FILED November 23, 2021 01:54 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. CHRISTOPHER SHANE RALSTON, aka Christopher Wayne Ralston, Defendant-Appellant Petitioner on Review.	Multnomah County Circuit Court Case No. 16CR33180 CA A165924 S068727

PETITIONERS'S BRIEF ON THE MERITS

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Multnomah County
Honorable Richard C. Baldwin, Judge

Opinion Filed: April 7, 2021
Author of Opinion: James, Judge
Before: Powers, Presiding Judge, and Egan, Chief Judge, and James, Judge

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PETITIONER'S BRIEF ON THE MERITS

Introduction

The state charged defendant with misdemeanor driving under the influence of intoxicants (DUII). When he tried to plead guilty, the state dismissed the information so it could charge him with felony DUII. But the state waited a month to bring the felony charge. During that time, a video of defendant's booking into jail was likely destroyed. The case then remained pending for a total of 14 months and two weeks.

Defendant moved to dismiss under Article I, section 10, of the Oregon Constitution, which requires the state to administer justice "without delay." He argued that the loss of the booking video prejudiced him because, he contended, it would have shown him walking with good balance and coordination shortly after his arrest. The trial court accepted defendant's representation about what a booking video would show generally but ruled that he had not demonstrated sufficient prejudice in his own case. Defendant entered a conditional guilty plea and appealed. The Court of Appeals largely agreed with defendant's arguments regarding prejudice, but it found that his initial attempt to plead guilty and later decision to enter a conditional plea undercut his position and affirmed largely on that basis. *State v. Ralston*, 310 Or App 470, 486 P3d 822, *rev allowed*, 368 Or 597 (2021).

Questions Presented and Proposed Rules of Law

First Question Presented

When the state arrests a defendant, files a charging instrument, and arraigns the defendant, but later dismisses to file a second charging instrument with greater charges, should a court consider the time between the two charging instruments in assessing whether the total delay violates Article I, section 10?

Proposed Rule of Law

Yes. Article I, section 10, requires the state to administer justice "without delay." When the state dismisses a charging instrument with the stated intention of bringing greater charges, the resulting delay should count against the state.

Second Question Presented

When a trial court denies a pretrial motion to dismiss under Article I, section 10, and the defendant enters a conditional guilty plea that reserves the right to appeal that ruling, what showing of prejudice must the defendant make?

Proposed Rule of Law

In evaluating a pretrial motion to dismiss under Article I, section 10, the trial court should assess prejudice to the defense by a prospective standard that requires only a reasonable possibility of prejudice. In reviewing a ruling on such a motion in a case that does not resolve via trial, the appellate court should apply the same standard and not apply a retrospective standard or require anything more than a reasonable possibility of prejudice.

Third Question Presented

Should motions to dismiss under Article I, section 10, be decided before trial?

Proposed Rule of Law

Yes, except in rare circumstances and primarily if the state asks that the court defer its ruling. If the state believes that its trial evidence will defeat the defendant's claim of prejudice, the state should say so and choose between previewing its trial evidence or asking that the motion be deferred until trial.

Fourth Question Presented

May a court reviewing a speedy trial claim consider the defendant's earlier attempt to plead guilty to a lesser charge before evidence was lost as a basis to conclude that the loss of the evidence did not prejudice the defense?

Proposed Rule of Law

No. In a criminal proceeding, an unsuccessful attempt to plead guilty may not be considered for any purpose.

Fifth Question Presented

When a DUII defendant shows that the state's delay in prosecuting the case likely resulted in the destruction of a video of his booking into jail and identifies reasons to infer that the video would have shown him walking with good balance and coordination, has he established a reasonable possibility of prejudice under Article I, section 10?

Proposed Rule of Law

Yes. A defendant can establish prejudice under Article I, section 10, by showing that the delay caused a reasonable possibility of impairment to the defense. A defendant can satisfy that standard by making a credible showing that the state's delay caused the loss of probative, exculpatory evidence that would have been relevant regardless of what evidence the state presented. The destruction of a jail booking video in a DUII case, which the defendant reasonably expects to have been favorable, qualifies as such prejudice.

Sixth Question Presented

When the total delay in a felony DUII case exceeds 14 months and a portion of the delay that the state failed to explain caused the destruction of a jail booking video, has the defendant established a violation of the requirement of justice without delay under Article I, section 10?

Proposed Rule of Law

Yes. Here, the state filed a misdemeanor DUII charge and dismissed it to file a felony charge. But the state waited a month, without explanation, before initiating the felony charge. That delay counts against the state under Article I, section 10, and it resulted in the destruction of the video of defendant's booking into jail. Defendant showed that the video would likely have been helpful to the defense and persuasive to a jury, which satisfied his burden to establish prejudice. Consequently, the state violated his right to justice without delay.

Summary of Historical and Procedural Facts

Historical facts

At 12:29 a.m. on June 3, 2016, Officer Nafie stopped defendant's car for failing to maintain a lane. ER-3.[1] Defendant had bloodshot and watery eyes, slurred his speech, and smelled of alcohol. *Id.* He told the officer that he swerved because he dropped his phone. *Id.* Defendant had multiple open containers of alcohol in his car and admitted consuming a few alcoholic drinks. ER-10. He refused to submit to field sobriety tests (FSTs). *Id.*

At 12:40 a.m., Nafie arrested defendant. ER-3. At 2:06 a.m., defendant refused to submit to a breath test. *Id.* At 2:32 a.m., defendant was booked into jail on the charge of misdemeanor DUII. ER-21.

At least five cameras record the booking process from several angles. ER-22. The process typically takes over five minutes and involves the arrestee walking, emptying their pockets, being frisked, removing their shoes while standing, and signing paperwork. ER-4, 6, 9, 21. The booking video reflects the arrestee's balance, swaying or lack thereof, and ability to walk. ER-4, 6, 9.

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[1] All ER citations reference the Excerpt of Record in defendant's Court of Appeals brief. The historical facts are based on the police report, which is not in the record but is summarized by the parties' memoranda, along with declarations by defense counsel and the prosecutors and an affidavit by the systems administrator for the jail.

Nafie's police report did not note whether defendant exhibited poor balance or difficulty walking, which are signs of impairment frequently noted in police reports describing impairment. ER-8.

Trial court proceedings

The day of defendant's arrest, the state filed an information charging him with misdemeanor DUII and reckless driving. ER-41. Defendant was arraigned, held in custody, appointed counsel, and given a court date of July 8. ER-3, 41. The prosecutor notified a felony DUII prosecutor that defendant might have two or more prior convictions that made the case a felony, and she requested copies of the prior convictions. ER-18.

On June 7, 2016, defendant's attorney requested a hearing for June 8 to plead guilty in an effort to avoid a felony DUII conviction. ER-10, 20, 41. The state moved to dismiss the information to ensure that the case could proceed as a felony. ER-10-11, 20. On June 8, the court granted the state's motion to dismiss and released defendant from custody. ER-20, 41-42.

On June 9, the felony DUII prosecutor received a case file that included the requested prior conviction records. ER-18. A month later, on July 8, the felony DUII prosecutor reviewed the file and confirmed that defendant could be charged with felony DUII. *Id.* On July 19, 2016, a grand jury returned a felony DUII indictment under the same case number as the information. ER-1.

The trial court reinstated the case and issued a statewide arrest warrant. ER-25. The state entered the warrant into local and national police databases and asked Washington State police to serve the warrant on defendant at his Battle Ground address. ER-24. On August 15, 2016, the state mailed defendant a notice explaining that the court had issued a warrant for his arrest for felony DUII and directing him to contact the court with any inquiries. ER-27.

On January 4, 2017, Clark County police arrested defendant for Washington offenses. ER-24. On January 5, defendant waived extradition to Oregon. *Id.* On March 16, defendant was transported to Oregon. *Id.*

On March 17, 2017, the trial court arraigned defendant and appointed an attorney from the same office as his prior attorney. ER-4, 42. The court released defendant from custody and gave him a new court date of April 28, 2017. TCF. Defendant's counsel filed a discovery demand on March 21, 2017. ER-42. A "Custody Issue" hearing occurred on April 28. *Id.*

Defense counsel sought the video recording of defendant's booking into jail on the night of his arrest. ER-4. However, as of May 1, 2017, the video had been destroyed. ER-22. The jail did not know when the video was destroyed, but it had a policy of keeping booking videos for only 30 days. ER-4.

Between April 28 and August 18—when the court held the hearing on defendant's motion to dismiss—the court took no actions other than to set over hearings. ER-42.

Motion to dismiss

On July 25, 2017, defendant filed a motion to dismiss that alleged a violation of his right to a speedy trial under the state and federal constitutions. ER-2. The motion emphasized the state's delay in obtaining an indictment and serving the warrant and the prejudice from the destruction of the booking video. ER-5-6. Based on her review of Nafie's report and her experience trying DUII cases, defense counsel anticipated that the video would have assisted the defense and been "uniquely persuasive" evidence to a jury. ER-9.

The state argued that the federal claim failed because the federal speedy trial clock restarted when the state dismissed the charges. ER-11-12. Thus, the state argued, the booking video "was likely deleted at a time when the Sixth Amendment speedy trial clock wasn't even in effect," because the indictment issued more than 30 days after defendant's booking. ER-12. As to defendant's state claim, the state argued that his claim of prejudice relied on speculation:

> "Assuming that the video equipment was working properly that day and the video did exist, we are left with only the speculation that the video would have been of high enough quality to be of evidentiary value. Further, we would have to assume that the booking process affords relevant observations in every case, and that this booking process afforded those same opportunities in precisely the same fashion. We are left to assume that the video would have been helpful to the defense, and not damaging. There is evidence in this case that the defendant was driving poorly, likely as a result of alcohol consumption, so it would be an equally fair assumption that the video would contain proof of the defendant's poor balance. In essence, the contents of the video if it existed are wholly speculative."

ER-15.

On August 18, 2017, the trial court heard defendant's motion to dismiss. The parties agreed that the court could consider the filings to be "the factual record on the issues." Tr 2-4. The judge noted that "it seems to be that the paperwork tells me everything I need in terms of what happened" but asked whether any witnesses would need to be called. Tr 4. The state declined to call witnesses, and defense counsel said that she did not "anticipate having more" but noted the possibility that further investigation could reveal additional evidence. Tr 4. The judge replied that he was "going to rule on your motion today [and] whether anything that happens thereafter, that's not up to me." Tr 5.

The court said the motion turned on whether defendant had established sufficient prejudice from the loss of the video. Tr 6, 10. It explained that Nafie "presumably" would not "be able to testify about balance," or, if he did, he "would be thoroughly subject to cross examination about why that wasn't in the report." Tr 7. Defense counsel said she "fully expected a video of [defendant] that showed him walking deliberately, with good balance, not staggering and not swaying." Tr 7. The court "accept[ed]" defense counsel's representation "about what [the video] would have shown normally for people" but not necessarily what it "particularly would have shown for [defendant]." Tr 8.

The court asked whether defense counsel was engaging in speculation as to how the video would depict defendant. Tr 8. Counsel acknowledged that the

video's destruction made it impossible to know with certainty what it would have shown, but she reiterated that the police report supported her inference that the video would have been more helpful than harmful. Tr 8-9.

Counsel argued that the delay in obtaining the indictment was unusual and that the state gave no explanation for the month it took the felony DUII prosecutor to review the case. Tr 9-10. The court said that the state had not received "the evidence that it was a felony" when it dismissed the misdemeanor charge. Tr 10. Counsel replied that the state quickly received that evidence and did not explain the delay in reviewing it. Tr 10. The court said that "a month or so delay is not an unusual delay." Tr 10. Counsel replied that the video was lost during that time, and the court agreed that the case turned on the video. Tr 10.

The state argued that "we're simply left to question whether this video would have been great for the state, great for the defense, or worthwhile to nobody" and that the record did not "establish[] with particularity what the contents should have shown." Tr 11.

The court denied the motion:

> "THE COURT: I'm going to deny the motion to dismiss. I don't [think] the defendant has made an adequate factual showing that the absent video or the overwritten video would have been helpful to the defense. And, I think the defendant bears that burden. And, I think the defendant's failed to meet it. So, I'm going to deny the motion to dismiss."

Tr 11-12.

With the agreement of the court and the state, defendant executed a conditional guilty plea to felony DUII, reserving his right to appeal the court's ruling on the motion to dismiss. ER-33. As part of a plea agreement, the court dismissed the reckless driving charge. ER-34; Tr 16.

Appellate proceedings

Defendant appealed and renewed his state constitutional claim. The parties generally reprised their arguments from the trial court.

The Court of Appeals noted several undisputed points, including that the "14-month delay is not so insignificant that we need not consider the other factors" and "that the length of the delay weighs against the state" but that the delay was neither intentional nor so long that it presumptively required dismissal. *Ralston*, 310 Or App at 479. The court concluded that the case involved 11 months of "reasonable and justified delays"—the time between the issuance of the warrant and defendant's arrest and the time between defendant's extradition and the resolution of his motion to dismiss—and "three months and 11 days" of unexplained but unintentional delays—the time between the dismissal of the information and filing of the indictment and the time between defendant's arrest and extradition. *Id.* at 480-83. Given that analysis, "as the parties agree," the court found that "defendant's claim rests on whether he has established a sufficient degree of prejudice to warrant dismissal." *Id.* at 483.

Accordingly, the court turned to prejudice. The court rejected "the state's argument that the officer's testimony would have been an adequate substitute for the booking video." *Id.* at 484. Rather, it found more persuasive one of its prior opinions that addressed the importance of video in a DUII prosecution:

> "'In general, the prosecution of a DUII case depends heavily on the opinion of the arresting officer in determining whether a defendant's mental or physical faculties were adversely affected to a noticeable or perceptive degree. Here, in the absence of the videotape, a jury would have only [the officer's] interpretation of defendant's performance of the FSTs, demeanor, appearance, and speech patterns, which, as noted, were to some extent not noticeably affected by alcohol. Of course, defendant may, but does not have to, offer his own version of the events to rebut [the officer's] conclusions and the Intoxilyzer results. However, defendant's testimony is not an acceptable substitute, because defendant's testimony carries the risk that the jury will view that testimony as extraordinarily self-serving, whereas that risk is not present in the videotape evidence. Accordingly, the videotape evidence is unique because it would provide defendant with an objective video replay of the events from which a jury *could draw its own conclusions*.'"

Id. at 485 (quoting *State v. Zinsli*, 156 Or App 245, 253-54, 966 P2d 1200, *rev den*, 328 Or 194 (1998) (emphasis in *Zinsli*, alterations in *Ralston*).

The court explained that the booking video "would have been *affirmative evidence*" to prove that defendant "was walking without any balance or coordination issues." *Id.* (Emphasis in original.) In contrast, without the video, Nafie "could have provided an alternative explanation as to why he omitted any mention of that in his report, including that it was a simple oversight." *Id.* And Nafie was an "adverse witness" with a "motive" to give such an explanation. *Id.*

The court also concluded that, based on defense counsel's experience and analysis of the police report, "defendant showed that there was at least some probability that the missing evidence would be favorable." *Id.* at 495. Specifically, it was reasonable to infer "that the booking video was more likely to show defendant walking with good balance and coordination." *Id.*

But the court ruled that defendant failed to establish the "materiality" of the video. *Id.* The court identified two facts that it found pertinent to that issue. First, because defendant entered a conditional plea, the record lacked Nafie's trial testimony. The court said that defendant "assume[d]" that Nafie would give incriminating testimony about defendant's balance but that it was "equally possible" that Nafie "would have admitted the inaccuracies, or inconsistencies, in his report." *Id.* at 496. The court suggested that defendant needed to show "how the officer would testify concerning the missing observations in his report." *Id.* And the court advised the bench and bar that "not every speedy trial motion can be resolved conclusively pretrial" and that in some cases "it may be necessary for a trial court to defer ruling on a speedy trial motion, or for prudent defense counsel to reraise the motion at the close of the case in chief." *Id.*

Second, the court noted that defendant "was willing to enter a guilty plea five days after his arrest without having viewed the booking video." *Id.* It identified that act as a "relevant" fact that it "cannot ignore" and which suggested that "defendant didn't view the video as sufficiently exculpatory." *Id.*

Based on that analysis, the court affirmed the trial court's ruling:

> "In sum, in this case we are dealing with a relatively small period of unexplained delay. While there is some probability the missing evidence was favorable, whether that missing evidence can be shown to be material is uncertain. Although the length of the delay weighs against the state, the remaining factors do not, because the reasons for the delay were not intentional and otherwise reasonable and justified, and defendant failed to establish a reasonable possibility of prejudice. Therefore, defendant's speedy trial rights under Article I, section 10, were not violated."

Id. at 497.

Defendant filed a petition for reconsideration, noting that his decision to enter a conditional plea and his earlier attempt to plead guilty to misdemeanor DUII, which had never been addressed as relevant facts before the Court of Appeals issued its opinion, were improper for the court to consider. The court denied the petition without further explanation.

Summary of Argument

Article I, section 10, requires the state to administer justice "without delay." It serves both the defendant's interest in a speedy trial as well as the public's interest in a prompt—and accurate—judicial system. In determining whether the state has violated Article I, section 10, the court considers the length of the delay, the reasons for the delay, and prejudice to the defendant. This case primarily concerns one question about how to measure the length of the delay and several questions about how to assess prejudice.

The "clock" starts running under Article I, section 10, once the defendant is arrested or charged. Although this court has not yet considered whether the state's dismissal of charges "restarts" the clock, it should hold that a period of dismissal counts toward the total delay when the state has only temporarily dismissed the charges and intends to continue the prosecution in the immediate future. That is because the constitution requires that court proceedings, once commenced, not be deferred. And the state's duty to administer justice promptly persists while the state is, in fact, administering justice. Although the United States Supreme Court has held that periods during which charges are dismissed do not count under the Sixth Amendment speedy trial clause, its analysis is distinguishable because the text and scope of the state and federal provisions are different.

Prejudice under Article I, section 10, can include pretrial incarceration, anxiety from pending charges, and impairment of the defense. And the court's analysis of prejudice depends in part on whether the issue arises from a pretrial motion or an appeal after a trial and conviction. An appellate court reviewing a case after trial may review the record retrospectively, meaning the defendant may need to make a more concrete showing of prejudice. But a trial court errs if it applies a retrospective test before trial, and an appellate court errs if it applies such a test in a case that does not resolve via trial. In either scenario, the court must apply a prospective test that requires only a reasonable possibility of

prejudice to the defense. A defendant can satisfy that test by identifying lost evidence and explaining why it would have been favorable.

And most speedy trial motions *should* be resolved before trial. An appellate court should not fault the defendant for raising the issue before trial or resolving the case via conditional plea. Nor should a court speculate about the state's trial evidence or require the state to preview its case before trial. Oregon law reflects several policy preferences that all encourage Article I, section 10, issues to be resolved before trial and potentially without a trial. If the state believes that its trial evidence may defeat the defendant's claim of prejudice, the state may say so and may choose whether to preview its case or ask that the motion be deferred until trial. But if the state accepts the pretrial record as sufficient for assessing prejudice, then the defendant and court may presume that the state's trial evidence will not affect the analysis.

Here, the Court of Appeals erred in faulting defendant for resolving his case via conditional plea and not a trial. The court further erred by relying on his prior attempt to plead guilty to misdemeanor DUII—to avoid a potential conviction of felony DUII—as evidence of his assessment of the evidence. That issue was not raised below and would have required additional factfinding by the trial court. Moreover, it contravenes the well-established rule in Oregon that an attempt to plead guilty cannot be used against the defendant for any

purpose—not only because it would be unfair to do so, but because it does *not* reflect the defendant's assessment of the case.

Those factors aside, defendant largely agrees with what the Court of Appeals said about prejudice. It held that defendant showed at least some probability that the jail booking video showed him walking with good balance and coordination, which would have been favorable evidence in his DUII case. Indeed, a video that reflected an absence of impairment would have been probative, exculpatory evidence—regardless of what evidence the state presented. By demonstrating that probability, defendant met the prospective standard of a reasonable possibility of prejudice. And that prejudice weighs heavily in favor of dismissal because it undermines the fairness *and* accuracy of the entire process.

All told, the delay in this case exceeded 14 months, which is unreasonable for an ordinary felony DUII case. The state gave no explanation for the delay that resulted in the destruction of evidence, and defendant showed a reasonable possibility that the evidence would have been favorable. And the state gave little or no explanation for the rest of the delay. Those facts together establish a violation of Article I, section 10, which warrants dismissal.

Argument

Article I, section 10, of the Oregon Constitution provides, in part, that "justice shall be administered, openly and without purchase, completely and without delay." That "mandatory directive" applies to both the court and the state, and "the burden to proceed promptly is on the state." *State v. Harberts*, 331 Or 72, 84, 87, 11 P3d 641 (2000). It requires that "there shall be *no* unreasonable delay after a formal complaint has been filed against the defendant." *Id.* at 83 (quoting *State v. Vawter,* 236 Or 85, 90-91, 386 P2d 915 (1963) (emphasis in *Harberts*)). If the state violates Article I, section 10, in a criminal case, the court must dismiss the charges with prejudice. *Id.* at 99.

Although that rule is like the federal speedy trial right, the state provision also serves "the public's interest in the prompt administration of justice." *Id.*at 83-84. Indeed, Article I, section 10, embodies the ancient principle that justice must be "free, for nothing is more iniquitous than justice for sale; complete, for justice should not do things by halves; [and] swift, for justice delayed is justice denied." *Bryant v. Thompson*, 324 Or 141, 148, 922 P2d 1219 (1996) (quoting David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or L Rev 35, 38 n 19 (1986)).

In rare cases, delay that is "manifestly excessive or purposely caused by the government to hamper the defense" may require dismissal without further inquiry. *Harberts*, 331 Or at 88. Usually, though, the application of Article I,

section 10, "is a fact-specific inquiry that requires the court to examine the circumstances of each particular case." *Id.* Relevant factors include "the length of the delay * * *, the reasons for the delay, and prejudice to the defendant." *Id.* With respect to prejudice, the court must consider prejudicial events that occur during any period of delay, regardless of whether a specific period of delay is reasonable or unreasonable. *Id.* at 96 n 10.

This case is largely about a six-week period of delay near the start of defendant's case—the time between the state's dismissal of the misdemeanor DUII charge and filing of the indictment for felony DUII. That period counts toward the total delay under Article I, section 10, because the state always intended to continue the prosecution and could not unreasonably defer the court proceedings. And the delay resulted in the destruction of a video of defendant's booking into jail. In assessing the prejudice from the loss of that evidence, the Court of Appeals erred in identifying two facts that had not been addressed below—the fact that defendant resolved his case by conditional plea and the fact that defendant had previously sought to plead guilty to misdemeanor DUII. Once those improper facts are removed from the analysis, the rest of the Court of Appeals' analysis shows that defendant met his burden of demonstrating a reasonable possibility of prejudice. That prejudice, combined with the total 14-month delay that was partially if not mostly *un*explained, establishes a violation of Article I, section 10.

I. A period during which the state has dismissed charges but intends to continue the prosecution counts toward the total delay, because the state's duty to administer justice without delay also continues.

Under Article I, section 10, the "'without delay' clock" starts running on one of two occasions: when the defendant is arrested and jailed on a charge or when the state files a charging instrument that is sufficient by itself to bring the defendant to trial. *State v. Vasquez*, 336 Or 598, 604, 610, 88 P3d 271 (2004).

Here, both occasions occurred on the same date—June 3, 2016, when defendant was arrested and jailed and the state filed an information that charged him with misdemeanors. *See* ORS 131.005(9)(a) (providing that a district attorney's information that alleges only misdemeanors "serves both to commence an action and as a basis for prosecution thereof"); *cf.* Or Const, Art VII (Amended), § 5 (allowing misdemeanors to be charged by information).

The first question in this case is whether the speedy trial clock was "paused" during the period between the dismissal of the information (and defendant's release from jail) and the filing of the indictment; whether the clock "restarted" upon the filing of the indictment; or, rather, whether that period counts toward the overall delay. Although the duration of that six-week period does not significantly affect the calculation of the total delay, it is critical to this case because—as the state noted in response to defendant's federal claim—during that six-week period the booking video was likely destroyed.

This court has not decided whether a period during which charges have been dismissed counts as delay under Article I, section 10. *See State v. Dykast*, 300 Or 368, 373, 712 P2d 79 (1985) (declining to resolve issue). And this case does not require the court to hold that such a period always counts. Rather, the question is whether to count a period during which the state has dismissed charges with the intent of filing more serious charges in the immediate future.

Again, Article I, section 10, requires that "justice" be "administered * * * without delay." Because "justice" involves court proceedings, it "suggests that those court proceedings, once commenced, shall not be prolonged or deferred." *Vasquez*, 336 Or at 605 n 5. In other words, once the state initiates a prosecution, it takes on the "burden to proceed promptly" and engage in "*no* unreasonable delay." *Harberts*, 331 Or at 83-84 (emphasis in original).

And the lack of active court proceedings should not relieve the state of its burden, which remains in effect while the state has begun a prosecution and intends to see it through. *Cf. State v. McDonnell*, 343 Or 557, 572, 176 P3d 1236 (2007) (the right to justice without delay "extends to every component of the criminal prosecution"). The state cannot unreasonably "defer[]" court proceedings that it fully intends to resume. *Vasquez*, 336 Or at 605 n 5. To hold otherwise would relieve the state of its constitutional duty even while it exercises its constitutional power. It would also let the state excuse its own unreasonable delays simply by dismissing and refiling charges.

The United States Supreme Court has held that time in which charges have been dismissed does not count under the Sixth Amendment.[2] *United States v. MacDonald*, 456 US 1, 7, 102 S Ct 1497, 71 L Ed 2d 696 (1982). But its analysis relied on several factors that are unique to the federal constitution.

First, the Sixth Amendment applies only to the "accused," and once charges have been dismissed the defendant is only a "formerly accused" person who "is, at most, in the same position as any other subject of a criminal investigation." *Id.* at 8-9. In contrast, Article I, section 10, is not limited to "accused" persons, so its plain text can include periods in which a defendant is not formally accused of a crime. *See State v. Ivory*, 278 Or 499, 504, 564 P2d 1039 (1977) (noting that textual distinction).

Second, the federal Due Process Clause protects against "undue delay" both "before charges are filed" and "after charges are dismissed," so the Court found it unnecessary to *also* include such periods in the Sixth Amendment speedy trial right. *MacDonald*, 456 US at 7. But the Oregon Constitution contains no due process clause, so excluding a period after charges are dismissed from consideration under Article I, section 10, would make that period subject to *no* state constitutional limits.

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[2] The Sixth Amendment to the United States Constitution provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *."

Third, the federal speedy trial right is "not primarily intended to prevent prejudice to the defense caused by passage of time" but instead to limit pretrial restrictions on liberty and the disruptions caused by pending charges. *Id.* at 8. Indeed, the "'prejudice to defense' factor has proved controversial in United States Supreme Court jurisprudence." *Harberts*, 331 Or at 85. But that factor has not been controversial in this court's jurisprudence, which has consistently recognized prejudice to the defense as "the most serious" type under Article I, section 10. *State v. Tiner*, 340 Or 551, 555, 135 P3d 305 (2006).

Here, the six-week period between dismissal and indictment should count toward the total delay under Article I, section 10. The state may have dismissed the information, but it never ended the prosecution. Rather, the state always intended to prosecute defendant for DUII and dismissed the misdemeanor charge only so it could file a felony charge. Even the court proceedings were not terminated but only deferred, because the case resumed under the same case number once the state filed the indictment. And, as will be discussed below, that period created a significant risk of prejudice to the defense that cannot be addressed under any other provision of the state constitution. Consequently, this court should hold that the speedy trial clock started running June 3, 2016, and continued running through August 18, 2017, a total delay of 14 months and two weeks.

Of course, the fact that charges are dismissed still matters under Article I, section 10. For example, the status of the case and reasons for dismissal can affect whether a period of delay is reasonable. Dismissal can also ameliorate the prejudice of pretrial confinement. On the other hand, for an indigent defendant who will be left without counsel, dismissal can *increase* the risk of prejudice to the defense. Without an attorney, the defendant may lose the ability to secure favorable evidence or interview witnesses while their memories are fresh.

Finally, as noted, there may be other circumstances in which dismissal of charges pauses the speedy trial clock. For example, a period between dismissal and reindictment might not count toward the delay if the state does *not* intend to continue the prosecution—say, if a key witness dies, but years later the state discovers new evidence that allows the prosecution to resume. But that issue can and should be left for another day.

II. A pretrial motion to dismiss under Article I, section 10, requires the defendant to make a prospective showing of a reasonable possibility of prejudice—and if the case does not resolve by trial, whether because the defendant enters a conditional plea or because the state appeals a ruling in the defendant's favor, the appellate court should apply the same prospective standard as the trial court.

Article I, section 10, recognizes three kinds of prejudice resulting from pretrial delay: pretrial incarceration, anxiety and concern of the accused, and potential impairment the defense. *Tiner*, 340 Or at 555. The last is "the most serious" kind, "because the inability of a defendant adequately to prepare a case

skews the fairness of the entire system." *Id.* And the defendant need not present "compelling and cogent evidence" that the defense has been impaired. *Harberts*, 331 Or at 94. Rather, "the proper inquiry is whether the delay caused a reasonable possibility of prejudice to the defense." *Id.*

Another question in this case involves the standard that an appellate court should apply in reviewing a trial court's pretrial ruling on a motion to dismiss under Article I, section 10. This court has said that the appellate court defers to the trial court's factual findings if they are supported by evidence in the record and decides the constitutional issue as a question of law. *State v. Johnson*, 342 Or 596, 157 P3d 198 (2007). And an appellate court's review of a pretrial ruling is ordinarily "limited to the record as it had developed at the time of the ruling; we do not evaluate a court's pretrial decision with the benefit of hindsight by, for example, taking into account what happened at trial." *State v. Sperou*, 365 Or 121, 137, 442 P3d 581 (2019).

But this court does not always apply such a limited review. For example, in reviewing the denial of a motion for judgment of acquittal at the close of the state's case, the appellate court will consider all the trial evidence—including the defendant's testimony—in determining whether the evidence supports the verdict. *State v. Gardner*, 231 Or 193, 195-96, 372 P2d 783 (1962); *see also Bennett v. N. Pac. Exp. Co.*, 12 Or 49, 68-69, 6 P 160 (1885) (applying same rule to challenges to sufficiency of the evidence in civil cases).

In the context of Article I, section 10, this court has said that the appellate court's assessment of prejudice can include trial evidence but that the test for prejudice varies depending on whether a trial has occurred:

> "[A] reasonable possibility that the delay *will* impair the defense is the proper *prospective* test for deciding that a case must proceed to trial, while a *retrospective* claim that a conviction must be reversed for delay reasonably calls for showing a more concrete likelihood that the delay was prejudicial to the defense."

Haynes v. Burks, 290 Or 75, 82, 619 P2d 632 (1980) (emphasis in original).

Here, defendant raised his challenge before trial, so *Haynes* required the trial court to apply a prospective test of a reasonable possibility of prejudice. And, although defendant now seeks to reverse his conviction, the test remains a reasonable possibility of prejudice. Indeed, this court has applied that standard even on appeal after a trial. *E.g.*, *Tiner*, 340 Or at 555.

As *Haynes* recognizes, when a defendant raises a speedy trial claim on appeal after a trial, the court should review the trial evidence and decline to find prejudice when the record does not reflect prejudice. But that approach does not change the substantive constitutional standard. Rather, it merely reflects the practical reality that the appellate court has more information available. "For on appeal from a conviction, the question of prejudice resulting from the delay can be examined retrospectively, though perhaps not with absolute certainty * * *." *Haynes*, 290 Or at 82. In other words, the rationale is similar to why a court reviews the entire record in appeals challenging sufficiency of the evidence—a

court should not reverse a conviction based on a claimed constitutional violation when the complete record shows that no violation occurred.

But that rationale has no bearing on the standard itself, which is always a reasonable possibility of prejudice. And whether that standard is applied prospectively or retrospectively should not matter except to the extent the record may be different after a trial. When an appeal occurs without a trial—whether because the defendant executes a conditional plea or because the state appeals a ruling in the defendant's favor—the appellate court is in the same position as the trial court and should apply a prospective, not retrospective, test.

Here, however, the Court of Appeals applied a retrospective test even though no trial occurred. It stated that the test for prejudice in *all* cases required the defendant to show two things: "probability and materiality." *Ralston*, 310 Or App at 493. Probability requires "an explanation as to how the lost evidence would be favorable." *Id.* In contrast, materiality requires "something in the record, based on the specific facts of each case, to support the defendant's theory that the lost evidence would have been helpful to the theory of the case, in the context of *how the evidence was presented at trial*." *Id.* (Emphasis added.) And the court faulted defendant for entering a conditional plea, because doing so "complicated" defendant's "already difficult task of establishing prejudice—showing the materiality of evidence never seen, to a trial that never happened." *Id.* at 495-96.

The Court of Appeals' "materiality" requirement appears to apply a retrospective standard to all speedy trial motions, contrary to this court's distinction in *Haynes* between pretrial and post-trial analysis. Materiality also appears to require more than a reasonable possibility of prejudice. This court's standard is fully accounted for by the first part of the Court of Appeals test, probability, which requires "an explanation as to how the lost evidence would be favorable." *Ralston*, 310 Or App at 493; *cf. Ivory*, 278 Or at 508 (holding that "a reasonable possibility of prejudice * * * was shown in the present case by identification of potentially favorable witnesses who could not be found due to a delayed trial"). By also requiring materiality, the Court of Appeals created a harsher standard, which this court has repeatedly refused to do. *See Harberts*, 331 Or at 94 (holding that trial court erred in requiring "'compelling and cogent evidence' of prejudice"); *id.* at 86 n 8 (rejecting state's argument for "an 'actual prejudice' test"); *Haynes*, 290 Or at 82 (adhering to "reasonable possibility" standard for pretrial motions and requiring "a more concrete likelihood" only after trial); *Ivory*, 278 Or at 508 (applying "reasonable possibility" standard in pretrial appeal because "it would be harsh to require proof with certainty").

Finally, the Court of Appeals opinion in this case appears to be the first Oregon appellate opinion applying a "materiality" standard for prejudice under Article I, section 10. But "materiality" has long been the standard for the state's duty to disclose favorable evidence to the defense under the federal Due

Process Clause. And the federal materiality standard is, indeed, retrospective—which has prompted criticism that the test is unhelpful in the pretrial context. *See, e.g.*, *United States v. Bagley*, 473 US 667, 699-700, 105 S Ct 3375, 87 L Ed 2d 481 (1985) (Marshall, J., dissenting) (explaining that defining materiality "not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively, by reference to the likely effect the evidence will have on the outcome of the trial," creates a standard that "virtually defies definition" before trial); *cf. State v. Bray*, 281 Or App 584, 599-600, 383 P3d 883 (2016), *aff'd,* 363 Or 226, 422 P3d 250 (2018) (noting that "'materiality' is imprecise and subjective" and requires "*post hoc* speculation" about "a potentially overwhelming number of variables").

Moreover, the federal disclosure requirement applies to all criminal cases, and the only relevant state conduct is whether to disclose the evidence or not. In contrast, a claim of prejudice under Article I, section 10, arises only when the state has already engaged in negligence of potentially constitutional magnitude. That distinction further supports a prospective prejudice standard for pretrial motions under Article I, section 10, without an additional showing of materiality. *Cf. Ralston*, 310 Or App at 487 ("parties and courts are well-served by recognizing the difficulty faced by defense counsel in these situations—situations that, by definition, only come about when there has been unexplained delay caused by the state").

III. Motions to dismiss under Article I, section 10, should generally be decided before trial; if the state's trial evidence potentially bears on the motion, the state should decide whether to preview its case before trial or agree to have the motion decided during trial.

The preference in Oregon is—or should be—to resolve speedy trial claims before trial. A trial court might have discretion to defer ruling on such a motion or permit a defendant to raise or renew the issue at trial, but such discretion should be exercised cautiously. The Court of Appeals' suggestion that a defendant call the state's witnesses to a pretrial hearing on the motion and have them preview their trial testimony, or that the court defer ruling on the motion until trial, would frustrate multiple legislative policy interests.

First, the legislature has expressed a preference, if not a requirement, that dispositive motions should be decided before trial. A trial court must hold an omnibus hearing before trial "to rule on all pretrial motions," and it must issue its ruling on those motions "prior to trial." ORS 135.037(2), (4).[3] "[T]he

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[3] ORS 135.037 provides, in part:

> "(1) At any time after the filing of the accusatory instrument in circuit court and before the commencement of trial thereon, the court upon motion of any party shall, and upon its own motion may, order an omnibus hearing.
>
> "(2) The purpose of an omnibus hearing shall be to rule on all pretrial motions and requests, including but not limited to the following issues:
>
> "(a) Suppression of evidence.

legislature has stated that the purpose of an omnibus hearing is to provide an early, coordinated resolution of legal issues in criminal cases." *State ex rel Carlile v. Frost*, 326 Or 607, 616, 956 P2d 202 (1998).

In contrast, the legislature has provided no statutory authority for speedy trial motions to be decided after trial begins. Indeed, the only post-verdict motions that the legislature has authorized in criminal cases are motions in arrest of judgment and motions for a new trial. *State v. Metcalfe*, 328 Or 309, 314, 974 P2d 1189 (1999). Neither motion provides a basis for a speedy trial claim. And this court has refused to recognize other post-verdict motions, especially for issues that can be decided earlier. *See id.* at 314-317 (reversing trial court's grant of post-verdict motion for judgment of acquittal).

Additionally, the nature of the right to justice "without delay" counsels that, should justice require dismissal rather than continued prosecution, a court should dismiss on the defendant's motion rather than delay the ruling until trial.

> "(b) Challenges to identification procedures used by the prosecution.
>
> "(c) Challenges to voluntariness of admissions or confession.
>
> "(d) Challenges to the accusatory instrument.
>
> "* * * * *
>
> "(4) At the conclusion of the hearing and prior to trial the court shall prepare and file an order setting forth all rulings of the court on issues raised under subsection (2) of this section."

Indeed, many of the reasons why violations of Article I, section 10, *require* dismissal support resolving the issue at the omnibus hearing. For example, protecting a defendant from the prejudice of pretrial incarceration and the anxiety of a pending charge may require dismissal as soon as the violation occurs, not requiring the defendant to wait until trial—which might not happen until months or even years later. Requiring a defendant to wait for trial would require them to tolerate, even exacerbate, the violation already suffered. *Cf. State v. Mills*, 354 Or 350, 373, 312 P3d 515 (2013) (holding that challenges to venue should be decided before trial, because venue serves "to protect a defendant from the hardship and potential unfairness of being required to stand trial in a distant place," so "it makes sense that the matter of venue should be resolved as soon as possible before the trial itself"). To the extent such a policy might aid an appellate court reviewing the trial court's ruling, this court should hold that price too high to justify its cost to the defendant, the prosecution, and the courts.

Second, the conditional plea statute reflects a legislative policy that a defendant should be able to promptly appeal adverse pretrial rulings that the defendant views as dispositive. ORS 135.335(3) provides that a defendant may execute a conditional guilty plea that reserves the "right" to appellate review of

the trial court's ruling on a "pretrial motion."[4] Requiring speedy trial motions to be decided at trial would frustrate the legislature's goals of "sav[ing] both time and resources" via conditional pleas and would instead consume the time and expense of a trial, including the burdens that trials inflict on jurors, witnesses, and crime victims. *State v. Dinsmore*, 342 Or 1, 7, 147 P3d 1146 (2006). If a defendant believes that they can no longer have a fair trial, it hardly makes sense to make them go to trial just to prove it.

Requiring a trial would also deny the defendant the benefits of the conditional plea process, which include not just efficiency but also concessions from the state—here, for example, the state agreed to dismiss the reckless driving charge in exchange for defendant's plea. And the state's willingness to engage in plea bargaining further reflects the state's interest in securing the plea and avoiding a trial. Finally, holding that a defendant who enters a conditional plea with the consent of the state and court can lose on appeal due to that very plea would unfairly penalize them for utilizing the process that the state itself provided. *Cf. Mills*, 354 Or at 373 (noting that it would be "unfair to [the]

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[4] ORS 135.335(3) provides:

> "With the consent of the court and the state, a defendant may enter a conditional plea of guilty or no contest reserving, in writing, the right, on appeal from the judgment, to a review of an adverse determination of any specified pretrial motion. A defendant who finally prevails on appeal may withdraw the plea."

defendant to hold that he forfeited the opportunity to challenge venue" when he did so in a manner "that the law in effect at the time of trial permitted").

Third, requiring defendants to make a pretrial record about how the state's witnesses would testify at trial would frustrate the longstanding legislative policy against depositions in criminal cases. *See, e.g.*, *State v. Walton*, 53 Or 557, 565, 99 P 431 (1909) (noting that the legislature intended to make depositions unavailable in criminal cases); *cf.* Or Const, Art I, § 42(1)(c) (giving crime victim the right to refuse a deposition by the defendant).

Given the practical realities of the criminal justice system, many defendants can assert speedy trial claims. *United States v. MacDonald*, 435 US 850, 862-63, 98 S Ct 1547, 56 L Ed 2d 18 (1978). Thus, under the Court of Appeals opinion in this case, any defendant could file a speedy trial motion and subpoena all the state's witnesses to a hearing on the motion for the ostensible purpose of showing prejudice—but for the real purpose of securing their testimony before trial, a deposition in all but name. *Cf. State v. Agee*, 358 Or 325, 334, 364 P3d 971 (2015), *adh'd to as modified on recons,* 358 Or 749, 370 P3d 476 (2016) (holding that trial court "effectively permitted an unlawful pretrial deposition of a defense witness" when it allowed the prosecutor to question the witness "extensively about the events surrounding the murder" outside the jury's presence).

Finally, authorizing trial courts to decide speedy trial motions during trial would frustrate the state's right to appeal an adverse ruling on the motion. *See* ORS 138.045(1)(a) (providing that the state may appeal from "[a]n order made *prior to trial* dismissing or setting aside one or more counts in the accusatory instrument" (emphasis added)). This court has expressed a policy of enabling, not disabling, the state from exercising its statutory right to appeal. *See, e.g.*, *Johnson*, 342 Or at 617 (declining to treat a state's appeal as unreasonable delay because doing so "would effectively prevent the state from reasonably pursuing a procedure that the legislature specifically has authorized"). For example, this court has held that it is inappropriate to treat a motion for judgment of acquittal as a demurrer—and thereby allow a mid-trial demurrer—due, in part, to the fact that doing so would deny the state the ability to appeal an adverse ruling on the motion. *State v. McKenzie*, 307 Or 554, 558-59, 771 P2d 264 (1989). Only by requiring a pretrial ruling can the courts preserve the state's right to appeal. *Id.*

Similarly, the only way the state can appeal a trial court's ruling *granting* a motion to dismiss under Article I, section 10, is if the court decides the motion before trial. *See State v. Caruso*, 289 Or 315, 321, 613 P2d 752 (1980) ("[a] purpose of [ORS 135.037] is to preserve the state's right of appeal"). If a court deferred the motion until trial, the state would lose its ability to appeal. Indeed, a defendant who had a weak speedy trial claim but a sympathetic judge might deliberately seek a ruling during trial in hopes of obtaining a dismissal with

prejudice that the state could not appeal. Only a policy favoring pretrial resolution of speedy trial motions can avoid that kind of gamesmanship.

Of course, sometimes it may be helpful or even essential to know what the state's trial evidence will be to determine whether the defense has been impaired by pretrial delay. But the above concerns all show that courts should exercise caution before deferring speedy trial motions until trial—or letting the defendant choose whether to subpoena the state's witnesses to a pretrial hearing or seek a dispositive ruling during trial.

Instead, the court should consider the state's preference. Not only does the state have the most to lose by the timing of when the motion is decided, the state also has the greatest knowledge of its own evidence. The state is most likely to know whether its witnesses will claim loss of memory due to the passage of time or whether they will volunteer exculpatory information that has not been disclosed in discovery. *See Sorenson v. Kribs*, 82 Or 130, 138, 161 P 405 (1916) ("the rule is elementary that, when a fact is peculiarly within the knowledge of a party, he must, if necessary, furnish the evidence thereof"). The state alone will know whether it will be burdensome to call its witnesses before trial or whether it can make an offer of proof or stipulation. And the state alone can make the decision whether it wishes to have a definitive pretrial ruling that it may appeal or whether it prefers to incur the risk of an unappealable dismissal later. Moreover, if the state agrees that the record at a pretrial hearing suffices

to decide the motion, then the state cannot argue on appeal that its trial evidence might have ameliorated the prejudice from the loss of evidence. *See Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001) (explaining that an appellate court may not affirm on a basis not argued in the trial court if the record could have developed differently had the argument been made below).

Here, the state expressly agreed that the record at the pretrial hearing was sufficient for the trial court to decide the motion to dismiss. And the state never contended that its witness, Officer Nafie, might concede any deficiencies in his report or give exculpatory testimony. To the contrary, the state's argument against prejudice was *not* that a favorable video would be unhelpful to the defense but that defendant failed to show the video would be favorable in the first place. If the state believed that its trial evidence could ameliorate the prejudice from the destruction of a favorable video, the state should have said so. *Cf. Ivory*, 278 Or at 508 n 6 (noting that the trial court gave the state a week to locate missing defense witnesses before it granted the defendant's motion to dismiss). Without such an assertion by the state, and without the state asking the court to defer ruling on the motion, defendant and the trial court were entitled to presume that the state had no evidence that could replace the missing video. The only dispute regarding prejudice was whether the video would be favorable at all.

IV. The Court of Appeals erred in considering defendant's attempt to plead guilty, because that choice was not addressed in the trial court—nor should it have been, because legislative policy counsels against considering such an attempt.

The Court of Appeals identified a second fact that it found "relevant" to whether the destruction of the video prejudiced defendant: defendant "was willing to enter a guilty plea five days after his arrest without having viewed the booking video." *Ralston*, 310 Or App at 496. In the court's view, that fact permitted an inference "that defendant didn't view the video as sufficiently exculpatory." *Id.*

That analysis is problematic for several reasons. First, defendant's attempt to plead guilty had never been addressed before the Court of Appeals issued its opinion—neither the trial court nor the parties discussed it as having any bearing on prejudice. Again, an appellate court may consider alternative reasons to affirm the trial court only if the record could not have developed differently. *Outdoor Media Dimensions Inc.*, 331 Or at 659-60. Here, at minimum, whether to draw the inference that "defendant didn't view the video as sufficiently exculpatory" was for the trial court, as factfinder, to decide. And had the trial court considered that question, defendant could have offered evidence to rebut the inference—such as his own testimony or that of his attorney about whether and why he had sought to plead guilty.

Second, the Court of Appeals' reliance on defendant's attempt to plead guilty contravenes the legislative mandate that an attempt to plead guilty must never be used against the defendant:

> "(1) A plea of guilty or no contest which is not accepted or has been withdrawn shall not be received against the defendant in any criminal proceeding.
>
> "(2) No statement or admission made by a defendant or a defendant's attorney during any proceeding relating to a plea of guilty or no contest which is not accepted or has been withdrawn shall be received against the defendant in any criminal proceeding."

OEC 410; ORS 135.445.[5]

Both statutes apply to the appellate courts. The evidence code "applies to all courts in this state" unless specifically exempted, and appeals are not among the exemptions. OEC 101(1); *see, e.g.*, *Eklof v. Steward*, 360 Or 717, 723 n 4, 385 P3d 1074 (2016) (applying OEC 201 to take judicial notice of facts on appeal). And a "criminal proceeding" includes a criminal appeal. *See* ORS 131.005(7) ("criminal proceeding" means "any proceeding which constitutes a part of a criminal action or occurs in court in connection with a prospective, pending or completed criminal action"); *cf. State ex rel Roby v. Mason*, 284 Or 427, 429, 587 P2d 94 (1978) ("criminal proceeding" includes extradition appeal). Even if OEC 410 or ORS 135.445 did not apply to the appellate court,

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[5] ORS 135.445 is identical to OEC 410 except that it says "the attorney of the defendant" instead of "a defendant's attorney" in subsection (2).

they applied to the trial court, and an appellate court could not affirm based on evidence that the trial court was barred from considering.

One purpose behind the exclusion of attempts to plead guilty is that "neither [the] defendant nor the state should be penalized for engaging in practices which are consistent with the objectives of the criminal justice system." Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Procedure Code, Final Draft and Report § 267, 164 (Nov 1972). Indeed, if a defendant seeks to enter an unconditional guilty plea to all charges, the state would ordinarily welcome such a decision. Here, defendant's attempt to plead guilty confounded the state only because the state did not actually want to try and convict him of misdemeanor DUII, despite its decision to charge him with that offense.

Before the legislature enacted OEC 410 and ORS 135.445, this court had already required the exclusion of withdrawn guilty pleas as a matter of "fairness and justice to the accused." *State v. Thomson*, 203 Or 1, 13-14, 278 P2d 142 (1954). In reaching that conclusion, this court surveyed appellate opinions from other jurisdictions and adopted the rationales of judges who had approved the exclusion of withdrawn pleas. *Id.* at 14. One of those rationales is that an attempt to plead guilty does not support an inference about the defendant's perception of their guilt or their chances at trial:

> "A defendant may wish to plead guilty for any one of several reasons having nothing to do with his guilt. He may wish to spare his family the unfavorable publicity attendant upon a trial. He may, for private reasons, prefer to plead guilty rather than have his past paraded before the world. He may fear that a trial might result in a relative or friend being charged as an accessory or in the defendant's being charged with other crimes. These and other cogent reasons may impel a defendant who does not believe he is guilty to plead guilty and waive a public trial."

Id. at 12 (quoting *State v. Weekly*, 41 Wash 2d 727, 731, 252 P2d 246, 249 (1952) (Donworth, J., dissenting)).

Here, the record shows why defendant may have sought to plead guilty regardless of the strength of the evidence: a plea to *misdemeanor* DUII would have precluded the state from charging him with a *felony*. *See State v. Stover*, 271 Or 132, 140, 531 P2d 258 (1975) (noting that jeopardy attaches when "the defendant is convicted on a plea of guilty"). And the difference between misdemeanor and felony DUII is significant—for example, felony DUII requires a mandatory minimum sentence of 90 days in jail, whereas misdemeanor DUII requires only two days in jail or 80 hours of community service. ORS 813.011(3); ORS 813.020(2); ORS 137.129(4). Indeed, at trial, the state expressly recognized that the reason defendant attempted to plead guilty was to avoid a potential felony conviction and never contended that the attempt reflected his assessment of the evidence.

Finally, the record contains another deficiency—it does not establish that defendant intended to plead guilty in the first place. The record contains no

evidence regarding what, if any, discussions occurred between defendant and his attorney before the state dismissed the charges. Given the timing of events, it could be that defendant's attorney, acting to secure a potential benefit for her client, scheduled the plea hearing as soon as possible *without* waiting for defendant to decide whether to plead guilty. It may even be that defendant's attorney did not have the chance to discuss the matter with him at all. In other words, the record contains no evidence that defendant, personally, decided to plead guilty to misdemeanor DUII. To find that he decided to plead guilty, and that in doing so he considered and rejected the possibility that a jail booking video might exist and be favorable evidence, is entirely speculative. It is certainly not a proper consideration for the first time on appeal.

V. Defendant established a reasonable possibility that the delay resulted in the loss of a booking video that would have been probative and exculpatory evidence regardless of what evidence the state presented.

Again, the question is whether defendant showed that "the delay caused a reasonable possibility of prejudice to the defense." *Harberts*, 331 Or at 94. Except for its discussion of defendant's conditional plea and earlier attempt to plead guilty to misdemeanor DUII, which are flawed for the reasons discussed above, defendant largely agrees with the reasoning of the Court of Appeals regarding prejudice. Specifically, the court held that "defendant showed that there was at least some probability that the missing evidence would be

favorable" and "that the booking video was more likely to show defendant walking with good balance and coordination." *Ralston*, 310 Or App at 495.

That video would have been relevant, probative evidence of defendant's innocence that would have had significant value to the defense. As this court has recognized, evidence of a DUII defendant's balance and coordination is always relevant to the defendant's guilt or innocence. *See, e.g.*, *State v. Mazzola*, 356 Or 804, 820, 345 P3d 424 (2015) (holding that FST evidence, which reflects a defendant's "coordination, balance, and motor skills," is "probative evidence" of impairment); *State v. Clark*, 286 Or 33, 39-40, 593 P2d 123 (1979) (holding that the absence of symptoms like dizziness or lack of coordination is always relevant to dispute a DUII charge).

And the video would have had that value independently of the state's evidence. As the Court of Appeals recognized, no matter what the state's witnesses testified, "[t]he jury could watch the video and '*draw its own conclusions*.'" *Ralston*, 310 Or App at 486 (quoting *Zinsli*, 156 Or App at 254). A video that showed defendant "walking with good balance and coordination," *id.* at 495, would have been more persuasive than even a witness testifying to the same facts. "Video recordings * * * can be uniquely powerful pieces of evidence * * *." *Id.* at 486-87. The Texas Supreme Court has described the "tremendous" persuasive power of video evidence:

> "If, as it is often said, a picture is worth a thousand words, then a video is worth exponentially more. Images have tremendous power to persuade, both in showing the truth and distorting it. A video can be the single most compelling piece of evidence in a case, captivating the jury's attention like no other evidence could. Video can often convey what an oral description cannot—demeanor, personality, expressions, and motion, to name a few."

Diamond Offshore Services v. Williams, 542 SW3d 539, 542 (Tex 2018) (footnotes omitted).

Thus, even in the unlikely event that Nafie testified that defendant had good balance and coordination, that testimony would not be an adequate substitute for a video showing defendant in motion. The state would still have Nafie's opinion that defendant was intoxicated. And the state could offer defendant's refusal to perform FSTs. *See* ORS 813.136 (allowing admission of FST refusal as substantive evidence). Whereas the video would empower jurors to draw their own conclusions. *Cf. State v. Kinney*, 249 Or App 651, 656-57, 278 P3d 100, *rev den,* 352 Or 600 (2012) (holding that a defendant's proposed stipulation that a video depicted child pornography did not adequately substitute for the video itself, because the video's "graphic nature" provided stronger support for inferences that the defendant knew the nature of the video and possessed it for a sexual purpose).

As this court has explained, prejudice to the defense is "the most serious" form of prejudice under Article I, section 10, "because the inability of a defendant adequately to prepare a case skews the fairness of the entire system."

Tiner, 340 Or at 555. Moreover, Article I, section 10, provides not just an individual right to the defendant but a systemic command that serves "the public's interest in the prompt administration of justice." *Harberts*, 331 Or at 83-84. Here, the loss of the video likely deprived defendant of exculpatory evidence—and in the unlikely event the video was inculpatory, it deprived the state of relevant evidence as well. Either way, the destruction of the video impaired not just the fairness but the accuracy of a trial, which prejudiced the administration of justice itself.

This court has also recognized that such prejudice has even greater weight when the state's conduct deprives the defendant of the ability to preserve the evidence. In *Ivory*, 278 Or at 508-09, this court held that a period of post-indictment but pre-arrest delay likely left the defendant "unaware of the outstanding charge" and with "little inducement to preserve memories and evidence," which increased "the risk of an unfair trial." Here, the state's decision to dismiss the misdemeanor DUII charge and its delay in filing the felony charge left defendant without counsel during the very period in which the video was likely destroyed. The video itself was the creation of the state, which could easily have taken steps to preserve it given that the state intended to continue the prosecution. And the state is the entity that destroyed the video as well. All those factors increase the significance of the prejudice that defendant suffered.

Again, the "reasonable possibility of prejudice" standard is not a "harsh" one that requires "proof with certainty." *Ivory*, 278 Or at 508. Rather, the standard can be met "by identification of potentially favorable witnesses who could not be found due to a delayed trial." *Id.*; *cf. Harberts*, 331 Or at 86 (quoting *Ivory*, 278 Or at 508) ("If a witness dies or disappears during the delay, the prejudice also is 'obvious.'"). Defendant met that standard.

Of course, the defendant needs to give sound reasons that the evidence would in fact have been relevant and favorable. This court has consistently rejected claims of prejudice that are speculative, tangential, or belied by the record. *See, e.g.*, *McDonnell*, 343 Or at 574-75 (no prejudice when defense had transcripts of witnesses from prior proceedings, failed to show that deceased witnesses "would have supplied any useful information," and failed to show that loss of memories had adverse impact); *Johnson*, 342 Or at 610-14 (no prejudice when some witnesses testified to facts that other witnesses had forgotten and the defense made an unpreserved, "speculative" claim about how a deceased witness would have testified); *Tiner*, 340 Or at 557-58 (no prejudice when defense "never determined" how a missing witness would testify and other missing witnesses' testimony was duplicative of witness who did testify); *State v. Emery*, 318 Or 460, 473-74, 869 P2d 859 (1994) (no prejudice when defense "offered no evidence" of how lost witnesses would have been favorable and "d[id] not explain specifically" how faded memories impaired the defense).

But this is not such a case. Defense counsel offered concrete, credible reasons for her belief that (1) video of defendant shortly after defendant's arrest existed, (2) the video would likely show defendant walking with good balance and coordination, and (3) such a video would be uniquely persuasive and relevant evidence. In other words, defendant made a nonspeculative showing that the state's delay cost him exculpatory evidence that was directly relevant to guilt or innocence. Defendant established a reasonable possibility of prejudice.

VI. The length of delay, reasons for delay, and prejudice all establish a violation of Article I, section 10, which warrants dismissal.

In this case, the delay amounted to 14 months and two weeks, which exceeds what Oregon courts have deemed reasonable for a felony prosecution. *See Emery*, 318 Or at 471 n 17 (assessing reasonableness of delay based on the 1990 Oregon Standards of Timely Disposition, which require that 98 percent of criminal cases conclude within 180 days of arraignment and that all criminal cases conclude within one year "except for exceptional cases").[6] Because the delay is greater than average, the inquiry "turns on" prejudice. *Id.* at 473. As discussed above, defendant has shown sufficient prejudice to warrant dismissal.

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[6] This court has also consulted statistics showing the mean time between charging and trial. *Emery*, 318 Or at 472 & n 19. In 2017, nearly 50 percent of felony cases in Multnomah County were resolved within 120 days and over 92 percent were resolved within one year. Oregon Judicial Department, *Statistical Report Relating to the Circuit Courts of the State of Oregon*, Table 7 (2017), https://www.courts.oregon.gov/about/Pages/reports-measures.aspx (accessed Nov 10, 2021).

But the length and reasons for delay also support dismissal. The most critical period—the six weeks between the state dismissing the information and filing the indictment—went almost entirely unexplained. Between June 9 and July 8, 2016, the state had all the evidence it needed to resume the prosecution, but it failed to do so and never said why. The trial court's statement that "a month or so delay is not an unusual delay" is unsupported by the record and cannot relieve the state of its burden to give some explanation for its delay. "[E]ven neutral reasons for delay must be weighed against the government, because 'the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.'" *Harberts*, 331 Or at 84 (quoting *Barker v. Wingo*, 407 US 514, 531, 92 S Ct 2182, 33 L Ed 2d 101 (1972)).

As the parties and lower courts recognized, that delay likely caused the destruction of the booking video that is the heart of the speedy trial issue. And things did not have to turn out that way. The state made multiple decisions (or omissions) that resulted in the destruction of relevant, probative evidence.

- The state filed a misdemeanor charge that it did not intend to pursue (gaining a substantial benefit—defendant's pretrial incarceration).
- The state did not ask that the court continue the appointment of counsel to protect defendant's interests while it sought an indictment.
- The state did not use the option of charging defendant with felony DUII by information, a process permitted by Article VII (Amended), section 5, of the Oregon Constitution, which likely could have occurred sooner than obtaining an indictment—possibly even at the outset of the case.

- The state did not review its file for a month and gave no explanation for that period.
- The state did not secure the booking video—evidence that would likely either be exculpatory, in which case the state had a legal and ethical duty to disclose it to defendant, or inculpatory, in which case the state would have benefited from having it.

Those facts are all relevant to whether the state fulfilled its duty to administer justice "without delay"—a duty the state owes not just to defendant but to the public.

Although the reasons for the other periods of delay are unlikely to be dispositive, defendant disagrees with the Court of Appeals' conclusion that the five months between issuance of the warrant and defendant's arrest was reasonable. The state knew that defendant lived in Washington, but it obtained a warrant that was valid only in Oregon and did not seek authority for defendant's arrest in Washington. *See State ex rel Boutwell v. Coughlin*, 90 Wash 2d 835, 839, 586 P2d 1145, 1147 (1978) ("the authority to arrest an alleged fugitive and deliver him to a demanding state resides with the Governor" and "is discretionary, depending solely upon that executive's fidelity to the compact entered with the other states in the formation of our union of states"). The record also does not reflect whether the state received any response from the Washington police that it asked to serve the warrant, or even whether the state had an agreement with those agencies or reasonable expectation that they would comply. And the notice of the warrant that the state mailed to defendant gave

him no instructions and little advice. It did not say whether he should (or could) turn himself in, whether he had (or could obtain) new court dates, or whether he could have his attorney reappointed. For those five months, the state took no action and gave defendant no reason to act, either.

Finally, the five months between defendant's felony arraignment and the hearing on his motion to dismiss was also largely unexplained. Very little occurred during that time, and it does not appear that the prosecution took any steps to expedite the case. Five months between arraignment and trial might be reasonable in an ordinary case, but the fact that this case had already languished for nine months—and that important evidence had already been lost—make that period far less reasonable. *Cf. Harberts*, 331 Or at 92 (explaining that when a case has already been subject to unreasonable delays, the state should give the case "the highest priority").

If the jail booking video had not been destroyed, defendant would not have a speedy trial claim. If this case did not take over 14 months from arrest to trial, defendant would not have a strong speedy trial claim either. But the state delayed this case unreasonably, and that delay likely resulted in the loss of probative, exculpatory evidence. Because the state failed to fulfill its duty to administer justice "without delay," the charges must be dismissed.

CONCLUSION

Defendant respectfully requests that this court reverse the decision of the Court of Appeals and the judgment of the trial court.

Respectfully submitted,

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Signed
By Kyle Krohn at 11:38 am, Nov 23, 2021

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 12, 681 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on November 22, 2021.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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