

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2026-OHIO-3988

THE STATE OF OHIO, APPELLEE, v. WILSON, APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Wilson*, Slip Opinion No. 2026-Ohio-3988.]

Criminal law—Preindictment delay—A defendant challenging preindictment delay on due-process grounds has the burden to establish both (1) that he was actually prejudiced by the delay and (2) that the delay was an intentional device to gain a tactical advantage for the State—Establishing actual prejudice requires showing that missing evidence would be favorable, material, and noncumulative—State v. Luck and its progeny overruled—Appellant failed to satisfy his burden to show that he was actually prejudiced by preindictment delay—Court of appeals’ judgment affirming trial court’s judgment denying appellant’s motion to dismiss indictment based on preindictment delay affirmed.

(No. 2025-0322—Submitted January 6, 2026—Decided October 14, 2026.)

APPEAL from the Court of Appeals for Clermont County,

No. CA2024-03-021, 2025-Ohio-134.

DETERS, J., authored the opinion of the court, which DEWINE, HAWKINS, and SHANAHAN, JJ., joined. FISCHER, J., concurred, with an opinion joined by BRUNNER, J. KENNEDY, C.J., concurred in judgment only, with an opinion.

DETERS, J.

{¶ 1} Under United States Supreme Court precedent, a preindictment delay violates a defendant's right to due process if the defendant demonstrates that the delay (1) caused actual prejudice to the presentation of his defense and (2) was an intentional device to gain a tactical advantage for the State. *United States v. Gouveia*, 467 U.S. 180, 192 (1984), citing *United States v. Lovasco*, 431 U.S. 783, 789-790 (1977), and *United States v. Marion*, 404 U.S. 307, 324 (1971).

{¶ 2} In this case, Scott Wilson argued that the State violated his due-process right when it obtained an indictment against him for involuntary manslaughter 16 years after the death of the victim. The Twelfth District Court of Appeals, however, determined that Wilson had failed to demonstrate that he was actually prejudiced by the delay. We agree with the Twelfth District.

{¶ 3} In reaching our decision, we overrule a line of cases from this court that began with *State v. Luck*, 15 Ohio St.3d 150 (1984). In *Luck*, this court deviated from the United States Supreme Court's test for evaluating preindictment delay by allowing speculative claims of prejudice to replace actual prejudice, *see id.* at 157, and allowing a finding that the State failed to provide a justifiable reason for the delay to replace a finding that the State had had a bad-faith motive, *see id.* at 158-159. This court's error eventually crystallized into a framework in which, once a defendant presented evidence of actual prejudice, the burden shifted to the State to provide evidence of a justifiable reason for the delay. *See State v. Jones*, 2016-Ohio-5105, ¶ 13, citing *State v. Whiting*, 1998-Ohio-575, ¶ 10-11, and *State v. Adams*, 2015-Ohio-3954, ¶ 99; *see also State v. Bourn*, 2022-Ohio-4321, ¶ 11 (lead

opinion). We retreat from these errors and apply the United States Supreme Court’s test.

I. BACKGROUND

{¶ 4} Hannah G.¹ was born in November 1984. In January 1985, when Hannah was only a few weeks old, Wilson shook her, and she suffered severe brain trauma.

{¶ 5} Later in January 1985, the State obtained an indictment against Wilson for felonious assault. His case was tried to a jury that summer. Although the jury acquitted Wilson of the original charge of felonious assault, it found him guilty of a lesser included offense: misdemeanor assault under R.C. 2903.13(B). An essential element of the misdemeanor-assault offense under R.C. 2903.13(B) was that Wilson “recklessly cause[d] serious physical harm” to Hannah. The trial-court judge sentenced Wilson to six months in jail.

{¶ 6} Hannah suffered the effects of her injury for the rest of her life. She experienced significant medical problems that left her immobile and unable to care for herself. She spent the last month of her life in a nursing home, before dying on December 1, 2006. A deputy coroner from the Hamilton County Coroner’s Office, Dr. Michael R. Kenny, performed an autopsy on Hannah and determined that her cause of death was encephalopathy resulting from late effects of blunt impact to her head. A neuropathologist, Dr. Greg Balko, examined Hannah’s brain after her death and reached the same conclusion as Dr. Kenny about Hannah’s cause of death. Dr. Kenny appended Dr. Balko’s neuropathology report to the autopsy report he prepared. Records indicate that the Clermont County Prosecutor’s Office was notified of Hannah’s death in December 2006.

1. The Twelfth District used the pseudonym “Hannah” for Wilson’s victim to protect her privacy and to provide ease of readability. 2025-Ohio-134, ¶ 2, fn. 1 (12th Dist.). Because Hannah was a minor when she suffered the injuries that have given rise to this case, we follow suit.

{¶ 7} Despite Dr. Kenny’s conclusion that late effects of brain trauma caused Hannah’s death, the State did not promptly file new charges against Wilson. However, in 2022, Hannah’s death again came to the attention of the State when Wilson filed a motion to seal the record of his misdemeanor-assault conviction. An assistant prosecuting attorney in the Clermont County Prosecutor’s Office conducted a review of Wilson’s file in response to the motion and discovered Hannah’s autopsy report, after which the prosecutor’s office and the Clermont County Sheriff’s Office began investigating Hannah’s death. Investigators located Hannah’s medical records from 1985 through 2005 and found several witnesses, including an admitting nurse, an investigator from the 1985 law-enforcement investigation, and Hannah’s mother. Other witnesses were missing or deceased, including two other investigators, hospital doctors who had examined Hannah, Dr. Kenny, and Dr. Balko.

{¶ 8} Armed with Hannah’s medical records and several available witnesses, the State presented a case against Wilson to a grand jury. On December 1, 2022, the Clermont County Grand Jury indicted Wilson on two charges related to Hannah’s death: one count of involuntary manslaughter under R.C. 2903.04(B) and one count of reckless homicide under R.C. 2903.041(A).² Wilson filed a motion to dismiss the indictment based on preindictment delay.

{¶ 9} In Wilson’s motion to dismiss, he argued that the preindictment delay violated his due-process right because vital witnesses and records were missing or unavailable. He homed in on the unavailability of two witnesses in particular: Dr. Kenny, who had performed the autopsy on Hannah, and Dr. Balko, who had prepared a neuropathology report after examining Hannah’s brain. Wilson also noted that records related to Wilson’s first criminal prosecution—including a recorded confession—had been destroyed. Likewise, Wilson claimed that medical

2. At the State’s request, the trial court dismissed the reckless-homicide count, and it is therefore not at issue in this appeal.

records, records from protective services, and records from the nursing home where Hannah was admitted shortly before her death were unavailable. Because of the missing or unavailable witnesses and records, Wilson argued that the 16-year preindictment delay prejudiced his defense. He also contended that the preindictment delay was not justified, because the State was aware of Wilson's connection to Hannah at the time of her death and the State had not collected any new evidence in the time since her autopsy was completed. Wilson asserted that the combination of actual prejudice and an unjustified delay violated his right to due process.

{¶ 10} The trial court held a hearing on Wilson's motion to dismiss in April 2023. Much of Wilson's argument at the hearing centered on the unavailability of Drs. Kenny and Balko. Dr. Balko had passed away sometime between 2010 and 2012. But Dr. Kenny was eventually located, and in September 2023, he testified at a second hearing on the motion to dismiss.

{¶ 11} During his testimony, Dr. Kenny explained that the coroner's office did not have a policy of consulting specialists for autopsies as a matter of routine and he initially could not remember the specific reason why he had asked Dr. Balko to examine Hannah's brain. However, Dr. Kenny believed it was because Dr. Balko could provide "supportive evidence" to Dr. Kenny's findings and could rule out other causes of death. But according to Dr. Kenny, Dr. Balko's report did not change or modify his opinion about Hannah's cause of death in any way and his opinion would have been the same with or without Dr. Balko's input. Dr. Balko's examination "was not critical to [his] ultimate finding as far as the cause of death," Dr. Kenny maintained.

{¶ 12} The trial court denied Wilson's motion to dismiss, finding that Wilson had not carried his burden to establish actual prejudice from preindictment delay, because he had failed to identify missing or unavailable evidence that would help his defense. The trial court also determined that the State had demonstrated

justification for its delay in bringing the indictment. The trial court noted that much of the delay between Wilson's criminal conduct and the indictment was because Hannah lived for almost 22 years after she sustained her injuries. And as for the delay after her death, the trial court found no evidence that the State had intentionally delayed the investigation to gain a tactical advantage in prosecuting Wilson. The trial court therefore concluded that Wilson had not been denied due process. Following the denial of his motion to dismiss, Wilson pleaded no contest to the involuntary-manslaughter charge. The trial court accepted his no-contest plea, found him guilty of the offense, and sentenced him to a two-year prison term.

{¶ 13} Wilson appealed the judgment denying his motion to dismiss to the Twelfth District, which affirmed the trial court's judgment. 2025-Ohio-134, ¶ 23 (12th Dist.). Like the trial court, the Twelfth District applied this court's burden-shifting framework that first requires the defendant to demonstrate actual prejudice and then, if the defendant is successful, places the burden on the State to provide evidence justifying the delay. *Id.* at ¶ 11, citing *Jones*, 2016-Ohio-5105, at ¶ 13. The Twelfth District agreed with the trial court that Wilson had failed to carry his burden to show actual prejudice from the unavailability of evidence. *Id.* at ¶ 14. In the Twelfth District's view, Wilson's arguments asserting prejudice caused by the unavailability of certain evidence were speculative and the unavailability of certain evidence was immaterial to the question whether the injuries Wilson inflicted on Hannah proximately caused her death. *See id.* at ¶ 15-17, 20. The Twelfth District further found that the unavailability of Dr. Balko as a witness actually benefited Wilson because his expert had enough information to attack Dr. Balko's report for Dr. Balko's failure to document microscopic injuries and Dr. Balko could not rebut this criticism. *Id.* at ¶ 19. Because Wilson had not carried his burden with respect to actual prejudice from the delay in indicting him, the Twelfth District declined to consider whether the delay was justified. *Id.* at ¶ 21.

{¶ 14} Wilson appealed to this court, and we accepted his appeal to determine whether the trial court’s judgment denying Wilson’s motion to dismiss based on preindictment delay violated his due-process right. *See* 2025-Ohio-1682.

II. ANALYSIS

{¶ 15} Criminal defendants enjoy several protections against undue delay in prosecution. The right to a speedy trial ensures that a case is brought to trial without undue delay, but this right does not attach until the defendant is arrested or formally accused. *Betterman v. Montana*, 578 U.S. 437, 441 (2016). When it comes to preindictment delays, like the one at issue here, statutes of limitations are the main protection against undue delay. *Id.*; *see also Marion*, 404 U.S. at 322. Statutes of limitations “represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice” and “provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant’s right to a fair trial would be prejudiced.” *Marion* at 322. Even though statutes of limitations provide ““the primary guarantee against bringing overly stale criminal charges,”” *id.*, quoting *United States v. Ewell*, 383 U.S. 116, 122 (1966), the United States Supreme Court has said that the right to due process also plays a role—albeit a limited one—in protecting criminal defendants against the consequences of “oppressive” prosecutorial delay, *Lovasco*, 431 U.S. at 789.

{¶ 16} Wilson does not argue that the statute of limitations for involuntary manslaughter had expired when he was indicted. Instead, he focuses his challenge to his conviction on his right to due process. He argues in his merit brief that he suffered actual prejudice because the missing or unavailable evidence would have minimized the impact of the State’s evidence and bolstered his defense. And he maintains that the State cannot demonstrate a justifiable reason for the delay. Wilson’s argument is built on a line of decisions from this court beginning with

Luck, 15 Ohio St.3d 150, that apply United States Supreme Court precedent holding that preindictment delay can sometimes violate the right to due process.³

{¶ 17} However, the State urges this court to overrule *Luck* and its progeny.⁴ The State insists that the burden-shifting framework in that line of cases is inconsistent with binding United States Supreme Court precedent and urges this court to correct course and realign with the United States Supreme Court’s precedent.

{¶ 18} We agree that Ohio’s burden-shifting framework for evaluating preindictment-delay claims employs a standard for showing prejudice that is too lenient and wrongly requires the State to demonstrate a justifiable reason for delay. The United States Supreme Court has placed the burden of proving concrete, actual prejudice and a bad-faith motive for the delay on the defendant. *Gouveia*, 467 U.S. at 192. Because Wilson has not carried his burden of showing actual prejudice, we affirm the Twelfth District’s judgment.

3. Although Wilson makes a cursory claim that his right to due process has been violated under both the Ohio and United States Constitutions, he does not develop his state constitutional claim separately. Our test for evaluating preindictment delay “is rooted in the Due Process Clause of the Fourteenth Amendment to the United States Constitution.” *Bourn*, 2022-Ohio-4321, at ¶ 10 (lead opinion). Despite this court’s assertion in *Luck* that the preindictment delay at issue in that case would “effectively deprive the defendant of her right to due process of law under Section 16, Article I of the Ohio Constitution,” *Luck* at 1105, this court’s analysis in *Luck* was focused on *Marion* and *Lovasco* and did not separately consider the Ohio Constitution, *see Luck* at 1102, 1105. And to the extent subsequent cases have stated that preindictment delay might violate the Ohio Constitution, they have relied on *Luck*. *See, e.g., Jones*, 2016-Ohio-5105, at ¶ 12 (observing that preindictment delay can violate the Ohio Constitution and citing *Luck* in support). Because this court has never determined that the Ohio Constitution affords greater rights than the United States Constitution with respect to preindictment delay and because Wilson has not presented such an argument, we do not separately consider preindictment delay under the Due Course of Law Clause of Article I, Section 16 of the Ohio Constitution.

4. Contrary to the concurring opinion’s assertion that the State forfeited its argument that *Luck* and its progeny should be overruled, *see concurring opinion*, ¶ 55, the State urged the Twelfth District to recognize that *Lovasco*—not the *Luck* burden-shifting framework—is binding on Ohio courts. And the State has renewed this argument before this court.

A. Preindictment delay violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution only if the defendant can show that the delay was an intentional device to gain a tactical advantage for the State

{¶ 19} Before getting to what’s wrong with Ohio’s current standard for evaluating preindictment-delay claims, we consider what the United States Supreme Court has said about preindictment delay. The idea that preindictment delay can violate a defendant’s right to due process appears to have its origins in *Marion*, 404 U.S. 307, a case about the right to a speedy trial under the Sixth Amendment to the United States Constitution. The defendants in *Marion* filed a motion to dismiss the indictment because the government had waited about three years to indict them after learning of the crimes with which they were charged. *Id.* at 309-310. The trial court granted the motion based on “lack of speedy prosecution,” *id.* at 310, but the United States Supreme Court reversed, *id.* at 311. It refused to extend the speedy-trial right “to the period prior to arrest.” *Id.* at 321. But it also recognized that principles of due process might offer recourse to a criminal defendant prejudiced by preindictment delay not covered by the right to a speedy trial or a statute of limitations. *Id.* at 323-324. Without outlining “when and in what circumstances actual prejudice” from preindictment delay merits dismissal of the indictment, the Court indicated that a successful criminal defendant would need to show that the delay “caused substantial prejudice” to the defendant’s right to a fair trial and that “the delay was an intentional device to gain tactical advantage over the accused.” *Id.* at 324.

{¶ 20} Several years later, in *Lovasco*, 431 U.S. 783, the Court confronted the issue of preindictment delay directly and gave teeth to its dicta from *Marion*. The Court confirmed that a trial court may dismiss an indictment for preindictment delay after considering “the reasons for the delay as well as the prejudice to the accused.” *Lovasco* at 790. The Court cautioned that “[j]udges are not free, in

defining ‘due process,’ to impose on law enforcement officials our ‘personal and private notions’ of fairness and to ‘disregard the limits that bind judges in their judicial function.’” *Id.*, quoting *Rochin v. California*, 342 U.S. 165, 170 (1952). Preindictment delay merits dismissal only when the reason for the delay “violates those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’” *id.*, quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), and “which define ‘the community’s sense of fair play and decency,’” *id.*, quoting *Rochin* at 173. As the author of the majority opinion in *Lovasco* later explained, these constraints limit due-process protection to those situations in which the government has delayed prosecution for tactical reasons. *See United States v. MacDonald*, 456 U.S. 1, 20 (1982) (Marshall, J., dissenting) (dissenting from majority decision holding that a delay between the dismissal of military charges and a subsequent indictment on civilian criminal charges did not violate the Speedy Trial Clause of the Sixth Amendment).

{¶ 21} Subsequent United States Supreme Court cases make clear that it is the defendant, not the State, who bears the burden to demonstrate both prejudice and a bad-faith motive. For example, in *Gouveia*, the Court observed that “the Fifth Amendment [to the United States Constitution] requires the dismissal of an indictment, even if it is brought within the statute of limitations, *if the defendant can prove* that the Government’s delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.” (Emphasis added.) *Gouveia*, 467 U.S. at 192. Placing the burden on the defendant to show bad faith is consistent with the requirements of due-process challenges in other contexts. *See, e.g., Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (“We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.”).

{¶ 22} The weight of authority from the federal courts of appeals recognizes that *Marion* and *Lovasco* require a defendant to show that the preindictment delay caused actual prejudice to the defense and that the government intentionally caused the delay to gain a tactical advantage. See *United States v. Sturdy*, 207 F.3d 448, 452 (8th Cir. 2000) (placing the burden on the defendant to show that the preindictment delay resulted in actual prejudice to his defense and that “the government intentionally delayed his indictment either to gain a tactical advantage or to harass him”); *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999) (“A defendant bears the ‘heavy burden’ of proving both that he suffered actual prejudice because of the alleged pre-indictment delay *and* that such delay was a course intentionally pursued by the government for an improper purpose.” [Emphasis in original.]); *United States v. Foxman*, 87 F.3d 1220, 1223 (11th Cir. 1996) (“[Preindictment] delay must also be the product of a deliberate act by the government designed to gain a tactical advantage.”); *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985), quoting *Gouveia* at 192 (“To invoke the extreme sanction of dismissal of the indictments under the Due Process Clause, the defendants must prove ‘that the government’s delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.’”); *United States v. Brown*, 742 F.2d 359, 362 (7th Cir. 1984) (“The Due Process Clause . . . would require dismissal of the indictment if it were shown *both* that preindictment delay caused substantial prejudice to his right to a fair trial and that the delay was an intentional device to gain tactical advantage.” [Emphasis in original.]).⁵ The defendant’s burden is a

5. Two federal courts of appeals have strayed from this test. See *Hoo v. United States*, 484 U.S. 1035 (1988) (White, J., dissenting) (noting that the United States Courts of Appeals for the Fourth and Ninth Circuits “have concluded that intentional misconduct is not the *sine qua non* for a due process violation from prosecutorial preindictment delay, and instead they hold that the proper inquiry is to balance the prejudice to the defendant against the Government’s justification for delay”). Even so, the Fourth Circuit has recognized that its position is against the weight of authority from its sister circuits and the United States Supreme Court. *Jones v. Angelone*, 94 F.3d 900, 905

steep one—the United States Court of Appeals for the Sixth Circuit has described it as “‘nearly insurmountable,’” *United States v. Harvel*, 115 F.4th 714, 728 (6th Cir. 2024), quoting *United States v. Rogers*, 118 F.3d 466, 477, fn. 10 (6th Cir. 1997).

{¶ 23} With these guiding principles in mind, we turn our attention to Ohio’s burden-shifting framework. Beginning with *Luck*, 15 Ohio St.3d 150, this court drew from *Lovasco* a two-part test requiring “proof of actual prejudice,” *Luck* at 154, and “no justifiable reason for the delay in prosecution,” *id.* at 158. In 1983, Luck was arrested after the State obtained an indictment against her for a murder that took place in 1967. *Id.* at 150-151. In the years between the murder and Luck’s indictment, two key witnesses (including an alternative suspect) had died, another witness’s memory of the event had faded, and all the recorded interviews of witnesses and suspects had been destroyed. *Id.* at 154. Luck argued that because the loss of witnesses and evidence had caused substantial prejudice, the preindictment delay violated her right to due process. *Id.* at 153-154.

{¶ 24} This court agreed with Luck. In its analysis of her claim, the court professed to follow the two-part test from *Lovasco*. *Luck* at 154, citing *Lovasco*, 431 U.S. at 789-790. But the details of the court’s reasoning refute its professed adherence to *Lovasco*. Cryptically, the court reasoned that Luck had shown actual prejudice because “it [could not] be said that the missing evidence or the dead witnesses would not have minimized or eliminated the impact of the state’s circumstantial evidence.” *Id.* at 157. As for the second part of the test, the court acknowledged that to prove that a delay in the commencement of a prosecution was unjustifiable, the United States Supreme Court requires proof of an intentional

(4th Cir. 1996) (“[o]n the authority of *Gouveia*, *Marion*, *Lovasco*, and *Youngblood*, every circuit, other than our own and the Ninth Circuit, has indeed held” that dismissal for preindictment delay requires the defendant to show actual prejudice and the government’s intentional delay for bad-faith motives).

delay for the purpose of gaining a tactical advantage for the State. *Id.* at 158. The court, however, created an additional way to satisfy the second part of the test, namely that a delay can also “be found to be unjustifiable . . . 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.” *Id.* In Luck’s case, the court believed that the State’s over 15-year delay was unjustifiable because its root cause was a “police error in judgment” in 1967 on whether the case should have been submitted to the prosecutor’s office. *Id.* Thus, the court affirmed the dismissal of Luck’s indictment. *Id.* at 159.

{¶ 25} Over the years, this court has refined *Luck*’s analysis into a burden-shifting framework for evaluating a due-process claim based on preindictment delay. *See Jones*, 2016-Ohio-5105, at ¶ 13, citing *Whiting*, 1998-Ohio-575, at ¶ 10-11, and *Adams*, 2015-Ohio-3954, at ¶ 99. Within that framework, the defendant has the first burden: adducing evidence showing actual prejudice. *Id.* Actual prejudice exists under the burden-shifting framework 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.” *Id.* at ¶ 28. If the defendant produces evidence showing actual prejudice, the burden shifts to the State to produce evidence of a justifiable reason for its delay in bringing the indictment. *Id.* at ¶ 13.

{¶ 26} This court’s burden-shifting framework deviates from the standard developed by the United States Supreme Court. *See Bourn*, 2022-Ohio-4321, at ¶ 72 (DeWine, J., concurring). Rather than requiring the defendant to show that the delay was an intentional device to gain a tactical advantage for the State, our precedent requires the State to show that the delay was justified. *See id.* This flips the second part of the United States Supreme Court’s standard on its head by

shifting the burden from the defendant to the State and by softening the standard for finding an impermissible purpose for the delay.

{¶ 27} *Luck* and its progeny have also strayed from the United States Supreme Court’s standard regarding prejudice. “The [United States] Supreme Court has repeatedly emphasized that, in order to establish a due process violation, the defendant must show that the delay ‘caused him *actual* prejudice in presenting his defense.’” (Emphasis added in *Schaffer*.) *United States v. Schaffer*, 586 F.3d 414, 425 (6th Cir. 2009), quoting *Gouveia*, 467 U.S. at 192. Speculative claims of potential harm are not sufficient to show actual prejudice. *See Marion*, 404 U.S. at 326. Rather, actual prejudice exists when missing evidence “would have been favorable and material” to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982), citing *Lovasco*, 431 U.S. 783, and *Marion*; accord *United States v. Murphy*, 100 F.4th 1184, 1209 (10th Cir. 2024) (“it is not enough that the evidence has been lost or impaired; rather, the defendant must show that the loss of the particular evidence actually prejudiced the defense”). “To show actual prejudice, the defendant must identify specific, concrete, and germane testimony or documents that were lost due to the delay.” *United States v. Hance*, 501 F.3d 900, 906 (8th Cir. 2007).

{¶ 28} In *Luck*, this court inverted the prejudice requirement. *See Luck*, 15 Ohio St.3d at 157-158. Recall that the *Luck* court concluded that “the deaths of witnesses, the fading of memories, and the loss of evidence” during an over 15-year preindictment delay would cause actual prejudice to the defendant at trial. *Id.* at 157. Although witness deaths, faded memories, and lost evidence might show actual prejudice depending on the circumstances, compare *Murphy* at 1209 (explaining that actual prejudice might take the form of lost or impaired witnesses or physical evidence), the *Luck* court’s reasoning for why those things created actual prejudice was flawed. As the opinion concurring in judgment only in *Bourn* observed, “the [*Luck*] court thought it possible that the lost evidence could have

aided the defendant. Pure speculation.” *Bourn* at ¶ 67 (DeWine, J., concurring in judgment only). And speculative claims of prejudice are not actual prejudice. *See United States v. Bartlett*, 794 F.2d 1285, 1291 (8th Cir. 1986) (reversing trial court’s findings of actual prejudice “because they [were] based on speculative, vague, and insubstantial allegations, and [were] thus insufficient to meet the standards required by *Marion* and *Lovasco*”).

{¶ 29} The United States Supreme Court’s interpretation of the Due Process Clause binds us under the Supremacy Clause, U.S. Const., art. VI, cl. 2. *See Bourn*, 2022-Ohio-4321, at ¶ 73 (DeWine, J., concurring in judgment only); *see also State v. Fips*, 2026-Ohio-1207, ¶ 16 (“Under the Supremacy Clause . . . , United States Supreme Court holdings control our interpretation of the Fourth Amendment [to the United States Constitution].”). To bring our case law in alignment with the United States Supreme Court’s precedent, we hold that a defendant challenging preindictment delay on due-process grounds has the burden to establish both (1) that he was actually prejudiced by the delay and (2) that the delay was an intentional device to gain a tactical advantage for the State. Contrary to *Luck*, we hold today that establishing actual prejudice requires showing that missing evidence would be—not could be or might be—favorable, material, and noncumulative. *See Bourn* at ¶ 68 (DeWine, J., concurring in judgment only).

{¶ 30} We overrule *Luck* and its progeny to the extent they conflict with this standard.

B. Wilson has not shown actual prejudice

{¶ 31} We turn now to the case before us. “Generally, this court reviews a trial court’s decision on a motion to dismiss an indictment for abuse of discretion.” *State v. Troisi*, 2022-Ohio-3582, ¶ 17. As discussed, Wilson had the burden to show that the preindictment delay in his case caused him actual prejudice. And if he succeeded on that argument, he was required to show that the delay was intentional on the State’s part to gain a tactical advantage over him. We conclude

that Wilson failed to satisfy his burden to show actual prejudice. And because he failed to satisfy his first burden, we need not consider the second burden—whether the delay was intentional on the part of the State.

{¶ 32} In his motion to dismiss, Wilson identified unavailable witnesses or records that fit into two categories: (1) records from the investigation and trial in 1985 and (2) evidence from around the time of Hannah’s death in 2006. However, he failed to show that any of the missing evidence would be favorable, material, and noncumulative.

1. 1985 Records

{¶ 33} To begin, Wilson asserts that he showed in his motion to dismiss that the unavailability of certain records from the time of his trial in 1985 caused him actual prejudice. He identified medical records submitted in the 1985 trial, the trial transcript, and Children’s Protective Services’ (“CPS”) records as the missing or unavailable records that caused him prejudice.⁶ Contrary to his argument, Wilson failed to show in his motion to dismiss that any of the missing records from the time of his assault on Hannah and his subsequent trial caused actual prejudice.

{¶ 34} Regarding most of the records he identified as unavailable, Wilson presented in his motion to dismiss only conclusory assertions that the missing records were material and that their loss affected his ability to receive a fair trial. With respect to the trial transcript, Wilson merely asserted that the fact of the transcript’s unavailability “further contribute[d] to the prejudicial effect of the pre-indictment delay.” He did not describe what he expected to find in the transcript or elaborate how it would have helped him negate an element of involuntary

6. In his merit brief to this court, Wilson also states that his own prior recorded statements are missing and that the investigating officers from the initial incident and Hannah’s treating physician from the hospital are unavailable witnesses. In his motion, however, Wilson failed to present any argument on how the unavailability of these records and witnesses caused him prejudice. Thus, we find that he has waived any arguments regarding these alleged pieces of unavailable evidence.

manslaughter or establish an affirmative defense.⁷ His perfunctory description of the prejudice caused by the lost CPS records—he said their absence “directly impacted [his] ability . . . to receive a fair trial”—is deficient for the same reason. Conclusory assertions of materiality and prejudice such as these, which lack a description of the substance of the testimony and records and an explanation of how the evidence would help the defense, are at best speculative and do not establish actual prejudice.

{¶ 35} Although Wilson provided in his motion to dismiss a short explanation for how the unavailability of the medical records submitted at his 1985 trial caused him prejudice, that explanation was not sufficient to move Wilson’s argument beyond the realm of speculation. Wilson contended that the medical records presented at his first trial were insufficient to show that he had caused serious physical harm to Hannah. However, he did not provide any concrete details about the contents of the records or how they could cast doubt on causation. Nor did he pinpoint which records were missing from the collection of medical records, dating from 1985 through 2005, that the State was able to locate. So even if Wilson’s argument about unavailable medical records was not speculative, it appears that these records are cumulative to evidence that was made available to him.

{¶ 36} What’s more, Wilson did not explain how challenging causation of serious physical harm to Hannah was material to his defense. Whether Wilson caused serious physical harm to Hannah was an issue in his 1985 trial. A jury found Wilson guilty of assault in violation of R.C. 2903.13(B), which includes “recklessly caus[ing] serious physical harm to another” as essential elements of the offense.

7. At the April 2023 hearing on the motion to dismiss, Wilson’s counsel also posited that the 1985 trial transcript might reflect potentially exculpatory information because something had led the jury to find Wilson guilty of a lesser included offense. But this suggestion was pure speculation, and so it does not improve on the argument in Wilson’s motion.

But in this case, Wilson was indicted for involuntary manslaughter in violation of R.C. 2903.04(B). This charge required the State to prove that Wilson “cause[d] the death of another . . . as a proximate result of the offender’s committing or attempting to commit a misdemeanor of any degree,” R.C. 2903.04(B). The Twelfth District determined that Wilson’s conviction for a misdemeanor violation of R.C. 2903.13(B) is a judicial fact that he could not contest. 2025-Ohio-134 at ¶ 16 (12th Dist.). Wilson did not argue otherwise in his motion to dismiss, and he does not argue otherwise now. Thus, he has not established that any missing medical records from his 1985 trial would have been material to his defense.

2. 2006 Evidence

{¶ 37} The second category of unavailable evidence that Wilson identifies from his motion to dismiss includes witnesses and records relating to Hannah’s death and autopsy in 2006: Dr. Balko, the neuropathologist who examined Hannah’s brain after her death, and records from the nursing home where Hannah lived shortly before her death.⁸ Wilson failed to show actual prejudice in his motion with respect to either Dr. Balko or the nursing-home records.

{¶ 38} As for the missing nursing-home records, Wilson made a bare, conclusory assertion in his motion to dismiss that the unavailability of the records would affect his ability to receive a fair trial. Wilson thus failed to establish actual prejudice regarding the unavailability of the nursing-home records.

{¶ 39} We are left with the unavailability of Dr. Balko. Although Wilson provides this court with a more detailed explanation of Dr. Balko’s importance to his defense than he provides for other unavailable witnesses and records, Wilson nevertheless fell short of showing actual prejudice in his motion to dismiss.

8. In his merit brief, Wilson also identifies as unavailable an investigator from the Hamilton County Coroner’s Office; however, he did not argue in his motion to dismiss that the unavailability of this investigator caused him prejudice, so this argument is waived.

{¶ 40} In his merit brief, Wilson insists that Dr. Balko's absence hampered the ability of Wilson's expert to render an opinion. In Wilson's view, Dr. Balko would have provided crucial information because of the key role that he played in examining Hannah's brain and determining possible causes of death. Wilson says that his neurology expert was surprised to find that Dr. Balko's report did not include a discussion of microscopic damage to Hannah's brainstem and upper cervical-spine structures, which, Wilson claims, is common in infants who have experienced traumatic injury. Because Dr. Balko is no longer available to testify, Wilson complains that Dr. Balko cannot answer questions about this omission. And Wilson believes that answers to these questions would have helped his expert render an opinion attacking the credibility of Dr. Balko's neuropathology report.

{¶ 41} The problem with Wilson's argument is twofold. First, he did not present these arguments to the trial court. The only argument he offered in his motion to dismiss was that Dr. Balko rendered an opinion agreeing with Dr. Kenny that Hannah's cause of death was past blunt-force trauma and that the opinion left several questions unanswered. Wilson did not specify what questions were left unanswered or why Dr. Balko's testimony, as opposed to that of another expert, was necessary to answer them.⁹ And second, even if he had made these arguments in the trial court, they do not establish actual prejudice.

{¶ 42} We are skeptical that Dr. Balko's presence would have been materially favorable to Wilson's defense. Dr. Balko's report is not favorable to Wilson: it reflects Dr. Balko's agreement with Dr. Kenny's conclusion that Hannah's brain showed past blunt-force head trauma and resulting encephalopathy. The only way that Dr. Balko's presence could have benefitted Wilson would be if, as Wilson contends, Dr. Balko's testimony would have aided attacks on his own

9. At the April 2023 hearing on the motion to dismiss, Wilson's counsel suggested that Dr. Balko might have clarified whether the past blunt-force trauma dated back to 1985 or the more recent past. This suggestion is too speculative to establish actual prejudice.

credibility. But Wilson’s argument on this point is speculative. He does not (1) identify what Dr. Balko would have said about why the neuropathology report did not include a discussion of microscopic damage to Hannah’s brainstem or (2) specify how that information would have bolstered his expert’s ability to cast doubt on Dr. Balko’s findings.

{¶ 43} Wilson also has not shown that Dr. Balko’s testimony would have been noncumulative. Dr. Kenny, the deputy coroner who performed the autopsy on Hannah, was available to testify at the September 2023 hearing on the motion to dismiss. According to his testimony, he performed his own examination of Hannah’s brain and reached his own conclusions about her cause of death. He testified that Dr. Balko’s examination of Hannah’s brain “was not critical” to his own cause-of-death finding. Dr. Kenny was also able to provide testimony about the physical condition of Hannah’s brain and how that contributed to his cause-of-death finding. Wilson asserts in his merit brief that Dr. Balko’s testimony was necessary because he had been the expert employed by the coroner’s office on these types of cases; however, this does not adequately explain what favorable, material evidence Dr. Balko could have provided that Dr. Kenny could not have.

{¶ 44} Another problem for Wilson is that Dr. Balko’s unavailability might have helped, rather than harmed, Wilson’s attempt to impeach Dr. Balko’s credibility. Regardless of Dr. Balko’s unavailability, Wilson’s expert could have drawn attention to Dr. Balko’s neuropathology report’s omission regarding the microscopic damage to Hannah’s brainstem and upper cervical-spine structures and explained why this omission was unusual under the circumstances. If Dr. Balko had been available to testify, perhaps he would have had a satisfactory explanation for the omission that would have unraveled Wilson’s defense. But because Dr. Balko was unavailable, Wilson was free to cast doubt on the thoroughness of the neuropathology report without fear of a harmful direct rebuttal. Perhaps that

freedom would have helped Wilson more than Dr. Balko’s answers to Wilson’s expert’s questions.

{¶ 45} Of course, this is all speculation—and that’s the problem. Wilson has not concretely shown how Dr. Balko would have helped his defense. This leaves us to guess how Dr. Balko’s presence might have helped Wilson at trial. And speculation like that falls short of the standard for actual prejudice under *Lovasco*, 431 U.S. 783, and *Marion*, 404 U.S. 307.

{¶ 46} In his motion to dismiss, Wilson failed to concretely show that any of the unavailable witnesses and records that he identified would have provided favorable, material, and noncumulative evidence, and so he failed to carry his burden to show actual prejudice. Because the trial court did not abuse its discretion when it concluded that Wilson had failed to show actual prejudice, it is not necessary to remand this matter for the trial court to determine whether Wilson proved that the preindictment delay was an intentional device to gain a tactical advantage for the State. *See Lovasco* at 789 (“proof of actual prejudice makes a due process claim concrete and ripe for adjudication”).

III. CONCLUSION

{¶ 47} To succeed on a motion to dismiss based on preindictment delay, a defendant has the burden to prove in his motion that the delay (1) caused actual prejudice to the presentation of his defense and (2) was an intentional device to gain a tactical advantage for the State. We overrule the decisions from this court that say otherwise. *See Luck*, 15 Ohio St.3d at 157-159; *Whiting*, 1998-Ohio-575, at ¶ 10-11; *Adams*, 2015-Ohio-3954, at ¶ 99; *Jones*, 2016-Ohio-5105, at ¶ 13; *Bourn*, 2022-Ohio-4321, at ¶ 11 (lead opinion).¹⁰ Because Wilson offered only conclusory

10. The precedential value of *Bourn*, 2022-Ohio-4321 (lead opinion), is questionable because it did not garner votes from four justices. *See Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 633 (1994) (noting that a plurality opinion was of “questionable precedential value” because it lacked the support of a majority of the justices on this court). However, we overrule it here to the extent it has any precedential value.

and speculative claims of actual prejudice, the trial court correctly denied his motion to dismiss based on preindictment delay. We therefore affirm the judgment of the Twelfth District Court of Appeals.

Judgment affirmed.

FISCHER, J., joined by BRUNNER, J., concurring.

{¶ 48} I agree with the majority that appellee the State of Ohio’s delay in filing appellant Scott Wilson’s indictment charging him with involuntary manslaughter did not result in actual prejudice to Wilson’s defense and, as a result, that the delay did not violate Wilson’s constitutional rights. I disagree, however, with the majority’s decision to opportunistically use Wilson’s appeal to overrule over 40 years of precedent regarding preindictment delay in the interest of being in lockstep with some of the federal courts. The federal test adopted by the majority is, at least on its face, unquestionably more onerous for Wilson to overcome than the test Wilson actually used to challenge his indictment. Moreover, in the lower courts, the State never explicitly argued for our preindictment case law to be overruled in favor of adopting a new test, and applying the federal test does nothing to alter the outcome for Wilson. Therefore, because it is inappropriate to unnecessarily overrule our precedent in this manner, I concur separately.

{¶ 49} Wilson filed this jurisdictional appeal challenging the trial court’s rejection of his motion to dismiss the indictment based on preindictment delay in violation of his due-process rights. Wilson’s sole proposition of law stated: “The trial court erred in denying [Wilson’s] motion to dismiss based upon pre-indictment delay violating [Wilson’s] due process rights under both the federal and Ohio Constitutions.” Wilson argued, as he did in the Twelfth District Court of Appeals, that the trial court erred in denying his motion to dismiss based on the State’s 16-year delay in indicting him because the delay violated his due-process rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as

well as Article I, Sections 10 and 16 of the Ohio Constitution. *See* 2025-Ohio-134, ¶ 10 (12th Dist.). Notably, three justices voted to deny jurisdiction over Wilson’s jurisdictional appeal, ostensibly persuaded by the State’s argument in its memorandum in response to Wilson’s memorandum in support of jurisdiction that Wilson could not show actual prejudice from the delay and that this case presented no substantial constitutional question. *See* 2025-Ohio-1682.

{¶ 50} This court has consistently applied a burden-shifting test to determine whether the State’s preindictment delay violated a defendant’s right to due process. Under this test, a defendant must first show “actual prejudice” from the delay. *State v. Jones*, 2016-Ohio-5105, ¶ 13, citing *State v. Whiting*, 1998-Ohio-575, ¶ 10-11, and *State v. Adams*, 2015-Ohio-3954, ¶ 99. If the defendant can establish actual prejudice, the burden shifts to the State “to produce evidence of a justifiable reason for the delay.” *Id.*, citing *Whiting* at ¶ 10-11 and *Adams* at ¶ 99. We most recently applied the *Jones* burden-shifting test in my lead opinion in *State v. Bourn*, 2022-Ohio-4321, in which at least five of the seven justices agreed that the *Jones* framework applied. *See Bourn* at ¶ 11, 38 (lead opinion); *id.* at ¶ 40 (O’Connor, C.J., concurring); *id.* at ¶ 78 (Brunner, J., dissenting, joined by Donnelly and Stewart, JJ.).

{¶ 51} The majority concludes that Wilson has not shown actual prejudice. Majority opinion, ¶ 46. I agree, and that is where the analysis of Wilson’s appeal should end. Instead, the majority launches into an unnecessary discussion of federal case law on preindictment delay. The entire discussion would be dicta if not for the majority’s decision to use Wilson’s appeal as a vehicle to overrule our preindictment-delay case law dating back to 1984.

{¶ 52} The main justification the majority gives for overruling our preindictment-delay case law on these facts is that “that line of cases is inconsistent with binding United States Supreme Court precedent.” *Id.* at ¶ 17. The majority then relegates its reference to the Ohio Constitution to a footnote, stating that

Wilson failed to separate his federal and state constitutional claims and that it will “not separately consider preindictment delay under the Due Course of Law Clause of Article I, Section 16 of the Ohio Constitution.” *Id.* at ¶ 16, fn. 3. The majority’s lack of legal analysis wrongfully ignores that our preindictment-delay case law has expressly implicated the Due Course of Law Clause of the Ohio Constitution.

{¶ 53} The *Jones* burden-shifting framework stems from *State v. Luck*, in which this court determined that the State’s preindictment delay resulted in constitutional violations when the defendant suffered actual prejudice from the delay and the State had no justifiable reason for the delay. 15 Ohio St.3d 150, 158 (1984), citing *United States v. Lovasco*, 431 U.S. 783, 789-790 (1977). This court in *Luck* reasoned that the State’s delay in prosecution would be unjustifiable when the State used the delay for a tactical advantage, as discussed in *United States v. Marion*, 404 U.S. 307 (1971), or when the State “through negligence or error in judgment, effectively cease[d] the active investigation of a case, but later decide[d] to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased.” *Luck* at 158. This court held that the State’s delay in *Luck* caused actual prejudice to the defendant and was unjustifiable, so the delay “[would have] effectively deprive[d] the defendant of her right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution [if] [the] case [had] proceed[ed] to trial.” *Id.* at 159.

{¶ 54} *Luck* implicates the Ohio Constitution, not just the United States Constitution, and this court is free to interpret the Ohio Constitution as providing greater individual rights than the United States Constitution, *see State ex rel. Cincinnati Enquirer v. Bloom*, 2024-Ohio-5029, ¶ 19-20. In other words, “we are not bound to walk in lockstep with the federal courts when it comes to our interpretation of the Ohio Constitution.” *Id.* at ¶ 22, quoting *State v. Smith*, 2020-Ohio-4441, ¶ 28. Therefore, because *Luck* and its progeny implicate the Due

Course of Law Clause of the Ohio Constitution, as well as federal due process, the majority in overruling *Luck* and the *Jones* burden-shifting test must also consider whether and to what extent the Ohio Constitution protects a defendant against the State's preindictment delay. The majority cannot simply ignore the Ohio constitutional issue here, particularly when the majority has opened the door to overhauling this constitutional issue in the first place and when Wilson has argued, beginning with his motion to dismiss and continuing with the merit brief he filed in this court, that the State's preindictment delay violated his constitutional right to due process under the Ohio Constitution. Wilson should not be faulted for failing to anticipate that this court would overrule its precedent. See *State v. Toran*, 2023-Ohio-3564, ¶ 35 (Gallagher, J., concurring) ("Our adversarial system is designed around the premise that the parties "are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw v. United States*, 554 U.S. 237, 244, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008), quoting *Castro v. United States*, 540 U.S. 375, 386, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003) (Scalia, J., concurring in part and concurring in the judgment). This system does not depend on an opposing party's prediction and preemption of potential arguments that might be belatedly raised.").

{¶ 55} All this to say, the majority should not even consider overruling *Luck* and its progeny here. The State never argued below that Ohio courts should overrule the *Jones* burden-shifting framework and instead argued that Wilson had failed to demonstrate actual prejudice under our decision in *Jones*. At the trial-court level, Wilson filed a motion to dismiss, arguing under *Luck* that the State's 16-year delay in indicting him caused him actual prejudice and that the State's delay was not justified. The trial court held two hearings on Wilson's motion to dismiss, and at neither hearing did the State raise any objection to the trial court's applying *Luck* and *Jones* in ruling on the motion. In fact, the State told the trial court during the first hearing that "the State had not addressed in its premotion memorandum related to the justifiability of the delay found in *Luck*. . . . [I]t's the State's position

that the court should not even consider any delay in this case and should just be looking at the actual prejudice claim by [Wilson].” By failing to explicitly raise the issue of overruling the *Jones* burden-shifting framework below, the State has forfeited that argument in this court. See *State v. Wintermeyer*, 2019-Ohio-5156, ¶ 10 (“A first principle of appellate jurisdiction is that a party ordinarily may not present an argument on appeal that it failed to raise below.”); *State v. Brown*, 2024-Ohio-749, ¶ 35, quoting *State v. Glaros*, 170 Ohio St. 471 (1960), paragraph one of the syllabus (“It is a general rule that an appellate court will not consider any error which counsel . . . could have called but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court.” [Ellipsis added in *Brown*.]).

{¶ 56} Even if the State had not forfeited its argument, the majority’s decision to overrule *Luck* and the *Jones* burden-shifting framework goes against our traditional notion of judicial restraint. “It is a long-standing principle that ‘[c]onstitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases.’” (Ellipsis added in *Epcon*.) *Epcon Communities Franchising, L.L.C. v. Wilcox Dev. Group, L.L.C.*, 2024-Ohio-4989, ¶ 17, quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973), citing *Marbury v. Madison*, 5 U.S. 137, 178 (1803). “Ohio law abounds with precedent to the effect that constitutional issues should not be decided unless absolutely necessary.” *Id.*, quoting *Hall China Co. v. Pub. Util. Comm.*, 50 Ohio St.2d 206, 210 (1977). It is unnecessary for us to consider whether to overrule our precedent in *Luck* and its progeny in this case. The appellate court ruled in the State’s favor in upholding the trial court’s rejection of Wilson’s motion to dismiss and in determining that Wilson’s prejudice argument needed to be more than speculative and that Wilson did not suffer actual prejudice by the State’s preindictment delay. 2025-Ohio-134 at ¶ 13-15, 20, 22 (12th Dist.). So as the State contends in its merit brief filed in this court, Wilson’s inability to show actual prejudice is fatal to his appeal,

regardless of whether *Luck* and its progeny apply. The majority does not reason otherwise.

{¶ 57} Finally, even though the majority overrules the constitutional test applied by the lower courts and adopts the federal test, the majority proceeds to apply the federal test to Wilson’s appeal instead of remanding the matter to the trial court to apply that test in the first instance. *See* majority opinion at ¶ 31, 46. The majority’s refusal to remand and its application of the federal test in the first instance is even more evidence that overruling *Luck* and its progeny on these facts is completely unnecessary. The refusal to remand is also inconsistent with the majority’s statement that this court must review a trial court’s decision on a defendant’s motion to dismiss an indictment for an abuse of discretion. Majority opinion at ¶ 31.

{¶ 58} In conclusion, because I agree that Wilson failed to show actual prejudice from the State’s preindictment delay and that the trial court correctly denied Wilson’s motion to dismiss the indictment, I would affirm the Twelfth District Court of Appeals’ judgment in this case. I disagree, however, with the majority’s decision to overrule our prior precedent on preindictment delay. Therefore, I respectfully concur separately.

KENNEDY, C.J., concurring in judgment only.

{¶ 59} Because I agree that appellant, Scott Wilson, has failed to show that appellee the State of Ohio’s preindictment delay caused him actual prejudice since all his asserted harms are speculative, I concur in the court’s judgment today. Also, the majority correctly explains that this court’s preindictment-delay test has diverged from the standard dictated by the Supreme Court of the United States. I write separately, however, because this case is easily resolved by relying on binding caselaw from the Supreme Court.

{¶ 60} When interpreting the United States Constitution, the Supreme Court’s precedent is binding. *See State v. Burnett*, 2001-Ohio-1581, ¶ 11 (“It has long been settled that the Supremacy Clause binds state courts to decisions of the United States Supreme Court on questions of federal statutory and constitutional law.”); U.S. Const., art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

{¶ 61} The Fifth Amendment to the United States Constitution provides that no person “shall . . . be deprived of life, liberty, or property, without due process of law.” Section 1 of the Fourteenth Amendment to the United States Constitution provides that no state “shall . . . deprive any person of life, liberty, or property, without due process of law.” The Supreme Court has determined that the right to due process protects against preindictment delay when a defendant proves that the delay (1) caused him or her actual prejudice in presenting his or her defense and (2) was used to gain a tactical advantage over him or her. *See United States v. Lovasco*, 431 U.S. 783, 789-790, 795 (1977); *see also United States v. Gouveia*, 467 U.S. 180, 192 (1984).

{¶ 62} Actual prejudice is concrete and prevents a fair trial; it is not the “prejudice inherent in any extended delay.” *United States v. Marion*, 404 U.S. 307, 325-326 (1971). In its preindictment-delay cases, the Supreme Court has determined prejudice by examining whether a defendant’s purported harm was speculative. *See, e.g., id.* at 326 (“Events of the trial may demonstrate actual prejudice, but at the present time [the defendants’] due process claims are speculative and premature.”). In discussing possible due-process violations in other contexts, the Court has required a defendant to show that he was prejudiced because unavailable evidence would have been “favorable” and “material” to his defense

and “not merely cumulative” to other available evidence. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-873 (1982).

{¶ 63} Concerning the second prong of the Supreme Court’s test, the Court has held that a defendant must show that compelling him to stand trial after the government’s delay diverged from the “‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’” *Lovasco* at 790, quoting *Mooney v. Holohan*, 294 U.S. 102, 112 (1935), “and which define ‘the community’s sense of fair play and decency,’” *id.*, quoting *Rochin v. California*, 342 U.S. 165, 173 (1952). This includes when the “delay undertaken by the Government [was] solely ‘to gain [a] tactical advantage over the accused.’” *Id.* at 795, quoting *Marion* at 324.

{¶ 64} Wilson argues that his right to due process under the Fifth and Fourteenth Amendments was violated. He also contends that his due-process right under the Ohio Constitution was violated, but he never develops that argument. Therefore, the United States Supreme Court’s precedent easily resolves this case. As the majority explains, all of Wilson’s prejudice arguments are speculative and the unavailable evidence he identifies is either not favorable or material to his defense or is cumulative to other evidence available to him. Consequently, Wilson has not met his burden to show that the State’s preindictment delay caused him actual prejudice, meaning his right to due process was not violated. Therefore, I concur in the court’s judgment affirming the judgment of the Twelfth District Court of Appeals.

Mark J. Tekulve, Clermont County Prosecuting Attorney, and Nick Horton, Assistant Prosecuting Attorney, for appellee.

Montgomery Law Office, L.L.C., and George P. Montgomery, for appellant.

SUPREME COURT OF OHIO

Russell S. Bensing, urging reversal for amicus curiae Ohio Association of Criminal Defense Lawyers.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Kristen L. Hatcher, and Michael R. Wajda, Assistant Prosecuting Attorneys, urging affirmance for amicus curiae Ohio Prosecuting Attorney's Association.
