

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
	:	

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

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## INTRODUCTION

There is no need for the Court to “clarify” the standard applicable to due-process claims based on allegations of excessive pre-indictment delay because there is no legitimate dispute about that standard. The standard is clear; the Eighth District simply chose not to apply it. Thus, despite what they now suggest in their briefs, Demetrius Jones and his amici are not asking the Court to choose between competing theories about how defendants must prove actual prejudice stemming from pre-indictment delay; they are instead asking the Court to endorse a standard that would irreconcilably conflict with nearly every other court to have considered such claims.

Significantly, Jones asks the Court to adopt his novel standard without even acknowledging—let alone responding to—the countless state and federal cases that have rejected arguments similar to his. The Attorney General’s amicus brief cited decisions from federal circuit court of appeals and Ohio appellate districts supporting the proposition that 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* AGO Amicus Br at 7-8 (collecting cases). In his brief defending the Eighth District’s decision, however, Jones largely ignores this vast weight of state and federal authority against his position.

Jones does so, perhaps, because he admits (as he must) that he cannot provide the non-speculative evidence required under the standard adopted by nearly every court other than the Eighth District. He acknowledges, for example, that there is no way of knowing what his mother might have testified to at trial. *See* Jones Br. at 13 and 19-20. And he argues that the fact of her death should alone be sufficient to satisfy his burden. *Id.* at 13. But the Court rejected a similar argument only a few months ago. *See State v. Adams*, 144 Ohio St. 3d 429, 2015-Ohio-3954 ¶ 103 (“The 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.” (emphasis added)).

Jones is also conspicuously silent about the requirement that defendants prove that “the exculpatory evidence could not be obtained by other means.” *See id.* For good reason; he admitted in proceedings before the trial court that another individual was present at the time of the alleged rape. *See* Tr. 57-58. But he has consistently refused to explain—at the trial court, on appeal, and now before this Court—why that individual’s testimony would not have been a suitable substitute for the testimony of his mother. *See id.*

Finally, a significant portion of Jones’s brief is irrelevant to the legal question presented in this case. Jones spends considerable time discussing the actions of the police and the reasons for the delay between the crime and his indictment. *See* Jones Br. at 1-2, 13-16, 20-21, and 23-24. But *this* case is not about the conduct of the police, or the manner in which they conducted their investigation. It is *only* about whether Jones has carried his burden of showing actual prejudice. Because he has not, the Court should not—and indeed cannot—consider at this stage the reasons for the delay. *See Adams*, 144 Ohio St. 3d 429 ¶ 107 (consideration of reasons for delay unnecessary until a defendant proves he was actually prejudiced).

## 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.*

The democratically enacted statute of limitations—not the Due Process Clause—provides the primary protection against the inevitable prejudice that accompanies the passage of even the smallest amount of time. *United States v. Marion*, 404 U.S. 307, 322-25 (1971). Nearly every court—including this one—has thus concluded that the Due Process Clause takes a backseat to

policing the length of pre-indictment delay. *See State v. Adams*, 144 Ohio St. 3d 429, 2015-Ohio-3954 ¶ 97 and *United States v. Lovasco*, 431 U.S. 783, 789 (1977).

Jones and his amicus seek to dramatically expand that role. In defending the Eighth District’s decision, they advocate a vague and malleable standard for pre-indictment delay claims that would allow courts to substitute their own judgment for that of the General Assembly. Settled precedent makes clear that the Due Process Clause does not permit such rule. *See Lovasco*, 431 U.S. at 790 (“Judges 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.”).

**A. State and federal courts are in broad agreement that a defendant asserting a pre-indictment delay claim must provide concrete and non-speculative evidence of actual prejudice**

To establish that pre-indictment delay resulted in a due-process violation, defendants must prove that they suffered actual and substantial prejudice. *Marion*, 404 U.S. at 324. It is nearly universally accepted (with the exception of the Eighth District) that evidence of prejudice must be “specific, concrete and supported by the evidence,” and that “vague, speculative or conclusory allegations will not suffice.” *United States v. Fuesting*, 845 F.2d 664, 669 (7th Cir. 1988). In light of that requirement, this Court has held that “[t]he 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*, 144 Ohio St. 3d 429 at ¶ 100 (quoting *United States v. Montgomery*, 491 F. App’x 683, 691 (6th Cir. 2012)).

Yet Jones’s brief suggests that the standard is unsettled and that there is some debate about the level of proof necessary to satisfy the actual-prejudice prong of a pre-indictment delay claim. *See Jones Br.* at 10-12. But the reality could not be more to the contrary. Federal courts universally agree: 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 Ohio courts. Other than the Eighth District, nearly every appellate district in Ohio has required defendants to provide concrete proof of actual prejudice. Like the federal courts, many have insisted that proof of actual prejudice “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 State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059.

In reality, therefore, Jones asks the Court to *depart* from the applicable standard, not to *clarify* it. He makes that request without even acknowledging, let alone addressing, the settled law that undercuts his arguments. Jones asserts, for example, that a rule requiring him to identify the substance of his mother's testimony would be unworkable and "not consistent with any concept of due process" or with this Court's decisions. Jones Br. at 19-20. He is wrong. That is *precisely* what courts have consistently required. As the Sixth Circuit has held, "a defendant does not show actual prejudice based on the death of a potential witness *if he has not given an indication of what the witness's testimony would have been and whether the substance of the testimony was otherwise available.*" *Rogers*, 118 F.3d at 475 (emphasis added). Other courts have done the same. See *United States v. Corbin*, 734 F.2d 643, 648 (11th Cir. 1984) (rejecting claim of actual prejudice because the defendants had "given no indication of what these witnesses would have been able to testify to"); *United States v. Beszborn*, 21 F.3d 62, 66 (5th Cir. 1994) ("There was no evidence that the testimony of any of these witnesses was exculpatory in nature, or that it would have actually aided the defense."). This Court relied on *Rogers* in its recent *Adams* decision and cited the very same section of that decision that is quoted above. See *Adams*, 144 Ohio St. 3d 429 ¶ 103. And it insisted that a defendant specifically show that the unavailable evidence was exculpatory. *Id.*

Jones addresses neither *Rogers* nor the many other decisions holding that the mere loss of evidence is insufficient to satisfy the actual-prejudice prong of a pre-indictment delay claim. Instead, he cites four cases in support of his argument to the contrary. See Jones Br. at 10-12. Two of his cited cases, however, involved much more concrete claims of prejudice. For

example, in *United States v. Mills*, 704 F.2d 1553 (11th Cir. 1983), a deceased witness had himself confessed to the murder for which the defendant was being tried. *Id.* at 1555-56. And in *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), the defendants offered specific details regarding the contents of a deceased witness's testimony. *Id.* at 1159. In both of the cases, moreover, the courts ultimately *denied* the motions to dismiss on the basis of pre-indictment delay. *See Mills*, 704 F.2d at 1557 and *Lindstrom*, 698 F.2d at 1157. Of the two remaining cases which granted relief, one was an Eighth District decision applying the very same reduced standard that the State challenges here. *See State v. Dixon*, 2015-Ohio-3144 ¶ 22 (8th Dist.) and Jones Br. at 10-11 (citing *Dixon*). Even in that case, however, the court of appeals found actual prejudice *not* because a witness had died or evidence was missing, but because Dixon had done what Jones has not—he identified “very specific evidence the witnesses would have provided that might have helped in his defense.” *Dixon*, 2015-Ohio-3144 ¶ 31.

Finally, Jones's reliance on *State v. Luck*, 15 Ohio St. 3d 150 (1984), the Court's first case to recognize a pre-indictment delay claim, does not help him. *First*, Jones's interpretation of *Luck* places more weight on that decision than it can bear. The Court in *Luck* did not specifically review the contents of the evidence Luck relied on to establish actual prejudice; it instead merely assumed the nature of that evidence. *See id.* at 157-58 and n.5. It made that assumption with significantly more evidence about what the missing witness would have testified to at trial than exists here. *See id.* In this case, by comparison, the trial court had *no* evidence to consider when it granted Jones's motion. *See Tr.* 1-62. *Second*, when the Court *did* address the evidence required to establish actual prejudice, it applied a familiar non-speculative evidence standard. *See Walls*, 96 Ohio St. 3d 437 ¶ 56. In *Walls*, the Court dismissed a pre-indictment delay claim, concluding that any evidence of prejudice to the defendant was

“speculative at best.” *Id.* It affirmed an appellate court decision which had held that “[p]roof of prejudice must be specific, particularized and non-speculative.” *See Walls*, 2000 WL 1818567 at \*5. *Third, Luck* is at most ambiguous on the question of prejudice, and the Court’s most recent decision in *Adams* has since eliminated any ambiguity. It clarified that defendants seeking to establish actual prejudice must point to *specific* and *exculpatory* evidence that was lost. *See Adams*, 144 Ohio St. 3d 429 ¶ 103 (a defendant must “identify exculpatory evidence that was lost”). And it recognized defendants cannot carry their burden based on speculative evidence alone. *See id.* ¶ 100 (“[T]he burden upon a defendant seeking to prove that preindictment delay violated due process is nearly insurmountable, especially because proof of prejudice is always speculative.”).

**B. Neither Jones nor his amici provide any reason for the Court to depart from its settled rule that Article I, Section 16 of the Ohio Constitution is generally coextensive with federal due-process protections**

Up until now, Jones has argued only that his *federal* due-process rights were violated because of the delay between his offense and his indictment. In their briefs however, he and amicus Ohio Association of Criminal Defense Lawyers argue for the first time that the Court should create a new constitutional right under the Ohio Constitution. Neither addresses a significant barrier to their request: the Court has held that “the due-process rights provided by the Fourteenth Amendment and those provided by Article I, Section 16 of the Ohio Constitution are coextensive.” *In re B.C.*, 141 Ohio St. 3d 55, 2014-Ohio-4558, ¶ 17; *see also Peebles v. Clement*, 63 Ohio St. 2d 314, 317 (1980); *State ex rel. Heller v. Miller*, 61 Ohio St. 2d 6, 8 (1980). Nor do they acknowledge that, with respect to pre-indictment delay claims, it has held that Article I, Section 16 of the Ohio Constitution and the federal Due Process Clause provide “comparable” protection. *Adams*, 144 Ohio St. 3d 429 ¶ 97.

Simply because the Court has in the past found that the Ohio Constitution provides additional rights, *see State v. Brown*, 143 Ohio St. 3d 444, 2015-Ohio-2438 ¶ 23 (protection against unreasonable search and seizure) and *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519 ¶ 24 (right to counsel), does not mean that it should do so again *here*. A party seeking to establish a new constitutional right must present “compelling reasons why Ohio constitutional law should differ from the federal law.” *See State v. Wogenstahl*, 75 Ohio St. 3d 344, 363 (1996). Jones and his amicus, however, have not presented *any* reasons, let alone compelling ones, why the Court should adopt a new right under the Ohio Constitution in this case. They have merely asserted that it has recognized new rights in other contexts and should therefore do so again. *See* Defense Lawyers Br. at 3-4 and Jones Br. at 8 n.2. Such a conclusory claim to a broad new constitutional right is ill-befitting of the significance of their request.

The insufficiency of their analysis is best highlighted by contrasting it with the Court’s own analysis in *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799. In *Norwood*, the Court recognized greater protections for private property under the state constitution. *Id.* ¶ 65. It did so, however, only after engaging in a thorough analysis of the relevant provisions of the state and federal constitutions. It addressed the history of the relevant clauses and the backdrop against which they were enacted. *Id.* ¶¶ 33-59. It considered state-specific questions of history and prior state jurisprudence. *See id.* ¶¶ 41, 74-75, and 78. And it provided detailed reasons explaining *why* it was necessary to provide property owners with greater protection under state law than afforded by the United States Constitution. *See id.* ¶¶ 60-64 and 66-77. The briefs of Jones and his amicus contain no similar analysis.

Finally, creating a new right would cause many problems and generate few benefits. Among other things, the same concerns that prompted the U.S. Supreme Court to limit the role

of the Due Process Clause in the pre-indictment delay context apply with equal force regardless of whether a defendant is asserting a state or federal claim. *First*, “insisting on immediate prosecution once sufficient evidence is developed to obtain a conviction would pressure prosecutors into resolving doubtful cases in favor of early and possibly unwarranted prosecutions.” *Lovasco*, 431 U.S. at 793. *Second*, it would render existing statute of limitations periods largely meaningless. Under existing law, “statutes of limitations, . . . provide predictable, legislatively enacted limits on prosecutorial delay.” *Id.* at 788. Eliminating that predictability would make it increasingly difficult to prosecute serious crimes like murder, which have *no* statute of limitations. *See* R.C. 2901.13(A)(2). *Third*, adopting a new constitutional right would open the door to subjective judgments based on a judge’s personal opinion about what is fair. The concern that judges might “abort criminal prosecutions simply because they disagree with a prosecutor’s judgment as to when to seek an indictment” is no less valid if they do so as a matter of state, rather than federal, law. *Id.* at 790.

**C. A court should rarely if ever grant a motion to dismiss on the basis of pre-indictment delay**

Jones and his amici fundamentally misunderstand the Attorney General’s argument about when a court should consider a motion to dismiss on the basis of pre-indictment delay. The Attorney General did not argue that such a motion may *never* be filed or considered prior to trial. Instead, the Attorney General argued simply that the “burden on a defendant seeking to establish actual prejudice resulting from a pre-indictment delay is even heavier” when the motion is made at that stage of the proceeding. *See* Attorney General Br. at 8-9. In light of that burden, the *better* practice is to “carry [a motion to dismiss] with the case, and make the determination of whether actual, substantial prejudice resulted from the improper delay in light of what actually transpired at trial.” *United States v. Crouch*, 84 F.3d 1497, 1516-17 (5th Cir. 1996); *see also*

Attorney General Br. at 8-9. After all, as the Fifth Circuit Court of Appeals sitting en banc has held, “it is difficult to imagine how a pretrial showing of prejudice would not in almost all cases be to some significant extent speculative and potential rather than actual and substantial.” *Id.* at 1516.

Even the Eighth District agreed that it was impossible to fully consider Jones’s claims of prejudice without a trial record. *See* En Banc Op. ¶¶ 37-38 and 41-44. It concluded that “evaluation of the likely effect of any missing evidence [would be] much easier in a posttrial/postconviction review,” *id.* at ¶ 38, and that the sparse record available made Jones’s claims of prejudice entirely speculative, *id.* at ¶ 44. Thus *even if* the Court has remaining doubts about whether Jones might be able to demonstrate actual prejudice, it should nevertheless reverse and remand so that the Eighth District can apply the appropriate standard after a trial.

Finally, Jones’s criticisms of the Attorney General’s argument, and the criticisms of his amici, are misplaced. First, while it is true that *United States v. MacDonald*, 435 U.S. 850 (1978), primarily held that defendants may not obtain interlocutory review of a decision denying a motion to dismiss on speedy trial grounds, one of the *reasons* it did so was because such claims require “a careful assessment of the particular facts of the case” and are therefore “are best considered only after the relevant facts have been developed at trial.” *Id.* at 858. The relevance of that decision to pre-indictment delay claims is confirmed by the fact that, like the Attorney General, several Justices of the U.S. Supreme Court have cited *MacDonald* in support of the principle that “the question whether preindictment delay violates due process of law cannot ordinarily be considered apart from the factual development at trial since normally only the events of the trial can demonstrate actual prejudice.” *See United States v. Scott*, 437 U.S. 82,

111 (1978) (quotations omitted) (Brennan, J. dissenting). And, as discussed above, the Fifth Circuit has done the same. *Crouch*, 84 F.3d at 1516.

Second, the Ohio Public Defender's identification of several trial court decisions granting a motion to dismiss before trial *supports* the Attorney General's argument that the question of actual prejudice should not be considered at that stage. *See* Ohio Public Defender Br. at 5. In each of the cited cases, the trial court's decision granting a motion to dismiss was *reversed* on appeal. *See Collins*, 118 Ohio App. 3d at 77; *Zimbeck*, 195 Ohio App. 3d 729 at ¶¶ 57-58; *Cochenour*, 1999 WL 152127 at \*1-2; *Jackson*, 446 F.3d at 851-52. Thus, contrary to the Ohio Public Defender's claims, *see* Br. at 5, the procedural posture *did* pose a problem for those courts—it played a role in the reversal of their decisions.

Third, Jones reads too much into the fact that the Court in *Luck* and *State v. Whiting*, 84 Ohio St. 3d 215 (1998), found that dismissal before trial was warranted. *Whiting* was not even concerned with the question of prejudice. *Id.* at 216 (“[T]he only point in dispute on appeal was which party bears the burden to demonstrate a justifiable reason for a delay.”) At most, moreover, the cases may have presented the rare instance where the Court could feel comfortable granting relief without a trial record. *See Crouch*, 84 F.3d at 1516 (“In all but the clearest and most indisputable cases, [a trial] court, even though inclined to grant such a motion, should nevertheless normally withhold doing so until after verdict, when the assessment of actual, substantial trial prejudice can more accurately be made.”). Those decisions say nothing about whether, as a general rule, it is preferable for courts to defer consideration of a motion to dismiss until a defendant's claims of trial prejudice can be evaluated *in light of an actual trial*.

**D. Jones has not demonstrated that the allegedly missing exculpatory evidence could not be obtained by other means**

It is not enough for a defendant asserting a pre-indictment delay claim to show that specific exculpatory evidence has been lost as a result of the passage of time. He must *also* prove that the “evidence could not be obtained by other means.” *Adams*, 144 Ohio St. 3d 429 ¶ 103. Jones cannot do so, and has never tried. In proceedings before the trial court, Jones acknowledged that another individual was present with his mother at the time of the alleged rape. *See* Tr. 57-58. Yet he has never offered any reason why that individual’s testimony would not have eliminated any potential prejudice stemming from his mother’s death. *See id.*; *see also* Jones Br. at 1-24. His unwillingness to address that requirement alone provides a sufficient basis on which to reverse the decision below.

Jones’s failure to even address whether the missing evidence could have been obtained through other means exemplifies the danger in regularly considering before trial motions to dismiss on the basis of pre-indictment delay. At the pre-trial stage, Jones had little incentive to obtain exculpatory evidence through other means; the less effort he put into doing so, the more likely it was that the trial court would find he had been prejudiced by the delay. *See Crouch*, 84 F.3d at 1516 n.30 (when a court considers a motion to dismiss before trial a defendant has “every incentive *not* to diligently search for or produce [exculpatory] evidence.”) By comparison, Jones would have had the opposite incentive had the case gone to trial. Not only would he have had an interest in presenting all potentially exculpatory evidence, he would have had the tools to do so. Among other things, his right to compulsory process means that he could have subpoenaed the other individual who was present and compelled him to testify. If, after trial, “the evidence or some adequate substitute [was] not produced, [a court] can have far more confidence that it really could not have been.” *Id.*

## 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 Reply Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellant was served on April 12, 2016 by U.S. mail on the following:

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