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Amicus by CDAM

**No. 135811**

**State of Michigan  
In the Supreme Court**

PEOPLE OF THE STATE OF MICHIGAN,

*Plaintiff-Appellee,*

-vs-

CHARLES WILLIAM MERCER, JR.

*Defendant-Appellant*

ON APPEAL FROM THE COURT OF APPEALS  
Court of Appeals No. 281006  
Ingham Circuit No. 07-118-FC

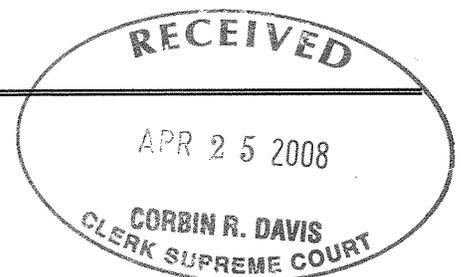
**CDAM'S AMICUS BRIEF SUPPORTING  
DEFENDANT-APPELLANT**

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## STATEMENT OF QUESTIONS PRESENTED

- I. **IN CASES INVOLVING VERY LONG DELAYED PROSECUTIONS, SHOULD THIS COURT APPLY A TWO PRONG BALANCING TEST AND LOOK AT THE PREJUDICE TO THE DEFENDANT AND WHETHER THE STATE HAS OFFERED A VALID REASON FOR THE DELAY?**

*Amicus answers, "Yes."*

*Defendant-Appellant answers "Yes."*

*The Plaintiff-Appellee answers "No."*

*The trial court answers "Yes."*

*The Court of Appeals answered, "No."*

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## **JURISDICTION**

CDAM relies on Dr. Mercer's Statement of Jurisdiction.

## **INTEREST OF AMICUS**

On April 2, 2008, this Court ordered oral arguments on the Defendant-Appellant's Application for Leave to Appeal. As part of this Court's order, the Court invited the Criminal Defense Attorney's of Michigan ("CDAM") and the Prosecuting Attorneys Association of Michigan ("PAAM") to file briefs pertaining to:

whether the constitutional due process standard for dismissal of a criminal prosecution based on prearrest delay requires a showing by the criminal defendant of both (1) actual and substantial prejudice due to the delay, and (2) the intent by the prosecution to gain a tactical advantage by means of the delay, and if not, whether and how a balancing test should be employed to consider these two factors.

This is CDAM's brief.

## **FACTS**

CDAM relies on Dr. Mercer's Statement of Facts.

## ARGUMENT

- I. **IN CASES INVOLVING LONG DELAYED PROSECUTIONS THIS COURT SHOULD LOOK AT THE PREJUDICE TO THE DEFENDANT AND WHETHER THE STATE HAS OFFERED A VALID REASON FOR THE DELAY. THE PLAIN LANGUAGE OF THE HIGH COURT'S RULING IN *UNITED STATES V. MARION* AND *UNITED STATES V. LOVASCO* DOES NOT REQUIRE THE DEFENDANT TO PROVE INTENTIONAL PROSECUTORIAL DELAY FOR AN IMPROPER TACTICAL ADVANTAGE.**

**Standard of Review.** The constitutional question presented in this amicus brief is a pure question of constitutional law and should be reviewed de novo. *People v Fransisco*, 474 Mich 82, 84, 711 NW2d 44 (2006).

Imagine for one minute that a crime occurs in 1968. Now imagine you are charged with that crime in 2007. Trying to step back in time forty years to disprove these allegations is a Herculean task. Unlike the State, you do not have an evidence locker, witness statements, or a chronology of events. You have to attempt to locate witnesses who (if alive) have long moved on and barely have any memory of the events. As you attempt to travel to the era of Lyndon Baines Johnson and Martin Luther King, you discover that your defense has largely been left in the 1960s and the hearsay rules afford a criminal defendant little opportunity to offer secondary evidence as to what your witnesses would have said.

For many years courts were receptive of the plight of a criminal defendant. If the Defendant showed actual prejudice (which almost always

exists in ancient cases),<sup>1</sup> courts made the prosecutor demonstrate a good reason for the delay.<sup>2</sup> Recently, some courts have retreated from this position and allowed many of these prosecutions to go forward unless the Defendant could demonstrate prosecutorial bad faith coming from either a deliberate attempt to gain a tactical advantage or alternatively a prosecutorial intent to harass.<sup>3</sup> This trend is seen more in federal courts than in state courts. Unfortunately, the scholarship concerning the treatment of this issue in state courts has been minimal. In the last section of this brief, CDAM discusses many of the balancing tests currently used in state courts and submits that most courts and authors have ignored these rulings. Many state courts employ a balancing test which does not require prosecutorial bad faith to find a violation of due process.

A criminal defendant should not be forced to go to trial with a lost defense because it is difficult to construct a test that can be mechanically

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<sup>1</sup> The State's appeal does not appear to argue that prejudice doesn't exist in this case. Their energy seems devoted to the fact that the Defendant must show intentional misconduct on their part before a criminal prosecution can be judicially dismissed.

<sup>2</sup> See, e.g. *People v Hernandez*, 15 Mich App 141, 147, 170 NW2d 851 (1968). See, gen. T.E. Brennan, *Convicting the Guilty and Acquitting the Innocent: Impediments to the Search for Truth Dismissal and Prearraignment Delay: Time is of the Essence*, 4 Cooley L Rev 493 (1987) (discussing developments in the law and arguing for a standard based on a balancing test).

<sup>3</sup> See, J.F. Holderman & C.B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. Crim. L. & Criminology 527, 529 (2006) (noting judicial retrenchment, but noting that prosecutor's continuing ethical duty to consider the rights of the accused in handling prosecutions).

applied to reach like results no matter which judge is applying the test.<sup>4</sup> Courts regularly utilize balancing tests in determining a whole variety of constitutional claims. The most obvious example of this is in the related Sixth Amendment post-indictment right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 530-531, 92 S. Ct. 2182, 33 L.Ed.2d 101, (1972); *Doggett v. United States*, 505 U.S. 647, 657, 112 S. Ct. 2686, 120 L.Ed.2d 520 (1992).<sup>5</sup> CDAM believes

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<sup>4</sup> The most commonly quoted quotation in support of this rationale comes from the Fifth Circuit:

[W]hat [the balancing test] seeks to do is to compare the incomparable. The items to be placed on either side of the balance (imprecise in themselves) are wholly different from each other and have no possible common denominator that would allow determination of which 'weighs' the most. Not only is there no scale or conversion table to tell us whether eighty percent of minimally adequate prosecutorial and investigative staffing is outweighed by a low-medium of actual prejudice, there are no recognized general standards or principles to aid us in making that determination and virtually no body of precedent or historic practice to look to for guidance. Inevitably, then, a 'length of the Chancellor's foot' sort of resolution will ensue and judges will necessarily define due process in each such weighing by their own 'personal and private notions of fairness,' contrary to the admonition of *Lovasco*.

*United States v. Couch*, 84 F.3d 1497 (5<sup>th</sup> Cir. 1996). As is demonstrated later in this brief, while there be a subjective component in this test (e.g. the judge has to look at all the factors), this test is being utilized successfully in many jurisdictions. Courts have displayed the correct hesitation in dismissing charges, but they done so where it would be substantially unjust to permit a prosecution to go forward. Courts routinely decide difficult issues and there is nothing about the proposed test which makes it more difficult to apply than many other tests currently in use.

<sup>5</sup> For a detailed analysis of *Crouch*, see, e.g. Comment, *Pre-Indictment Delay: Establishing a Fairer Approach Based on United States v. Marion and United States v. Lovasco*, 78 Temp. L. Rev. 1049, 1062-63 (2005).

that such a test can be constructed and that Courts can responsibly administer such a test.

Contrary to popular belief, the United States Supreme Court has never formally adopted the actual bad faith test in the Fifth Amendment Due Process prearrest delay context. While a deliberate prosecutorial attempt to delay a criminal case to gain a tactical advantage would certainly satisfy the second half of the due process inquiry, the high Court has never limited the inquiry to this fact pattern. Cases from the high Court have recognized the need for a careful evaluation of the circumstances. Despite the fact that the federal courts are highly divided on this issue and courts on both sides of the rift have characterized the Court's pronouncements as unclear,<sup>6</sup> the United States Supreme Court thus far has unfortunately declined to resolve this split.<sup>7</sup>

While there is no doubt that the statute of limitations is the primary protector against stale prosecutions, the absence of a statute of limitations cannot be read to completely absolve the Courts of their duty to protect against fundamentally unfair prosecutions. As the Court stated, the "statute of limitations does not fully define (an accused's) rights with respect to the events occurring prior to indictment." *United States v. Marion*, 404 U.S. 307, 324, 92

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<sup>6</sup> "*Marion* nor *Lovasco* is crystal clear on this issue, and each opinion contains some language that can give comfort to either view" *United States v. Crouch*, 84 F.3d 1497, 1510 (5<sup>th</sup> Cir. 1996).

<sup>7</sup> Justice White filed a dissenting statement in a case where the Court denied certiorari, in which he recognized the split in the circuits and opined that the Court should have granted certiorari. *United States v. Hoo*, 825 F.2d 667 (2<sup>nd</sup> Cir.1987), cert. denied, 484 U.S. 1035, 108 S. Ct. 742, 98 L.Ed.2d 777 (1988).

S. Ct. 455, 465, 30 L.Ed.2d 468, 480-81 (1971). *See also People v. Lawson*, 67 Ill.2d 449, 367 N.E.2d 1244, 1248 (1977). In fact, sometimes a prosecution within the statute of limitations can still violate due process. *See, e.g. State v. Chavez*, 111 Wash.2d 548, 761 P.2d 607 (1988) (“statutes of limitations automatically excuse unreasonable delay or failure to prosecute at an earlier time. Indeed, statutes of limitations do not preclude judicial inquiry into the reasonableness or constitutionality of delays within that period”).

A. *The United States Supreme Court Has Never Expressly Limited Due Process Challenges to Long Delayed Prosecutions to Cases Where the State Intentionally Delayed the Prosecution. The High Court’s Pronouncements Have Required an Individualized Determination.*

The United States Supreme Court’s ruling in *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L.Ed.2d 468 (1971), is the seminal case addressing whether a defendant’s federal constitutional rights are violated by an extensive delay between the occurrence of a crime and the indictment or arrest of a defendant for the crime. In *Marion*, the defendants were charged with having engaged in a fraudulent business scheme beginning in March of 1965 and ending in January of 1966.

The *Marion* prosecutor did not empanel a grand jury to investigate the scheme until September of 1969, and no indictment was returned until March of 1970. The defendants moved to dismiss the indictment, claiming: (1) the indictment delay violated their Sixth Amendment right to a speedy trial; and, (2) the delay violated their Fifth Amendment right to due process of law. The

federal district court granted the defendants' motion and dismissed the indictment.

The United States Supreme Court reversed the dismissal, rejecting the defendants' Sixth Amendment speedy trial claims, holding that such protection did not apply until "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge," which was not implicated in defendants' complaints of pre-arrest delay. 92 S. Ct. 455. Concerning the defendants' Fifth Amendment due process claims, the Court noted that the primary guarantee against the bringing of overly stale charges was whatever statute of limitations applied to the crime.

However, "the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment." *Id.* at 324, 92 S. Ct. 455. The Court next held that prejudice is not enough for a dismissal. The Court accepted the Government's concession that prejudice coupled with intentional Governmental misconduct is sufficient to dismiss a case, but made it clear that the Court was not deciding what other circumstances might qualify."

Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. Cf. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963); *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959). *However, we need not, and could not now, determine when and in what*

*circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution.*

*Id.* at 324-25, 92 S. Ct. 455 (footnotes omitted) (emphasis added). The Court later stated:

Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.

*Id.* at 325, 92 S. Ct. 455. The Court concluded its Opinion by stating, “[e]vents at trial may demonstrate actual prejudice, but at the present time appellees’ due process claims are speculative and premature.” *Id.* at 326, 92 S. Ct. 455.

Six years after *Marion*, the United States Supreme Court revisited the due process implications of pre-arrest delay in *United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 52 L.Ed.2d 752 (1977). There, the defendant was indicted in March of 1975 for possessing firearms stolen from the mail beginning in July and ending in August of 1973. Lovasco moved to dismiss the indictment, claiming that the prosecutor’s delay in bringing the indictment caused him prejudice through the deaths of two favorable witnesses and therefore violated his due process rights. The trial court agreed and dismissed the indictment, finding that the seventeen-month delay before the case was presented to the grand jury “had not been explained or justified” and was “unnecessary and unreasonable.” *Id.* at 787, 97 S. Ct. 2044. The Eighth Circuit affirmed the dismissal.

The United States Supreme Court granted certiorari “to consider the circumstances in which the Constitution requires that an indictment be dismissed because of delay between the commission of an offense and the initiation of prosecution.” *Id.* at 784, 97 S. Ct. 2044. The Court discussed the *Marion* decision and rejected Mr. Lovasco's argument that if a defendant suffered actual prejudice from the pretrial delay, this was sufficient proof to establish a due process violation: “*Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” *Id.* at 790, 97 S. Ct. 2044. In a later discussion of the “reasons for the delay,” the Court stated, “[i]n our view, investigative delay is unlike delay undertaken by the Government solely ‘to gain a tactical advantage over the accused’...” *Id.* at 795, 97 S. Ct. 2044, citing *Marion*, 404 U.S. at 324, 92 S. Ct. 455. The Court went on to note:

In *Marion* we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions.... More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases. We simply hold that in this case the lower courts erred in dismissing the indictment.

*Id.* 796-97, 97 S. Ct. 2044, 2052 (footnote omitted)

Thus, a two-prong test emerged from *Marion* and *Lovasco* to establish a due process claim for pre-arrest delay: (1) the defendant must show actual prejudice from the delay, and (2) prejudice alone is not sufficient to show a violation of due process where the delay was due to the government's continuing investigation of the crime. The test was not limited to the cases of active Government misconduct claimed by the prosecution (e.g. that the delay was to gain a tactical advantage or harass the defendant).

From the time *Lovasco* was decided in 1977, the United States Supreme Court has not granted certiorari to discuss in more depth the due process standard as established by *Marion* and *Lovasco*, and has only tangentially discussed the *Marion/Lovasco* standard in cases involving other issues. See *United States v. Gouveia*, 467 U.S. 180, 192, 104 S. Ct. 2292, 81 L.Ed.2d 146 (1984) (in a case involving right to appointment of counsel for federal prison inmates who were placed in administrative detention pending indictment for crimes committed in prison, the Court stated, in dicta, "the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice"); *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988) (in a case concerning whether defendant's due process rights were violated by the police destruction of evidence in the absence of bad faith motives by the police, the Court cited *Marion's* language that "no actual prejudice to the conduct of the defense is

alleged and proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them”).

The United States Supreme Court’s rulings mandate a case-by-case approach. The intentional misconduct view urged by the prosecution is a bright line rule at odds with these principles.<sup>8</sup>

*B. The Better Reasoned Approach in the Lower Federal Circuits is the View of the Fourth, Seventh, and Ninth Circuits.*

Amicus admits that the majority of circuits have limited the preindictment due process challenge to cases involving deliberate prosecution delay for the purposes of harassment and/or to obtain a tactical advantage.<sup>9</sup>

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<sup>8</sup> As the Fourth Circuit as noted:

Therefore, in both *Lovasco* and *Marion*, the Supreme Court made it clear that the administration of justice, vis-a-vis a defendant's right to a fair trial, necessitated a case-by-case inquiry based on the circumstances of each case. Rather than establishing a black-letter test for determining unconstitutional preindictment delay, the Court examined the facts in conjunction with the basic due process inquiry: “whether the action complained of ... violates those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions’ ... and which define ‘the community's sense of fair play and decency.’” *Lovasco*, 431 U.S. at 790, 97 S.Ct. at 2048 (citations omitted); see *United States v. Automated Medical Laboratories*, 770 F.2d 399, 404 (4th Cir.1985).

*Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). See also Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & Mary L. Rev. 622-23 (1990).

<sup>9</sup> See, e.g., *United States v. Johnson*, 120 F.3d 1107 (10th Cir.1997); *United States v. Rogers*, 118 F.3d 466 (6th Cir.1997); *United States v. Ismaili*, 828 F.2d 153 (3d. Cir.1987), cert. denied, 485 U.S. 935, 108 S.Ct. 1110, 99

Most of these rulings are based on a misreading of *Marion*.<sup>10</sup> The *Marion* Court accepted the prosecutor's concession that a deliberate tactical delay to gain a legal advantage was improper, but the Court took pains to make clear that this was not the sum total of this universe. These Courts of Appeals have created a brightline rule often claiming that anything less would allow some element of judicial subjectivity to creep into the process and somehow interfere with executive charging decisions.<sup>11</sup>

Moreover, a review of the case law in these circuits reveals a dearth of authority beyond the United State Supreme Court cases. *United States v. Lebron-Gonzalez* generally cites to *Marion* for the preindictment delay standard, but includes no specific cite for the proposition that the defendant must show improper intent on the part of the prosecution. 816 F.2d at 831. In fact, the First Circuit Court of Appeals did not include any cite for the proposition. *Id.* The other Circuits all cite to *Marion* at page 324 or 325.<sup>12</sup> One applicable portion of the Court's opinion at those citations is the following:

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L.Ed.2d 271 (1988); *United States v. Hoo*, 825 F.2d 667 (2d. Cir.1987), cert. denied, 484 U.S. 1035, 108 S.Ct. 742, 98 L.Ed.2d 777 (1988); *United States v. Lebron-Gonzalez*, 816 F.2d 823 (1st Cir.), cert. denied, 484 U.S. 843, 108 S.Ct. 135, 98 L.Ed.2d 92 (1987).

<sup>10</sup> "Although in the clear majority, these decisions are flatly inconsistent with the [*Lovasco*] balancing test." *United States v. Sabath*, 990 F. Supp. at 1017.

<sup>11</sup> *Crouch*, 84 F.3d at 1512 (criticizing the *Howell* test as being based too much on the judges' "personal and private notions of fairness...").

<sup>12</sup> See *United States v. Hoo*, 825 F.2d at 671; *United States v. Ismaili*, 828 F.2d at 167; *United States v. Rogers*, 118 F.3d at 475; *United States v.*

Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. (at 324).

However, as explained earlier, the Court clarified this statement in the same paragraph. The Court mentioned that it was not exploring every possible way a defendant's due process rights could be violated by preindictment delay.

*Marion*, at 324. Determining whether a defendant's rights have been violated, a court must engage in a "delicate judgment" by considering the circumstances of each case. *Id.*

The other statement to which the Circuit Courts could be referring is the following:

Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them. (at 325).

This Court should recognize that this citation does not give legal authority to require intentional and improper delay. The Supreme Court never imposed such a requirement in every case. The above quote could even be construed to suggest that less actual prejudice shown can be balanced against more egregious behavior by the government, thus still amounting to a violation of due process rights.

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*Hendricks*, 661 F.2d 38, 40 (5<sup>th</sup> Cir. 1981); and *United States v. Townley*, 665 F.2d 579, 581 (11<sup>th</sup> Cir. 1982).

The decisions of United States Court of Appeals for the Fourth, Seventh, and Ninth Circuits properly recognize the mandate for a balancing test.<sup>13</sup> The Fourth and Seventh Circuits read the second element of the *Marion/Lovasco* standard test to require a "balancing test" once a defendant can show actual prejudice due to the delay. Pursuant to this scheme, once the defendant proves that he has suffered actual prejudice, the burden shifts to the state to "come forward and provide reasons for the delay." See, e.g., *United States v. Sowa*, 34 F.3d 447 (7th Cir.1994).<sup>14</sup> Similarly, the Ninth Circuit requires a showing of actual prejudice for the first prong and that the delay, when balanced against the prosecution's reasons for it, offends "fundamental conceptions of justice which lie at the base of our civil and political institutions." *United States v. Gilbert*, 266 F.3d 1180, 1187 (9<sup>th</sup> Cir. 2001); *United States v. Doe*, 149 F.3d 945, 948 (9<sup>th</sup> Cir. 1998).

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<sup>13</sup> The Tenth Circuit appears to have moved into the intentional misconduct camp, but it is unclear how and when the Court made the shift. Early Tenth Circuit refused to require prosecutorial intent to deceive, and instead found a due process violation in the face of "substantial fault by government representatives." *United States v. Glist*, 594 F.2d 1374, 1378 (10th Cir.1979) (affirming dismissal of indictment where government agents failed to develop the facts adequately, resulting in a "shambles of a trial") (quoting district court). Although *Glist* has never been overruled, it appears that the Tenth Circuit appears to have shifted to requiring a showing of purposeful governmental delay. See *United States v. Engstrom*, 965 F.2d 836, 839 (10th Cir.1992).

<sup>14</sup> See also *Aleman v. The Honorable Judges of the Circuit Court of Cook County*, 138 F.3d 302, 309 (7th Cir.1998) (stating that to demonstrate a pre-indictment delay violation, the defendant must show actual delay and the government must demonstrate justification for the delay, "which the court will balance against the prejudice"), cert. denied, 531 U.S. 1152, 121 S.Ct. 1097, 148 L.Ed.2d 969 (2001).

The Fourth, Seventh, and Ninth Circuits explicitly reject the argument that only proof of an improper prosecutorial motivation for the delay is sufficient to establish a violation of due process. See *Howell v. Barker*, 904 F.2d 889 (4th Cir.1990); *Jones v. Angelone*, 94 F.3d 900 (4<sup>th</sup> Cir. 1996); *Sowa*, 34 F.3d at 451-51; and *Moran*, 759 F.2d at 781. The Fourth Circuit even points out that the Supreme Court in *Lovasco* specifically states that recklessness can support finding a violation of due process. *Howell*, 904 F.2d at 895; citing *Lovasco*, *supra*, at 795.

A showing of bad faith is unnecessary where the defendant has been greatly prejudiced by the delay. See *United States v. Ross*, 123 F.3d 1181, 1184-85 (9th Cir. 1997) (“Whether due process has been violated is decided under a balancing test and ‘[i]f mere negligent conduct by the prosecutors is asserted, then obviously the delay and/or prejudice suffered by the defendant will have to be greater.’”) (quoting *United States v. Moran*, 759 F.2d 777, 782 (9th Cir.1985)); *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir.1990) (affirming district court's grant of writ of habeas corpus on the basis of preindictment delay because the government conceded prejudice and admitted it was “negligent” in delaying prosecution). Using *Lovasco*'s balancing test, these circuits hold governmental negligence sufficient to establish a due process violation when the delay prejudices the defendant to the point that it “violates fundamental conceptions of justice.” *Moran*, 759 F.2d at 782 (citing *Lovasco*, 431 U.S. at 790); *Howell*, 904 F.2d at 895. They consider a rigid bad-faith

requirement to be incompatible with *Lovasco's* flexible balancing test. *Howell*, 904 F.2d at 895; *Moran*, 759 F.2d at 781-82.

All the Circuits employing a balancing test under the second prong recognize that legitimate investigative delay will not result in a violation of due process and cite *Lovasco* for that assertion. See *Sabath*, 990 F Supp 1007 (ND Ill. 1998); *Howell*, 904 F.2d at 895; and *Sowa*, 34 F.3d 447, 451 (7<sup>th</sup> Cir. 1994). However, the Government cannot merely assert investigative delay without advancing proof of the ongoing investigation. *Sabath*, 990 F. Supp. at 1016 (where the Government argued it sought tax records for two of the years during the delay, the AUSA personally interviewed every witness in the four year delay, and the AUSA was overworked and had taken little vacation time during this time period).

Case law from the Fourth, Seventh, and Ninth Circuits further caution against the implications of requiring a defendant to show improper prosecutorial motive in preindictment delay. The Fourth Circuit Court of Appeals warned that under the harsher test, if a defendant cannot prove a bad motive, then he cannot get relief no matter how egregious the government's conduct. *Howell*, 904 F.2d at 895. A defendant can never know why the authorities have delayed his indictment and the Government will never admit to an improper strategic delay.<sup>15</sup> *Sabath*, 990 F. Supp. at 1017. In contrast, the "burden [of showing proper investigative motive] is not heavy for the government." *Sowa*, 34 F.3d at 451. Forcing a defendant to show an improper

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<sup>15</sup> This is especially so in our adversarial system of justice where delay is highly unlikely to be benign or neutral. *Sabath*, 990 F.Supp. at 1018.

motive in delaying on the part of the Prosecution "violates fundamental conceptions of justice, as well as the community's sense of fair play." *Howell*, 904 F.2d at 895.

The test advanced by Amicus will not result in abuse. As stated above, the case law recognizes and respects investigatory delay. Furthermore, some circumstances that have resulted in a violation of due process include law enforcement convenience and concluding the investigation but simply not proceeding with the case for several years. *See Howell*, 904 F.2d at 895 (where the defendant was in jail in another county during the entire time period of delay and the police did not serve the arrest warrant until his release, a little over two years later) and *Sabath*, 990 F. Supp. at 1016 (where the investigation was concluded one year after the fire occurred, but the Government did not charge the defendant until six years after the fire).

C. *The Marion/Lovasco Balancing Test Continues in Many State Courts.*

The People's strict two prong test has been rejected by Courts in California, Hawaii, Illinois, New York, Pennsylvania, West Virginia,<sup>16</sup> and Tennessee. This Court should similarly reject the test. Unfortunately, these decisions have not received the scholarly attention that the federal cases and Amicus has not located no definitive source digesting all of the cases.

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<sup>16</sup> *State v. Beard*, 194 W.Va. 740, 461 S.E.2d 486 (1995).

The California courts apply the same balancing test advanced by Amicus to determine whether due process under its Constitution<sup>17</sup> has been violated. *People v. Catlin*, 26 Cal.4th 81, 107, 26 P.3d 357 (2001). A defendant must first demonstrate actual prejudice and the prosecutor can then explain the delay. *Id.* The court then balances the prejudice, or harm, to the defendant against the justification advanced by the State. *Id.*

California does distinguish between the right to due process under the state constitution and due process under the federal constitution:

Unlike federal law, however, this state has extended the right to the preindictment and prearrest stage, holding that it attaches under article I, section 15, of our Constitution after a complaint has been filed. *Jones*, 3 Cal.3d at p. 740; *People v. Hannon*, 19 Cal.3d at p. 608. (1977) But the consequence of a violation depends upon the stage at which a violation of the right occurs. The right to a speedy trial following the filing of an indictment or information and the time limitations applicable thereto are set forth by statute (§ 1382) and a violation of the statute is presumed to be prejudicial. (*Sykes*, 9 Cal.3d at pp. 88-89.) **A violation at a prior stage depends upon a balancing of the prejudicial effect of the delay and the**

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<sup>17</sup> Cal. Const., Art. 1, Sec. 15 provides:

The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel.

Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law.

**justification thereof.** (*Jones*, 3 Cal.3d at p. 740;  
*Bradford*, 17 Cal.3d at pp. 18-19.)

*Scherling v. Superior Court of Santa Clara County*, 22 Cal.3d 493, 504, 585 P.2d 219 (1978) (emphasis provided). Further, California applies the same balancing test to analyze preindictment delay as it does to violations of the right to a speedy trial. *Id.* at 505. In California, "it makes no difference whether the delay was deliberately designed to disadvantage the defendant, or whether it was caused by negligence of law enforcement agencies or the prosecution." *Id.* at 507. The bottom line is whether the defendant was denied a fair trial. *Id.* No violation occurs when there is no prejudice to the defendant and the prosecution has not deliberately delayed the indictment. *Id.* However, a violation does exist when the prosecution has acted only negligently, but prejudice to the defendant outweighs that negligence. *Id.*

Recently, the Supreme Court of California briefly discussed the federal standard of preindictment delay in *People v. DePriest*, 42 Cal.4th 1, 163 P.3d 896 (2007). After rejecting defendant's contention that his federal and state rights to a speedy trial were violated, the Court addressed the defendant's belated claim of a federal due process violation. *Id.* at 27. The Court stated,

[to] warrant dismissal of the case on due process grounds, existing law requires a showing that the state's conduct in deferring prosecution 'deviate[d] from "fundamental conceptions of justice"' (*United States v. Lovasco* (1977) 431 U.S. 783, 790-791), and that the ability to mount a defense has thereby suffered 'substantial prejudice.' (*Marion, supra*, 404 U.S. 307, 324; see *Lovasco, supra*, at pp. 790-791.)<sup>18</sup>

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<sup>18</sup> The Court should note that this decision was issued in August of 2007. In July of 2007 a California Appellate Court issued a decision that

*DePriest*, 42 Cal.4<sup>th</sup> at 28. The Court then held that defendant's federal due process right was not violated.

Hawaii uses a balancing test. In *State v. Keliheleua*, 105 Hawai'i 174, 95 P.3d 605 (2004), the Court set forth the test as follows:

"[w]hen a defendant alleges a violation of due process based on preindictment delay, the court must employ a balancing test, considering actual substantial prejudice to the defendant against the reasons asserted for the delay.<sup>19</sup> ... However, [i]f a defendant fails to show actual substantial prejudice, the inquiry ends and the reasons for the delay need not be addressed." *Id.* (citing *Crail*, 97 Hawai'i at 180, 35 P.3d at 207; *Carvalho*, 79 Hawai'i at 170, 880 P.2d at 222).

Illinois also utilizes a balancing test. In *People v. Lawson*, 67 Ill.2d 449, 367 N.E.2d 1244 (1977), the Court looked at *Marion* and the division of opinion amongst the federal circuit courts. The Court noted that the balancing method varies among jurisdictions, and the analysis is delicate.

Where there has been a delay between an alleged crime and indictment or arrest or accusation, the defendant must come forward with a clear showing of actual and substantial prejudice. Mere assertion of inability to recall is insufficient. If the accused satisfies

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stated in dicta that the federal standard required the defendant to show improper purpose. *People v. Boysen*, 152 Cal. App. 4th 1409, 62 Cal.Rptr.3d 350 (2007). The California Supreme Court's decision obviously takes precedence over the Court of Appeals' decision. It is a higher court in that state and its decision was later in time. Furthermore, Westlaw displays a red warning flag for *Boysen*. A review of the KeyCite shows that review of the case was granted and the opinion was superseded on October 17, 2007. No link to that case displays.

<sup>19</sup> Internal citations are as follows: *State v. Higa*, 102 Hawai'i 183, 187, 74 P.3d 6, 10 (2003) (citing *State v. Crail*, 97 Hawai'i 170, 178-79, 35 P.3d 197, 205-06 (2001); *State v. Levi*, 67 Haw. 247, 249, 686 P.2d 9, 10-11 (1984); *State v. English*, 61 Haw. 12, 17-18, 594 P.2d 1069, 1073-74 (1978)).

the trial court that he or she has been substantially prejudiced by the delay, then the burden shifts to the State to show the reasonableness, if not the necessity, of the delay.

If this two-step process ascertains both substantial prejudice and reasonableness of a delay, then the court must make a determination based upon a balancing of the interests of the defendant and the public. Factors the court should consider, among others, are the length of the delay and the seriousness of the crime.

*Lawson* was decided on June 1, 1977, eight days before the Supreme Court issued *Lovasco*. However, the Illinois Supreme Court released a "Supplemental Opinion on Denial of Rehearing to address the *Lovasco* opinion. The prosecutor argued that *Lovasco* imposed a strict test upon defendants alleging that preindictment delay violated their due process rights. The Court did not agree. Illinois interprets its standard as consistent with those of the United States Supreme Court because 1) the *Marion* Court held that actual prejudice is necessary but not sufficient to show a violation of due process, and 2) the *Lovasco* Court held that legitimate investigative delay does not result in a due process violation. Illinois still follows *Lawson*. See *People v. Silver*, 376 Ill. App. 3d 780, 315 Ill. Dec. 609 (Ill. App. 2 Dist., 2007).

Massachusetts utilizes a similar balancing test. According to their high court:

In order to be entitled to dismissal of the indictments due to a preindictment delay, the defendant must demonstrate that he suffered substantial, actual prejudice to his defense, and that the delay was intentionally or recklessly caused by the government. See *United States v. Marion*, 404 U.S. 307, 324, 92 S.

Ct. 455, 30 L.Ed.2d 468 (1971); *Commonwealth v. Patten*, 401 Mass. 20, 21, 513 N.E.2d 689 (1987); *Commonwealth v. Best*, 381 Mass. 472, 484, 411 N.E.2d 442 (1980); *Commonwealth v. Imbruglia*, 377 Mass. 682, 688, 387 N.E.2d 559 (1979).

*Commonwealth v. George*, 430 Mass. 276, 281, 717 N.E.2d 1285, 1289 (1999)

New York has found that prejudice is presumed in cases like this and does not require a showing of deliberate prosecution malfeasance. In New York, where there is a long enough delay, the charges must be dismissed whether or not the defendant's ability to present a defense has been harmed. See *People v Staley*, 41 N.Y.2d 789, 396 N.Y.S.2d 339, 364 NE2d 1111, 1114 (1977). In *People v Taranovich*, 37 N.Y.2d 442, 373 N.Y.S.2d 79 (1975), the New York Court of Appeals stated: "there is no specific temporal duration after which a defendant becomes automatically entitled to release for denial of a speedy trial." Rather, the court must consider the diverse factors of each case. Some of these factors include, but are not limited to "the extent of the delay, the reason for the delay, the nature of the underlying charge, whether or not there has been an extended period of pretrial incarceration, and whether or not there is any indication that the defense has been impaired by reason of the delay." *People v Taranovich*, 37 N.Y.2d 442, 373 N.Y.S.2d 79, 335 N.E.2d 303 (1975).

Admittedly, the prejudice against a criminal defendant must be severe. The mere passage of time (standing alone) is not grounds for a dismissal. In *People v Vernace*, 96 N.Y.2d 886, 756 N.E.2d 66, 730 N.Y.S.2d 778 (2001), the New York Court of Appeals held that the delay of the indictment for a double

homicide was made in good faith and for sufficient reasons. Thus, defendant was not deprived of due process, "even though there may be some prejudice to defendant. *Id.* at 888. The dissent criticized the opinion for not finding that unjustified delay (as opposed to actual prejudice) required dismissal. The prejudicial effect of "inordinate" delay is presumed and the burden lies on the prosecution to establish good cause. *Id.* at 889. The government delayed Vernace's indictment fourteen years, during which no investigation actually occurred. *Id.* See also Stonitish, *The Effect of People v. Verace on a Criminal Defendant's Right to Due Process and a Speedy Trial in New York*, 76 St John's L Rev 657 (2002).

Pennsylvania has expressly rejected the restricted reading of *Marion/Lovasco* posed by the prosecutor. Pennsylvania is unique in that appears to require recklessness as the requirement to dismiss a prosecution. The Pennsylvania Supreme Court remanded a murder by arson case where a man was charged with killing his wife and child. *Commonwealth v. Snyder*, 552 Pa. 44, 713 A.2d 596 (1998). The Court instructed the lower court to explore all the circumstances surrounding the eleven year delay. In rejecting the narrow reading of *Lovasco*, the Court stated:

Whether done intentionally or not, the Commonwealth gained a tremendous strategically advantage against the Appellant due to the passage of time and the loss of critical defense testimony through death and memory.... We hold that, based on all of the facts of this case, bringing this prosecution after more than eleven years caused actual prejudice to the Appellant and deprived him of due process of law unless there were proper reasons for the delay.

*Id.* See also *Commonwealth v. Scher*, 803 A.2d 1204 (Pa. 2002) (reaffirming *Snyder*). In *Scher*, the Court stated that Defendant was required to demonstrate actual prejudice. After that, the prosecution must show all the reasons for the delay and the Court “must then examine all of the circumstances to determine the validity of the Commonwealth’s reason for the delay.” Where the evidence shows that the delay was the product of intentional bad faith *or recklessness*, the Court was empowered to dismiss the charges. *Id.*, at 1221.

The Tennessee Supreme Court has rejected the strict test urged by the state. *State v. Gray*, 917 S.W.2d 668 (Tenn 1996). The Court has recognized that a delay may violate a defendant's due process right depending on the manner of the delay. *Id.* at 671, citing *Halquist v. State*, 489 S.W.2d 88, 93 (Tenn. Crim. App. 1972). Some Tennessee lower courts had previously required the defendant to show a purposeful delay by the State for a tactical advantage.<sup>20</sup> The *Gray* Court, however, recognized that the “[federal] due

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<sup>20</sup> See *State v. Dykes*, 803 S.W.2d 250 (Tenn. Cr. App. 1990). The Supreme Court of Tennessee rejected Gray's contention he made the showing of intentional prosecutorial delay “assuming *arguendo*, that *Dykes* is the standard.” *Gray*, 917 S.W.2d at 671. Reviewing the citations in *Dykes* and subsequent lower court cases reveals the early decision of *Holquist v. State*, 489 S.W.2d 99 (Tenn. Crim. App. 1972). The intermediate court observed:

While there is no constitutional right to be arrested, ... courts have recognized that an unreasonable delay between the commission of the offense and the arrest may violate the defendant's constitutional rights if the delay results in prejudice to him *or* was part of a deliberate, purposeful and oppressive design for delay.

process standard is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 673, citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). It held that under the Tennessee Constitution, "the trial court must consider the length of the delay, the reason for the delay, and the degree of prejudice, if any, to the accused in determining whether pre-accusatorial delay violates due process." *Id.* at 673. The Court concluded that the forty year delay violated Gray's federal and state due process rights. *Id.* at 674.

Washington applies a three prong test. *State v. Salavea*, 151 Wash.2d 133, 139, 86 P.3d 125, 127 (2004). The defendant must, of course, demonstrate prejudice. *Id.* Upon finding evidence of prejudice, the Court next considers the state's reason for delay. *Id.* Finally, to dismiss based on preindictment delay, the court must balance prongs one and two. "If the delay is intentional due process is violated, but if the delay only is negligent, due process may or may not be violated." *Id.* A violation has occurred if the delay violates the fundamental conceptions of justice. *Citing, Lovasco*, 431 U.S. at 790, 97 S. Ct. 2044; *Calderon*, 102 Wash.2d at 352-53, 684 P.2d 1293; *Dixon*, 114 Wash.2d at 860, 865-66, 792 P.2d 137.

West Virginia has found that a delay could not be justified where the investigation was dormant and the State knew the Defendant's whereabouts at all times. *State ex rel. Leonard v. Hey*, 269 S.E.2d 394 (W. Va, 1980). There,

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*Id.*, at 93 (emphasis provided). However, the subsequent case law demonstrates an interpretation of this "or" as an "and," contrary to normal grammatical meaning.

the Court found that a “[a] delay of eleven years between the commission of a crime and the arrest or indictment of a defendant, his location and identification having been known throughout the period, is presumptively prejudicial to the defendant and violates his right to due process of law.”

This Court should adopt a standard that allows a defendant to show actual and substantial prejudice accompanied by prosecutorial negligence to prove a due process violation. In instances of prosecutorial negligence, it is often the case that the delay spans decades rather than years. By the time a criminal file resurfaces, evidence in favor of the defense has died. Errors in the prosecutor's office or police department are not usually the fault of one individual, but are attributable to dereliction of investigative responsibilities, over-extended staff or are just plain mistakes. The Court must begin with the presumption that the defendant suffering delay is actually innocent. The Court cannot expect innocent people to keep tabs on their alibis and physical belongings from a lifetime ago. While the Government may not have had a bad motive, the defendant is still left with no tools, a situation over which he had no control. Decades after an incident, the innocent defendant has no witnesses and either no or corrupted evidence, and thus he has no defense. Yet, the Government has the evidence it has managed to preserve, including reports and statements, despite lack of investigation over the intervening decades. Dereliction of investigative responsibilities or inter-office mistakes cannot outweigh a defendant's ability to meet the charges against him. When the Government commits negligence and a defendant suffers substantial

prejudice to the extent that a fair trial is unattainable, due process has been breached.

Even, however, if this Court adopts the recklessness approach rather than a negligence standard, dismissal is warranted in this case. As the *Sabath* Court noted:

Over the last few years, the Seventh Circuit and various other courts have warned the United States Attorney's Office that administrative, bureaucratic, non-investigatory problems cannot provide a compelling justification for long delays in returning indictments. (citations omitted) Thus, by 1992, the United States Attorney's Office was aware that waiting to indict a case on the eve of the running of the applicable statute of limitations may be pushing the "due process" envelope to the edge.

Despite this knowledge, the government remained indifferent to the severe consequences of delaying Defendant's indictment. The government had, by its own admission, fully completed its criminal investigation of Defendant by December 1992. It was aware that its case was a circumstantial arson case and that Defendant's main alibi witness, his father, was 78 years old. The government was also well aware that circumstantial arson cases are not easier to defend as they get older. The government's case relies mainly on financial motive evidence-evidence that never fades and remains documented in financial and insurance records. In contrast, Defendant's ability to mount a defense suffers from the fatal combination of diminished memories, flawed government reports, lost evidence and unavailable witnesses.

While the government also prejudiced itself somewhat by delaying its prosecution of this case, the prejudice is overwhelmingly felt by Defendant in this type of circumstantial arson-for-profit case. This fact was confirmed at the New Year's Eve evidentiary hearing in which Special Agent Mirocha confirmed that he wrote down only important incriminating information when he arrived on the scene. He had no independent

recollection of any potential exculpatory statements made to him by the only three persons at the site of the fire in 1991, which included Defendant and his now-deceased father. How can ordinary, untrained laypersons be expected to remember the important events over six years later when a trained criminal investigator cannot remember key conversations on which the government is attempting to base a conviction? In this case, the Court personally saw and tested the actual prejudice that faded memories visited on the Defendant.

In spite of its knowledge about the circumstances surrounding the investigation, ill-prepared reports, elderly and sick key witnesses, a case agent who passed away, faded memories of the government's own investigative agents, and missing physical evidence, the government consciously delayed seeking an indictment in 1993, 1994, 1995 and 1996. This prosecutorial behavior was at the very least reckless, and, under the circumstances presented by this case, violated the Due Process Clause.

*Sabath*, 990 F. Supp. at 1019. The Court dismissed the case against the defendant. Under these circumstances, the prejudice suffered by the defendant would result in an unfair trial. *Id.*

The balancing tests advocated by these states all recognize that intentional governmental misconduct is not an absolute prerequisite to invoking the due process right. In cases where there is extensive unexplained or unjustifiable delay which irreparably harms a criminal defendant, a Court has the judicial obligation to dismiss these charges. This Court should either summarily adopt this approach or grant leave to appeal. Certainly, all the statements chastising the United States Supreme Court for not resolving the 30 year judicial controversy demonstrate that this issue also meets the standards for having leave to appeal to this Court granted.

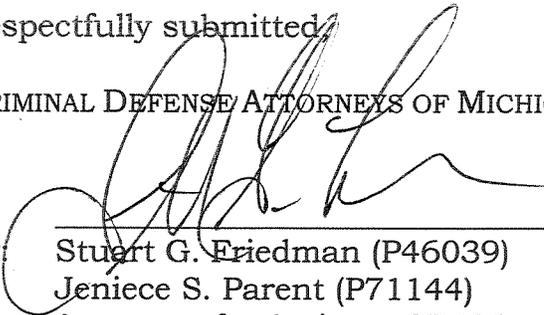
**RELIEF**

For the reasons set forth above, the Amicus moves this Court to:

1. Reinstate the dismissal order;
2. Grant leave to appeal;

Respectfully submitted,

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