to do with it. I just knew with his state of mind at that time and my state of mind that it wasn't good to have a hold of a gun and I lunged. In a matter of that much time, I grabbed the gun and pulled away (indicating). We struggled and the gun went off.

Notes of Testimony, 10/6/97, pp. 90 - 92, 94 - 100.

Scher then explained why he decided to engage in a cover-up of and why he had lied to investigators, to the press, and to the public for the next twenty-one years.

> I was thinking, How can I tell anybody this accident happened like this and have anybody believe me in Montrose, what with all the rumors that were going on and me being a relative newcomer to the area and Marty's father is the mayor and I'm the only Jew in town, in the county? And I felt I couldn't tell anybody.
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> * * *
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> And I decided since it was an accident that I was going to make it into another accident. I couldn't face the public telling them the right truth of an accident. I had to make something up of another accident. So I made up the story about him running with the gun and tripping and falling. I was afraid that I would be convicted if I didn't -- and if I was convicted, I'd never be able to practice medicine again.
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> So I made up that story and took the gun that I dropped right when it discharged and wiped off the barrel with a handkerchief and put it back into my pocket. I took the gun and I put it with the muzzle facing his head where he laid. Then I untied his shoelace to make it look like there was something he tripped over. And I ran back down the trail to the cabin, past the cabin. I was going to go tell Mr. Russin to get help.

N.T., 10/6/97, pp. 102 - 03.

The jury convicted Scher of first-degree murder and the trial court sentenced him to life imprisonment on October 22, 1997. On appeal to the Superior Court, Scher raised numerous issues, including the claim that the twenty-year delay in filing charges against him violated his right to due process of law as guaranteed by the United States and Pennsylvania Constitutions. The Superior Court reversed the Judgment of Sentence and discharged Scher, concluding that the Commonwealth had violated Scher's due process rights by delaying twenty years in charging him with murder. Commonwealth v. Scher, 732 A.2d 1278 (Pa. Super. 1999). We granted the Commonwealth's Petition for Allowance of Appeal to address the question of when pre-indictment delay violates an individual's rights to due process of law.

DISCUSSION

The Due Process Standard

In Commonwealth v. Snyder, 713 A.2d 596 (Pa. 1998), this Court held that Article 1, Section 9 of the Constitution of Pennsylvania[10] is coextensive with the due process protections of the United States Constitution.[11] We expressly declined in Snyder to hold that the Pennsylvania Constitution provides greater protection than the due process provisions of the United States Constitution, and held that, with respect to claims of violation of due process caused by pre-arrest delay, "our analysis is the same pursuant to both due process clauses." Id. at 602. Consequently, we must turn to the standards governing due process claims based on pre-arrest delay promulgated by the United States Supreme Court.

United States v. Marion, 404 U.S. 307 (1971), was the seminal case to address whether a defendant's federal constitutional rights are violated by an extensive delay between the occurrence of a crime and the indictment or arrest of a defendant for the crime. In Marion, the defendants were charged with having engaged in a fraudulent

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[10] Known as the Due Process Clause of the Pennsylvania Constitution, this Section provides, in relevant part, "nor can [an accused] be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." PA. CONST. ART. 1, § 9.

[11] The Due Process Clause of the Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law…." U.S. CONST. AMEND. XIV, § 1. The United States Supreme Court decisions that have examined due process claims grounded on pre-arrest delay that arose in federal criminal prosecutions, discussed infra, have relied on the Due Process Clause of the Fifth Amendment, which provides, "[n]o person shall…be deprived of life, liberty, or property, without due process of law…." U.S. CONST. AMEND. V. We analyze Scher's federal constitutional claims pursuant to the Fourteenth Amendment, which is specifically applicable to the Commonwealth's actions. Cf. Shoemaker v. City of Lock Haven, 906 F. Supp. 230, 238 (M.D. Pa. 1995) ("Rights guaranteed by the Fifth Amendment are not incorporated into the Fourteenth where…such rights, if they exist, can be asserted directly under the Fourteenth Amendment").

business scheme beginning in March of 1965 and ending in January of 1966. The federal prosecutor in Marion did not empanel a grand jury to investigate the scheme until September of 1969, and no indictment was returned until March of 1970. The defendants moved to dismiss the indictment, claiming: (1) the delay in indicting them violated their Sixth Amendment right to a speedy trial; and, (2) the delay violated their Fifth Amendment right to due process of law. The federal district court granted the defendants' motion and dismissed the indictment. The United States Supreme Court reversed the dismissal, rejecting the defendants' Sixth Amendment speedy trial claims, holding that such protection did not apply until "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge," which was not implicated in defendants' complaints of pre-arrest delay. Id. at 320. Concerning the defendants' Fifth Amendment due process claims, the Court noted that the primary guarantee against the bringing of overly stale charges was whatever statute of limitations applied to the crime.[12] The Court went on to note, however, "the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment." Id. at 324.

The following passage from Marion is significant:

> Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. Cf. Brady v. Maryland, 373 U.S. 83 (1963); Napue v. Ilinois, 360 U.S. 264 (1959). However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution.

Id. at 324 - 25 (footnotes omitted). The Court later stated:

[12] There is, however, no limitations period for prosecution of murder in the Commonwealth of Pennsylvania. 42 Pa.C.S. § 5551.

> Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.

Id. at 325. The Court concluded its Opinion by stating, "[e]vents at trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." Id. at 326.

Six years after Marion, the United States Supreme Court revisited the due process implications of pre-arrest delay in United States v. Lovasco, 431 U.S. 783 (1977). Eugene Lovasco was indicted in March of 1975 for possessing firearms stolen from the mail beginning in July and ending in August of 1973. Lovasco moved to dismiss the indictment, claiming that the prosecutor's delay in bringing the indictment caused him prejudice through the deaths of two favorable witnesses and therefore violated his due process rights. The trial court agreed and dismissed the indictment, finding that the seventeen-month delay before the case was presented to the grand jury "had not been explained or justified" and was "unnecessary and unreasonable." Id. at 787. The Eighth Circuit affirmed the dismissal. The United States Supreme Court granted certiorari "to consider the circumstances in which the Constitution requires that an indictment be dismissed because of delay between the commission of an offense and the initiation of prosecution." Id. at 784. The Court discussed the Marion decision and rejected Lovasco's argument that if a defendant suffered actual prejudice from the pretrial delay, this was sufficient proof to establish a due process violation: "Marion makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." Id. at 790. In a later discussion of the "reasons for the delay," the Court stated, "[i]n our view, investigative delay is unlike delay undertaken by the Government solely 'to gain a tactical

advantage over the accused'…." Id. at 795, citing Marion, 404 U.S. at 324. Thus, a two-prong test emerged from Marion and Lovasco to establish a due process claim for pre-arrest delay: (1) the defendant must show actual prejudice from the delay, and (2) prejudice alone is not sufficient to show a violation of due process where the delay was due to the government's continuing investigation of the crime.

From the time Lovasco was decided in 1977, the United States Supreme Court has not granted certiorari to discuss in more depth the due process standard as established by Marion and Lovasco, and has only tangentially discussed the Marion/Lovasco standard in cases involving other issues. See United States v. Gouveia, 467 U.S. 180, 192 (1984) (in a case involving right to appointment of counsel for federal prison inmates who were placed in administrative detention pending indictment for crimes committed in prison, the Court stated, in dicta, "the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice"). See also Arizona v. Youngblood, 488 U.S. 51, 57 (1988) (in a case concerning whether defendant's due process rights were violated by the police destruction of evidence in the absence of bad faith motives by the police, the Court cited Marion's language that "no actual prejudice to the conduct of the defense is alleged and proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them").

All the federal circuits that have examined pre-arrest delay due process claims agree that the Marion/Lovasco standard requires that a defendant establish, as a threshold matter, that he or she suffered actual prejudice from the delay. All federal circuits also agree that Marion and Lovasco require another step for there to be a successful due

process claim. There is a split of authority, [13] however, as to what that next step involves. A majority of the circuits hold that a defendant bears the burden of proving both actual prejudice from the delay and that the delay was "intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution of for some other impermissible, bad faith purpose." United States v. Crouch, 84 F.3d 1497, 1514 (5th Cir. 1996). See, e.g., United States v. Johnson, 120 F.3d 1107 (10th Cir. 1997); United States v. Rogers, 118 F.3d 466 (6th Cir. 1997); United States v. Ismaili, 828 F.2d 153 (3d. Cir. 1987), cert. denied, 485 U.S. 935 (1988); United States v. Hoo, 825 F.2d 667 (2d. Cir. 1987), cert. denied, 484 U.S. 1035 (1988); United States v. Lebron-Gonzalez, 816 F.2d 823 (1st Cir.), cert. denied, 484 U.S. 843 (1987). The Fourth and Seventh Circuits, on the other hand, read the second element of the Marion/Lovasco standard differently, and say that it requires a "balancing test" once a defendant can show actual prejudice due to the delay. Pursuant to this scheme, once the defendant proves that he has suffered actual prejudice, the burden shifts to the state to "come forward and provide reasons for the delay." See, e.g., United States v. Sowa, 34 F.3d 447 (7th Cir. 1994). The Fourth Circuit explicitly rejected the state's argument that only proof of an improper prosecutorial motivation for the delay would be sufficient to establish a violation of due process. See Howell v. Barker, 904 F.2d 889 (4th Cir. 1990).

Recently, we reviewed the standard for due process claims based on pre-arrest delay in Commonwealth v. Snyder, 713 A.2d 596 (Pa. 1998). Keith Snyder was charged in 1993 with the murder of his wife and child, who died during a fire at the Snyder home in 1982. The local and state police investigated the deaths for two years, and a special

[13] Justice White filed a dissenting statement in a case where the Court denied certiorari, in which he recognized the split in the circuits and opined that the Court should have granted certiorari. United States v. Hoo, 825 F.2d 667 (2nd Cir. 1987), cert. denied, 484 U.S. 1035 (1988).

investigating grand jury was empanelled in 1984, but disbanded in 1986 without returning an indictment. In 1993, a new District Attorney reopened the case and charged Snyder with murder. Snyder filed a motion to dismiss the charges on the grounds that the eleven-year delay between the occurrence of the crime and the indictment caused him actual prejudice and deprived him of his due process rights. The trial court denied the motion, and a jury convicted Snyder of first-degree murder. On appeal, the Superior Court affirmed. We granted allocatur in Snyder "to decide whether the extraordinary pre-arrest delay denied the Appellant due process of law." Id. at 597.

We concluded that Snyder had suffered actual prejudice from the pre-arrest delay. An autopsy of his wife's body showed that she had consumed a large amount of alcohol at the time of her death. Snyder argued that certain witnesses who had died by the time of his trial had heard statements from his wife that she was contemplating suicide. We determined that the death of witnesses who would have aided Snyder's defense theory that his wife actually set the fire as an act of suicidal depression prejudiced him.

Of particular importance to Scher's case, we then went on to say, "looking to the second prong of the Marion/Lovasco test, we must next decide whether the Commonwealth's reasons for postponing the Appellant's arrest were proper." Id. at 603. The Commonwealth argued that Snyder could prevail on his claim of deprivation of due process only if he demonstrated that the delay was an intentional ploy designed to give the Commonwealth an advantage at trial. We rejected this argument:

> The Appellant does not argue that the prior District Attorneys of Luzerne County intentionally postponed this prosecution to gain a tactical advantage over the Appellant. It appears that the prosecutors, in the exercise of their discretion, decided for reasons that do not appear in the record, that this case lacked prosecutorial merit. Nor is there any basis to conclude that [the current District Attorney] intentionally continued to defer this prosecution for inappropriate reasons. However, the Appellant asserts that reviving this dormant investigation against him was improper, eleven

> years after Mrs. Snyder's death, based solely on changed policies of the District Attorney's Office.
>
> Whether done intentionally or not, the Commonwealth gained a tremendous strategical advantage against the Appellant due to the passage of time and the loss of critical defense testimony through death and memory…. We hold that, based on all of the facts of this case, bringing this prosecution after more than eleven years caused actual prejudice to the Appellant and deprived him of due process of law unless there were proper reasons for the delay.

Id. at 605. We then remanded in order for the Commonwealth to have the opportunity to present the reasons for the delay.[14]

In reviewing Scher's due process claim based on pre-arrest delay, the Superior Court examined the development of the standard in Marion and Lovasco, and our discussion of that standard in Snyder. Commonwealth v. Scher, 732 A.2d 1278 (Pa. Super. 1999). The court summarized our interpretation of the Marion/Lovasco standard in Snyder as requiring an evaluation of: (1) whether the pre-arrest delay resulted in actual prejudice to the appellant, and (2) whether the Commonwealth's reasons for postponing the appellant's arrest were proper. Scher, 732 A.2d at 1282. The court opined, however, that we had not, in Snyder, "specifically set forth a standard for lower courts to apply in evaluating the propriety of an investigation undertaken by the Commonwealth." Id. at 1283. After concluding that "our case law reveals no other standard," the court relied on a Ninth Circuit opinion, United States v. Mays, 549 F.2d 670 (9th Cir. 1977), to provide the second element of the due process standard. In particular, the court cited the balancing test adopted in Mays as being most consistent with the due process principles articulated in Marion and Lovasco:

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[14] As will be discussed in more detail infra, the trial court affirmed Snyder's murder conviction on remand, which the Superior Court affirmed in an en banc opinion. Commonwealth v. Snyder, 761 A.2d 584 (Pa. Super. 2000).

> [T]he standard to be used [in a due process claim for pre-indictment delay] has to do with where the fulcrum for the balancing test is to be placed. In Marion, the Court states that the presence of actual prejudice resulting from pre-indictment delay would not by itself warrant the dismissal of a criminal prosecution. The greater the length of the delay and the more substantial the actual prejudice to the defendant becomes, the greater the reasonableness and the necessity for the delay will have to be to balance out the prejudice. However, despite the degree of actual prejudice, for a judgment in favor of dismissal, there must be some culpability on the government's part either in the form of intentional misconduct or negligence.

Scher, 732 A.2d at 1284, (quoting Mays, 549 F.2d at 678) (emphasis omitted). Based on this standard, the Superior Court concluded:

> [W]here there has been an excessive and prejudicial pre-arrest delay, we will not only inquire as to whether there has been any intentional delay by the prosecution to gain a tactical advantage over the accused, but we will also consider whether the prosecution has been negligent by failing to pursue a reasonably diligent criminal investigation.

Id. It is this determination by the Superior Court -- that mere negligence in the investigation of a crime constitutes an improper purpose for pre-arrest delay -- that we must consider presently.

As we made apparent from our previously-cited language in Snyder, we do not follow the view subscribed to by the majority of the federal circuits that a defendant can prevail on a due process claim based on pre-arrest delay only where he or she proves actual prejudice and that the delay was an intentional device employed by the prosecutor to gain a tactical advantage over the accused. We agree with the court below in its reading of Marion and Lovasco that delay intentionally undertaken by the prosecution to gain a tactical advantage over the defendant is one case, but not the only case, where pre-arrest delay would violate due process.

However, in requiring, as we did in Snyder, an examination of the reasons for the delay, we did not intend to create an obligation on the Commonwealth to conduct all

criminal investigations pursuant to a due diligence or negligence standard, measured from the moment when criminal charges are filed and the defendant raises his due process claim. Such a standard would be too onerous, requiring judicial oversight of decisions traditionally entrusted to the prosecutor. Furthermore, a due diligence or negligence standard would require an inquiry into the methods, resources, and techniques of law enforcement in conducting a criminal investigation that would amount to judicial second-guessing of how the Commonwealth must build its case. We are mindful of the Supreme Court's admonition in Lovasco against placing too stringent a responsibility on the prosecution to justify the delay in the face of these claims:

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." Rochin v. California, 342 U.S. 165 (1952). Our task is more circumscribed.

Lovasco, 431 U.S. at 790.

Indeed, the disposition of the Snyder case following our remand order illustrates the flaw in the Superior Court's adoption of a negligence standard in Scher. Pursuant to our remand order in Snyder, the trial court conducted two days of hearings to ascertain the propriety of the Commonwealth's reasons for charging Snyder eleven years after the crime occurred. Snyder, 761 A.2d at 586. The Commonwealth presented the testimony of previous Luzerne County District Attorneys as to the status of the investigation when they held office, and what steps were taken to advance the investigation. At the close of these hearings, the trial court concluded that the prosecutor's delay in filing charges was not improper and affirmed Snyder's murder conviction. An en banc Superior Court affirmed. The court agreed with the trial court that the Luzerne County District Attorneys had not acted improperly and that their actions did not deprive Snyder of his right to due process of

law. Notably, the court summarized the reasons why due process principles do not require a judicially-imposed due diligence or negligence standard for oversight of a criminal investigation:

> From our review of the precedents…it is clear that in assessing the performance of prosecutors as to delay in initiating charges, there is a distinct characteristic of hesitancy to critically evaluate the day-to-day decision making of the office of the prosecutor. This, undoubtedly, stems from a recognition that the prosecutor must face a stream of current cases which demand immediate attention and are subject to intense public scrutiny; that the office typically has limited resources which must react to legislative, judicial, media and public demands for priority in addressing an ever-changing array of social problems….
>
> It should not offend constitutional standards even if it may be said that a given case has undergone a period of informed deferral or perhaps even benign neglect.

Id. at 589 (footnote omitted). Recognizing that a panel of that court in Scher had applied a standard that "by its terms, implicates both a negligence and due diligence concept in the judicial evaluation of the prosecutor's performance," the en banc court in Snyder specifically refused to follow that standard. Id. at 590. The court stated, "[t]he Scher decision was filed after the hearing and order on remand in the instant matter and we have elected not to follow the 'due diligence' and negligence standards adopted therein. As a court en banc, we are not bound to follow a superior court panel opinion." Id. (citations omitted).

We agree with this rationale that negligence or due diligence in the conduct of a criminal investigation is not the appropriate standard for deciding whether delay in indictment deprives a defendant of due process. As a result, the test that we believe is the correct one must take into consideration all of the facts and circumstances surrounding the case, including: the deference that courts must afford to the prosecutor's conclusions that a case is not ripe for prosecution; the limited resources available to law enforcement

agencies when conducting a criminal investigation; the prosecutor's motives in delaying indictment, and; the degree to which the defendant's own actions contributed to the delay. Therefore, to clarify the standard established in Snyder, we hold that in order to prevail on a due process claim based on pre-arrest delay, the defendant must first show that the delay caused him actual prejudice, that is, substantially impaired his or her ability to defend against the charges. The court must then examine all of the circumstances to determine the validity of the Commonwealth's reasons for the delay. Only in situations where the evidence shows that the delay was the product of intentional, bad faith, or reckless[15] conduct by the prosecution, however, will we find a violation of due process. Negligence in the conduct of a criminal investigation, without more, will not be sufficient to prevail on a due process claim based on pre-arrest delay. With this clarification of the standard in mind, we turn to Scher's case.

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[15] We borrow this concept that due process claims based on pre-arrest delay must show more than mere negligence in the conduct of a criminal investigation from federal caselaw concerning federal civil rights lawsuits brought pursuant to 42 U.S.C.A. § 1983, which allege a violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs who raise those claims must show more than ordinary negligence on the part of state actors in order to recover in a Section 1983 lawsuit where they claim a violation of either substantive or procedural due process. See Daniels v. Williams, 474 U.S. 327, 328 (1986) ("Due Process Clause is simply not implicated by the negligent act of an official causing unintended loss of or injury to life, liberty, or property"). See also County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998) (in a Section 1983 suit arising from a collision during high-speed chase by police, "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation"). While we do not follow those circuits that recognize a pre-arrest due process claim only when the defendant shows that the prosecution intentionally delayed indictment or arrest in order to gain a tactical advantage at trial over the defendant, nevertheless we believe that the standard we adopt here, requiring a showing that the Commonwealth acted intentionally, in bad faith or recklessly in delaying indictment, accommodates the principle that due process violations based on pre-arrest delay will only occur in the rarest cases where the Commonwealth's conduct shocks the conscience and offends one's sense of justice.

Actual Prejudice

The threshold question we must address whenever a defendant raises a due process claim due to pre-arrest delay is whether the defendant suffered actual prejudice from the delay. See, e.g., Commonwealth v. Sneed, 526 A.2d 749, 752 (Pa. 1987). We have not elucidated the meaning of "actual prejudice"; however, numerous federal appellate courts have refined the concept. In order for a defendant to show actual prejudice, he or she must show that he or she was meaningfully impaired in his or her ability to defend against the state's charges to such an extent that the disposition of the criminal proceedings was likely affected. Jones v. Angelone, 94 F.3d 900, 907 (4th Cir. 1996). This kind of prejudice is commonly demonstrated by the loss of documentary evidence or the unavailability of an essential witness. United States v. Cornielle, 171 F.3d 748, 752 (2d. Cir. 1999). It is not sufficient for a defendant to make speculative or conclusory claims of possible prejudice as a result of the passage of time. United States v. Sturdy, 207 F.3d 448, 452 (8th Cir. 2000). Where a defendant claims prejudice through the absence of witnesses, he or she must show in what specific manner missing witnesses would have aided the defense. United States v. Trammell, 133 F.3d 1343, 1351 (10th Cir. 1998). See also Sneed, 526 A.2d at 752 (defendant failed to show prejudice from unavailability of witnesses because he failed to show how witnesses' testimony would have tended to exculpate him). Furthermore, it is the defendant's burden to show that the lost testimony or information is not available through other means. United States v. Rogers, 118 F.3d 466, 475 (6th Cir. 1997).

Scher claims that he suffered prejudice because certain witnesses died and important evidence was lost by the time of trial that would have aided his defense that the shooting of Dillon was accidental, not intentional. Specifically, he points to the deaths of four witnesses: Dr. Grace, Coroner Conarton, Detective Collier and Trooper Salinkas. Scher also claims prejudice from the decomposition of Dillon's body that occurred during

the twenty-year period, and from the Commonwealth's conduct of the second autopsy in 1995, which he claims interfered with his ability to present expert testimony in support of his position that Dillon's death was accidental. Further, Scher argues that the loss or destruction of other evidence, such as: the ejector mechanism from the sixteen-gauge shotgun; the audio recording of the June 1976 autopsy; certain photographs taken of the scene; the unused shotgun ammunition, and; any bloodstains on the inside of the shotgun, impaired his ability to show that the shooting was accidental and not a premeditated act of murder.

In order to argue prejudice from the loss or destruction of evidence in these due process claims, the defendant must show that the loss or destruction of evidence related to the delay in filing charges. With respect to some of the items that Scher claims were lost or destroyed, the delay in filing charges clearly had no role in causing these items to be lost or destroyed. First, Scher contends that by the time charges were filed against him, the shotgun had been fired numerous times, thus eliminating any bloodstains that may have been inside the barrel, which would have tended to prove a close range of fire consistent with Scher's story that the shooting was an accident. However, one of Scher's experts, George Fassnacht, a forensic firearms consultant, testified that the repeated firing of the shotgun in 1976 by the police during testing of the weapon would have removed any bloodstains from inside the barrel. Accordingly, the loss of this evidence cannot be attributed to the delay in indicting Scher for murder, as the bloodstains would have been eliminated and hence unavailable for his defense even if the Commonwealth had filed charges in 1976. Additionally, Scher asserts that the fact that Dillon's body was washed and embalmed before the June 3, 1976 autopsy prejudiced him because it affected his ability to determine whether there was any gunpowder residue on the skin around the wound that would have indicated the range of fire. This claim of prejudice also fails because the loss of this evidence cannot be attributed to the delay in indicting Scher.

Indeed, Dillon's body had been washed and embalmed within a day of his death, and, therefore, would have been in this condition even if the Commonwealth had filed charges immediately. Finally, Scher points to the investigators' failure to preserve the unused ammunition from the scene and claims prejudice because the type of ammunition that was present but unused could have supported his claim of accident and negated the Commonwealth's position that the killing was intentional.[16] The Commonwealth, however, never collected the unused ammunition from the scene, which, therefore, would not have been available to Scher regardless of the delay in filing charges. Consequently, Scher cannot rely on the loss of evidence in these instances to support his claim that the pre-indictment delay prejudiced him.[17]

Scher also claims prejudice from the loss of evidence that occurred sometime during the twenty-year delay, specifically, the ejector mechanism from the sixteen-gauge shotgun and photographs of Dillon's body taken at the scene that were in Detective Collier's custody.

Scher offered the testimony of George Fassnacht to show that, based on certain characteristics of the shotgun, an accidental discharge of the weapon during a struggle was

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[16] The type of shell that killed Dillon was a number four load high brass magnum shell. The Commonwealth argued that this kind of shell would not be used in skeet or trap shooting and that its presence in the sixteen-gauge shotgun evidenced the intent of Scher to murder Dillon. Scher contends that they had a mix of ammunition with them and bought whatever was on sale, and therefore the presence of other number four shells in the unused ammunition would have shown that there was nothing unusual for him and Dillon to utilize number four shells for skeet or trap shooting.

[17] These claims more properly relate to a due process claim based on police failure to preserve evidence. The United States Supreme Court has made clear, however, that the police do not violate a defendant's due process rights by failing to preserve potentially useful evidence unless the defendant can show that the police acted in bad faith. Arizona v. Youngblood, 488 U.S. 51 (1988). There has been no showing of bad faith on the part of the police with respect to the loss of evidence in these instances.

possible. With respect to the ejector mechanism from the shotgun, Fassnacht testified that a police report concerning the weapon prepared in 1976 contained no notation that the ejector mechanism was missing at that time. However, a police report prepared in April of 1996 noted that the ejector was missing, which Fassnacht testified would only occur if the gun had been disassembled and the ejector removed. Fassnacht testified on direct examination that the ejector mechanism allows the weapon to be fired in a "normal manner" and that its subsequent absence showed that it was not in its original condition when the police tested it in 1996. On cross-examination, however, Fassnacht conceded that the ejector mechanism does not affect the firing of the gun. Indeed, in response to the question, "So the ejector tore [sic] really has nothing to do with whether or not the gun will go off by pulling the trigger or otherwise, does it?", Fassnacht answered, "That's correct." Because Scher's expert admitted that the absence of the ejector mechanism has no bearing on whether the gun would discharge accidentally, his claim of prejudice from the loss of this evidence cannot be sustained.[18]

During the initial investigation of Dillon's death, Detective Collier apparently obtained Polaroid photographs of Dillon's body that were taken by the Pennsylvania game commissioner who was one of the first individuals at the scene. When the authorities

[18] Moreover, the only connection Fassnacht ever made between the absence of the ejector mechanism and a determination of whether the gun could discharge accidentally was when he testified that "I don't know that the process used to remove the ejector didn't dislodge any detritus which may cause a shock or drop failure of the mechanism." N.T. 10/9/97 p. 27. Fassnacht explained that he observed grease and dirt inside the weapon that would have also been present in 1976, which could have been responsible for an accidental firing, but that he was unable to get the weapon to discharge without pulling the trigger when he tested it in 1997. Nevertheless, despite the absence of the ejector mechanism and the inability to duplicate an accidental firing when he tested the weapon in 1997, Fassnacht opined that, to a reasonable degree of scientific certainty based on his examination of the weapon, the shotgun could have fired accidentally during a struggle between Dillon and Scher. Id. p. 20.

reactivated the investigation at the urging of the Dillon family, Mr. Dillon requested that the investigators obtain those photographs and review them. The state police investigators contacted Detective Collier's widow, but were unable to locate the photographs and concluded that they had been destroyed. Scher now claims that the destruction of these photographs deprived him of potentially exculpatory evidence, and therefore prejudiced him.

As we stated earlier, a claim of prejudice based on loss of evidence must show that the lost testimony or information is not available through other means. See United States v. Rogers, 118 F.3d 466, 475 (6th Cir. 1997). Here, the lost photographs were not the only photographs of Dillon's body as it appeared at Gunsmoke. Trooper Zanin had taken numerous photographs of Dillon's body at the scene, which were introduced at trial and had been reviewed by Scher's experts prior to their testimony.[19] Scher fails to explain what would have appeared in the Polaroid photographs that could not be seen in the photographs taken by Trooper Zanin in his documentation of the scene. His claim of prejudice is entirely speculative and is without support in light of the other photographic evidence that was available to him.

Scher claims prejudice from the deaths of three witnesses involved in the initial investigation of Dillon's death: Trooper Salinkas, Detective Collier, and Coroner Conarton. We have previously noted that a defendant who claims prejudice through the absence of witnesses must show in what specific manner the missing witnesses would have aided the defense. See United States v. Trammell, 133 F.3d 1343, 1351 (10th Cir. 1998). Scher argues that Trooper Salinkas and Detective Collier would have provided exculpatory

[19] John Shane, M.D., a pathologist who testified on Scher's behalf, identified twenty-seven black-and-white photographs of Dillon taken at the scene that he had reviewed. N.T. 10/9/97, p. 108.

testimony because they viewed the evidence close in time to Dillon's death and did not pursue charges against Scher. With respect to Trooper Salinkas, Scher's argument is pure speculation: he does not know how Trooper Salinkas would have testified if he were alive at the time of trial and offers no instance of exculpatory information that Trooper Salinkas possessed to the exclusion of other witnesses. Regarding Detective Collier, to the extent that we can glean his views from his June 9, 1976 report introduced by Scher at the pretrial hearing,[20] Scher's claim that he would have provided exculpatory testimony has no support in the record. Indeed, Detective Collier's report, and the testimony at the pretrial hearing from Collier's contemporaries, demonstrate that Collier suspected Scher of having committed murder, and therefore would not have provided testimony favorable to Scher.[21]

It is, however, Scher's claim of prejudice from the death of Coroner Conarton that illustrates the flaw in his argument regarding the potentially exculpatory testimony of these investigating officers. At trial, Scher's defense was that the shooting occurred accidentally. His claim of prejudice from the deaths of Collier, Salinkas, and Conarton is based on the assumption that because these individuals never pressed for the filing of murder charges against Scher, they must have agreed that Dillon's death was an accident. Specifically with regards to Coroner Conarton, Scher notes that Dillon's death certificate, completed by Conarton, lists the cause of Dillon's death as accidental. Scher contends that he was prejudiced when he lost the opportunity to have Conarton explain why he believed Dillon's

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[20] See n. 4, supra.

[21] As an instance of Collier's potential usefulness as a witness, Scher points to the Polaroid photographs allegedly in Collier's possession that were never recovered. Scher claims Collier could have either produced the photographs or described what they showed. We have previously held, however, that the absence of those photographs cannot support Scher's claims of prejudice in light of the numerous other photographs of Dillon's body taken at the scene that were relied on by Scher's experts. Consequently, we will not find prejudice from the loss of Collier's testimony regarding these photographs.

death was accidental. What Scher ignores, however, is that in the section of the death certificate that asks, "How did injury occur?", Coroner Conarton wrote, "Running with gun, fell, gun went off." As Scher admitted in his trial testimony, this is not how Dillon died, and his stories to Conarton, Collier, and the other investigating officers to this effect were lies. Conarton was present when Scher gave his statement to Trooper Hairston at the scene, which related the false story of how Dillon tripped while running with the shotgun. The record strongly suggests that Conarton formed his opinion as to the cause of Dillon's death based mainly on Scher's false statement and a cursory review of the scene where Dillon's body lay positioned in a manner, with shoelaces untied, that Scher deliberately set to make it appear that Dillon tripped and fell while carrying the shotgun.[22] When Scher finally testified that the shooting did not occur from Dillon tripping and falling, as he had repeatedly told the investigators and the public, he substantially undermined the importance of any investigatory conclusions that relied on this false scenario. Consequently, we cannot credit Scher's complaints of prejudice from the absence of Conarton's testimony to explain why he concluded that Dillon's death was accidental, when it is apparent that Conarton accepted a version of the "accident" that Scher himself admitted was false and upon which he did not base his defense.

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[22] The Superior Court below stated, "[w]e will…never know why Conarton believed Dillon's death to be accidental." Scher, 732 A.2d at 1286. While it is true that we will never have absolute proof of why Conarton believed Dillon's death was accidental, there is ample evidence in the record, in addition to the above-referenced notation on Dillon's death certificate, that Conarton accepted Scher's false version of events very early on in the investigation. Trooper Hairston testified that Coroner Conarton had expressed to him the opinion that the shooting was an accident right after Scher had given his statement, within minutes of inspecting the scene. N.T. 9/25/97, pp. 18 -19. Edward Little testified that Coroner Conarton was "hellbent that this was accidental," and that he had to intervene with Conarton to delay issuance of the death certificate, which occurred within 10 days of Dillon's death.

The most serious claim of prejudice raised by Scher concerns the death of Dr. Grace and the loss of audio recordings from the June 3, 1976 autopsy performed by Dr. Grace, as well as the alteration of Dillon's body during the second autopsy in 1995. The critical issue to Scher's defense was whether the physical evidence was consistent with an accidental discharge of the weapon during a struggle. Evidence of the angle of Dillon's chest wound, the presence or absence of "scalloping"[23], the presence or absence of gunpowder around the wound, and the size of the wound were relevant to the determination of whether Dillon was shot from a close range, consistent with a struggle, or a more distant range that could not have been caused by an accidental discharge during a struggle.

In support of his defense theory, Scher presented a number of expert witnesses. John Shane, M.D., a pathologist, reviewed, among other evidentiary items: twenty-seven black and white photographs of the scene; the clothes worn by Dillon, the photographs taken during Dr. Grace's autopsy; photographs taken during the second autopsy in 1995; forty-three microscopic slides of tissue taken from Dillon's body; Dr. Grace's autopsy report; and the shot cup retrieved from Dillon's body. Dr. Shane observed that Dr. Grace did not note scalloping around the margins of Dillon's chest wound in his June 3, 1976 autopsy report, and that his own review of the photographs from that autopsy indicated no scalloping. Based on his review of the autopsy photographs and Dr. Grace's report, Dr. Shane opined, to a reasonable degree of medical certainty, that there was no scalloping around the margins of Dillon's chest wound and that this indicated a close range of

[23] According to Dr. Cyril Wecht, a forensic pathologist who testified for Scher, "scalloping" is "a kind of a continuously curled contour from the mollusk of the scallop where the shell, instead of just a line may not be straight, may be curvy, linear but it has a continuous non-indented line. Scalloping…is an indentation usually of fairly uniform nature." N.T. 10/14/97 p. 105. The presence of scalloping is useful in determining range of shotgun fire, according to Dr. Wecht, because "as the shotgun blast moves further back then the pellets are beginning to disburse a little bit. Then you will begin to get some irregular contouring of the edges of the wound." Id. p. 106.

discharge -- within twelve inches. Dr. Shane also noted that the June 3, 1976 autopsy report showed "what was apparently powder burns" in the wound tract, and his examination of the slides from the 1995 autopsy indicated the presence of carbon that Dr. Shane identified as gunpowder residue. Dr. Shane testified that the presence of gunpowder residue in the wound tract signaled that the range of fire would have been within eighteen inches, due to the limited distance that gunpowder travels from the barrel when a firearm is discharged. Finally, at the close of direct examination, Scher's counsel asked Dr. Shane the following:

> Q: Doctor, based on your review of the various reports that you have identified for the jury, your examination of the physical evidence in this case, the analysis you have conducted, do you have an opinion to a reasonable degree of medical certainty as to the distance between muzzle and skin in this case?
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> A: I do.
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> ***
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> Q: What is your opinion?
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> A: My opinion is that the distance of the muzzle from the skin surface was 12 inches or less.

N.T. 10/10/97 p. 67.

Scher also presented the testimony of Cyril Wecht, M.D., a forensic pathologist and the Coroner of Allegheny County. Dr. Wecht reviewed, among other items: Dr. Grace's autopsy report; the report from the 1995 autopsy; Dillon's clothing; 873 photographs produced by the Commonwealth; various expert reports; and tissue samples obtained from Dillon's body. Dr. Wecht concluded that, based on his examination of the autopsy photographs and the absence of any notation of scalloping in Dr. Grace's autopsy report, there was no scalloping around the edges of Dillon's chest wound, which indicated that the shotgun was fired at close range. Based on his examination of the slides prepared from

tissue extracted from Dillon's body, Dr. Wecht concluded that gunpowder residue was present in Dillon's chest wound. Concerning whether the physical evidence was inconsistent with an accidental discharge during a struggle, Dr. Wecht opined that there was no evidence that was inconsistent with that scenario, and that, to a reasonable degree of medical certainty, the range of fire was less than one foot. Towards the close of direct examination, Scher's counsel elicited the following opinion:

> Q: Now, Dr. Wecht, do you have an opinion to a -- based on your review of all of the physical evidence and your review of the reports and your review of the slides and photographs, do you have an opinion to a degree of reasonable medical certainty as to whether or not the wound caused in this case is consistent with a struggle?
>
> A: Yes, I have an opinion.
>
> Q: What is that opinion?
>
> ***
>
> A: Yes, in my opinion, with a reasonable degree of medical certainty, the findings in this case which we have talked about would be entirely consistent with a struggle and the accidental discharge of the weapon.

N.T. 10/14/97 p. 116.

Another forensic pathologist, Michael Baden, M.D., testified for the defense. Dr. Baden reviewed, among other items: the autopsy report of Dr. Grace; the death certificate of Dillon; the photographs of Dillon's body at the scene and at the initial autopsy; various police and laboratory reports; and slides prepared from samples extracted during the second autopsy. Dr. Baden testified that carbonaceous material present in the slides prepared from tissue extracted from the wound tract indicated the presence of gunpowder. Further, Dr. Baden reviewed the photographs from the scene and the initial autopsy and concluded, as had Drs. Shane and Wecht, that there was no scalloping present on the margin of the gunshot wound. Similar to Drs. Shane and Wecht, Dr. Baden opined that the

distance between the muzzle of the shotgun and the skin was within a few inches, up to one foot. At the close of his direct examination, Dr. Shane testified, to a reasonable degree of medical certainty, that the physical evidence "was entirely consistent with there being a struggle," and that there was "no scientific evidence that is inconsistent with a struggle."

The ability of Scher's experts to support his defense by offering opinions to a reasonable degree of medical certainty based on a review of the evidence available to them demonstrates why Scher's claims of prejudice fail. He has not shown that he was meaningfully impaired in his ability to defend against the charges to such an extent that the disposition of the proceedings was likely affected. See Jones v. Angelone, 94 F.3d 900, 907 (4th Cir. 1996). Despite the absence of Dr. Grace's direct testimony concerning his observations from the autopsy and the audio tapes of that autopsy, there was sufficient evidence, including photographs and Dr. Grace's report, for Scher's experts to offer specific opinions concerning the presence of gunpowder in the wound tract, the range of fire, and whether the physical evidence was consistent with a struggle.[24] Further, Scher claims prejudice from the removal of the "wound of entry" from Dillon's chest during the 1995 autopsy performed by Dr. Mihalakis, who later testified as an expert for the Commonwealth, which Scher's experts were unable to examine when they (Dr. Baden, Dr. Shane, and Dr.

[24] As an example of how Dr. Grace's testimony would have been helpful to his case, Scher relies on the testimony of his experts, who stated that some conclusions, such as whether gunpowder is present and whether there is scalloping along the edges of the wound, are best made by the individual who first examined the body -- in this case, Dr. Grace. However, Scher used the fact that Dr. Grace's report indicated the presence of gunpowder in the wound tract and did not note scalloping along the margins of the wound to his advantage, which left the burden on the Commonwealth to explain the inconsistencies between Dr. Grace's conclusions and its position that Scher murdered Dillon. Moreover, it is far from certain that Dr. Grace would have testified in support of Scher's theory of an accidental shooting. A police report of an October 10, 1994 interview indicated that Grace had formed no opinion as to whether the manner of Dillon's death was homicide, suicide, or accidental. N.T. 10/15/97 pp. 108 - 09.

Wecht) performed a third autopsy in 1996. Scher's experts, however, utilized the slides prepared by Dr. Mihalakis from tissue removed during the 1995 autopsy in forming their opinions regarding the presence of carbonaceous material in the wound tract. In the pretrial hearings, Dr. Wecht conceded that he had given opinions in other cases where he was unable to do the autopsy personally or directly observe the body and therefore relied on "reports, photographs, microscopic slides, crime lab reports, [and] investigative reports by police" in forming his conclusions. We find, therefore, that Scher did not suffer actual prejudice due to the death of Dr. Grace, the loss of audio tapes from the first autopsy, and the extraction of the wound of entry during the 1995 autopsy, where the remaining evidence was of sufficient quality to enable three highly-qualified pathologists to offer expert testimony on specific matters in dispute and to render opinions to a reasonable degree of medical certainty that the physical evidence was consistent with an accidental, close-range discharge during a struggle.

Finally, Scher argues prejudice due to the faded memories of witnesses and his supposed inability to present a psychological profile of Dillon. Preliminarily, we note that the difficulty of witnesses to recall precisely what happened years ago is likely to be present in any murder case where charges are filed many years after the crime occurred. Our legislature, however, has chosen to place no statute of limitations on murder prosecutions and has made a policy determination that punishment of the most serious crime should outweigh the difficulties otherwise incurred in the prosecution of "stale" charges. A defendant who claims actual prejudice from the faded memories of witnesses, therefore, must show in concrete terms how the loss of memory has deprived him or her of the ability to defend against the charges; general allegations of prejudice are not sufficient. Here, Scher offers only one specific example of the faded memory of a witness to sustain this

claim of prejudice: the testimony of Jocelyn Richards.[25] Richards testified that, during a conversation at the hospital where they worked together prior to Dillon's death, Scher had told her that "if he wanted something, he would get it one way or another." In his testimony, Scher contracted this, denying that he ever made such a statement. Contrary to Scher's claim, this is not an instance of a witness' memory fading. Richards recalled Scher making this statement and so testified -- Scher simply disputes that he said it. Hence, this claim of prejudice fails. At the pretrial hearings, Scher proffered the testimony of Richard Fischbein, M.D., who explained that he was unable to offer an opinion as to Dillon's psychological state at the time of his death because the passage of time made it impossible for him to obtain the necessary data. When asked to make an offer of proof concerning the relevance of a psychological autopsy[26], Scher's counsel explained that "[t]here is the possibility that this victim may have committed suicide. I believe it goes…to that issue." N.T. 7/18/97 p. 175. This testimony, of course, took place before the trial testimony of Scher, when the fabricated story of Dillon shooting himself while running with the shotgun was still at issue. The admission by Scher that Dillon was shot while the two engaged in a struggle with the weapon eliminated whatever marginal relevance the opinions of Dr. Fischbein would have had regarding potential suicidal tendencies by Dillon.

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[25] See Appellee's Brief, pp. 46 - 47.

[26] According to Dr. Fischbein, a "psychological autopsy" is:

> [A] method whereby, after the death of an individual, by looking at previous medical history, looking at the facts of the individual, where they were found, talking to family members, talking to other loved ones…we are trying to reconstruct the mind set of that individual and asking questions that may disclose risk factors that could be associated with accidental death, other risk factors that may be associated with suicide.

N.T. 7/18/97 pp. 23 - 24.

We hold that Scher has failed to establish that he suffered actual prejudice as a result of the delay.

Reasons for the Delay

Although we have concluded that Scher has not met the burden of demonstrating actual prejudice due to the delay in indictment, and could end our analysis there, we nevertheless feel compelled to examine the reasons for the delay in this case to illustrate why the Commonwealth has not violated Scher's right to due process of law pursuant to the principles developed in this opinion. We have stated that, in order for there to be a violation of due process, the Commonwealth's behavior must be more than merely negligent in causing the delay. Only where the Commonwealth has intentionally delayed in order to gain a tactical advantage or acted recklessly to such a degree as to shock one's conscience and offend one's sense of justice will we find a deprivation of due process. We do not find the Commonwealth's behavior in this case to be so outrageous as to meet that standard. There has been no allegation that the Commonwealth intentionally delayed indicting Scher in order to gain a tactical advantage over him, and the record contains credible denials from a succession of Susquehanna County District Attorneys that they ever intentionally employed delay tactics. Furthermore, we cannot accept the Superior Court's conclusion that the Commonwealth's actions were "grossly negligent." Astonishingly, the Superior Court's opinion makes no mention of the watershed moment in this case: when Scher admitted that he had lied to investigators about how Dillon's death occurred and that, for the past twenty years, he lied when he denied having had an affair with Patricia prior to the incident at Gunsmoke. Rather than exercise his constitutional right to say nothing, which would, in all likelihood, have heightened the suspicion against him and possibly resulted in an investigation that would have resulted in immediate charges, he instead staged the scene and fabricated a story that gained some credence with investigators. Perhaps, as Scher argues, those investigators should have been more circumspect in

accepting his tale and pursued their suspicions more thoroughly, but we cannot find the Commonwealth's actions towards Scher so egregious when, in a small town, in a rural part of Pennsylvania with a part-time District Attorney, those responsible for enforcing the law would find it difficult to disbelieve the word of a respected physician. Nor can we ignore the benefit that Scher gained by lying to authorities rather than remaining silent: he enjoyed his liberty for twenty years. In these circumstances, we cannot find that the Commonwealth's failure to charge Scher with murder sooner violated his right to due process of law.

CONCLUSION

We reverse the Order of the Superior Court and remand to the Superior Court for the consideration of Scher's remaining appellate issues. Jurisdiction relinquished.

Former Chief Justice Flaherty did not participate in the decision of this case.

Mr. Justice Castille files a Concurring Opinion.

Mr. Justice Nigro files a Concurring Opinion.

Mr. Justice Saylor files a Concurring Opinion.

Mr. Chief Justice Zappala files a Dissenting Opinion in which Mr. Justice Cappy joins.