Supreme Court No. 89956-8
(Court of Appeals No. 68852-9-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL McCONNELL,

Petitioner.

PETITION FOR REVIEW

LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Michael McConnell asks this Court to review the published opinion of the Court of Appeals in *State v. McConnell*, ___ Wn. App. ___, 315 P.3d 586 (2013). A copy is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. The statute of limitations for rape is 10 years, and the period begins to run from the date of commission or the "date on which the identity of the suspect is conclusively established by DNA testing," whichever is later. A rape occurred in June of 1998, and in November of 1998 the crime lab performed DNA testing on samples taken from the victim's clothing and identified the unique DNA profile of the rapist. Twelve and a half years later, the State charged Michael McConnell with the crime. Did the prosecution violate the statute of limitations, requiring reversal of the conviction and dismissal of the charge?

2. Preaccusatorial delay violates due process where, considering the prejudice to the defendant and the reasons for the delay, the late prosecution offends fundamental notions of justice. The State did not file an information in this case until almost thirteen years after the crime, even though it collected evidence and created a DNA profile right after the crime. It did not re-test the DNA or re-check the database for matches during the intervening twelve years, and it destroyed all of the other

evidence, including physical evidence, photographs, and statements of other suspects and witnesses, in 2003. A potential alibi witness died in 2010. Did the preaccusatorial delay violate Mr. McConnell's right to due process, requiring reversal of the conviction and dismissal of the charge?

C. STATEMENT OF THE CASE

In June of 1998 an elementary-school teacher was raped in her classroom. CP 353. The Washington State Patrol Crime Laboratory extracted DNA from the victim's underpants and identified three unique profiles. CP 286-87. One was the victim's, one was her husband's, and one was the presumed rapist's. CP 287. Although the lab identified the unique genetic profile of the perpetrator, it was not able to match it to a name in its database. The State's forensic scientist noted, "The DNA profile of the semen donor will be occasionally compared to the data bank to see if it matches any of the new entries." CP 287. The crime lab produced its report on November 23, 1998. CP 287.

In the meantime, the Snohomish County Sheriff's Office investigated the crime. Detectives Wilkins, Scharf, and Ward went to the school and collected evidence, took photographs, and wrote reports. CP 270, 271. Detective Wilkins interviewed multiple suspects, including a person of interest named Larry Crawford. CP 271. Thirty items of

evidence were booked into the Snohomish County Sheriff's Office. CP 339-40.

Although the crime lab identified the unique genetic profile of the rapist, the prosecutor's office did not file an information. This was so even though the prosecutor's office regularly charges people based on DNA profile rather than name. *See* CP 292, 296, 303-05, 310, 313, 344. Instead, the case sat dormant for years.

In 2003, Detective Wilkins ordered the destruction of all evidence in the case, because he believed the statute of limitations had run. CP 270-71, 341. The destroyed items included all of the detectives' reports, written statements from suspects and witnesses, photographs of the crime scene, items of clothing from both the victim and suspected perpetrator, the telephone the perpetrator allegedly yanked out of the wall, and other physical evidence. CP 270-71, 339-40. The only evidence not destroyed was "a single sperm cell" at the lab. 5/21/12 RP 6.

Seven years later, Detective Scharf "became interested in this case" again, and asked the crime lab to compare the rapist's DNA profile to another known sample. CP 273-74. In the twelve years since the rapist had been identified, his profile had not been "occasionally compared to the data bank" as promised in the State Patrol's 1998 report. CP 287. But in 2010, after Detective Scharf expressed an interest, the lab retested the

sample using contemporary techniques ("STR" as opposed to "RFLP"), and searched the database again for a match.[1] CP 274. The lab concluded the profile matched that of Michael McConnell, whose genetic identity had been entered into the database in 2000. CP 341, 284. On March 25, 2011, the State charged Michael McConnell with the 1998 rape. CP 356.

In 1998, Michael McConnell was a 17-year-old child living with his mother. In 2011, Mr. McConnell was an adult with no history of sex offenses. CP 21; 5/21/12 RP 18. His mother had died in 2010. CP 342.

Mr. McConnell moved to dismiss the charge against him as barred by the statute of limitations, and in the alternative as a violation of due process. CP 291-324, 337-52. The trial court denied the motion. CP 265. Mr. McConnell was convicted following a stipulated facts bench trial, and he preserved his right to appeal the denial of the motion to dismiss. CP 38, 259.

At sentencing, the State acknowledged that the case "came down to a single piece of evidence ... a single sperm cell." 5/21/12 RP 6. The prosecutor conceded, "the rest of the evidence in the case was destroyed by the State." 5/21/12 RP 6.

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[1] "STR" stands for "short tandem repeat". "RFLP" stands for "restriction fragment length polymorphism". CP 341.

The Court of Appeals affirmed the trial court's denial of Mr. McConnell's motion to dismiss. *McConnell*, 315 P.3d at ¶ 1. It held that the statute of limitations began to run in 2011 when the DNA profile was matched to a name, not in 1998 when the unique DNA profile of the alleged rapist was identified. *Id.* at ¶¶ 26-30. It also rejected the argument that preaccusatorial delay violated Mr. McConnell's right to due process, concluding that Mr. McConnell could not show actual prejudice. *Id.* at ¶¶ 31-39.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The interpretation of the amended statute of limitations is an issue of first impression warranting this Court's review.

Issues of first impression regarding statutory construction are matters of substantial public interest that should be addressed by this Court. RAP 13.4(b)(4); *see, e.g., State v. Moeurn*, 170 Wn.2d 169, 240 P.3d 1158 (2010); *State v. Engel*, 166 Wn.2d 572, 210 P.3d 1007 (2009). The question in this case is the meaning of a 2006 amendment to the Statute of Limitations, RCW 9A.04.080. The amendment provides that the 10-year limitations period for rape begins to run "from the date of commission or one year from the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing, whichever is later." RCW 9A.04.080(3); *see* Laws of 2006, Ch. 132, § 1 (effective

June 7, 2006). Mr. McConnell asks this Court to grant review and hold that the identity of a suspect is conclusively established by DNA testing when the forensic scientist identifies the perpetrator's unique DNA profile, not when that profile is matched to a name in a database.

In determining the meaning of a statute, courts look first to the text; if the statute is clear on its face, its meaning is to be derived from the language alone. *Moeurn*, 170 Wn.2d at 174. If the statute is susceptible to more than one reasonable interpretation, "we may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal citation omitted). Where a statute is ambiguous, the rule of lenity requires it be interpreted strictly against the State and in favor of the accused. *State v. Mullins*, 128 Wn. App. 633, 642, 116 P.3d 441 (2005).

The purpose of a statute of limitations is "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114-15, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970). Such limitations reflect a recognition that time "erode[s] memories or [makes] witnesses or other evidence unavailable." *Stogner v.*

California, 539 U.S. 607, 615, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003). Statutes of limitations "encourag[e] law enforcement officials promptly to investigate suspected criminal activity." *Toussie*, 397 U.S. at 115. Finally, they "prevent prosecution of those who have been law abiding for some years." Wayne R. LaFave, *Criminal Procedure*, § 18.5(a) at 184 (3d ed. 2007). Thus, statutes of limitations must be construed "in favor of repose." *Toussie*, 397 U.S. at 115.

The phrase at issue here is "the date on which the identity of the suspect is conclusively established by [DNA] testing." RCW 9A.04.080 (3). "Identity" means "the state of having unique identifying characteristics held by no other person or thing." *Collins English Dictionary – Complete and Unabridged* (HarperCollins Publishers, 2003). Thus, the identity of a suspect is not conclusively established by associating a name with him, because unlike DNA profiles, names are not unique.

For instance, there are over 1,600 people in this country with the name "Michael McConnell". http://names.whitepages.com (last viewed January 21, 2014). But there is only one person in the world with the DNA profile identified in this case in 1998. *See* "No two of us are alike -- even identical twins: Pinpointing genetic determinants of schizophrenia," *ScienceDaily*, Retrieved November 8, 2012, from

http://www.sciencedaily.com /releases/2011/03/110328151740.htm (noting even "identical" twins are not genetically identical; "[i]nstead, each person's DNA profile is truly a unique identifier"). Courts have recognized this principle. *See, e.g., State v. Dabney*, 663 N.W.2d 366, 372 (Wis. Ct. App. 2003) ("[A] DNA profile is arguably the most discrete, exclusive means of personal identification possible. A genetic code describes a person with far greater precision than a physical description or a name."). Thus, the identity of a suspect is conclusively by DNA testing when a unique genetic profile is generated.

The DNA in this case was extracted and tested in 1998. The rapist's identity was conclusively established: the lab generated a unique DNA profile. CP 286-87. The State was required to charge the suspect within ten years of that date. As Mr. McConnell pointed out in the trial court, the State regularly charges people by unique DNA profile rather than by name, but it simply failed to charge anyone in this case in a timely manner. CP 292, 296, 303-05, 310, 313. The State's own practice of charging DNA profiles demonstrates the fallacy of its argument that the word "identity" means "name".

Even if the plain meaning of the word "identity" did not resolve the issue, the surrounding context reinforces the conclusion that the limitations period began to run in 1998. The clock begins to run when the

identity is conclusively established by DNA testing. RCW 9A.04.080 (3). DNA testing occurred in this case in 1998, and it generated a unique profile. The State argued that the limitations period did not start running until a computer search matched the profile to a name, but this is not what the statute says. In fact, the legislature rejected proposed language that would have stated "the statute of limitations is triggered when a DNA profile is matched with a DNA profile from any certified database." House Bill Report, SSB 5042 (2005); CP 321. The limitations period begins to run when DNA testing conclusively establishes the identity of the suspect, not when a computer search matches this unique identity to a name. RCW 9A.04.080(3).

Finally, even if the word "identity" or the phrase "by DNA testing" were ambiguous, the rule of lenity requires the statute be construed strictly against the State. *Toussie*, 397 U.S. at 115, 122; *Mullins*, 128 Wn. App. at 642. Strictly construing the statute, as we must, the limitations period expired in 2009, and the 2011 prosecution was improper. This Court should grant review to resolve the meaning of this statutory amendment. RAP 13.4(b)(4).

2. This Court should also grant review of the related constitutional question of whether preaccusatorial delay violated Mr. McConnell's right to due process.

Not only did this prosecution violate the statute of limitations, it also violated Mr. McConnell's right to due process, warranting review under RAP 13.4(b)(3).

Even if a charge is filed within the statute of limitations, preaccusatorial delay may violate the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV; *State v. Oppelt*, 172 Wn.2d 285, 287, 257 P.3d 653 (2011). "The core question a court must answer is whether fundamental conceptions of justice would be violated by allowing the prosecution." *Oppelt*, 172 Wn.2d at 287. To resolve this issue, Washington courts apply a three-step analytical framework: (1) the defendant must show actual prejudice from the delay; (2) the court must determine the reasons for the delay; and (3) the court must weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution. *Id.* at 295.

A defendant is not required to show the State acted in bad faith; mere negligent delay may violate due process. *Id.* at 292 (citing *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990); *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985)). Whether preaccusatorial delay violates due

process in a given case is a question of law this Court reviews de novo. *Id.* at 290.

In this case, the prejudice of the State's delay to Mr. McConnell outweighs its reasons for the delay. The late prosecution therefore violated Mr. McConnell's right to due process.

The prejudice in this case is much greater than that in *Oppelt*, where this Court held the defendant showed some prejudice but that on balance due process was not offended. In that case, the delay was only six years – the crime occurred in 2001 and the defendant was charged with child molestation in 2007. *Oppelt*, 172 Wn.2d at 286-87. The defendant argued he was prejudiced because one of the witnesses could not remember the events surrounding the alleged crime very well. Specifically, the relative who had put lotion on the victim's vagina could not remember the brand she used. The defendant argued this prejudiced his ability to argue that the lotion, not a criminal act, caused the inflammation observed by doctors. *Id.* at 287-88. This Court agreed that this memory loss constituted some degree of prejudice, but held that on balance due process was not violated. *Id.* at 296.

Here, in contrast, more than twelve years passed between the crime and the charge, not just six years. Furthermore, unlike in *Oppelt*, there was not simply one witness whose memory was compromised. Instead,

the State destroyed all evidence except the one piece it ended up using against Mr. McConnell. And while the relative at issue in *Oppelt* lost her memory during the delay, Mr. McConnell's mother, with whom he lived at the time of the alleged crime, lost her life during the delay. She died in 2010, and would have been available for this case had the State prosecuted it in a timely manner.

As Mr. McConnell's attorneys explained in the trial court, the negligent delay and destruction of all but one piece of evidence additionally prejudiced Mr. McConnell by preventing his attorneys from being able to provide effective assistance of counsel. CP 346; *See State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010) (describing counsel's duty to investigate evidence). Mr. McConnell could not hire his own expert to examine the destroyed evidence or extract an independent biological sample from the victim's clothing. CP 293, 346-47. Nor could the defense analyze the destroyed piece of clothing worn by the alleged perpetrator, the plaster casts taken from bicycle tracks left by the alleged perpetrator, or the photographs of the crime scene and victim's injuries. CP 347. The delay in charging prevented the defense from being able to interview Mr. McConnell's mother, with whom he lived at the time of the incident because he was still a child. CP 293. His mother was a potential alibi or fact witness. CP 348. In sum, the prejudice here, where 12 years

passed and almost all of the evidence was destroyed, is much greater than that in *Oppelt*, where only six years passed and only one witness's memory was compromised.

The reason for the delay was the State's multiple instances of negligence. First, it was negligent in not filing an information when it identified a unique genetic profile in 1998. Second, it was negligent when it failed to follow through with its own promise to "occasionally compare [the profile] to the data bank to see if it matches any of the new entries." CP 287. Third, it was negligent in failing to retest the DNA using STR analysis until 2010, given the State started using that technique in 2000. CP 268, 345. And fourth, it was negligent in destroying all of the other evidence in 2003, before the statute of limitations had run and before the DNA was retested.

The State presented no excuses for most of this negligence. It did argue that the failure to perform STR testing earlier was justified by limited resources, but this argument should be rejected just as the court in *Howell* rejected a similar argument. 11/28/11 RP 78; *see Howell*, 904 F.2d 889. In *Howell*, one county delayed filing charges for two and a half years while proceedings against the defendant in another county were pending. *Id.* at 891. The State justified the delay as a practice followed "in order to avoid the inconvenience and expense of transporting the wanted person

back and forth between the two counties for hearings and trials." *Id.* The Fourth Circuit, like this Court in *Oppelt*, rejected the State's proposed rule that only bad-faith delay violates due process. *Id.* at 895. The court held the State was negligent and there was "no valid justification in this case for the preindictment delay." *Id.*

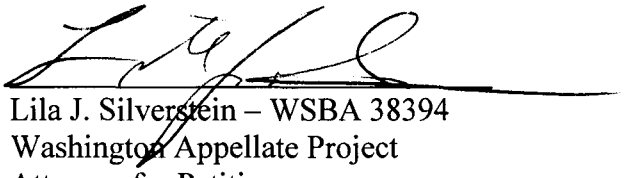
Similarly here, the inconvenience and expense of STR testing does not justify delaying it for ten years. Furthermore, the State did not even attempt to justify the failure to charge the DNA profile in 1998 or the destruction of the evidence in 2003. It would be ironic for State to get away with destroying almost all of the evidence based on its misunderstanding of the statute of limitations, but then arguing that neither the statute of limitations nor due process prohibited it from prosecuting Mr. McConnell eight years later with the one piece of evidence it hadn't destroyed. What happened in this case violates fundamental notions of justice, requiring reversal under the Fourteenth Amendment. *See Oppelt*, 172 Wn.2d at 287.

E. CONCLUSION

For the reasons set forth above, Michael McConnell respectfully requests that this Court grant review.

DATED this 22nd day of January, 2014.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Petitioner

APPENDIX A

315 P.3d 586
Court of Appeals of Washington,
Division 1.

STATE of Washington, Respondent,
v.
Michael William McCONNELL, Appellant.

No. 68852–9–I. | Dec. 30, 2013.

Synopsis

Background: Defendant was convicted in the Snohomish Superior Court, Bruce I. Weiss, J., of rape in the first degree, and he appealed.

Holdings: The Court of Appeals, Schindler, J., held that:

[1] identity of a suspect is not "conclusively established" until DNA testing matches the DNA profile of an unknown suspect to the DNA profile of a known suspect for purposes of 10–year statute of limitations for rape in the first degree, and

[2] State's 13 year delay in filing rape charges did not violate defendant's due process rights.

Affirmed.

Attorneys and Law Firms

Lila Jane Silverstein, Washington Appellate Project, Seattle, WA, for Appellants.

John Jeppe Juhl, Attorney at Law, Everett, WA, for Respondents.

Opinion

SCHINDLER, J.

¶ 1 The 10–year statute of limitations for rape in the first degree begins on the date of commission of the crime or one year from the date "on which the identity of the suspect is conclusively established by deoxyribonucleic acid [(DNA)] testing ..., whichever is later." [1] Michael William McConnell appeals his conviction for rape in the first degree arguing the State did not charge him within the 10–year statute of limitations. In the alternative, McConnell claims the delay in filing the charges violated due process. Because DNA testing did not conclusively establish the identity of McConnell until 2011 and the delay in filing the charges did not violate his due process rights, we affirm.

FACTS

¶ 2 At around 8:30 a.m. on June 24, 1998, E.C. went to her portable classroom at Discovery Elementary School to prepare for the upcoming summer school session. Of the five portable classrooms located at the north end of the school campus, E.C.'s portable classroom was the farthest away to the east. E.C. locked the door to the portable but opened the southeast window. Over the course of the morning, E.C. left the classroom several times. Each time E.C. left, she locked the door but left the window open.

¶ 3 E.C. locked the door after returning to the classroom after lunch. While she was sitting at her desk, a male voice said, " 'Okay, here we go. Get down on the floor.' " E.C. turned around and saw a man dressed in black. The man was wearing a black knit cap with his face partially covered and only his eyes and nose visible, a black long-sleeved shirt, black pants, black gloves, and black lace-up boots. The man pointed a large-caliber revolver at E.C. and told her to lay face-down on the floor and demanded money. E.C. told the man where to find her purse and heard him going through the purse.

¶ 4 The man told E.C. not to move, scream, or look at him or he would " 'blow [her] fucking head off.' " The man then knelt down beside her and put his hand between her legs. The man told E.C. to remove her pants and underwear. The man held the gun to her neck with one hand while he digitally raped her with his other hand. The man then moved behind E.C. and raped her anally. When E.C. screamed in pain, the man put the gun to "her head and cocked it, reminding her of the consequences." After anally raping E.C., the man ordered her to roll onto her back and vaginally raped her. The man then got dressed and asked E.C. where the telephone was located. The man tore the telephone cord and wires from the wall and told E.C. "that he would shoot her if he saw her outside before he was gone." Approximately five minutes after the man left, E.C. ran to an adjacent portable classroom and called 911.

¶ 5 Snohomish County and Everett Police Department officers responded to the 911 call. E.C. " 'was crying and her whole body was trembling.... [S]he collapsed on the floor sobbing and trembling.' " E.C. gave the police officers a

brief summary of what happened before going to the hospital. Officers searched the classroom and surrounding area. The officers observed scuff marks on the exterior wall below the southeast window and found a black sweater south of the school. A K–9 dog tracked a scent from the portable classroom to a grassy area nearby where the K–9 officer observed bicycle tracks. The officers took plaster casts of the bicycle tracks. A latent fingerprint analysis of the telephone found no fingerprints of value.

¶ 6 The hospital performed a sexual assault examination of E.C. Before meeting with E.C. the next day, officers collected E.C.'s clothing and the sexual assault evidence from the hospital.

¶ 7 E.C. told the officers that she locked the door to the classroom but left the southeast window open. E.C. said that after returning from lunch, she was sitting at her desk looking out the north window and did not hear the man climb inside. E.C. described the man who raped her as a white male, between 18 and 24 years old, and possibly blond. E.C. believed the man was between 5 feet 10 inches and 6 feet tall and weighed 170 pounds. The Snohomish County Sheriff's Office issued a news release with a description of the suspect and a composite drawing based on E.C.'s description.

¶ 8 On September 10, 1998, Washington State Patrol Crime Laboratory (WSPCL) forensic scientist Brian Smelser obtained semen samples from the swabs and underwear taken from E.C.[2] Using restriction fragment length polymorphism (RFLP) testing, WSPCL forensic scientist Jodi Sass identified the DNA of two male contributors. One contributor was identified as E.C.'s spouse. The other contributor was an unknown male. The DNA profile of the unknown male did not match any DNA profile in the WSPCL convicted felon database.

¶ 9 In 1998, the Federal Bureau of Investigation (FBI) started maintaining a national DNA index system, the "Combined DNA Index System" (CODIS). The FBI uses short tandem repeat (STR) DNA testing for the CODIS database. In 2000, the WSPCL transitioned from using RFLP to STR DNA testing. When the WSPCL transitioned from RFLP to STR testing, 957 unknown DNA profiles in the WSPCL database were "classified as closed work requests."

¶ 10 On October 12, 2000, the court sentenced Michael William McConnell for the crime of residential burglary. On December 5, 2000, the court sentenced McConnell for committing the crime of residential burglary with a deadly weapon. As a result of the felony convictions, McConnell was ordered to submit to DNA testing.

¶ 11 In 2003, the lead detective in the 1998 rape investigation, Snohomish County Detective George Wilkins, authorized the release and destruction of the evidence from the unsolved 1998 rape case. According to Detective Wilkins, "[T]here was a big push at the Sheriff's office to help the property room clear out evidence" and he mistakenly believed the statute of limitations for the 1998 rape had expired. Detective Wilkins said he did not contact the prosecutor's office to confirm whether the statute of limitations had expired before authorizing destruction of the evidence retained at the Snohomish County Sheriff's Office. The destroyed evidence included the black sweater found near the school, photographs of the classroom, photographs of the abrasions on E.C.'s neck, photographs of the area surrounding the school, the plaster casts of the bicycle tracks, the telephone the suspect had pulled out of the wall, and E.C.'s clothing.

¶ 12 In June 2010, Snohomish County Detective James Scharf was assigned to the cold case unit and was investigating a 1995 homicide. The 1995 homicide occurred in the same area as the 1998 rape and involved a suspect who rode a bicycle. Detective Scharf had worked on the 1998 rape investigation. Detective Scharf said that because the case "stuck out in my mind," he decided to look into the case again "to determine if the DNA profile was ever compared in CODIS." Detective Scharf contacted the WSPCL and learned "there was plenty of DNA extracted from the victim's panties that could be tested again using the current [STR] process." Detective Scharf requested the WSPCL conduct STR testing.

¶ 13 On January 7, 2011, WSPCL forensic scientist Jodi Sass contacted Detective Scharf about the results from the STR analysis on a sample previously extracted from the victim's underwear. After identifying the major male DNA profile, Sass searched the CODIS database. The DNA profile matched the DNA from "Michael W. McConnell, date of birth 12–18–80." Sass asked Detective Scharf to obtain "a known sample directly" from McConnell to confirm the match. Sass told Detective Scharf that "there is still plenty of DNA extract to use for further testing."

¶ 14 Detective Scharf obtained a copy of McConnell's 1998 driver's license. The 1998 driver's license described McConnell as a white male with blond hair, 5 feet 8 inches tall, and 163 pounds. Detective Scharf determined that based

on McConnell's date of birth, "McConnell would have been 17 years and 6 months old at the time this rape occurred."

¶ 15 On February 28, 2011, the court issued a search warrant to obtain DNA from McConnell. On March 2, Detective Scharf and Detective Patrick VanderWeyst took saliva swabs from McConnell for DNA testing. During an interview with the detectives, McConnell said that in 1998 he lived with his parents, two brothers, and a sister in a house located eight-tenths of a mile from Discovery Elementary School. McConnell said he "had a bunch of bikes."

¶ 16 On March 17, Sass completed the DNA analysis of the saliva swabs from McConnell. Sass confirmed that the major male DNA from E.C.'s underwear "matches the DNA typing profile obtained from the reference sample of Michael McConnell." The WSPCL forensic report states the "estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile is 1 in 19 quadrillion."

¶ 17 On March 25, 2011, the State charged McConnell with the 1998 rape in the first degree of E.C. McConnell filed a motion to dismiss on the grounds that the State did not charge him within the 10–year statute of limitations under RCW 9A.04.080(1)(b)(iii)(A) and (3). The 10–year statute of limitations for rape in the first degree runs from the date of commission of the crime or one year from "the date on which the identity of the suspect is conclusively established" by DNA testing.[3] McConnell argued his identity was conclusively established in 1998 when the WSPCL obtained a unique genetic profile using RFLP analysis. In the alternative, McConnell asserted the delay in filing the charges violated due process. In support of the motion to dismiss, McConnell submitted court records showing the Snohomish County Prosecutor's Office had previously charged unknown suspects using a DNA profile rather than by name.

¶ 18 The State argued the identity of McConnell was not conclusively established until the WSPCL conducted STR testing and was able to match the DNA profile from the 1998 rape to the DNA obtained from McConnell. The State submitted the declaration of WSPCL DNA manager Gary Shutler, the 2011 WSPCL forensic report, and the 1998 WSPCL forensic report. The 1998 WSPCL forensic report states that "[n]o matches were found between the DNA profile of the semen donor and the DNA profiles in the data bank."

¶ 19 Shutler states that after the FBI began using STR testing for the CODIS database, the WSPCL began transitioning from RFLP to STR testing, and an increased and ongoing demand for DNA testing and analysis resulted in a backlog. Shutler explains that "[d]ue to the limitation of resources[,] no systematic process was ever employed to evaluate old RFLP data base cases for suitability of performing STR analysis." But Shutler states that if an agency working on a cold case submitted a request for analysis, the remaining DNA extract sample would be reanalyzed using STR testing.

¶ 20 The State also presented legislative history related to the 2006 amendment to the statute of limitations for rape in the first degree stating that the 10–year limitations period runs from the date the identity of the suspect is conclusively established by DNA testing.[4] According to the House Bill Report for Substitute Senate Bill 5042, the Washington Association of Criminal Defense Lawyers (WACDL) and the Washington Defenders Association (WDA) expressed concerns about whether a preliminary match from a DNA database would be sufficient to "conclusively" establish a suspect's identity. H.B. Rep. on Substitute S.B. 5042, at 3–4, 59th Leg., Reg. Sess. (Wash.2005). WACDL and WDA suggested adding language to expressly state "that the statute of limitations is triggered when a DNA profile is matched with a DNA profile from any certified database." H.B. Rep. on Substitute S.B. 5042, at 4.[5]

¶ 21 The court denied the motion to dismiss. The court entered findings of fact and conclusions of law and incorporated its oral ruling. The court concluded the State filed the charge of rape in the first degree within the statute of limitations. The court ruled that the statute of limitations "did not begin until the suspect's identity was 'conclusively established,' which occurred on or after December 13, 2010 when the Defendant's DNA profile was matched with the suspect's DNA profile" in the CODIS database and confirmed by the subsequent DNA analysis. The court rejected McConnell's interpretation of the statute:

> In this statute, the critical word that needs to be focused in on is the term "conclusively." If the argument of the defense is accurate, there would have been no need for the legislature to insert the term "conclusively" in the statute.
>
> Each DNA profile has a unique genetic sequence of DNA. If the intent for the statute of limitations was to run when a person had been identified by their DNA profile and the unique genetic makeup of the profiles, the word

"conclusively" would be superfluous. The intent behind adding the term "conclusively" meant more than having a unique DNA profile. The identity of the suspect was conclusively established when either there was the actual comparison between the two samples, or, when there was the match in the CODIS system, because, under either scenario in this case, the case was filed timely.

¶ 22 The court also rejected McConnell's argument that prosecutorial delay violated due process:

> The passage of time that occurred in this case-between entry of the Defendant's DNA profile into CODIS using STR testing methods in late 2000 or early 2001, and resubmission of the rape suspect's DNA profile into CODIS using STR testing methods in January, 2011 (as opposed to the RFLP method originally used in 1998)-does not amount to "delay" in the sense that word ("delay") is used to evaluate governmental mismanagement or negligence in the context of preaccusatorial delay claims. Given that no "delay" occurred, actual prejudice, reason for delay, and a balancing thereof are not addressed.

¶ 23 McConnell agreed to a stipulated bench trial. The parties submitted over 200 pages of documentary evidence, including the police reports from the 1998 rape investigation, transcripts of the 1998 interview with E.C., the 2011 interview with McConnell, and the 1998 and 2011 WSPCL forensic reports. [6] The court found McConnell guilty of rape in the first degree. At sentencing, E.C. told the court, "To this day, I have no idea who he is, how he found me, or why he did this to me. He is a complete stranger to me." The court sentenced McConnell to 161 months.

ANALYSIS

Statute of Limitations

[1] ¶ 24 McConnell contends he is entitled to dismissal of the rape in the first degree conviction because the State did not charge him within the 10–year statute of limitations.

¶ 25 RCW 9A.04.080 sets forth the statute of limitations for rape in the first degree. RCW 9A.04.080 states, in pertinent part:

> (1) Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.
>
> ....
>
> (b) [T]he following offenses shall not be prosecuted more than ten years after their commission:
>
> ....
>
> (iii)(A) Violations of RCW 9A.44.040 or 9A.44.050 if the rape is reported to a law enforcement agency within one year of its commission.
>
> ....
>
> (3) In any prosecution for a sex offense as defined in RCW 9.94A.030, *the periods of limitation* prescribed in subsection (1) of this section *run from the date of commission or one year from the date on which the identity of the suspect is conclusively established by [DNA] testing* or by photograph as defined in RCW 9.68A.011, *whichever is later.* [7]

¶ 26 The parties dispute the meaning of the phrase, "date on which the identity of the suspect is conclusively established by [DNA] testing." RCW 9A.04.080(3). McConnell argues that the phrase, "date on which the identity of the suspect is conclusively established by [DNA] testing," means the date when the unique DNA profile of a rape suspect is identified, not when the State matches the unknown DNA profile to a particular person. McConnell argues his identity was conclusively established when the 1998 forensic report identified a unique DNA profile. The State argues that the words "conclusively established" mean more than obtaining a unique DNA profile from an unknown suspect. The State asserts that the identity of an unknown rape suspect is not conclusively established until the DNA profile of an unknown suspect is matched to the DNA profile of a known suspect. The State argues McConnell's identity was not conclusively established until the DNA analysis in 2011 identified McConnell through CODIS and the DNA test of the swab from McConnell confirmed his DNA matched the profile of the unknown 1998 rape suspect.

¶ 27 The interpretation of a statute is a question of law that we review de novo. *State v. Gonzalez,* 168 Wash.2d 256, 263,

226 P.3d 131 (2010). Our goal in interpreting a statute is to carry out the legislature's intent. *Gonzalez,* 168 Wash.2d at 263, 226 P.3d 131. We must avoid an interpretation that would produce an unlikely, absurd, or strained result. *State v. Fjermestad,* 114 Wash.2d 828, 835, 791 P.2d 897 (1990). We first examine the plain language of the statute. *Gonzalez,* 168 Wash.2d at 263, 226 P.3d 131. We determine the plain meaning "from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel,* 166 Wash.2d 572, 578, 210 P.3d 1007 (2009).

¶ 28 We interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *City of Seattle v. State,* 136 Wash.2d 693, 698, 965 P.2d 619 (1998). If the meaning of a statute is plain on its face, we give effect to the plain meaning as an expression of legislative intent. *State v. J.M.,* 144 Wash.2d 472, 480, 28 P.3d 720 (2001).

[2] ¶ 29 Because the statute does not define "conclusively established," we look to the ordinary meaning of the words. "When a statutory term is undefined, the words of a statute are given their ordinary meaning, and the court may look to a dictionary for such meaning." *Gonzalez,* 168 Wash.2d at 263, 226 P.3d 131. "Conclusive" means "forming an end or termination ...: putting an end to debate or question [especially] by reason of irrefutability: involving a conclusion or decision." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 471 (2002). "Establish" means "to make firm or stable: ... to settle or fix after consideration ...: to prove or make acceptable beyond a reasonable doubt." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 778.

¶ 30 To determine whether a match conclusively establishes the identity of a rape suspect, a forensic scientist must compare an unknown DNA profile with a known DNA profile. *See State v. Gore,* 143 Wash.2d 288, 302, 21 P.3d 262 (2001) ("DNA typing methods are designed to extract portions of DNA molecules and determine whether the genetic profile resulting from a forensic sample matches that of a suspect."), *overruled on other grounds by State v. Hughes,* 154 Wash.2d 118, 110 P.3d 192 (2005); *State v. Copeland,* 130 Wash.2d 244, 262, 922 P.2d 1304 (1995) (once a suspect's blood sample is found to " 'match' " a forensic sample, scientists calculate the likelihood of a random match). Accordingly, the identification of a DNA profile from an unknown suspect does not "put[ ] an end to debate or question" or "involve[ ] a conclusion or decision," or "settle" or "prove" a defendant's identity. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 471, 778. We conclude that under the plain language of the statute, the identity of a suspect is not "conclusively established" until DNA testing matches the DNA profile of an unknown suspect to the DNA profile of a known suspect.

Preaccusatorial Delay

[3] **[4]** ¶ 31 In the alternative, McConnell contends he is entitled to reversal because preaccusatorial delay violated due process. Whether preaccusatorial delay violates due process is a question of law we review de novo. *State v. Oppelt,* 172 Wash.2d 285, 290, 257 P.3d 653 (2011). Preaccusatorial delay violates due process if prosecution of the case "violat [es] fundamental conceptions of justice." *Oppelt,* 172 Wash.2d at 295, 257 P.3d 653.

[5] **[6]** **[7]** ¶ 32 The court uses a three-part test to determine whether preaccusatorial delay violates due process. First, the defendant must specifically show actual prejudice from the delay. *Oppelt,* 172 Wash.2d at 295, 257 P.3d 653. A defendant is not required to show bad faith; "negligent delay can violate due process." *Oppelt,* 172 Wash.2d at 292, 257 P.3d 653. However, "[w]here the State's reason for delay is mere negligence, establishing a due process violation requires greater prejudice to the defendant than cases of intentional bad faith delay." *Oppelt,* 172 Wash.2d at 296, 257 P.3d 653. If the defendant establishes prejudice, the burden shifts to the State to show the reasons for the delay. *Oppelt,* 172 Wash.2d at 295, 257 P.3d 653. The court then examines the entire record to weigh the reasons for the delay against the prejudice and "determine whether fundamental conceptions of justice would be violated by allowing prosecution." *Oppelt,* 172 Wash.2d at 295, 257 P.3d 653.

¶ 33 McConnell claims the delay resulted in prejudice because his mother is no longer alive to testify and the State destroyed all the evidence. McConnell also argues the 12–year delay in filing the charges is more prejudicial than the six-year delay in *Oppelt.*

¶ 34 In *Oppelt,* the minor victim told her great-grandmother that her stepfather molested her. *Oppelt,* 172 Wash.2d at 287, 257 P.3d 653. The great-grandmother gave the victim lotion to apply to her vagina. *Oppelt,* 172 Wash.2d at 287, 257 P.3d 653. A nurse examined the victim and observed redness and swelling of the genitalia. *Oppelt,* 172 Wash.2d at 287, 257 P.3d 653. The great-grandmother reported the abuse to police a few days later but "[t]he report never made it to the

prosecutor's office." *Oppelt,* 172 Wash.2d at 288, 257 P.3d 653. The State did not charge Oppelt with child molestation until six years later. *Oppelt,* 172 Wash.2d at 287–88, 257 P.3d 653. At trial, the great-grandmother could not recall what type of lotion she gave the victim. *Oppelt,* 172 Wash.2d at 296, 257 P.3d 653.

¶ 35 The Supreme Court held that the delay was the result of the State's negligence but did not violate Oppelt's due process rights. *Oppelt,* 172 Wash.2d at 296, 257 P.3d 653. The court concluded that the great-grandmother's memory loss caused only "very slight prejudice" because the defendant was not precluded from arguing that the lotion caused the redness and swelling. *Oppelt,* 172 Wash.2d at 296, 257 P.3d 653.

¶ 36 Here, McConnell does not show actual prejudice from the delay in filing charges. McConnell does not identify what his mother's testimony would have shown. While McConnell argues his mother was a potential alibi or fact witness, he does not identify what his mother would have said if called to testify. Nor does McConnell explain why the other members of his family, his father, brothers, or sister, could not provide the same or similar testimony.

¶ 37 McConnell also claims he was prejudiced by the destruction of evidence, including the black sweater believed to have been worn by the suspect, plaster casts of the suspect's bicycle tracks, and photographs taken of the crime scene and the victim's injuries. But McConnell does not identify exactly how the destroyed evidence resulted in actual prejudice. Further, there is no dispute that the destruction of the evidence was unrelated to the delay in filing charges.

¶ 38 In addition, McConnell asserts that because E.C.'s clothing was destroyed, he was unable to extract an independent sample for DNA testing. Contrary to his assertion, the record establishes there was "plenty of DNA extract[ ]" to use for further testing. [8]

¶ 39 Without citation to authority, McConnell also contends that the State should have compared the unknown sample to the DNA database and retested the DNA using STR analysis before 2010. [9] But "investigative and administrative delays in the processing of a case are fundamentally unlike delay undertaken by the [State] solely 'to gain tactical advantage over the accused.' " *State v. Alvin,* 109 Wash.2d 602, 606, 746 P.2d 807 (1987) [10] (quoting *United States v. Lovasco,* 431 U.S. 783, 795, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)). Here, the record shows that the delay in retesting the DNA from the unsolved 1998 rape case was not undertaken to gain a tactical advantage. Due to limited resources, the WSPCL retested DNA profiles from the RFLP database only when a specific request was made. We conclude the record establishes the delay in filing the charge of rape in the first degree against McConnell did not violate fundamental conceptions of justice.

¶ 40 We affirm the conviction of rape in the first degree.

WE CONCUR: BECKER, and GROSSE, J.

1 RCW 9A.04.080(1)(b)(iii)(A), (3).

2 DNA extraction involves both removing cells from the objects to which they are attached (clothing, blood samples, etc.) and removing the DNA from inside the cell. *State v. Cauthron,* 120 Wash.2d 879, 893, 846 P.2d 502 (1993).

3 RCW 9A.04.080(1)(b)(iii)(A), (3).

4 Laws of 2006, ch. 132, § 1.

5 The House Bill Report for Substitute Senate Bill 5042 states, in pertinent part:

> Defense attorneys understand and generally agree that the advances in [DNA] technology should be fully utilized, including in cold cases, to advance the cause of justice in the court system-the victims deserve no less.... [T]here are concerns with the triggering language in that it requires "conclusive" establishment of a suspect's identification. What about the situation where the lab finds a "preliminary" or "tentative" match by running it through a single database? This preliminary identification would probably trigger an investigation by police but it would not trigger the statute of limitations.... It is not clear from the bill who is responsible for reaching the conclusion that a suspect has been "conclusively" identified. One suggestion ... is to amend this section to state that the statute of limitations is triggered when a DNA profile is matched with a DNA profile from any certified database.

H.B. Rep. on Substitute S.B. 5042, at 3–4.

6 The court also considered "all previously admitted evidence and exhibits admitted during pre-trial proceedings."

7 (Emphasis added.) Between 1998 and 2013, the legislature amended RCW 9A.04.080 several times. *See*

LAWS OF 2006, ch. 132, § 1; Laws of 2009, ch. 53, § 1; LAWS OF 2009, ch. 61, § 1; LAWS OF 2012, ch. 105, § 1; LAWS OF 2013, ch. 17, § 1. In 2006, the legislature amended the statute to state that the 10–year statute of limitations runs from the date of the commission of the act or from the date a defendant's identity is conclusively established by DNA testing, whichever is later. LAWS OF 2006, ch. 132, § 1. Because the amendments do not affect our analysis here, we cite to the current version of the statute. *See also State v. Hodgson,* 108 Wash.2d 662, 666–67, 740 P.2d 848 (1987) ("When the Legislature extends a criminal statute of limitation, the new period of limitation applies to offenses not already time barred when the new enactment was adopted and became effective.").

8 McConnell also cites *Howell v. Barker,* 904 F.2d 889 (4th Cir.1990). Howell is distinguishable. In *Howell,* the State conceded actual prejudice. *Howell,* 904 F.2d at 895.

9 McConnell also claims the State should have used the DNA profile from the RFLP testing to charge him as an unknown suspect. But McConnell cites no authority for the proposition that the State should have done so.

10 (Alteration in original.)

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent, MICHAEL MCCONNELL, Appellant.	)	NO. 68852-9-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 22ND DAY OF JANUARY, 2014.

X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711