

IN THE SUPREME COURT OF OHIO  
CASE NO. 2025-0322

STATE OF OHIO,	)	
Plaintiff-Appellee,	)	On Appeal from the Twelfth District
	)	Court of Appeals
	)	
vs.	)	Clermont County No. CA2024-03-021
	)	
SCOTT ALAN WILSON,	)	
Defendant-Appellant.	)	
	)	

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**AMICUS BRIEF OF OHIO PROSECUTING ATTORNEY’S ASSOCIATION IN  
SUPPORT OF APPELLEE-STATE OF OHIO**

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## **INTEREST OF AMICUS CURIAE**

The Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission includes assisting prosecuting attorneys in the pursuit of truth and justice and advocating for public policies that promote public safety and help secure justice for victims.

That said, OPAA has an interest in the standard of pre-indictment delay. Amicus curiae submit this brief to address the growing divergence between Ohio's preindictment delay jurisprudence and the approach followed by federal circuit courts and state courts nationwide. This divergence has created uncertainty for prosecutors and defendants alike, affecting the administration of justice throughout Ohio.

Amicus curiae recognizes that the court below found that Wilson failed to demonstrate actual prejudice. So it did not make a finding that the delay was unjustified. But because the question of pre-indictment delay begins with the framework (the test to find a due process violation), amicus curiae takes the opportunity to address the framework. In OPAA's view, the Court should realign Ohio's approach with the majority rule.

## **STATEMENT OF THE CASE AND FACTS**

Amicus curiae adopts the Statement of the Case and Facts explained by the State of Ohio.

## **LAW AND ARGUMENT**

**PROPOSITION OF LAW: THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS BASED UPON PRE INDICTMENT DELAY VIOLATING APPELLANT'S DUE PROCESS RIGHTS UNDER BOTH THE FEDERAL AND OHIO CONSTITUTIONS**

## **SUMMARY OF ARGUMENT**

For forty years, Ohio has charted a different course from federal courts in analyzing preindictment delay. This divergence—rooted in *State v. Luck*, 15 Ohio St.3d 150 (1984), and

reaffirmed in *State v. Jones*, 2016-Ohio-5105—has created a burden-shifting framework that departs from United States Supreme Court precedent.

The distinction matters. While the majority of courts require defendants to prove prosecutors deliberately delayed charges for tactical advantage, Ohio asks only whether the State can justify its delay. This difference has led to dismissals of serious prosecutions that would proceed under the federal standard. Pre-indictment delay jurisprudence is grounded in federal due process. So, the understanding of what federal due process requires should be uniform. Like the Fifth Circuit and states like Florida and New Mexico, the Court should realign Ohio’s approach with federal constitutional requirements. That said, the judgment below should be affirmed under any framework.

## **ARGUMENT**

### **I. The Federal Standard: Clear and Demanding**

The Due Process Clause provides only minimal protection against pre-indictment delay, establishing an exceptionally demanding standard for defendants. To prevail, a defendant must prove both actual substantial prejudice to specific aspects of their defense and that the government deliberately delayed to gain tactical advantage over the defendant. *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977). The Supreme Court explicitly held 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.

#### **A. The “Actual Prejudice” Requirement**

The first prong of this test requires defendants to demonstrate concrete, not speculative, harm to their defense. As the Supreme Court recognized decades earlier in *United States v. Marion*, “passage of time, whether before or after arrest, may impair memories, cause evidence to be lost,



deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself.” 404 U.S. 307, 322 (1971). That said, the legislatively adopted statute of limitations serves as the defendant’s primary protection against such potential prejudice. *Id.* at 322-23. Beyond this statutory protection, the Due Process Clause guards only against actual prejudice resulting from pre-indictment delay. *Id.* at 324.

This distinction between potential and actual prejudice proves crucial in practice. Even when defendants can demonstrate that witnesses died during the delay period, this alone does not establish a constitutional violation. Defendants must prove that specific evidence or testimony was actually lost and that this loss meaningfully impaired their ability to mount a defense, rather than merely speculate about what might have been available.

#### **B. The “Deliberate Delay” Prong**

Even more challenging than proving actual prejudice is satisfying the second prong: demonstrating that the government deliberately delayed prosecution to gain tactical advantage. In *Lovasco* itself, despite an 18-month delay that resulted in the death of two defense witnesses, the Court held that prosecutors may continue investigating even when probable cause already exists: “to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.” 431 U.S. at 796.

The Court’s reasoning reflects a strong deference to prosecutorial judgment. Prosecutors remain “under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.” *Id.* at 791. Requiring immediate prosecution would improperly pressure prosecutors into “resolving doubtful cases in favor of early (and possibly unwarranted) prosecutions” and would “preclude full consideration of the desirability of not prosecuting in particular cases.” *Id.* at 790-96. The Court found no violation

where delay was “caused by the government's efforts to identify persons in addition to respondent who may have participated in the offenses.” *Id.* at 795.

### **C. The Result: A Nearly Insurmountable Burden**

This two-pronged framework creates a nearly insurmountable burden for defendants challenging pre-indictment delay. The Supreme Court has never found a due-process violation based solely on the length of delay, reflecting the exceptionally high bar established by these precedents. Defendants cannot rely on speculation about lost evidence or faded memories; they must identify specific witnesses or evidence actually lost and demonstrate that the delay itself, rather than mere passage of time, caused the prejudice. Most critically, even with proven prejudice, dismissal requires proof that the government intentionally delayed “to gain tactical advantage over the accused.” *Marion*, 404 U.S. at 324.

## **II. Ohio’s Distinctive Approach: A Burden-Shifting Framework**

### **A. The Decision in *Luck* Begins the Drift**

*Luck*, 15 Ohio St.3d 150 establishes a markedly more defendant-protective standard than the restrictive federal framework detailed above, creating several important distinctions that make Ohio due process claims more viable than their federal counterparts.

The most significant departure lies in what constitutes unjustifiable delay. Unlike the federal standard requiring proof that prosecutors “deliberately delayed to gain tactical advantage” (see Section I.B), *Luck* broadens this standard. This Court held that delay becomes unjustifiable when caused by prosecutorial “negligence or error in judgment” that leads to cessation of active investigation, even without any tactical motive. *Id.* at 158.

This represents a fundamental shift in approach. *Luck* subjects reasons other than deliberate delay to gain a tactical advantage to judicial scrutiny. The Court criticized the fifteen-year delay where prosecution ultimately proceeded “without one shred of new evidence” on a case “substantially the same as it had been since 1968.” *Id.* at 158-159. In contrast to the extraordinary deference federal precedent shows to prosecutorial-timing decisions (Section I.B), *Luck* takes a more skeptical stance. While acknowledging that courts should not “assume the role of the prosecutor,” the Court problematically determined that pre-indictment delay prejudice could also be found where, “through negligence or error in judgment, [the prosecution] 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 its active investigation ceased.” *Id.* at 158. The opinion suggests that when investigation effectively ceases and later prosecution relies on the same evidence, the burden shifts to the state to justify the intervening delay.

Significantly, *Luck* states that “the length of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable,” suggesting that extremely long delays can themselves render prosecutorial inaction unjustifiable, regardless of the state’s subjective motivations. *Id.* at 158. This contradicts the federal approach where even lengthy delays are permissible if the delay was not deliberate to gain a tactical advantage.

#### **B. The *Jones* Framework: Burden-Shifting Without Bad Faith**

More recently, the Court crystalized Ohio’s departure from federal law. While purporting to clarify the standard, *Jones* confirmed a burden-shifting framework fundamentally different from *Lovasco* in significant ways. First, *Jones* does not have a bad faith requirement: once a defendant demonstrates actual prejudice, the burden shifts to the state to justify the delay. *Jones*, ¶13. The burden shifts regardless of whether the delay was intentional, negligent, or even reasonable at the

time. Second, Ohio allows defendants to establish prejudice without proving what unavailable witnesses would have said. In *Jones*, the Court stated that a defendant need not “establish precisely what that witness would testify to” as long as the testimony would be relevant to the defense. *Id.* ¶27. This is far from requiring concrete proof of prejudice. Third, unlike federal law, where the defendant bears the burden throughout, Ohio shifts the burden to the State once prejudice is shown. The state must then prove a “justifiable reason” for the delay—a standard more stringent than requiring a showing of deliberate delay to gain a tactical advantage.

### **C. Federal Circuits Have Held Otherwise**

Significantly, Ohio’s framework is inconsistent with a majority of federal circuit courts. The prevalent view stresses that a defendant must show substantial prejudice and that the delay was intended to gain a tactical advantage. *United States v. Royle V*, 86 F.4th 462, 472-473 (1st Cir. 2023); *United States v. Black*, 918 F.3d 243, 281 (2nd Cir. 2019); *United States v. Shealey*, 641 F.3d 627, 634-635 (4th Cir. 2011); *United States v. Crouch*, 84 F.3d 1497, 1508-1509 (5th Cir. 1996); *United States v. Schaffer*, 586 F.3d 414, 424-426 (6th Cir. 2009); *United States v. Lewis*, 146 F.4th 621 (8th Cir. 2025); *United States v. Murphy*, 100 F.4th 1184 (10th Cir. 2024); *United States v. Thomas*, 62 F.3d 1332, 1339 (11<sup>th</sup> Cir. 1995).

### **D. Wilson and the OACDL Put the Pre-Indictment Delay Standard at Issue**

Considering what Wilson and the OACDL argue, this case provides an opportunity to revisit Ohio’s pre-indictment delay standard. The OACDL asks the Court to continue following *Luck* and *Jones*, arguing that “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.” OACDL Br. at 2. This framework would reject the federal requirement that defendants prove prosecutorial misconduct, instead focusing on

whether delays have allegedly deprived juries of “so much relevant information that its verdict is no longer reliable.” *Id.* Wilson attempts to apply this approach by identifying what he characterizes as prejudice from the delay, including the death of neuropathologist Dr. Balco, the unavailability of treating physician Dr. Maria Stephan, and the unavailability of records impacts his ability to have a fair trial. Appellant Br. at 13-17. It appears that part of Wilson’s actual prejudice argument is premised on a belief that there was no determination that he caused serious physical harm. Appellant Br. at 14. But that’s not accurate. As the State points out, Wilson was found guilty of recklessly (not knowingly) causing serious physical harm under R.C. 2903.13(B). Appellee Br. 2.

Wilson then contends that he need not prove the State deliberately delayed to gain a tactical advantage; instead, he argues the State bears the burden of producing “evidence of a justifiable reason for delay” once prejudice is demonstrated. *Id.* at 18. The OACDL reinforces this burden-shifting approach, arguing that Ohio courts should scrutinize whether the State justifies the delay. OACDL Br. at 10-11. OACDL makes the same mistake Wilson does. OACDL argues that the records from the 1985 trial would be useful because there was no finding of serious physical harm. OACDL Br. 10-11.

Both Wilson and the OACDL thus advocate for an approach that would treat prosecutorial delay not as presumptively legitimate absent proof of bad faith, but as presumptively problematic once actual prejudice is shown, requiring affirmative justification from the State. The United States Supreme Court does not require this.

#### **E. The OACDL’s Position Exposes the Flaw in Ohio’s Framework**

The OACDL says, “[i]n 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.” OACDL Br. 2. OACDL concludes that the trial court should have granted the pretrial motion to dismiss. OACDL Br. 11. But consider also OACDL’s core question and answer: “[w]e 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?” Their answer: “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 that trial will be.” OACDL Br. 2.

The OACDL position exposes a flaw in the current framework because there was no jury verdict here. The burden on a defendant seeking to establish actual prejudice from pre-indictment delay is even heavier where, as here, a defendant moves to dismiss before trial. Before trial, “an estimate of the degree to which delay has impaired an adequate defense tends to be speculative.” *United States v. MacDonald*, 435 U.S. 850, 858 (1978). Courts cannot ascertain how missing witnesses or documents would affect a defendant’s case, nor can they compare a trial with missing evidence to one without. As the Supreme Court concluded when first recognizing due-process claims from pre-indictment delay, “[e]vents of the trial may demonstrate actual prejudice,” but pre-trial challenges are “speculative and premature.” *Marion*, 404 U.S. at 326.

The need to defer these claims until after trial flows from their grounding in the Due Process Clause. *See Crouch*, 84 F.3d at 1516-17. Due process deprivations “will normally occur only by conviction, and not simply by trial itself.” *Id.* at 1516. If a defendant is acquitted, no deprivation occurred. Ohio’s current test invites an impossible task. The test asks lower courts to weigh prejudice against the reasons for delay. But time cuts both ways—delay “may also weaken the Government's case.” *Marion*, 404 U.S. at 322. Regardless, “denial of relief before trial in no

way precludes the accused, if convicted, from successfully demonstrating that undue and improper preindictment delay substantially and unfairly prejudiced his ability to avoid that result.” *Crouch*, 84 F.3d at 1516. As a consequence, any dismissal of the indictment would be premature and unwarranted.

## **II. This Court’s Pre-Indictment Delay Cases Have Drifted from the Federal Standard**

With that history established, turn to this Court’s most recent case on the pre-indictment-delay standard, *State v. Bourn*, 2022-Ohio-4321. In that case, the State received information in 2017 linking the defendant to a rape kit collected in 2005. *Id.* at ¶¶4–5 (plurality op.). The trial court dismissed the indictment after the defendant argued the following loss of evidence prejudiced him: “the bar where [the victim] allegedly had seen Bourn was gone, the original police file was gone, the officer handling that file was deceased, Bourn’s phone records were unavailable,” and the rape kit went untested for several years. *Id.* at ¶6. That wasn’t enough, this Court said. It first recited the burden-shifting framework discussed above. *Id.* at ¶11. It then held that Bourn failed to establish “actual prejudice” under *Jones*. *Id.* at ¶¶16–17.

To show “actual prejudice,” a defendant must show that “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.” *Id.* at ¶17, citing *Jones* at ¶28. This requires more than showing that the “missing evidence or unavailable testimony ‘could’ or ‘may’ help the defendant.” *Id.* It requires showing the evidence “would” help the defendant. *Id.* If that sounds like a tough standard, that is by design—this Court called the burden “nearly insurmountable.” *Id.* at ¶18, citation omitted.

Consider the missing evidence in *Bourn*. Yes, the bar at which the victim said she met the defendant closed. But even if the bar were still open, “it is not likely that Bourn would be able to

obtain testimony that he never went there or that he was not there on the evening in question.” *Id.* at ¶35. Next, this Court dismissed the defendant’s argument that the missing case file would have helped him as “purely speculative” and thus insufficient to show actual prejudice. *Id.* at ¶31. Same analysis for the death of the original investigator—any argument that the investigator would have exonerated Bourn was also “purely speculative.” *Id.* at ¶36. Bourn’s strongest argument was the loss of phone records, which he said would have shown that “the sexual encounter was prearranged and consensual.” *Id.* at ¶27. But Bourn didn’t do enough to show that the missing records caused prejudice. For starters, the phone calls “may not have taken place.” *Id.* at ¶28. And evidence that never existed cannot support an actual-prejudice claim. *Id.* Bourn’s investigator summarily testified that Bourn’s cell-phone provider went out of business without investigating whether the records were available otherwise, such as through the victim’s phone records. *Id.* at ¶¶48–49 (O’Connor, C.J., concurring). Nor would the mere existence of phone calls show that the victim “consented to have sex with Bourn.” *Id.* at ¶29 (plurality op.). After examining each type of evidence Bourn argued caused him prejudice, a majority of this Court determined that Bourn’s showing was speculative at best, failing to carry his burden to show prejudice. *Id.* at ¶37.

Although *Bourn* did not produce a majority opinion, this Court now has an opportunity to realign Ohio pre-indictment delay case law with the authoritative interpretation given the federal Constitution. As Justice DeWine noted, concurring in judgment in *Bourn*, “We are duty bound to follow the United States Supreme Court in its interpretation of the United States Constitution. I would do so.” *Id.* at ¶52 (DeWine, J., concurring in judgment). The Supreme Court’s precedent requires a defendant to make two showings to sustain a due-process claim based on pre-indictment delay: “(1) ‘actual prejudice’ to the fair-trial right and (2) deliberate action on the part of the government to ‘gain tactical advantage.’” *Id.* at ¶64, quoting *United States v. Marion*, 404 U.S.



307, 324 (1971), and *United States v. Lovasco*, 431 U.S. 783, 790, 795 (1977). By dismissing cases in which defendants cannot make such showings, Ohio courts arrogate “power that belongs to political actors”—namely prosecutors, who have the “executive power to prosecute crime” and the Ohio Legislature, which sets statutes of limitation. *Id.* at ¶74. Such action has a great cost. A decision based on pre-indictment delay is “unrelated to factual guilt or innocence,” which “‘should be the central concern in a criminal proceeding.’” *Id.* at ¶75, quoting *United States v. Scott*, 437 U.S. 82, 98–99 (1978), and *Stone v. Powell*, 428 U.S. 465, 490 (1976).

Were this Court to realign Ohio’s test for pre-indictment delay, it would join good company. The U.S. Court of Appeals for the Fifth Circuit has used this standard since the 1990s.<sup>1</sup> *United States v. Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994); *United States v. Crouch*, 84 F.3d 1497, 1532 (5th Cir. 1996) (en banc). It is the defendant’s burden to show that the government “intended to delay” in order to gain “some tactical advantage” or for “some other bad faith purpose” and that the delay “caused actual, substantial prejudice” to the defense. *United States v. Seale*, 600 F.3d 473, 479 (5th Cir. 2010). Even a lengthy investigative delay is unlikely to satisfy the standard. An investigative delay “is not so one-sided” and in fact supports “fair play and decency” by allowing the prosecutor to “refuse[] to seek indictments until he is completely satisfied that he should prosecute and will be able to promptly establish guilt beyond a reasonable doubt.” *Id.* at 479–80 (quoting *Lovasco*, 431 U.S. at 795).

Over time, this Court’s pre-indictment delay precedent ended out-of-step with the majority of federal circuits and with the Supreme Court’s guidance in *Marion* and *Lovasco*. The history

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<sup>1</sup> The balancing test currently used by this Court is the minority test among federal circuits. *United States v. Avants*, 367 F.3d 433, 441 (5th Cir. 2004). The Sixth Circuit uses the same caused-actual-prejudice-to-obtain-a-tactical-advantage standard as the Fifth Circuit. *Monzo v. Edwards*, 281 F.3d 568, 581–82 (6th Cir. 2002).

reveals “turtles all the way down.” *State ex rel. Jordan v. Dep’t of Rehab. & Corr.*, 2025-Ohio-3051, ¶12 (DeWine, J., concurring). This case gives this Court an opportunity to correct this judicial drift and align its pre-indictment delay case law with the federal standard. Wilson presents no argument for interpreting the Ohio Constitution’s due-process guarantee differently than its federal counterpart. In fact, this Court would not be the first state supreme court to reject the balancing test in favor of the more certain actual-prejudice-and-tactical-advantage one.

### **III. Other States Largely Follow the Federal Standard**

Since *Marion* and *Lovasco*, each state has developed its own approach to preindictment delay. Broadly, these approaches fall into three categories: 1) states that adopt a standard based on greater protection found in their own state constitutions; 2) states that rely on a balancing test reflecting the minority view among federal appellate courts; 3) states that require both prejudice and a showing that the state intentionally caused the delay, the majority view of federal appellate courts. Many states occupy the third category. Two states started in the second category before dropping into the third, based on a desire to align themselves with the federal standard. This Court should follow suit.

#### **A. There is no basis for this Court to find greater protection under Ohio’s Constitution**

A small minority of states find greater protection in their state constitutions. Begin with California. Courts there must “balance the harm to the defendant against the justification for the delay.” *People v. Nelson*, 43 Cal.4th 1242, 1250 (2008). “[U]nder California law, negligent, as well as purposeful, delay in bringing charges, may, when accompanied by a showing of prejudice, violate due process.” *Id.* at 1255. In the case of negligent delay, “a greater showing of prejudice would be required establish a due process violation. *Id.* at 1256. Similarly, New York’s test bears no resemblance to the Supreme Court’s. There, the extent of and reason for the delay alone can be

enough. The establishment of prejudice is not necessary. *People v. Regan*, 39 N.Y.3d 459, 472 (2023). This Court need not go that far. After all, “the Ohio Due Course of Law Clause, Section 16, Article 1 [i]s coextensive with the Due Process Clause of the Fourteenth Amendment to the United States Constitution because the language used in the two clauses is virtually the same.” *State v. Anderson*, 2016-Ohio-5791, ¶21. This Court has recognized that the state due process clause is equivalent to its federal counterpart since 1893. *Id.* There is no basis under Ohio law for this Court to expand protection under the Due Course of Law Clause, and Wilson has not argued that greater protection exists. This Court need not concern itself with an analysis under the Ohio Constitution.

**B. Few other courts follow a burden-shifting test like Ohio’s**

Ohio currently employs a burden shifting test. This Court “has ‘firmly established a burden-shifting framework for analyzing a due-process claim based on preindictment delay.’” *Bourn*, 2022-Ohio-4321 at ¶11 quoting *Jones*, 2016-Ohio-5105, at ¶12. A burden-shifting test is the minority federal view. In many states, the burden lies squarely with the defendant. Take Connecticut. There, “[i]n order to establish a due process violation because of pre-accusation delay, the defendant must show both that actual substantial prejudice resulted from the delay and that the reasons for the delay were wholly unjustifiable, as where the state seeks to gain a tactical advantage over the defendant.” *State v. Morrill*, 197 Conn. 507, 522 (1985). Now, Wisconsin. There, the defendant must also prove both actual prejudice and that the government’s delay in charging arose from an improper motive or purpose. *State v. Rivest*, 106 Wis.2d 406, 419 (1982). Next, Massachusetts, where “[d]ismissal of an indictment is only required where a defendant makes a persuasive showing of both actual prejudice and intentional or reckless conduct by the government that caused the delay.” *Commonwealth v. Dame*, 473 Mass. 524, 534 (2016); *accord*

*State v. Hales*, 2007 UT 14, ¶45 (requiring “the defendant to show both (1) actual prejudice and (2) bad faith”); *State v. Wilibanks*, 95 Idaho 346, 351 (1973) (adopting to *Marion* criteria to evaluate preindictment delay); *State v. Strong*, 555 P.3d 537, 550 (Ariz. 2024) (a defendant must show that the prosecution intentionally slowed proceedings to gain a tactical advantage or to harass the defendant and actual prejudice resulted); *State v. Utley*, 956 S.W.2d 489, 495 (Tenn. 1997) (the accused must prove that there was a delay, prejudice resulted, and the state caused the delay to gain a tactical advantage); *Spence v. State* 795 S.W.2d 743 (Texas 1990) (applying *Marion* test and finding that defendant had failed to meet his burden to show an intentional delay to gain tactical advantage); *State v. Glazebrook* 282 Neb. 412, 421 (2011) (defendant must show substantial prejudice and the delay was intentional to gain an advantage); *Morrisette v. Commonwealth*, 264 Va. 386, 393 (2002) (“The defendant bears the burden of proving both actual prejudice and improper purpose)

Even some states using a balancing test place the burden on the defendant. Consider Oregon. It favors a balancing test but places the burden on the defendant to meet both prongs. Its supreme court held that “[t]o demonstrate that preindictment delay violated the federal due process clause, a defendant must show that the delay actually prejudiced the defendant and that the government culpably caused the delay.” *State v. Stokes*, 350 Ore. 44, 64 (2011). When evaluating the defendant’s claim, “[a] court must weigh the government’s reason for the delay against the prejudice to determine whether the delay violated our society’s fundamental conceptions of justice, fair play, and decency.” *Id.*

These states have adopted their tests based on *Marion* and *Lovasco*, and the cases that followed. This Court has the same opportunity here. It can align itself with the Supreme Court, most federal appellate circuits, and the supreme courts of many other states. When this Court has

recognized that a provision of the Ohio Constitution is coextensive with its federal counterpart, it “can rely on decisions of both this Court and the United States Supreme Court in construing them.” *Anderson*, 2016-Ohio-5791 at ¶23. It is perhaps long past time for this Court to align itself with the Supreme Court’s precedent on preindictment delay. Supreme Courts of other states have taken that leap.

**C. Other state supreme courts have changed course to align with the United States Supreme Court**

After the Supreme Court decided *Marion*, New Mexico courts were faced with a preindictment delay question. In 1976, New Mexico’s Court of Appeals adopted a test based on *Marion*.<sup>2</sup> *State v. Jojola*, 89 N.M. 489, 490 (Ct.App. 1976). The court explained that *Marion* “requires a showing of substantial prejudice to the defense before the defendant can obtain a dismissal for pre-indictment delay.” *Id.* In the end, the court adopted a test based on its understanding of *Marion*. It determined that “where actual prejudice is shown, the actual prejudice must be balanced against the reasons for the delay in determining whether a defendant has been substantially prejudiced.” *Id.* While the court acknowledged that the elapsed time alone does not determine whether actual prejudice, it did not provide a comprehensive definition of the term. *Id.* at 491. Instead, the court focused on the facts of the case before it, concluding that the defendant had not shown that “his defense might have been more successful if the delay had been shorter.” *Id.*

Fifteen years later, the New Mexico Supreme Court changed course. Now with the benefit of both *Marion* and *Lovasco*, as well as the federal appellate court cases that followed, the New Mexico Supreme Court adopted the two-prong test that it believed comported with the Supreme

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<sup>2</sup> It is worth noting that New Mexico has a single appellate court, so absent reversal by its Supreme Court, the *Jojola* test would apply to the whole state.

Court's decisions in *Marion* and *Lovasco*. *Gonzalez v. State*, 111 N.M. 363, 365 (1991). The New Mexico Supreme Court's test requires "a defendant to prove prejudice and an intentional delay by the state to gain a tactical advantage." *Id.*

After announcing its test, the court then concerned itself with defining its prejudice prong. It first noted that other courts had used both "substantial" and "actual" prejudice to describe the necessary showing. *Id.* See also *Bourn*, 2022-Ohio-4321 at ¶16 (explaining that "substantial prejudice" and "actual prejudice" have been used synonymously, generating confusion, and clarifying that "actual prejudice" is the standard in Ohio.) New Mexico's approach was slightly different than this Court's in *Bourn*. The New Mexico Supreme Court explained that it considered "actual prejudice" and "substantial prejudice" to be separate components of the prejudice showing. *Gonzalez*, at 365. "[A]ctual prejudice" evinces a threshold of certainty" while "substantial prejudice addresses the severity of the prejudice once it has been established." *Id.* Like Ohio, prejudice must be established by "more than mere conjecture[.]" *Id.* Rather, the defendant must show "in what specific manner missing witnesses would have aided his defense." *Id.* citing *United States v. Jenkins*, 701 F.2d 850, 855 (10th Cir. 1983).

As to the second prong, the New Mexico Supreme Court found that "when prejudice is coupled with the state's *intentional* delay to gain a tactical advantage, due process requires dismissal of the indictment." (Emphasis added.) *Id.* "Otherwise, the state is entitled to the preindictment period that the legislature, as a matter of public policy, has enunciated in the applicable statute of limitations." *Id.* at 366.

Years later, Florida followed suit. Much like New Mexico, Florida had first adopted a balancing test. Its first test required that "[w]hen a defendant asserts a due process violation based on preindictment delay, he bears the initial burden of showing actual prejudice . . . [i]f the

defendant meets this initial burden, the court must then balance the court then must balance the demonstrable reasons for the delay against the gravity of the particular prejudice on a case-by-case basis.” *Rogers v. State*, 511 So.2d 526, 531 (Fla. 1987). When applying that test, “[t]he outcome turns on whether the delay violates the fundamental conception of justice, decency, and fair play embodied in the Bill of Rights and [F]ourteenth [A]mendment.” *Id.* All that changed in 2022. When it adopted the balancing test, Florida was following the Fifth Circuit’s decision in *United States v. Townley*, 665 F.2d 579 (5th Cir. 1982). As the Fifth Circuit moved away from the balancing test, eventually so did Florida. Florida found *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996), persuasive, in which the Fifth Circuit rejected its previous balancing test in favor of a test that requires “a showing of substantial prejudice to the defendant and bad faith on the part of the [s]tate.” *Jackson v. State*, 347 So.3d 292, 306 (Fla. 2022).

When it adopted the new test, Florida’s Supreme Court determined that its previous balancing test was “clearly erroneous” and wished to align itself with the majority rule among the federal circuit courts. *Id.* at 306. Florida is not alone in this regard. A few years earlier, in 2016, the Supreme Court of Vermont addressed the same question. Unlike Florida and New Mexico, Vermont had never expressly adopted a balancing test. Instead, it had never been clear about the applicable standard. Still, it adopted the majority rule.

In *State v. King*, 2016 VT 131, ¶12, the Court was asked to clarify the standard used to evaluate preindictment delay under the United States and Vermont Constitutions. The *King* court examined *Marion* and *Lovasco* in detail. *Id.* at ¶16-19. It concluded that even though it had not analyzed the issue in detail in its previous cases, the federal majority rule applied to Vermont. *Id.* at ¶21.

Vermont parted ways with the majority federal view in its evaluation of the second prong. While Vermont had never adopted the balancing test, its view was that the second prong was not limited to delay to gain a tactical advantage. *Id.* at ¶22. Relying on the Supreme Court’s rationale in *Lovasco*, the *King* court concluded that a finding of a due process violation due to preindictment delay requires a showing of “actual substantial prejudice from the delay and prosecutorial misconduct intended to gain a tactical advantage or to advance some other impermissible purpose that violates ‘fundamental concepts of justice’ or ‘the community’s sense of fair play and decency.’” *Id.* at ¶23 quoting *Lovasco*, 431 U.S. at 790. Regardless of the expansion of the second prong, the burden remained squarely with the defendant.

The *King* court was careful to explain why it rejected the federal minority view. It noted that “courts merely possess a circumscribed duty to determine whether the preaccusation delay violated due process.” *Id.* ¶ 26. While the court noted the concern among minority jurisdictions that “defendants will find it difficult to prove both prongs of the majority standard,” especially an improper prosecutorial motive. *Id.* But that is as it should be. “[T]hat difficulty helps maintain the limited applicability of the Due Process Clause to preaccusation delay[,]” as the Supreme Court envisioned in *Marion* and *Lovasco*. *Id.* Again, the core protection against the state bringing overly stale charges is found in statutes of limitation. *Id.*

Ohio should follow New Mexico and Florida. As the law of preindictment delay has evolved since *Marion* and *Lovasco*, most states and federal courts are heading in the same direction. By enacting statutes of limitation, the legislature protects against long delays and stale charges. The bar to dismissal for preindictment delay is meant to be high. As the Vermont Supreme Court recognized, due process has a limited applicability to preindictment delay. Expanding its protections past those enacted by the legislature is intended only for outliers—those



egregious cases where defendants suffer demonstrated prejudice and the state is acting with bad intent. The majority view protects against those cases, without the chaos in the lower courts that a balancing test invites. *See Bourn*, 2022-Ohio-4321, ¶76 (DeWine, J. concurring) (explaining the improper dismissals resulting from this Court’s test). This Court now has that opportunity.

#### **IV. The Convictions Should Stand Regardless of the Test**

And so, the convictions here should stand. Under any test, Wilson’s convictions should be affirmed because Wilson has failed to show actual prejudice. As the Twelfth District held, Wilson’s arguments are speculative. *State v. Wilson*, 2025-Ohio-134, ¶¶13, 15-17, 21 (12th Dist.). This is the correct conclusion because the record suggests that Wilson could have defended himself at trial through his own witnesses. This is what renders his arguments speculative. Consequently, the Twelfth District did not address whether “the State’s delay was justified.” *Id.* at ¶21. Still, the pre-indictment delay standard is at the forefront of this appeal. Through this appeal, the Court can make two significant holdings.

First, the Court can reinforce that a defendant’s claim of actual prejudice must be non-speculative. Appellate courts throughout Ohio have referenced the concrete proof standard for actual prejudice in different ways. In *State v. Flickinger*, 1999 Ohio App. LEXIS 225 (4th Dist. Jan. 19, 1999), while relying on several federal court decisions, the Fourth District held that a defendant must provide concrete proof that he will suffer actual prejudice at trial as a result of the pre-indictment delay. *Id.* at \*14. The Fourth District found that the defendant’s assertions were too speculative to satisfy the concrete proof standard. *See id.* at \*15. Thus, *Flickinger* indicates that a defendant’s speculative assertion is not concrete proof of actual prejudice. The Fifth District agreed in *State v. Schraishuhn*, 2011-Ohio-3805 (5th Dist.) holding that concrete proof of actual prejudice was required as opposed to mere speculation of prejudice. *Id.* at ¶34. While not

expressly using the phrase “concrete proof” the Sixth District in *State v. Brock*, 2012-Ohio-6055 (6th Dist.), indicated that actual prejudice must be demonstrated through objective evidence and that the court was not allowed to presume prejudice prefaced upon conjecture and speculation. *Id.* at ¶5. Several courts have described the concrete proof standard in relation to proof of the exculpatory value of the lost evidence. *State v. Robinson*, 2008-Ohio-3498, ¶121 (6th Dist.); *State v. Wade*, 2008-Ohio-4574, ¶48 (8th Dist.); *State v. Ennist*, 2008-Ohio-5100, ¶27(8th Dist.); *State v. Kemp*, 2013-Ohio-167, ¶31(8th Dist.); *State v. Zimbeck*, 2011-Ohio-2171 (6th Dist.); *State v. Cumberland*, 2014-Ohio-185, ¶22-25 (4th Dist.). In *State v. Smith*, 2014-Ohio-3034 (8th Dist.) the Eighth District agreed that a defendant could not speculate as to the subject of a witness testimony nor could the defendant speculate as to how the missing evidence impaired his defense. *Id.* at ¶28. This Court should not adopt a rule that allows actual prejudice to be proven through speculation and conjecture. Nor should the Court adopt a rule that dismisses a case for pre-indictment prejudice where the record shows that the defendant could mount a defense and leave the ultimate question of guilt or innocence to the jury. *Wilson*, 2025-Ohio-134, ¶4, 19 (finding that Wilson’s expert, Dr. Heil, could attack the credibility of Dr. Balko’s report and also noting the availability of the coroner who conducted the autopsy). Wilson also complained of missing evidence from 1985. But he cannot dispute the prior judicial finding that he caused serious physical harm to the victim. *Id.* at ¶16. So the Court can hold that actual prejudice cannot be found merely because the defendant explains missing evidence could have helped his defense.<sup>3</sup>

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<sup>3</sup> This would require the Court to also revisit *Jones*, 2016-Ohio-5105, ¶28.

Second, this Court should realign the Court's pre-indictment delay test with *Lovasco* and *Marion* to make clear that for purposes of federal due process, an indictment cannot be dismissed without a showing that the prosecution delayed an indictment for purposes of gaining a tactical advantage.

### **CONCLUSION**

This Court should realign Ohio's preindictment delay jurisprudence with the federal standard by requiring defendants to demonstrate both actual prejudice and that the delay was an intentional device by the government to gain tactical advantage. This realignment would bring Ohio in alignment with prevalent understanding of *Lovasco* and *Marion*. The judgment below should otherwise be affirmed.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

A copy of the OPAA's amicus brief has been electronically filed on this 8<sup>th</sup> day of September, 2025 and served upon:

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