

In the Supreme Court of Ohio

STATE OF OHIO,	}	CASE NO. 2025-0322
Plaintiff-Appellee,		
v.	}	ON APPEAL FROM THE CLERMONT COUNTY COURT OF APPEALS TWELFTH APPELLATE DISTRICT
SCOTT ALAN WILSON,		
Defendant-Appellant.	}	COURT OF APPEALS CASE NO. 2024 CA-03-021

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

RUSSELL S. BENSING (0010602)
377B Lear Rd.
Suite 121
Avon Lake, OH 44012
(216) 241-6650
rbensing@ameritech.net

**COUNSEL FOR *AMICUS CURIAE* OHIO
ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS IN SUPPORT OF
APPELLANT**

GEORGE P. MONTGOMERY (0046738)
45 North Market Street
Batavia, OH 45102
(513) 732-2900
george@montgomerylawoffice.com

COUNSEL FOR APPELLANT

MARK L. TEKULVE (0038543)
Clermont County Prosecutor

Nicholas Horton (0091191)
(COUNSEL OF RECORD)
Assistant County Prosecutor
76 Riverside Drive, 2nd Floor
Batavia, OH 45103
(513) 732-8175
nhorton@clermontcountyohio.gov

COUNSEL FOR APPELLEE

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STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellee.

LAW AND ARGUMENT

Overview and Summary of Argument. The jury's task in a criminal trial is to produce a reliable outcome. We do not want the routine acquittal of the guilty, and even less the routine conviction of the innocent. We want the jury to get it right.

And so we have constructed a system which we believe will allow the jury to produce an accurate verdict. We have rules to ensure the jury gets only reliable, relevant evidence. We have procedures – “cross-examination, the greatest engine ever invented for the discovery of truth” – to aid the jury in coming to the correct result. We have two adversaries presenting the evidence

in support of their respective positions.

But the implicit premise of all this is that the jury will get as much information as we can provide. It is a universal truth that the more information one has in making a decision, the more likely it is that one will make the correct decision. And so it is with juries. The less information they are given, the more they have to speculate on what missing witnesses or evidence would have shown, the less reliable the outcome of the trial will be.

The statute of limitations is the legislature's determination that at a certain point, so much information has been lost, through faded memories or missing evidence and witnesses, that the outcome of a trial would no longer be reliable. As the Supreme Court observed in *United States v. Marion*, 404 U.S. 307, 322-323, (1971), those statutes "specify[] a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."

But the statute of limitations is not the only bar to delayed prosecution. The courts have held that if a defendant can show actual prejudice from an unjustifiable delay in commencing prosecution, due process requires dismissal of the charges against him.

The sole issue in this case is what constitutes "actual prejudice." We submit that resolution of this question requires focusing on the jury process: has the jury been deprived of so much relevant information that its verdict is no longer reliable? We present the following proposition of law:

AMICUS CURIAE OACDL'S PROPOSITION OF LAW: In determining whether a defendant was prejudiced by pre-indictment delay, actual prejudice exists when missing evidence or unavailable testimony, identified by the defendant and relevant to the defense, would minimize or eliminate the impact of the state's evidence and bolster the defense. (State v. Jones, 148 Ohio St. 3d 167, 2016-Ohio-5105 and State v. Luck, 15 Ohio St.3d 150 (1984), followed.)

1. The development of the concept of pre-indictment delay. The defendants in *United*

States v. Marion, *supra*, 404 U.S. 307 (1971), argued that the speedy trial provision of the Sixth Amendment required dismissal of the indictment against them, which was brought three years after the activities for which they were charged. The Court found that “the speedy trial provision has no application until the putative defendant in some way becomes an ‘accused,’” an event which occurred only when the defendants were indicted, a month before they filed their motion to dismiss. 404 U.S. at 313.

But the Court did not stop there. While acknowledging that the statute of limitations provided the main defense against delayed prosecution, the Court found that “the statute of limitations does not fully define the appellees’ rights with respect to the events occurring prior to indictment”; as the government conceded, the Fifth Amendment’s Due Process Clause would require dismissal if “the pre-indictment delay in this case caused substantial prejudice to appellees’ rights to a fair trial.” U.S. at 324. What might constitute “substantial prejudice” the Court left for another day; the defendants had not even alleged they had suffered any.

The Supreme Court considered the issue of preindictment delay for the next time six years later in *United States v. Lovasco*, 431 U.S. 783 (1977). That case did not provide an answer to what constitutes actual prejudice, either. After again acknowledging that the Due Process Clause guaranteed protection against delayed prosecution beyond that provided by the statute of limitations, the Court held that while *Marion* established that “proof of prejudice is generally a necessary but not sufficient element of a due process claim … the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” U.S. at 789.

Lovasco thus established two requirements for a defendant seeking dismissal of the case against him on the basis of pre-indictment delay: he must demonstrate that he suffered actual

prejudice from the delay, and that the delay was unjustifiable. The Court in *Lovasco* dealt only with the second issue, finding that the government's reason for the mere eighteen-month delay – to conduct a full investigation before bringing charges – was not an unreasonable one, and did not “violate those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency.” 431 U.S. at 790 (internal citations and quotation marks omitted).

While both *Marion* and *Lovasco* held that the Due Process Clause required dismissal of the indictment if the defendant suffered “substantial” or “actual” prejudice from unjustified delay in initiating the prosecution, neither defined what those terms meant. In *Marion*, the defendants claimed no prejudice; in *Lovasco*, while the Court in *dicta* noted that the defendants had been “somewhat prejudiced” by the deaths of two witnesses, it did not reach that question because it found the delay completely justified.

This Court first confronted the issue of pre-indictment delay in *State v. Luck*, 15 Ohio St.3d 150 (1984). Luck was the suspect in the murder of Helen Marie Tietjen in 1967. The police interrogated Luck and interviewed several other witnesses shortly after Tietjen’s death, but then inexplicably sat on the case for the next fifteen years. Luck was finally indicted in 1983.

The court adopted the approach articulated in *Lovasco*, that “the prejudice suffered by the defendant must be viewed in light of the state's reason for the delay.” O.St.3d at 153. The analysis of prejudice focused on a witness named Cassano, who died in the fifteen-year interim between the crime and the indictment. Luck told the police that Cassano was in the apartment at the time of the killing – in fact, the police originally considered him a suspect – and was “the one person who could have helped her.” The court found that this, and the loss of all the witness

interviews and statements, demonstrated actual prejudice.

This Court then moved to consideration of the reasons for delay. While *Marion* and *Lovasco* had talked only in terms of the delay being unjustifiable if it was intended to “gain a tactical advantage over the defendant,” *Luck* expanded that to include “when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased.” O.St.3d at 158. The court found that the delay in *Luck*’s prosecution easily satisfied that standard.

The court also found actual prejudice from the fourteen-year delay in *State v. Whiting*, 84 Ohio St.3d 215, 1998-Ohio-575: according to the lower court opinion, Whiting “offered evidence showing that witnesses to support his proffered alibi were no longer available. He also showed that some of the physical evidence that police obtained during the 1981 investigation were [sic] no longer available.” *State v. Whiting*, 1997 Ohio App. LEXIS 4165, 1997 WL 568018 (2nd Dist.), at *2. The focus then shifted to the justification for the delay. The appellate court had held that while the State had the burden of coming forward with reasons for the delay, the defendant still had the burden of proving it was unjustified. The Supreme Court reversed, reiterating that once the defendant established actual prejudice, the burden was on the State to prove the reason for the delay.

Marion, *Lovasco*, *Luck*, and *Whiting* establish that the statute of limitations does not provide the full extent of protection against delayed prosecution: if the defendant can show actual prejudice from unjustifiable delay, the Due Process Clause compels dismissal of the indictment. The focus of the Due Process Clause in the context of pre-indictment delay is the fairness of subjecting the defendant to trial. *Lovasco* perhaps states it best: the defendant

suffering actual prejudice from unreasonable delay “violate[s] those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency.” 431 U.S. at 790.

2. The determination of prejudice. As noted, the statute of limitations conclusively presumes that the defendant has been prejudiced if prosecution is delayed beyond a certain point, regardless of the reasons for the delay. But a defendant claiming pre-indictment delay must show actual prejudice. He cannot claim the mere passage of time or the fading of memories as grounds for dismissal, because the statute of limitations already takes that into account.

For that reason, courts have routinely denied motions to dismiss where the defendant relies “solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost.” *State v. Willis*, 1997 Ohio App. LEXIS 3153, 1997 WL 419613 (7th Dist.). Similarly, in *State v. Flickinger*, 1999 Ohio App. LEXIS 225, 1999 WL 34854 (4th Dist.), the court affirmed the denial of the motion to dismiss where the only prejudice claimed by the defendant was that “his memory as to the events surrounding the alleged offense has faded.” The court reached the same result in *State v. Tullis*, 10th Dist. Franklin No. 04-AP-333, 2005-Ohio-2205, where the defendant contended only that “the delay made it difficult for him to locate and present relevant witnesses.” See also *State v. Copeland*, 2008-Ohio-234 (8th Dist.), ¶14 (“Copeland did not allege any prejudice other than arguing a general presumption of prejudice based on the length of the delay”); *State v. Wade*, 2008-Ohio-4574 (8th Dist.) , ¶47 (“Wade is not able to allege any prejudice other than arguing a general presumption of prejudice based on no more than a 14-month delay”); and *State v. Bolton*, 2012-Ohio-169 (8th Dist.), ¶30 (defendant’s only claim of prejudice was that “he could have already served a substantial portion of his sentence had he been indicted and convicted earlier”).

The lack of prejudice was also key to this Court's decision in *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954. Adams contended that the death of a key witness prejudiced him. But that witness would have been a co-defendant; as the court observed, “[i]f anything, Landers's absence at trial was a benefit to Adams's defense because Landers had implicated Adams in the murder before he died.” ¶103. The problem was not that Adams failed to show *actual* prejudice, it was that he showed *no* prejudice. “Indeed, we find no evidence in the record that Adams was prejudiced by the passage of time prior to indictment.” ¶101.

This Court began the task of defining prejudice in two cases: *State v. Jones*, 148 Ohio St.3d 167, 2016-Ohio-5105, and *State v. Bourn*, 172 Ohio St.3d 343, 2022-Ohio-4321.

A. *State v. Jones*. Jones was charged with rape, the alleged incident occurring almost twenty years earlier. Although they had Jones' full name and address, the police investigation consisted solely of unsuccessfully attempting to contact the complainant on two occasions. The rape kit sat in the police evidence room for eighteen years, until someone finally sent to the Bureau of Criminal Investigation for testing. Jones was indicted one day before the statute of limitations was to expire.

According to the complainant, the assault took place in Jones' apartment, and his mother was sitting outside in the living room. The complainant alleged that she screamed, but the mother didn't do anything. In the twenty years it took the State to prosecute Jones, the mother died.

The trial court granted the motion to dismiss for pre-indictment delay, and the 8th District affirmed. The State appealed to this Court, arguing in essence that to show prejudice, Jones would have to show what the mother would have testified to.

This Court reversed, finding that the appellate court had erred in commingling the issue

of prejudice with the reason for the delay. But it rejected “the state’s suggestion that any claim of actual prejudice based on the death of a potential witness is too speculative to succeed unless the defendant can establish precisely what that witness would testify to and that the testimony would be directly exculpatory.” ¶27. It remanded the case back to the court of appeals for application of the proper standard.

B. *State v. Bourn.* *Bourn* presented another delayed rape investigation, which allegedly occurred at a bar. *Bourn* argued that he was prejudiced by the 12-year delay in prosecution: the house where the incident happened had been demolished, the bar where the two met was closed, the original police file could no longer be found, the officer handling the file was deceased, and *Bourn*’s phone records were unavailable. (He claimed that he and the complainant had contacted each other after the incident.) The trial court granted a motion to dismiss, and the 8th District affirmed.

On appeal, the State urged that the Court adopt a new test: a defendant must provide concrete proof of actual and substantial prejudice. The Court rejected the State’s entreaty, finding that *Jones* provided an adequate explanation of prejudice: a defendant could show actual prejudice by demonstrating that missing evidence or unavailable testimony would minimize or eliminate the impact of the state’s evidence and bolster the defense.

The Court had little trouble disposing of most of *Bourn*’s claims, mainly because he could not make any showing of how the missing police file or the death of the investigating officer would have affected his ability to defendant against the charges. Here, the Court made an important distinction: the question wasn’t whether the missing evidence *could have* assisted him, but whether it *would* have. The same could be said for the demolished house or the closed bar. The only claim that required further discussion was as to the missing phone records, but as

the concurring opinion pointed out, Bourn had made no showing that those records were not available from other sources, such as the complainant's cell phone records

3. Actual prejudice is established by the absence of critical information – eyewitnesses, alibi witnesses, or other such evidence – lost as a result of the delay. That “sense of fair play and decency” has governed the courts’ application of law on pre-indictment delay. While there are no hard and fast rules – even the death of a witness may not in itself demonstrate prejudice – the courts have focused on whether the delay has caused the loss of so much critical information that the trial result cannot be deemed fair.

That will not necessarily result in dismissal, because the justification for the delay must still be considered. In *United States v. Mills*, 704 F.2d 1553, 1557 (11th Cir. 1983), for example, the court found that the death of the person who had confessed to the murder for which Mills was charged was “genuinely prejudicial to preparation of [Mills’] defense,” but found the delay in prosecution justified. The court in *United States v. Lindstrom*, 698 F.2d 1154, 1158 (11th Cir. 1983) came to a similar conclusion, holding that while the death of two key witnesses constituted “a *prima facie* showing of prejudice,” the delay was occasioned by a “good faith ongoing investigation.”

Ohio courts have also concluded that the defendant has demonstrated actual prejudice when the loss of key evidence will result in an unfair trial. In *State v. Dixon*, 2015-Ohio-3144 (8th Dist.), Dixon had a parole violation hearing shortly after he was alleged to have committed a rape in 1993. At the hearing, Diamond, Dixon’s employer at the time, testified that he spoke to the alleged victim after the incident, and she told him that the sexual encounter was “mutual with no force,” that she had “feelings for Dixon,” and that “if she could not have Dixon, no one would.” Despite the parole violation, the State waited until 2013, just prior to the expiration of

the statute of limitations, to indict him. By that time, Diamond had died. The court found that “the unavailability of Diamond's testimony would greatly impair Dixon's ability to create a defense.” ¶30.

The court in *State v. Winkle*, 2014-Ohio-895 (7th Dist.), also found that the delay in prosecution substantially prejudiced the defendant. Winkle was prosecuted for rape and gross sexual imposition against his daughter sometime between 1994 and 1996, and claimed to be prejudiced “due to the destruction or loss of many evidentiary records.” ¶2. In affirming the dismissal of the indictment prior to trial, the court found that Winkle had indeed “provided a wide array of potential evidence that is no longer available that he believes would have directly contradicted key aspects of the victim's story or could have provided an alibi … Hospital records, invoices, tax records, personal calendars, employment records, medical equipment records had all been lost or destroyed during the delay in prosecution.” ¶24.

Since the evidence is lost, we have no way to tell whether every night during the alleged period of the crimes can be accounted for, or whether the evidence would have considerably narrowed the dates that need to be accounted for, greatly simplifying Appellee's defense. Either way, the lost evidence appears to seriously affect Appellee's ability to even create a defense. ¶27.

And, of course, we have this Court's decisions in *Luck* and *Whiting*, where the indictments were dismissed because the court found actual prejudice from the death of key witnesses.

4. Application of the substantial prejudice standard to this case. The appellate court here found no prejudice from the lack of any records from Wilson's 1985 conviction, concluding that “Wilson was convicted *** for assaulting Hannah and causing her *serious* physical harm – this is a judicial fact which Wilson cannot contest or deny.” (Emphasis supplied.) But that is not

accurate; Wilson was convicted of misdemeanor assault, which requires proof of only *physical* harm. As such, the records from the 1985 prosecution would have been quite useful in determining the exact nature of the injury to Hannah, and the subsequent ability to tie that into her death twenty-two years later.

Similarly, the testimony of Dr. Blalock was essential. After all, he was the one who made the connection between the 1985 injury and her death.

The State could offer no justification for the 15-year delay between Hannah's death and the presentment of the case to the grand jury. This was a situation where indeed missing evidence or unavailable testimony would minimize or eliminate the impact of the state's evidence and bolster the defense.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully prays the Court to reverse the decision of the 12th District Court of Appeals and order the discharged.

Respectfully submitted,

/s/Russell S. Bensing
Russell S. Bensing (0010602)
377B Lear Rd.
Suite 121
Avon Lake, OH 44012
(216) 241-6650
rbensing@ameritech.net

**ATTORNEY FOR *AMICUS CURIAE*
OHIO ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS**

SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers was served upon all parties by email this 21st day of July, 2025.

/s/Russell S. Bensing
Russell S. Bensing