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 No. 16CR33180 CA A165924 SC S068727

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Multnomah County
Honorable RICHARD BALDWIN, Judge

Opinion Filed: April 07, 2021
Author of Opinion: JAMES, J.
Before: Powers, Presiding Judge, and Egan, Chief Judge, and James, Judge

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Continued…

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INTRODUCTION

Defendant was arrested, booked, and charged with misdemeanor driving under the influence of intoxicants (DUII). The prosecutor dismissed the misdemeanor charges within a few days to investigate whether defendant had predicate convictions that would have elevated the charge to a felony, and six weeks later a grand jury indicted defendant for felony DUII. By that time, video footage from the jail on the night defendant was arrested and booked, which had to be kept for 30 days, likely had been overwritten automatically. The central dispute in this case is whether the loss of that video, coupled with a relatively short period of unexplained delay in bringing defendant to trial, violated his right to a speedy trial under Article I, section 10, of the Oregon Constitution.

Defendant's right to a speedy trial was not violated here. Even if one counts the full fourteen months that elapsed from arrest to the date the trial court denied his motion to dismiss, at most about three and a half of those months was unexplained delay, and it caused defendant no serious prejudice. The lack of speedy trial violation is particularly true here, where the booking video likely was overwritten at a time when no charges were pending. Moreover, especially in the pretrial posture in which his motion to dismiss was

filed, it is too speculative to conclude that the booking video would have been helpful to defendant if the case had proceeded to trial.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW[1]

First question presented: Is a 14-month pretrial delay in a DUII prosecution, of which at most three and a half months was unexplained, unconstitutional when the only prejudice that the defendant identifies is the unavailability of video footage of his booking that was automatically overwritten no less than 30 days after his arrest?

First proposed rule of law: No. Without a case-specific showing of how the footage would have been helpful to the defense, any minor prejudice caused by the routine overwriting of the footage does not establish a constitutional violation in the context of a 14-month delay.

Second question presented: Does a criminal defendant have a right to a speedy trial under Article I, section 10, of the Oregon Constitution during periods when all charges against a defendant have been dismissed but new charges still could be filed?

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[1] Defendant identified seven questions presented in his petition for review to this court, and this court limited review to six of those seven questions presented (with minor modifications to one of the six). The state has reframed the issues into two questions presented, but believes that those two questions—and their answers—address all of the issues this court needs to decide this case.

Second proposed rule of law: No. Like the Sixth Amendment, Article I, section 10, does not apply to a period after the state has dismissed all charges against the defendant, even if the state intends to pursue new charges. Statutes of limitation and the Due Process Clause protect against undue delay in filing new charges.

BACKGROUND

The relevant facts are largely procedural and undisputed.

Shortly after midnight on June 3, 2016, defendant was arrested for DUII. (ER 3 (defendant's motion to dismiss representing what police report said)).[2] Two hours later, he was booked into jail. (ER 21). The booking area has cameras that record footage of individuals going through the booking process; that footage is kept for at least 30 days but then is automatically overwritten by the recording system starting with the oldest videos. (ER 22).

The same day as defendant's arrest, the state charged him by district attorney's information with misdemeanor DUII and reckless driving. (TCF 15). But the prosecutor soon determined that defendant might have two previous DUII convictions, which could make the crime a felony. (ER 18); *see also* ORS 813.011(1) (DUII is a felony if in the last ten years the defendant had two previous convictions under Oregon's DUII law or its statutory counterpart in

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[2] Unless otherwise indicated, all ER citations are to the Excerpt of Record filed with defendant's opening brief in the Court of Appeals.

another jurisdiction). On June 8, 2016, the state moved to dismiss the misdemeanor charges after being notified that the defendant had set "a quick plea" to the misdemeanor charges before the "felony review" could be completed; the court granted the motion to dismiss and ordered defendant's release. (ER 4, ER 18, ER 20; TCF 19–20).

Six weeks later, on July 19, 2016, a grand jury indicted defendant for felony DUII and reckless driving based on the June 3rd incident and two previous Washington State convictions for DUII from 2012 and 2014. (ER 1). A judge issued an arrest warrant the same day. (ER 25). The sheriff's office entered the warrant into various databases the following day, and on July 29th it asked law enforcement in Washington State—where defendant lived—to serve the warrant. (ER 24, 26). The sheriff also mailed notice of the arrest warrant to defendant's home address on August 15th. (ER 24, 27).

On January 4, 2017, defendant was arrested in Washington both on Washington charges and on the DUII indictment at issue here. (ER 24, 28–29). The following day he waived extradition to Oregon. (ER 24, 30). Defendant was transported to Oregon on March 16th and arraigned the following day. (ER 24, 31, 42).

On May 1, 2017, defendant's lawyer learned that the video footage of defendant's original booking on June 3, 2016, had been overwritten and no longer existed. (ER 8). Defendant moved to dismiss the charges on speedy-

trial grounds, arguing that he was prejudiced by not being able to use the video at trial because it may have shown him exhibiting ordinary balance and coordination two hours after he drove. (ER 3–7).

The trial court held a hearing on defendant's motion. (Tr 2–12). The only evidence defendant offered in support of his motion was a declaration from his counsel in which she described the evidence from the arresting officer's police report. (ER 8). The declaration also described counsel's expectation of what a booking video of defendant would have included and that in her experience those videos can "demonstrate a [d]efendant's ability or inability to walk to and from the booking area, to follow directions of deputies, and to stand in balance." (ER 9). She also stated that "it is not uncommon for a jail booking video to show a [d]efendant standing on one foot and removing a shoe while maintaining balance." (ER 9).

Defendant also introduced an affidavit from a Multnomah County Sherriff's Office employee who described what video recording equipment would have been in use on the day of defendant's arrest. (ER 22). The affidavit explained that, on that date, "[five] or more cameras existed in the * * * booking area, and recorded video footage of inmates going through the booking process." (ER 22). The affidavit also described how the videos "are recorded digitally and are available for thirty days or more from when the video is created," but that system then "automatically overwrites video starting from

the oldest date." (ER 22). Finally, the employee verified that the booking videos from the date of defendant's arrest had been overwritten as of May 1, 2017, when they were first requested by defense counsel. (ER 22).[3]

Defendant did not introduce a copy of the police report or present testimony from the arresting officer to make a record of what the officer would say and how the defense cross-examination would have unfolded. Nor did he introduce an example of what the booking videos would look like.

The trial court denied the motion. (ER 32). It noted that the periods of time that elapsed in this case are "not unusual" and that the only issue was the loss of the video in light of the "not uncommon passage of time." (Tr 5). In particular, the court concluded that "a month or so delay" between arrest and indictment was "not an unusual delay." (Tr 10). And it ruled that defendant had not "made an adequate factual showing" that the video "would have been helpful to the [d]efense." (Tr 11–12).

Defendant entered a conditional guilty plea to felony DUII in exchange for dismissal of the reckless driving charge. (ER 34). He reserved his right to appeal the denial of his motion to dismiss on speedy-trial grounds. (ER 34).

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[3] In addition to the declaration and affidavit submitted by defendant, the state submitted declarations of the DDA who handled defendant's case when it was originally charged as a misdemeanor and of the DDA who presented the case to the grand jury the following month. (ER 18–20).

The Court of Appeals affirmed. *State v. Ralston*, 310 Or App 470, 486 P3d 822, *rev allowed*, 368 Or 597 (2021). The court declined defendant's invitation for it to resolve an open issue over how much time to count in the speedy-trial analysis under Article I, section 10—specifically, whether or not to count the period between dismissing and refiling charges. *Id.* at 477. Instead, it assumed without deciding that it should count the full period of time from defendant's arrest to the trial court's denial of the motion to dismiss. *Id.* at 477.

Of those 14 months, the court concluded that only about three and a half months involved unexplained delay: roughly a month between when the district attorney's office obtained the records of defendant's previous DUII convictions and when a deputy district attorney reviewed those records, and the two and a half months between when defendant waived extradition to Oregon and when he was transported. *Id.* at 479–82. The court concluded that the rest of the delay was "explained, reasonable, and justified." *Id.* at 479. For example, the state took sufficient steps to serve the arrest warrant promptly, and after defendant's arraignment the court scheduled his appearances promptly. *Id.* at 480–82.

The court also concluded that defendant did not sufficiently establish that the delay prejudiced him by causing him to be unable to obtain the booking video. *Id.* at 495. Although the court accepted that the video might have shown that he was walking and maintaining balance without difficulty, it concluded

that in the pretrial posture in which defendant's motion to dismiss was addressed, it was speculative that that evidence would have been helpful to the defendant's theory of the case had the case proceeded to trial. *Id.* at 495–96. In particular, defendant had not offered any evidence about what the arresting officer would have testified at trial about his balance. *Id.* at 496. The court noted that sometimes a speedy-trial motion is better addressed after the evidence has been presented at trial, when the court can better assess the importance of any missing evidence in the context of the case as a whole. *Id.*

The court also noted as "relevant," although not "dispositive," that defendant "was willing" to plead guilty to misdemeanor DUII before the original charges were dismissed and "without having viewed the booking video." *Id.* The court stated that it "cannot ignore" that fact, which it concluded weighed "in some measure" against defendant's claim of the video's importance. *Id.*

Considering the totality of the circumstances, the court concluded that "we are dealing with a relatively small period of unexplained delay" and that it was "uncertain" whether the video would have helped defendant. *Id.* at 497. On balance, the court concluded that defendant had not established "a reasonable possibility of prejudice" from the unintentional delay. *Id.*

SUMMARY OF ARGUMENT

The video of defendant's booking was automatically overwritten after 30 days, most likely during the six-week period between dismissal of the misdemeanor charges and indictment for felony DUII. The loss of that video does not require dismissal of the charges on Article I, section 10, speedy-trial grounds.

When addressing speedy-trial claims, courts examine the length of the delay, the reasons for the delay, and the extent to which the delay prejudiced the defendant. Here, of the 14 months from his arrest to when the trial court denied his motion to dismiss, at most three and a half months were not adequately explained, reasonable, and justified. And at least six weeks of the 14-month total involved time when no charges were pending between the dismissal of the information and the grand jury's indictment. Because the Article I, section 10, speedy trial right does not cover the pre-indictment period, any loss of evidence during that period—specifically the overwritten booking video—is not included in the prejudice analysis.

Moreover, defendant offered only speculation as to what the booking video might have shown and how it might have helped his defense had the case gone to trial. The video, taken more than two hours after he was driving, *might* have shown him walking or balancing on one leg. But other than defense counsel's declaration that she had successfully used booking videos in other

DUII cases in the past, defendant offered no evidence as to how the missing video in this case would have been helpful to his defense. And even if the video showed that he was not stumbling, nothing in the record suggests that that would undermine the state's case or meaningfully advance defendant's case. The loss of the video caused at most minor prejudice to defendant, and that prejudice is not serious enough to merit dismissal of the charges for a relatively short period of delay. Consequently, the trial court correctly denied defendant's motion to dismiss.

ARGUMENT

Article I, section 10, of the Oregon Constitution provides, in part, that "justice shall be administered * * * without delay." Among other things, that provision gives criminal defendants a right to a speedy trial. *State v. McDonnell*, 343 Or 557, 571, 176 P3d 1236 (2007). Determining whether a criminal prosecution satisfies Article I, section 10, is "a fact-specific inquiry that requires the court to examine the circumstances of each particular case." *State v. Harberts*, 331 Or 72, 88, 11 P3d 641 (2000). "This court evaluates three factors in determining whether the state has deprived defendant of his right to justice without delay: (1) the length of the delay; (2) the reasons for the delay; and (3) prejudice to defendant from the delay." *McDonnell*, 343 Or at 572.

The question here is whether the 14 months that elapsed between defendant's arrest and trial—only three and a half months of which was unexplained—constituted a constitutional speedy trial violation where the only evidence of prejudice was the loss of the booking video. It did not. As explained below, the overall length of delay was not excessive, and the unexplained delay was reasonable. That relatively short period of unexplained delay coupled with only a speculative showing of prejudice was not enough to establish a constitutional violation.

A. The unexplained period of delay in bringing defendant to trial was relatively short.

Here, as the Court of Appeals found, any delay was largely "explained, reasonable, and justified," with only a "relatively small period" that was unexplained. *Ralston*, 310 Or App at 479, 497. Even the 14 month-period from arrest to the decision on the motion to dismiss is short compared to most speedy-trial cases. *See, e.g.*, *McDonnell*, 343 Or at 575 (14-year delay did not violate speedy-trial rights); *State v. Tiner*, 340 Or 551, 558, 135 P3d 305 (2006), *cert den*, 549 US 1169 (2007) (four-year delay did not violate speedy-trial rights); *Harberts*, 331 Or at 74 (five-year delay violated speedy-trial rights); *State v. Emery*, 318 Or 460, 474, 869 P2d 859 (1994) (two-year delay, although unreasonable, did not violate constitutional speedy-trial rights); *State v. Mende*, 304 Or 18, 25, 741 P2d 496 (1987) (16-month delay did not violate

speedy-trial rights); *State v. Dykast*, 300 Or 368, 377, 712 P2d 79 (1985) (18-month delay did not violate speedy-trial rights); *Haynes v. Burks*, 290 Or 75, 90, 619 P2d 632 (1980) (two-and-a-half-year delay "does not establish that a fair trial is now no longer possible so as to entitle plaintiff to dismissal of the prosecution"). But even 14 months may be overstating the delay, because the six weeks between the dismissal of the information and the issuance of the indictment should not be considered.

1. Preindictment delay is not considered in the Article I, section 10, speedy trial analysis.[4]

Article I, section 10, is not triggered during a period when no charges are pending. This court generally has interpreted Article I, section 10, to be consistent with the Sixth Amendment's Speedy Trial Clause. *Harberts*, 331 Or at 84. *See also State v. Vasquez*, 336 Or 598, 604, 88 P3d 271 (2004) (discussing and applying constitutional interpretation methodology set out in

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[4] This section primarily addresses the first question presented in this court's order allowing review: whether a court should consider "the time between the two charging instruments in assessing whether the total delay violates Article I, section 10, of the Oregon Constitution"? (Order Allowing Review, Sept. 30, 2021, at 1). The Court of Appeals declined to reach the issue because the parties in the trial court "treated the filing of the misdemeanor information as the date the speedy trial clock began," and "[n]o party challenged that holding at trial, nor on appeal." *Ralston*, 310 Or App at 477. But because this court expressly allowed review of the issue, the state addresses it in the event this court chooses to reach it. If the court does reach it, it is dispositive of the appeal, because, as explained below, defendant's only allegation of prejudice stems from this period of time.

Priest v. Pearce, 314 Or 411, 840 P2d 65 (1992)). And the Speedy Trial Clause does not cover time during which charges were dismissed. *United States v. MacDonald*, 456 US 1, 7, 102 S Ct 1497, 71 L Ed 2d 696 (1982). "Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause." *Id.*

The logic of the Sixth Amendment rule applies equally to Article I, section 10. Like the Sixth Amendment speedy trial right, the Article I, section 10, speedy trial right runs not from the date of the crime but from "an indictment or one of the constitutionally prescribed procedures that are alternatives to an indictment." *Vasquez*, 336 Or at 613. The "principal historical reason" for the right to a speedy trial is "to prevent prolonged pretrial incarceration," *Id.* at 609–10, which is an issue only when charges themselves are pending. Once charges are dismissed—even if they are dismissed without prejudice—the defendant is back "in the same position as any other subject of a criminal investigation": perhaps concerned about the possibility of charges being filed, but without personal liberty impaired. *MacDonald*, 456 US at 8–9.

There are, of course, statutory and constitutional protections for a person who, although not currently subject to formal criminal charges, could face those charges in the future. But those protections against *preindictment* delay are primarily statutes of limitations and, in extreme cases, the Due Process Clause. *State v. Stokes*, 350 Or 44, 56, 248 P3d 953, *cert den*, 565 US 920 (2011).

When the state dismisses all charges in good faith, even when it contemplates or expects that further charges may be filed at a future date, it restores the defendant to the position of anyone who could face criminal charges. Dismissal of the charges means that the state must comply with the statute of limitations and the requirements of due process. *See, e.g.*, ORS 131.105 (requiring that a criminal prosecution be "commenced" within the applicable limitations period); *see also State v. Silver*, 239 Or 459, 464, 398 P2d 178 (1965) (after original indictment was dismissed, new indictment had to satisfy the statute of limitations).

Article I, section 10, does not impose additional time constraints in those circumstances. Although its requirement that "justice shall be administered * * * without delay" may "suggest[] that those court proceedings, once commenced, shall not be prolonged or deferred," *Vasquez*, 336 Or at 605 n 5, dismissal of the charges resolves the court proceedings in their entirety. If the statute of limitations has not yet run, the defendant is situated no differently than any other potential subject of criminal charges during the limitations period. Defendant is mistaken to argue that a dismissed prosecution nonetheless continues so long as the state "intends to see it through." (Pet BOM 21). "[W]here an indictment is dismissed and the matter is resubmitted to the grand jury[,] the prosecution is in the same posture in which it would have been if the defendant had never been indicted." *State v. Nichols*, 236 Or 521,

527, 388 P2d 739 (1964); *see also Abbott v. Baldwin*, 178 Or App 289, 298, 36 P3d 516 (2001), *rev den*, 334 Or 75, *cert den*, 537 US 901 (2002) (holding that a new indictment after a dismissal "clearly was a distinct criminal action"). Because no charges are pending after a prosecution is dismissed, Article I, section 10, is not implicated by that period. *Accord State v. Lee*, 396 P3d 316, 329 (Wash 2017) (a delay between arrest, after which no charges are filed immediately, and the eventual filing of charges did not trigger the defendant's speedy-trial rights).

Defendant is wrong to suggest that that rule would "let the state excuse its own unreasonable delays simply by dismissing and refiling charges." (Pet BOM 21). The state is not arguing here that the speedy-trial clock resets upon the filing of new charges, just that it does not run *during a period when no charges are pending*. If the state files charges, unreasonably delays the proceeding, and then dismisses and refiles the same charges before the statute of limitations runs, the defendant may have an argument under Article I, section 10, about any delay that occurred *before* the charges were dismissed. And if the state unreasonably delays after dismissing the charges but before refiling them, the defendant may have an argument under the statute of limitations or the Due Process Clause. The question here is not whether there should be protections against unreasonable delay at every stage of the process; there are. The question is whether the reasonableness of delay during a period when no

charges are pending should be scrutinized under Article I, section 10, or instead under the statute of limitations and the Due Process Clause. *Cf. Vasquez*, 336 Or at 612 (holding that a "complainant's information," even if an accusatory instrument for purposes of the criminal code, does not start the speedy-trial clock under Article I, section 10, because it is not sufficient to bring the defendant to trial).

Defendant objects that excluding that period from consideration under Article I, section 10, "would make that period subject to *no* state constitutional limits." (Pet BOM 22 (emphasis in original)). But that is true of any other period of preindictment delay. The legislature has enacted statutes of limitations to protect defendants against the prejudice caused by unreasonable delay, and in extreme cases even a prosecution within the statute of limitations may violate due process if the state's delay unfairly prejudiced the defendant. There is no greater need for additional state constitutional protections in the context of dismissed charges than there is for charges that have not been filed at all. If anything, the potential for prejudice from unreasonable delay is less serious when, as here, the individual knows that the state intends to pursue charges than when the individual is unaware of the potential for charges. *Cf. State v. Ivory*, 278 Or 499, 508–09, 564 P2d 1039 (1977) (holding pre-arrest delay is "inherently more damaging to [a] defendant's ability to obtain a fair trial" because the defendant "may be unaware of the outstanding charge, so that

there is little inducement to preserve memories and evidence") (footnote omitted).

2. Even if preindictment delay is considered, at least 11 of the 14 months of delay were explained, justified, and reasonable.

Even if this court considers the six weeks before the indictment, most, if not all, of the 14 months that elapsed here were justified. The state acted diligently in the immediate wake of defendant's arrest on June 3, 2016. The district attorney's information was filed the same day; he was arraigned that afternoon; and on June 8th the district attorney moved to dismiss the charges when it learned that defendant might have previous DUII convictions that elevated the crime to a felony. (ER 18, 20, 40–41).

The next period was the six weeks from dismissal to indictment. As explained above, that should not figure into the calculus. But even if it did, nothing about that delay was unreasonable. The state obtained the records establishing defendant's previous Washington DUII convictions on June 9, 2016. (ER 18). The deputy district attorney responsible for the case did not review the file until July 8th. (ER 18). The trial court concluded that "a month or so" is "not an unusual delay," (Tr 10), and the Court of Appeals agreed that "generally * * * a 30-day delay for a DDA to review a file may be reasonable when considering the high-volume caseloads many Oregon district attorney offices handle," *Ralston*, 310 Or App at 479. The Court of Appeals nonetheless

concluded that the delay here was unexplained because the record did not specifically explain the reason that it took a month to review the file here. *Id.* at 480. The court apparently agreed, however, that the ten days to obtain a grand-jury indictment after the deputy district attorney reviewed the file were reasonable. At most, then, a month of the period before indictment was not fully explained.

The Court of Appeals correctly found that the delay during the next period, from indictment on July 19th to arrest the following January 4th, was explained and reasonable. *Id.* at 480-81. The trial court issued an arrest warrant on the date of the indictment, July 19, 2016. (ER 25). Law enforcement entered the warrant into computer systems the following day, asked their Washington counterparts to attempt to serve it nine days later, and mailed notice of the arrest warrant to defendant's home address less than a month after the warrant was issued. (ER 24, 26–27). Defendant now asserts that the state "obtained a warrant that was valid only in Oregon and did not seek authority for defendant's arrest in Washington," (Pet BOM 49), but that contention—which is unpreserved—is not supported by any citation to the record. The record suggests to the contrary: When Washington law enforcement arrested defendant on local charges, they executed the Oregon arrest warrant as well. (ER 28–29).

Defendant waived extradition to Oregon the day after his arrest, on January 5, 2017, but was not transported to Oregon until March 16th. (ER 30–31). The delay may have been related to the Washington charges on which defendant had also been arrested on January 4th. (ER 29). But the record does not explain what happened, and the Court of Appeals concluded that the two months and 11 days from waiver to transportation was unexplained delay. *Ralston*, 310 Or App at 481.

Defendant was arraigned in Oregon the day after he was transported from Washington (March 17, 2017), released on recognizance, and scheduled for a court date on April 28, 2017. (TCF 29–30). As the Court of Appeals recognized, "[a] next court date 42 days out is not unusually long for a felony prosecution." *Ralston*, 310 Or App at 482. Over the next five months the case proceeded through "the normal steps in the criminal justice process," and the delay was "not unduly lengthy." *Id.* Defendant concedes that "[f]ive months between arraignment and trial might be reasonable in an ordinary case," but argues that it was unreasonable here because of the earlier delays. (Pet BOM 50). But he does not explain specifically what more he thinks the court or the prosecutor should have done during that period, or how his counsel would have been prepared to go to trial in fewer than five months.

Thus, as the Court of Appeals concluded, at most three and a half of the fourteen months from arrest to decision was unexplained delay: a month of

preindictment delay and two months and 11 days while defendant was awaiting extradition from Washington. The other 11 months were "explained, reasonable, and justified." *Ralston*, 310 Or App at 479.

3. Even a delay of 14 months is not particularly excessive for a felony prosecution.

Other considerations confirm that even the total 14-month period here was reasonable. First, longer delays are reasonable when the defendant is out of custody, because "[p]retrial imprisonment in connection with the pending charges shortens the constitutionally permissible measure of delay." *Harberts*, 331 Or at 83 (quotation marks omitted). Here, nothing in the record suggests that defendant was in custody on these charges during the 14 months except for five days from his arrest on June 3, 2016, to his release on June 8, 2016, and the two and a half months from his arrest on January 4, 2017, until his release at arraignment on March 17, 2017.[5] (TCF 8, 19, 29; ER 24). All told, however, that amounts to less than three months of custody out of the 14 months.

Second, 14 months for a felony case, although not minimal, is hardly unusual. Defendant notes that the Oregon Judicial Conference's Standard for Timely Disposition aspire to have all felonies adjudicated within a year. (Pet BOM 47). But that is from the date of *arraignment*, and here less than six

[5] The record is not clear how much of that period of time was related to the charges in this case versus defendant's Washington charges.

months had elapsed since the date that defendant was arraigned on felony charges. *See* Oregon Judicial Conference, Standard for Timely Disposition (1990), *at* https://www.courts.oregon.gov/about/OJDCJITF/cji-OJD-judicial-conference-standards-timely-disposition-1990.pdf (visited Dec. 24, 2021). In any event, the statistics that defendant cites (Pet BOM 47 n 6) show that 7.45% of felony prosecutions statewide take more than a year to resolve. Oregon Judicial Department, *Statistical Report Relating to the Circuit Courts of the State of Oregon*, tbl 7, at 9 (2017), *at* https://www.courts.oregon.gov/about/Documents/ojd_2017_goals_for_timely_disposition_v5.0_tas_2018-06-25.pdf (visited Dec. 24, 2021). This case's length is not an extreme outlier.

Third, the statutes governing the commencement and completion of prosecutions suggest that 14 months is not particularly excessive. By statute, the trial in a felony prosecution generally must commence within three years of the date of the indictment. ORS 135.746(1)(b). That statute reflects a legislative judgment that delays of less than three years are not necessarily unreasonable. And it bears emphasis again, especially with respect to the six weeks of preindictment delay at issue here, that the legislatively prescribed statute of limitations for felony DUII is three years. ORS 131.125(8)(a). The periods at issue here are far shorter than what the legislature has allowed to investigate and prosecute this type of claim.

The Court of Appeals concluded that although only a "relatively small period" of delay was unexplained, the length of the delay nonetheless did weigh against the state. *Ralston*, 310 Or App at 497. But that relatively short delay should not weigh very heavily because it was at most negligent, rather than caused by the prosecution "purposely to hamper the defense." *See Harberts*, 331 Or at 86. To the extent the delay hampered the defense's access to the booking video, that potential prejudice was at worst the result of "inadvertent or negligent conduct," which makes the fault "minor." *Dykast*, 300 Or at 377.

B. Defendant suffered no nonspeculative prejudice from the delay.

The remaining factor—prejudice to the defendant—weighs decisively against defendant here. In the totality of the circumstances, any small degree of prejudice from the relatively short delay was not sufficient to require dismissal of the charges.

This court has always required "some degree of actual prejudice to the ability to prepare a defense to the charge in order to establish a constitutional violation of sufficient magnitude to justify dismissal of the criminal charge." *Mende*, 304 Or at 23. Even significant unjustified delay does not "justif[y] the drastic remedy of dismissal, absent some showing of actual prejudice." *Id.* at 25 (discussing 16 months of unjustified delay). And although only a "reasonable probability of prejudice" is needed to trigger the court's consideration of the prejudice factor, "when the value of unavailable evidence

is only speculative, the unavailability of that evidence will not factor significantly in the analysis." *State v. Johnson*, 342 Or 596, 608, 157 P3d 198 (2007), *cert den*, 552 US 1113 (2008).

1. To the extent that the video was overwritten before defendant was indicted, any prejudice associated with the missing video is not part of the speedy trial analysis.

Defendant's only prejudice argument relates to prejudice suffered during the time between the dismissal of the misdemeanor information and the filing of the felony indictment. He argues that "[t]his 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." (Pet BOM 19). That is the crucial period because "[d]uring that time, a video of defendant's booking into jail was likely destroyed." (Pet BOM 1). The destruction of that video is the only basis for defendant's claim of prejudice: "If the jail booking video had not been destroyed, defendant would not have a speedy trial claim." (Pet BOM 50).

But, as explained above, that period of time is not properly part of speedy trial calculation. Therefore, any evidence lost during that period of time was not related to an event or delay ascribed with significance by Article I, section 10. Consequently, any prejudice associated with evidence lost during that time also should not be part of that calculation.

Application of the rule to this case is straightforward. The booking video was recorded on June 3, 2016. (ER 21). The court dismissed the misdemeanor information on June 8th. (ER 20, 40). The grand jury indicted defendant on July 19th. (ER 1). The record does not reflect exactly when the booking video was overwritten, but it was sometime after July 3rd—30 days after it was taken—and defendant asserts that it "likely" happened in the two weeks between that date and the date of the indictment. (ER 22; Pet BOM 1). During that time, no charges were pending against defendant, and Article I, section 10, was not implicated. Even if the state had unreasonably delayed the case after the indictment, the earlier delay could not have prejudiced defendant because the booking video was already destroyed. Accordingly, the trial court correctly denied defendant's motion to dismiss.

2. It is speculative that the booking video would have been helpful to the defense if the case had gone to trial.

Even if the loss of the booking video occurred at a time when charges were pending and the Article I, section 10, speedy trial provision was implicated, defendant failed to establish nonspeculative prejudice from the loss of the video. As explained above, the only prejudice that defendant claims to have suffered here is the loss of the booking video. Defendant asserts that the video was "'more likely to show [he] walked with good balance and coordination'" which he claims was material because "evidence of a DUII

defendant's balance and coordination is always relevant to the defendant's guilt or innocence." (Pet BOM 43). But defendant offered very little evidence about what the video might have shown, and nothing but speculation that it might have been helpful if this case had gone to trial.

To begin with, defendant did not make a record of what the booking video footage even could have shown logistically given the number and placement of the cameras and the size of the booking area. Notably, defendant did not introduce a demonstrative exhibit of a booking video that would provide evidence of what generally can be seen in such footage or otherwise fill those gaps. As a result, nothing in the record explains, for example, how close the cameras are to the individuals being booked into custody, what angles they show, if they have unobstructed views, and what level of resolution they provide.

Instead, defendant offered only a declaration from his attorney saying that she had previously used booking videos at DUII trials because they "demonstrate a [d]efendant's ability or inability to walk to and from the booking area, to follow the directions of deputies, and to stand in balance," and that it is "not uncommon" for them to show a defendant "standing on one foot and removing a shoe while maintaining balance." (ER 9; *see also* ER 22 (affidavit noting only that the cameras "recorded video footage of inmates going through the booking process")). But that generic, conclusory assertion

did not make an adequate record to allow the court to find that the booking video could have been meaningful evidence. At most, the record shows that five cameras were posted in what was presumably a very large room that contained the booking area. It thus is entirely possible, if not likely, that any footage of defendant would have been from a significant distance.

Nor for that matter did defendant explain, except in generic terms, what the video might have shown about *his* coordination and balance during booking. He asserts that the video was "likely to show [him] walking with good balance and coordination." (Pet BOM 47). But that inference is speculative and not the most probable inference. The most reasonable inference from what little is in the record is that defendant was intoxicated. Hence, to the extent the video showed anything about defendant's balance and coordination at the time of driving, it may well have shown that his balance and coordination was poor. As such, the evidence would have helped the state's case and harmed defendant's case and would not have been a basis for a finding of prejudice.

Defendant himself was there. But he did not offer even his own testimony about what happened during the booking—for example, about whether he was stumbling around or walking normally, and whether he had occasion to stand on one foot. Nor, for that matter, did he offer any evidence that he was *not* drunk that night and that the video therefore likely would have shown him acting soberly.

More importantly, defendant did not establish that—even *if* it showed him walking and keeping his balance—the video would have been helpful to his defense in any meaningful way. There was no evidence that the arresting officer or anyone else would have testified that defendant was stumbling around or unable to maintain his balance. Indeed, defense counsel noted that the officer's report did not have "any descriptions of my client exhibiting poor balance or difficulty walking." (ER 8). Consequently, the officer may well have conceded that defendant did not display any lack of balance or coordination. And in the unlikely event that the officer would have testified at trial that defendant did have poor coordination and balance, such evidence would have been readily impeached by the officer's failure to include that information in his report. Regardless, defendant needed to make a record of how the officer would have testified about defendant's coordination and balance to allow the court to assess the potential prejudice caused by the overwritten booking video.

Moreover, the benefit of any evidence would have been significantly diminished because of the time that elapsed between when defendant drove and when he was booked into custody. That is, regardless of any indication of whether defendant's coordination and balance was impaired when he was stopped and arrested, a video of him more than two hours later would be of limited value in determining defendant's intoxication at the time of driving.

The pertinent time to assess defendant's intoxication is when he drove, not two hours later. As a matter of logic, the fact that defendant had ordinary balance and coordination two hours after driving says relatively little about whether he had poor balance and coordination—let alone was intoxicated—when he drove. *See State v. Hedgpeth*, 365 Or 724, 727, 452 P3d 948 (2019) (emphasizing need for state to prove that the defendant was intoxicated at the time of driving).

Nothing in the record suggests that the state's case would turn on assertions about the extent to which defendant displayed an ability to keep balance two hours after driving. The arresting officer's report is not in the record, but the state's probable-cause affidavit was based on that report and likely reflects the evidence that would have been presented at trial. (TCF 14). According to the affidavit, the officer pulled defendant over after observing him, while driving on I-84, crossing the dotted white line, jerking his vehicle back into his lane, and then failing to maintain his lane several more times. *Id.* Upon being pulled over, defendant had bloodshot and watery eyes, slurred speech, and a strong odor of alcohol. *Id.* Defendant admitted that he had had a few drinks—he eventually mentioned "a Roman Coke [possibly a mistranscription of a rum and coke] and 3 beers"—and that he had stopped drinking just before he began driving. *Id.* There were multiple open alcohol containers in plain view in the vehicle. *Id.* Defendant refused to perform field sobriety tests and refused to take a breath test. *Id.*; *see also* ORS 813.136

(evidence of refusal to submit to field sobriety tests is admissible in a DUII prosecution); ORS 813.310 (same for breath tests).

All of that evidence suggests that the state's case would have turned primarily on defendant's failure to maintain his lane, the arresting officer's observations of defendant's appearance and his speech, defendant's admitted drinking, and his refusal to submit to tests to determine his level of intoxication. It is speculative that a video of him not stumbling more than two hours later would have any tendency to undermine the state's case. Defendant may be right that in DUII prosecutions, evidence of intoxication is always relevant to a defendant's guilt or innocence. (Pet BOM 43). But even if a video showing defendant hours later might cross the low threshold of relevance, it would not necessarily carry much persuasive value, especially where there was no indication that the state would present evidence suggesting poor coordination or balance.

Defendant's claim of prejudice is also undercut by the fact that he knew, when the information was dismissed, that the state would still be reviewing the record to determine whether to seek an indictment. Despite that, he did not attempt to have the booking video preserved. Even though the state dismissed the misdemeanor charges, defendant could have made a demand that the state preserve this evidence. That he did not suggests that he did not expect the

video would be helpful, even with his personal knowledge of what happened at booking.

Ultimately, defendant's theory of prejudice is no stronger than theories that this court has rejected in other cases. In a capital case, for example, this court rejected as "speculative" the argument that testimony from the defendant's aunt, who helped raise him and "highly likely * * * would have had something kind to say" but had died during the period of delay, would have been helpful in his effort to avoid the death penalty. *Johnson*, 342 Or at 614. Similarly, in another capital case, this court concluded the defendant did not suffer cognizable prejudice from the death of his mother, which required him to present her penalty-phase testimony through a transcript rather than live, or from the death of other family members where there was no information about what they would say. *McDonnell*, 343 Or at 574–75. Here, it is just as speculative that the booking video would have been helpful if the case had gone to trial.

Citing *Haynes v. Burks*, 290 Or at 82, defendant argues that for a pretrial motion to dismiss he need show only a "reasonable possibility" that missing evidence would impair the defense. (Pet BOM 26). But *Haynes* was an original jurisdiction habeas corpus case where the question was whether a defendant should be released from pretrial custody—not whether charges should be dismissed. *Haynes*, 290 Or at 77. It is not surprising, then, that the

"prejudice" inquiry there necessarily involves a degree of speculation about how the lengthy pretrial incarceration *might be* prejudicial to the defendant's ability to defend against the pending charges.

"[D]espite the foregoing language from *Haynes*," this court's decisions reviewing motions to dismiss have all required defendant to show "some degree of *actual* prejudice" before dismissing on speedy-trial grounds. *Mende*, 304 Or at 23 (emphasis added). When there is a reasonable probability of prejudice, that is enough to give the prejudice *some* weight in the defendant's favor. *See Johnson*, 342 Or at 607-08 ("When a defendant proves that the delay caused a reasonable possibility of prejudice to the ability to prepare a defense, that will weigh in the defendant's favor.") (quotation marks omitted). But a stronger showing of prejudice is required to obtain dismissal when the delay was at most negligent and not extraordinarily lengthy. Regardless, defendant did not show even a reasonable possibility at this stage of the proceedings.

3. The showing of prejudice is especially speculative because defendant moved to dismiss pretrial.

As the Court of Appeals noted, a showing that might be too speculative pretrial could become nonspeculative at trial once it is clear what the state's case and the theory of the defense is. *Ralston*, 310 Or App at 495–96. Sometimes, "even favorable evidence may be only minimally material to the dispute, depending on how a case is tried." *Id.* Here, particularly without

knowing how the arresting officer would testify, it was speculative that the video would add meaningfully to the defense. *Id.* at 496.

Defendant is incorrect that the standard of prejudice should be *lower* for pretrial motions to encourage dismissal of cases pretrial. (Pet BOM 24–37). That is exactly backwards and relies on a misunderstanding of *Haynes*. It makes no sense to dismiss a case pretrial when it is possible that the trial itself would show that there was no significant prejudice.

Haynes does not support a different conclusion. That decision recognized that the inquiry must be somewhat different when a court is ruling pretrial in an original jurisdiction habeas proceeding, and thus making a prediction about prejudice, than when it rules after trial, when it can assess prejudice more concretely. 290 Or at 82 ("Thus 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."). The question in a habeas proceeding, like *Haynes*, is whether the defendant must be released from custody—not whether charges should be dismissed.

Because the prejudice associated with pretrial delay is case specific, the effect of lost evidence may sometimes be best assessed after trial. Contrary to defendant's assertion, (Pet BOM 35–36), addressing a speedy-trial motion to

dismiss after trial does not deprive the state of an opportunity to appeal. The state agrees that the trial court is required to rule on the motion in a manner that preserves its ability to appeal, but so long as the trial court waits until after the verdict to rule, the state's ability to appeal is preserved. *Cf. State v. McKenzie*, 307 Or 554, 558–59, 771 P2d 264 (1989) (explaining the difference between midtrial and post-verdict dismissals for purposes of double jeopardy). ORS 138.045(1)(i) authorizes the state to appeal from "[a]n order made after a guilty finding dismissing or setting aside one or more counts in the accusatory instrument." That would cover a post-verdict dismissal on speedy-trial grounds.

A defendant is, of course, free to move to dismiss pretrial and ask the court to address the motion based on the record at that time. But doing so does not lessen the showing that a defendant must make. As a practical matter, that *showing is harder to make pretrial* as the United States Supreme Court explained in *MacDonald*: "[t]he denial of a pretrial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial—when prejudice can be better gauged—would also be denied." 435 US at 858–89. Nonetheless, the *standard* for proving prejudice resulting from pretrial delay in order to obtain dismissal is the same regardless of when the speedy-trial motion is filed.

4. The Court of Appeals erred in relying on defendant's attempt to plead guilty to misdemeanor DUII, but that error does not affect the analysis of this appeal.

In addition to explaining why defendant's showing of prejudice—especially in a pretrial posture—was too speculative to weigh in his favor, the Court of Appeals also considered one other "fact" in the totality of the circumstances: that defendant appeared to be willing to plead guilty to the original misdemeanor DUII charges without reviewing the booking video, which would not yet have been overwritten at the time. *Ralston*, 310 Or App at 496. The trial court did not rely on that fact, the state never argued that the Court of Appeals should consider it, and the state agrees with defendant that the Court of Appeals erred in taking it into account. Although the record reflects that defendant sought a "quick plea" to the misdemeanor before the state could conduct a "felony review," (ER 18), such a desire likely says little about the value of the video.

But the Court of Appeals' error in considering defendant's plea strategy did not affect its bottom-line conclusion and does not change the analysis in this court. The Court of Appeals separately concluded that it was speculative that the video would be of significant help to defendant if he went to trial. *Ralston*, 310 Or App at 495–96. For that reason alone, the loss of the video did not constitute the sort of prejudice required to establish a speedy-trial violation. *See Johnson*, 342 Or at 608 ("[W]hen the value of unavailable evidence is only

speculative, the unavailability of that evidence will not factor significantly in the analysis.").

C. Considering the relatively short delay and speculative theory of prejudice, defendant was not entitled to dismissal of the charges.

Article I, section 10, requires a "fact-specific inquiry" based on "the circumstances of each particular case." *Harberts*, 331 Or at 88. That requires examining how much prejudice any delay caused, considered in the context of the reasons for the delay. *See, e.g.*, *Johnson*, 342 Or at 614.

Here, regardless of whether one considers only the time post indictment or the full 14 months beginning with the misdemeanor information to the decision on the motion to dismiss, the period of time is relatively short for a speedy-trial case—and even shorter if the focus is just on the unexplained delays. On the other side of the balance, defendant did not show that he suffered more than minimal prejudice from not having the booking video. As the trial court found, he did not make an adequate showing that the video "would have been helpful to the [d]efense." (Tr 12). He also did not show that he likely would have had the video if the state or the court had acted more expeditiously.

In *Tiner*, this court concluded that more than two years of unjustified delay from the state exercising "poor judgment" in pursuing an appeal did not warrant dismissal because the delay did not "significantly prejudice[]" the

defense of the case. 340 Or at 558. Here too, this court should conclude—like the trial court and the Court of Appeals—that any delay in this case did not violate defendant's right under Article I, section 10, to a speedy trial.

CONCLUSION

This court should affirm the Court of Appeals' ruling, which affirmed the conviction but vacated part of the trial court's judgment and remanded for resentencing.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 19, 2022, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Kyle Krohn, attorneys for Petitioner on Review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 8,678 words. I further 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 as required by ORAP 5.05(3)(b).

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