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In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2015-1427
	:	
Appellant,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
DEMETRIUS JONES,	:	
	:	Court of Appeals
Appellee.	:	Case No. 101258
	:	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLANT

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Bill Would Extend Deadline For Prosecuting Some Cases, Akron Beacon Journal,
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Press Release, Office of the Ohio Attorney Gen. Mike DeWine, *Attorney General DeWine Wants Sexual Assault Kit Testing Commission to Create Ohio Guide* (June 14, 2011) *available at* http://perma.cc/8N4W-XER8 16

Press Release, Office of the Ohio Attorney Gen. Mike DeWine, *Attorney General's Bureau of Criminal Investigation Exceeds Sexual Assault Kit Testing Goal* (Oct. 1, 2013) *available at* http://perma.cc/LKV8-G764.....3

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Steve Reilly, *Tens of thousands of rape kits go untested across USA*, USA Today, July 16, 2015 *available at* http://perma.cc/F86L-YHM3 16

INTRODUCTION

There is no question that the "[p]assage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive a defendant of witnesses, and otherwise interfere with his ability to defend himself." *United States v. Marion*, 404 U.S. 307, 321 (1971). That is why legislatures adopt statute of limitations. Such legislatively adopted limits on when a defendant may be prosecuted for a particular offense are the primary defense against potential prejudice that may result from the passage of time. *Id.* at 322-23. If a prosecution is commenced within the statutory period, courts presume that a defendant has not been prejudiced by any delay between the commission of the offense and the indictment. *Jones v. Angelone*, 94 F.3d 900, 907 (4th Cir. 1996).

On occasion, the Due Process Clause may bar a prosecution even when it is brought within the applicable statute of limitations, but the clause places an exceedingly high burden on defendants seeking to establish that type of violation. *State v. Adams*, ___ Ohio St. 3d ___, 2015-Ohio-3954 ¶ 100 (describing the burden as "nearly insurmountable"). First, defendants claiming a due-process violation must show that the pre-indictment delay actually prejudiced them. *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977). Their evidence of actual prejudice "must be definite and not speculative, and the defendant must demonstrate how the loss of a witness and/or evidence is prejudicial to his case." *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985). Second, even evidence of actual prejudice does not suffice to establish a due-process violation; courts must also consider the *reasons* for a delay. *Adams*, 2015-Ohio-3954 at ¶ 99. Third, a defendant rarely if ever will be able to prove actual prejudice before trial; as the U.S. Supreme Court has held, "[e]vents of the trial may demonstrate actual prejudice," but when due-process claims arise before trial they are likely "speculative and premature." *Marion*, 404 U.S. at 326.

In this case, the State charged Demetrius Jones with rape after DNA from a previously untested rape kit inculpated him. The State filed an indictment one day before the expiration of the applicable statute of limitations. Jones moved to dismiss, arguing that the delay between the alleged crime and the indictment violated his due-process right to a fair trial because his mother—a possible witness—had died in the intervening period. The trial court granted his motion and the Eighth District affirmed. In doing so, the court of appeals committed three fundamental errors.

First, the court of appeals failed to require concrete and non-speculative evidence of actual prejudice. Instead of asking whether the passage of time resulted in the loss of exculpatory evidence, the Eighth District below applied a novel standard based on "conceptions of due process and fundamental justice." *State v. Jones*, 2015-Ohio-2853 ¶ 36 (8th Dist.) That standard is at odds with decisions from nearly every court to have considered similar claims—including this one. As this Court held in *Adams*, "[t]he death of a potential witness during the preindictment period can constitute prejudice, but only if the defendant can identify exculpatory evidence that was lost and show that the exculpatory evidence could not be obtained by other means." 2015-Ohio-3954 ¶ 103.

Second, the court of appeals conflated the threshold question of actual prejudice with the secondary question of the reasons for delay. Whether a defendant has suffered actual prejudice as a result of pre-indictment delay is only the necessary first step in a two-step analysis. *See Lovasco*, 431 U.S. at 790 ("proof of prejudice is generally a necessary but not sufficient element of a due process claim"). The second step is reached only *after* a defendant has introduced concrete evidence of actual prejudice, and it is only then that a court may consider the reasons for a delay. *See Adams*, 2015-Ohio-3954 at ¶ 99. The Eighth District, however, merged the

inquiries and found that the delay on the State's part outweighed the burden that Jones otherwise should have been required to bear. *See Jones*, 2015-Ohio-2853 at ¶ 46.

Third, the court of appeals affirmed the trial court's decision granting Jones's motion to dismiss the indictment even though there was no trial record against which to compare his claims of prejudice. As the U.S. Supreme Court has maintained from the beginning, the "*[e]vents of the trial* may demonstrate actual prejudice." *Marion*, 404 U.S. at 326 (emphasis added). Before trial, however, "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, 858-59 (1978). The need to defer consideration of the prejudice question until after trial is especially relevant here, because Jones has acknowledged that another individual was present with his mother at the time of the alleged rape. Had the case gone to trial, Jones could have subpoenaed that individual to testify. He has never offered any reason why doing so would not have eliminated any potential prejudice stemming from the death of his mother. *See* Tr. 57-58. Even the Eighth District admitted that questions of prejudice were speculative because of the absence of a trial record demonstrating what that individual's testimony might have been. *See Jones*, 2015-Ohio-2853 at ¶ 44.

For these reasons, and the reasons that follow, the Court should reverse the Eighth District's decision and remand for a trial on the originally charged offenses.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, the Attorney General is concerned with prosecuting sexual crimes and maintaining public safety. The Attorney General's interest here is especially strong because he has led a major effort to combat rape and sexual assault through DNA testing backlogged sexual assault kits. *See* Press Release, Office of the Ohio Attorney Gen. Mike DeWine, *Attorney General's Bureau of Criminal Investigation Exceeds Sexual Assault Kit*

Testing Goal (Oct. 1, 2013) *available at* http://perma.cc/LKV8-G764. The Attorney General takes an interest in any legal development that will hinder the State's ability to prosecute rapists.

STATEMENT OF THE CASE AND FACTS

A. Demetrius Jones was indicted for rape and kidnapping, but the trial court dismissed the indictment prior to trial on the basis of pre-indictment delay

Demetrius Jones was charged with rape and kidnapping in a two-count indictment filed on August 30, 2013, one day before the applicable statute of limitations expired. *State v. Jones*, 2015-Ohio-2853 ¶¶ 3, 10 (8th Dist.) ("En Banc Op."). Before trial, Jones moved to dismiss the indictment on the basis of pre-indictment delay. Motion to dismiss, R. 26. At the hearing on his motion to dismiss, it was established that the victim and her mother called the police on September 1, 1993 and reported that she had been raped. Tr. 5-6. The victim was transported to a nearby hospital where a rape kit was administered. Tr. 6-7. Medical records and the police report showed that the victim at that time named Jones as her attacker. *Id.*

The victim's 1993 rape kit was not tested until September 2011. Tr. 24-25. After the results of the rape kit test were returned to the Cleveland Police Department, they reopened the case on July 20, 2013—only 41 days before Jones was indicted. En Banc Op. ¶¶ 8-10. The DNA sample from Jones to which the rape kit was matched was not obtained until 2005 or 2006, when it was gathered in connection with one of his 22 other felony cases in Cuyahoga County. Tr. 49-50.

Jones maintained that his encounter with the victim was consensual. *See* Tr. 32. At the hearing, he argued that the delay prior to indictment prejudiced his case because the victim's clothes and other evidence had been lost, and that his mother, who died in 2011, might have been able to testify that that she did not hear anything unusual at the home that night. Tr. 10-11. Jones acknowledged that another individual was present at the time of the rape, but failed to

explain why that individual's testimony would not have been a suitable substitute for that of his mother. *See* Tr. 57. The trial court granted the motion to dismiss and the State appealed. En Banc Op. ¶ 2.

B. The Eighth District affirmed and adopted a novel standard for demonstrating that pre-indictment delay resulted in actual prejudice

The Eighth District affirmed the trial court's decision dismissing the indictment. En Banc Op. ¶¶ 49-50. The panel determined that a conflict existed between its proposed decision and the decision in *State v. Mack*, 2014-Ohio-4817 (8th Dist.). *Id.* ¶ 1. It concluded that its proposed standard for demonstrating actual prejudice conflicted with the standard applied in prior cases and, rather than issue a panel opinion, called for initial en banc review. *Id.* Sitting en banc, the Eighth District held that actual prejudice from a pre-indictment delay should be judged under a "conceptions of due process and fundamental justice standard." En Banc Op. ¶ 36.

Four judges dissented. They disagreed with the majority's adoption of "a less stringent standard for assessing actual prejudice in preindictment delay claims," and noted that the "standard offered by the majority is in conflict with the long-standing actual or substantial prejudice standard that has been in play over the past three decades in Ohio." En Banc Op. ¶ 51.

The Cuyahoga County Prosecutor's office timely moved to certify a conflict between the en banc decision and decisions from each of Ohio's eleven other appellate districts. The Eighth District granted that motion, *State v. Jones*, No. 101258 (8th Dist., Sept. 9, 2015), but this Court determined that no conflict existed and dismissed the Notice of Certified Conflict filed by the State, *State v. Jones*, 143 Ohio St. 3d 1541, 2015-Ohio-4633.

ARGUMENT

***Amicus Curiae* Proposition of Law:**

> *To prevail under a theory that pre-indictment delay violated due process, a defendant must first show actual prejudice with specific, concrete allegations supported by the evidence; vague, speculative, or conclusory allegations do not suffice.*

A. Defendants alleging a violation of Due Process resulting from pre-indictment delay must prove that the delay caused actual and substantial prejudice to their right to a fair trial

1. Evidence of actual prejudice resulting from a pre-indictment delay must be specific and non-speculative

"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." *United States v. Marion*, 404 U.S. 307, 322 (1971). The legislatively adopted statute of limitations is a defendant's primary protection against such *potential* prejudice. *Id*. at 322-23. The Due Process Clause, on the other hand, protects only against *actual* prejudice resulting from pre-indictment delay. *See id*. at 324. But even then, its role is limited. There is no set period of time after which pre-indictment delay becomes impermissible; "[u]nlike a Sixth Amendment speedy-trial claim, no presumption of prejudice arises in the due-process context when a preindictment delay exceeds a particular length of time." *State v. Adams*, ___ Ohio St. 3d ___, 2015-Ohio-3954 ¶ 98. Mere disagreement with a prosecutor's decision about when to commence a prosecution is likewise insufficient to demonstrate a due-process violation. "[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment." *Lovasco*, 431 U.S. at 790.

Instead, to establish that pre-indictment delay resulted in a due-process violation, defendants must demonstrate that they suffered actual and substantial prejudice. *Marion*, 404

U.S. at 324. Evidence of that prejudice must be "specific, concrete and supported by the evidence" and "vague, speculative or conclusory allegations will not suffice." *United States v. Fuesting*, 845 F.2d 664, 669 (7th Cir. 1988). Courts cannot "determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions." *Lovasco*, 431 U.S. at 796. As this Court has recognized, that makes the actual prejudice standard a difficult one to meet. "The burden upon a defendant seeking to prove that preindictment delay violated due process is 'nearly insurmountable,' especially because proof of prejudice is always speculative." *Adams*, 2015-Ohio-3954 at ¶ 100 *quoting United States v. Montgomery*, 491 Fed. App'x 683, 691 (6th Cir. 2012).

Every federal circuit that has considered the standard for demonstrating actual prejudice resulting from pre-indictment delay has similarly recognized that the proof of actual prejudice "must be definite and not speculative, and the defendant must demonstrate how the loss of a witness and/or evidence is prejudicial to his case." *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985). *See also United States v. Stokes*, 124 F.3d 39, 44 (1st Cir. 1997); *United States v. King*, 560 F.2d 122, 129 (2d Cir. 1977) (holding pre-indictment delay claims failed for lack of "measurable prejudice"); *United States v. Ismaili*, 828 F.2d 153, 168-69 (3d Cir. 1987); *Jones v. Angelone*, 94 F.3d 900, 907-08 (4th Cir. 1996); *United States v. Crouch*, 84 F.3d 1497, 1515 (5th Cir. 1996); *United States v. Rogers*, 118 F.3d 466, 477 n.10 (6th Cir. 1997); *United States v. Doerr*, 886 F.2d 944, 964 (7th Cir. 1989); *United States v. Jackson*, 446 F.3d 847, 851-52 (8th Cir. 2006); *United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir. 1993); *United States v. Colonna*, 360 F.3d 1169, 1177 (10th Cir. 2004); *United States v. Radue*, 707 F.2d 493, 495-96 (11th Cir. 1983); *United States v. Mills*, 925 F.2d 455, 464 (D.C. Cir. 1991) *rev'd on other grounds*, *United States v. Mills*, 964 F.2d 1186 (1992).

The same is true of state courts. Other than the Eighth District, every appellate district in Ohio has held that "proof of actual prejudice must be specific, particularized and non-speculative." *State v. Stricker*, 2004-Ohio-3557 ¶ 36 (10th Dist.); *see also State v. Mizell*, 2008-Ohio-4907 ¶ 40 (1st Dist.); *State v. Collins*, 118 Ohio App. 3d 73, 77 (2nd Dist. 1997); *State v. Mapp*, 2011-Ohio-4468 ¶ 42 (3rd Dist.); *State v. Cochenour*, No. 98CA2440, 1999 WL 152127, *1-2 (4th Dist. March 8, 1999); *State v. Klusty*, 2015-Ohio-2843 ¶ 17 (5th Dist.); *State v. Zimbeck*, 195 Ohio App. 3d 729, 2011-Ohio-2171 ¶ 57 (6th Dist.); *State v. Davis*, 2007–Ohio–7216 ¶ 17 (7th Dist.); *State v. Tillman*, 66 Ohio App. 3d 464, 467 (9th Dist. 1990); *State v. Peoples*, 2003-Ohio-4680 ¶ 30 (10th Dist.); *State v. Drummond*, 2015-Ohio-939 ¶ 41 (11th Dist.); *State v. Heath*, No. CA 96-04-035, 1997 WL 44374, *2 (12th Dist. Feb. 3, 1997); *State v. Walls*, No. CA99-10-174, 2000 WL 1818567, *5 (12th Dist. Dec. 11, 2000) *aff'd* 96 Ohio St. 3d at 438.

Finally, concrete evidence of actual prejudice is only the first step of a two-step analysis. *Lovasco*, 431 U.S. at 790 ("proof of prejudice is generally a necessary but not sufficient element of a due process claim"). Even the "shortest and most necessary delay" has the potential to result in actual prejudice to a defendant. *Marion*, 404 U.S. at 324-25. But because "no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution," *id*., it must also be shown that the *reasons* for the delay were impermissible, *see Adams*, 2015-Ohio-3954 at ¶ 99. Importantly however, a court may consider the reasons for delay only *after* a defendant has already proven actual prejudice through concrete and specific evidence. *See id.*

2. The prejudicial effect of a pre-indictment delay should be evaluated only after trial

The burden on a defendant seeking to establish actual prejudice resulting from a pre-indictment delay is even heavier where, as here, a defendant moves to dismiss an indictment

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). It is difficult before trial, for example, to ascertain how a missing witness or document would affect a defendant's case. And before trial, courts cannot compare a trial with missing evidence to a trial without missing evidence. As the U.S. Supreme Court concluded when it first recognized a due-process claim arising from pre-indictment delay, "[e]vents of the trial may demonstrate actual prejudice," but a pre-indictment challenge before that time is generally "speculative and premature." *Marion*, 404 U.S. at 326; *cf. Lovasco*, 431 U.S at 787 n.7 ("In addition to challenging the Court of Appeals' holding on the constitutional issue, the United States argues that the District Court should have deferred action on the motion to dismiss until after trial, at which time it could have assessed any prejudice to the respondent in light of the events at trial.").

The need to defer consideration of these pre-indictment delay claims until after trial is confirmed by the fact that such claims are grounded in the Due Process Clause. *See Crouch*, 84 F.3d 1516-17. The Due Process Clause prohibits the deprivation of "life, liberty, or property, without due process of law." U.S. Const., Amend. XIV. But the deprivation of that right "will normally occur only by conviction, and not simply by trial itself." *Crouch*, 84 F.3d at 1516. If a defendant is acquitted, then no deprivation ever occurred. The need to wait await a conviction is particularly important because the passage of time cuts both ways—it "may also weaken the Government's case." *Marion*, 404 U.S. at 322. If a defendant is *not* acquitted, the "denial of relief before trial in no way precludes the accused, if convicted, from successfully demonstrating that the undue and improper preindictment delay substantially and unfairly prejudiced his ability to avoid that result." *Crouch*, 84 F.3d at 1516.

B. The Eighth District both applied the wrong standard to Jones's pre-indictment delay claim and granted his motion at the wrong time

The Eighth District committed at least two significant errors when it upheld the trial court's decision to dismiss the charges against Jones. *First*, it failed to insist on concrete and non-speculative evidence of actual prejudice. As a result, it effectively reduced the standard of proof necessary to establish such prejudice. *Second*, it did not wait until after trial to determine whether Jones's right to a fair trial was impaired by the pre-indictment delay. Taken alone, either error would be a sufficient reason to reverse the Eighth District's decision below. But taken together, the errors reflect a wholesale abandonment of controlling precedent.

1. The Eighth District adopted a novel standard that is inconsistent with controlling precedent and undermines Ohio law

In his motion to dismiss the indictment, Jones failed to offer any concrete evidence that he had been prejudiced by the delay in his indictment. He claimed that his mother had been present at the time of the alleged rape, but that she had passed away before he was indicted. Motion to Dismiss, R. 26 at 4-5 and 7-8. Her death, he argued, was sufficient to show that he had suffered actual prejudice. *See id.* at 10-11. But he never provided any concrete evidence about how the loss of her testimony prejudiced him and admitted at a hearing on his motion to dismiss that there was no way of knowing what her testimony might have been had she not passed away before trial. Tr. 11. Nor did he show that the same evidence could not have been obtained through other means—a notable omission in light of the fact that he acknowledged that another individual was present at the time of the alleged rape. Tr. 57-58.

This Court has already rejected the argument that the death of a possible witness is enough to establish a due process violation. In *Adams* it held that while "[t]he death of a potential witness during the preindictment period can constitute prejudice," a demonstration of actual prejudice requires a defendant to "identify exculpatory evidence that was lost and show

that the exculpatory evidence could not be obtained by other means." 2015-Ohio-3954 at ¶ 103. And it emphasized that "the possibility that memories will fade, witnesses will become inaccessible, or evidence will be lost is not sufficient to establish actual prejudice." *Id.* at ¶ 105 (citing *Marion*, 404 U.S. at 325-26). That holding is consistent with decisions from other courts which have required defendants to "identify the witness [they] would have called; demonstrate, with specificity, the expected content of that witness' testimony; establish to the court's satisfaction that [they have] made serious attempts to locate the witness; and, finally, show that the information the witness would have provided was not available from other sources." *Jones*, 94 F.3d at 908.

The Eighth District created an unavoidable conflict with precedent generally and with *Adams* specifically by abandoning the requirement that a defendant identify exculpatory evidence that had been lost as a result of the delay. En Banc Op. ¶ 17 (citing with approval "a less stringent standard than the 'exculpatory evidence standard'"). Although Jones indicated that he would have called his mother as a witness, Tr. 10-11, he was unable to provide any indication of what her testimony might have been, *id.* Furthermore, he acknowledged at the hearing on his motion to dismiss that another individual was present during the time of the alleged rape, but refused to address who that individual was or why he could not testify at trial. Tr. 57-58.

Instead of applying the standard adopted by this court and others, the Eighth District applied a novel standard that it described as being based on the "concepts of due process and fundamental justice." En Banc Op. ¶ 19. Beyond its conflicts with controlling precedent, that standard conflated the U.S. Supreme Court's two-factor test for pre-indictment delay claims. It also invited incongruous results and opened the door to arguments based on mere speculation.

First, by considering the reasons for delay as part of its prejudice analysis, the Eighth District turned a two-part test into a single question about fairness. *See* En Banc Op. ¶¶ 45-46. But, as *Lovasco* explained, there are *two* necessary elements to a pre-indictment delay claim. Those elements are (1) actual prejudice and (2) the reasons for the delay. "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." 431 U.S. at 790; *accord State v. Luck*, 15 Ohio St. 3d 150, 157 (1984) (discussing the "two-part test required in cases of pre-indictment delay"). In adjudicating actual prejudice pursuant to a "conceptions of due process and fundamental justice" standard, the Eighth District rendered the first inquiry indistinguishable from the second. It collapsed the two factors into a single question: does the pre-indictment delay seem unfair and unjustified to a given judge?

Second, the Eighth District's "conceptions of due process and fundamental justice standard" invites subjective judgments. Whether pre-indictment delay violates "conceptions of due process" cannot be measured without further specifying the criteria. The Eighth District's standard is subjective. This subjectivism is exactly what the U.S. Supreme Court foreclosed when it held 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.'" *Lovasco*, 431 U.S. at 790 (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952)). Moreover, this standard could lead to inconsistent dismissals of indictments against similarly situated defendants. Indeed, the Eighth District's decision invites incongruous *results* for defendants because it creates incongruous *standards* in Ohio's intermediate courts. Jones and others in Cuyahoga County will walk free with their indictments dismissed, not because of non-speculative, actual prejudice from delay, but because a given

judge thought this delay violated "basic conceptions of due process." If a judge elsewhere feels differently, then a similarly situated defendant somewhere else in the State may be convicted and sentenced.

Third, unlike the non-speculative standard applied by every other court, the Eighth District's standard would invite speculative claims about possible witness testimony, about what would have been remembered, or what missing documents might have proved absent the delay. As the U.S. Supreme Court has recognized, every delay can result in some measure of prejudice: "prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution." *Marion*, 404 U.S. at 324-25. But the Eighth District's ambiguous standard suggests that very thing: every delay-caused detriment to a defendant's case could invite a court to terminate a criminal prosecution prior to trial if it seems to that judge to violate "fundamental justice."

2. Even if the Eighth District had applied the correct standard, it nevertheless erred by granting Jones's motion prior to trial

At the jurisdictional stage, Jones claimed that the Eighth District merely applied the same standard that is applied by courts throughout Ohio and the rest of the country. *See* Memorandum in Opposition to Jurisdiction at 3. And the Eighth District has since written that it too believes there to be little or no difference between the standard applied in this case and the one applied by every other court. *State v. Owens*, 2015-Ohio-3881 ¶¶ 8-10 (8th Dist.). That view is neither correct, nor universally shared by the Eighth District's judges. In a decision dismissing a *second* rape indictment against Jones, one of the dissenting judges again maintained that the decision in *this* case was "in conflict with the long-standing actual or substantial prejudice standards that has

been in play over the past three decades in Ohio." *State v. Jones*, 2015-Ohio-5540 ¶ 23 (8th Dist.) (Gallagher, J. concurring) (quoting En Banc Op. ¶ 51).

Even if the standard *was* the same, the trial court nevertheless erred by not waiting until after trial to consider Jones's motion. That error is obvious from the face of the Eighth District's opinion. The opinion *explicitly acknowledged* the difficulties inherent in considering Jones's motion prior to trial. En Banc Op. ¶¶ 37-38 and 41-44. And it struggled with how best to evaluate the prejudicial effect of the death of Jones's mother in light of the fact that another individual was also present in the house at the time of the alleged rape. In the end, the court of appeals ultimately concluded that it could not resolve that speculative question on the record before it. En Banc Op. ¶ 44.

Such problems could have been avoided had the trial court waited until after trial to consider Jones's motion. To begin with, it is possible that Jones would have been acquitted, making any further proceedings unnecessary. But even if he had been convicted, there at least would have been a record against which to compare his claims of prejudice. The importance of a trial record is particularly significant in this case because Jones has acknowledged that his mother was not the only other person present at the time of the alleged rape. Tr. 57-58. Had the case gone to trial, Jones could have subpoenaed the other individual to testify in place of his mother.

Because the indictment was dismissed prematurely, however, the courts below were left to speculate about what that individual might have testified about had Jones done so. *See* En Banc Op. ¶ 44 (noting that it was impossible to determine "on this record" whether the individual's testimony could have cured any potential prejudice resulting from the death of Jones's mother). The Eighth District's solution to this uncertainty was to affirm the trial court's

decision granting Jones's motion to dismiss. Its solution *should* have been to reverse the trial court's decision dismissing the indictment and to remand for a trial.

C. The Eighth District's decision undermines the legislatively adopted statute of limitations and threatens efforts by the General Assembly and the Attorney General to bring justice to victims of rape and sexual assault

The negative effect of the Eighth District's decision extends well beyond just this case. By substituting a "conceptions of due process and fundamental justice standard" for the non-speculative evidence standard, the Eighth District eroded the value of enacted statutes of limitations. "The applicable statute of limitations is the mechanism established by law to guard against possible, as distinguished from actual, prejudice resulting from the passage of time between crime and the charge, protecting a defendant from overly stale criminal charges." *Crouch*, 84 F.3d at 1515 n.26. Statutes of limitations "provide predictable, legislatively enacted limits on prosecutorial delay," and the Due Process Clause has only "a limited role to play." *Lovasco*, 431 U.S. at 789. Because the statute of limitations represents the General Assembly's considered judgment about when delay is too long, "any period of delay in commencing prosecution that falls within the statute of limitations is not prejudicial in the absence of specific evidence to the contrary." *State v. Flickinger*, No. 98 CA 09, 1999 WL 34854, at *6 (4th Dist. Jan. 19, 1999).

The need to defer to the General Assembly's considered judgment about the appropriate statute of limitations is especially pressing in the context of rape and sexual assault. The legislature has taken an active interest in ensuring that the statute of limitations for such crimes adequately protects both victims and defendants. In 1998, for example, it extended the limitations period from six to twenty years. 122 H.B. 49 (1998). At the time, at least one legislator noted that extending the statute of limitations "would remove the time bar that prevents justice from being done." *Bill Would Extend Deadline For Prosecuting Some Cases*, Akron

Beacon Journal, Nov. 13, 1997, at D6 *available at* 1997 WLNR 1543998. More recently, the General Assembly again extended the applicable statute of limitations, adding five years to the twenty-year statute of limitations adopted in 1998. 131 H.B. 6 (2015). It also provided an additional five years within which to prosecute defendants linked to a rape by DNA evidence. *See* R.C. 2901.13(D)

The more recent extension was undertaken in part as a response to the problem of untested rape kits. *See* Darrel Rowland, *Bill extending time limit on rape prosecutions on way to governor*, Columbus Dispatch, July 1, 2015 *available at* perma.cc/QY28-7X3W. At least 70,000 kits containing valuable DNA evidence across over 1,000 police agencies nationwide have yet to be tested—and this number is likely only a fraction of the total untested rape kits in the United States. *See* Steve Reilly, *Tens of thousands of rape kits go untested across USA*, USA Today, July 16, 2015 *available at* http://perma.cc/F86L-YHM3. This is especially disheartening for rape survivors, given that the rape kit collection process is an invasive four to six-hour process that is endured largely because it offers the best evidence to help identify suspects, exonerate the wrongly accused, and aid in prosecuting cases. *Id*.

In response to this important national issue, the Ohio Attorney General launched an initiative in 2011 to combat sexual crimes through aggressive DNA testing of untested sexual assault kits. *See* Press Release, Office of the Ohio Attorney Gen. Mike DeWine, *Attorney General DeWine Wants Sexual Assault Kit Testing Commission to Create Ohio Guide* (June 14, 2011) *available at* http://perma.cc/8N4W-XER8. Since its inception, the initiative has resulted in at least 2,285 matches to rapists in the FBI's Combined DNA Index System. *See* Reilly, *Tens of thousands of rape kits go untested across USA*, USA Today. Forensic experts at the Ohio's Bureau of Criminal Investigation have received more than 10,000 previously untested rape kits

from 194 law enforcement agencies statewide. *See* Rachel Dissell, *DNA identifies suspects in more than 37 percent of 8,000 tested Ohio rape kits*, The Cleveland Plain Dealer, August 10, 2015 *available at* http://perma.cc/QA5J-S6YY.

In Cuyahoga County alone, the initiative has resulted in indictments in 350 cases, a third of which are believed to be serial rapists. *Id*. In the 132 completed cases, over 70 percent of defendants have taken a plea or been found guilty. *Id*. By undermining the legislatively adopted statute of limitations, the Eighth District's decision threatens the progress that has been made in bringing justice to their victims.

CONCLUSION

For the foregoing reasons, the Court should reverse the Eighth District's decision and should remand for a trial on the charged offenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellant was served on January 19, 2016 by U.S. mail on the following:

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