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STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF  
MICHIGAN,

Plaintiff-Appellee,

v

CHARLES WILLIAM MERCER, JR.,

Defendant-Appellant.

Supreme Court No. 135811

Court of Appeals No. 281006

Trial Court No. 07-118-FC

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DEFENDANT-APPELLANT'S

SUPPLEMENTAL BRIEF

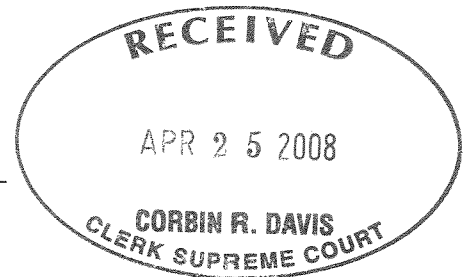


TABLE OF CONTENTS

INDEX OF AUTHORITIES ..... i

STATEMENT OF QUESTIONS PRESENTED ..... iii

ARGUMENTS ..... 1

I. THE CONSTITUTIONAL DUE PROCESS STANDARD FOR DISMISSAL OF A CRIMINAL PROSECUTION BASED UPON PRE-ARREST DELAY DOES NOT REQUIRE THAT THE DEFENDANT DEMONSTRATE BOTH PREJUDICE AND THAT THE PROSECUTION INTENDED TO GAIN A TACTICAL ADVANTAGE BY MEANS OF THE DELAY. AN INTENT TO GAIN A TACTICAL ADVANTAGE IS BUT A FACTOR FOR THE COURT’S CONSIDERATION IN ITS ANALYSIS. .... 1

A. Constitutional due process does not require a showing by the defendant who has been substantially and actually prejudiced by the delay that the prosecution’s delay was an intentional device to gain a tactical advantage before a case can be dismissed. .... 1

II. IN ANALYZING PRE-ARREST DELAY CLAIMS, TRIAL COURTS SHOULD APPLY A BALANCING TEST TO CONSIDER THE PREJUDICE TO THE DEFENDANT AS A RESULT OF THE DELAY AND THE PROSECUTION’S REASONS FOR THE DELAY AND DETERMINE WHETHER THE DEFENDANT CAN BE GIVEN A FAIR TRIAL. ONE OF MANY FACTORS THE COURT MAY CONSIDER WOULD BE WHETHER THE DELAY WAS AN INTENTIONAL DEVICE TO GAIN A TACTICAL ADVANTAGE. .... 5

A. Once an accused comes forward with evidence of prejudice as a result of the delay, the burden must shift to the prosecution to explain the delay. .... 8

B. In cases where there is no statute of limitations, due process plays a more significant role in the Court’s analysis of pre-arrest delay claims. .... 9

RELIEF REQUESTED ..... 14

**INDEX OF AUTHORITIES**

**CASES**

*Arizona v Youngblood*, 488 US 51; 109 S Ct 339 (US Ariz, 1988) ..... 2, 3

*Bailey v Glover*, 88 US 342; 22 L Ed 2d 636 (1875) ..... 10

*Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972) ..... 6

*Bigelow v Walraven*, 392 Mich 566; 221 NW2d 328 (1974) ..... 10

*Bukowski v Detroit*, 478 Mich 268; 732 NW2d 75 (2007) ..... 6

*Burnett v New York Central R Co*, 380 US 424; 85 S Ct 1050; 13 L Ed 2d 941 (1965) .... 12

*Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971) ..... 10

*Buzzn v Muncey Cartage Co*, 248 Mich 64; 226 NW 836 (1929) ..... 9

*Chamski v Wayne Co Board of Auditors*, 288 Mich 238; 284 NW 711 (1939) ..... 13

*Chase Securities Corp v Donaldson*, 325 US 304; 65 S Ct 1137; 89 L Ed 1628 (1945) ... 11

*Chesnow v Nadell*, 330 Mich 487; 47 NW2d 666 (1951) ..... 13

*First Nat'l Bank of Ovid v Steel*, 146 Mich 308; 109 NW 423 (1906) ..... 10

*Forest v Parmalee*, 402 Mich 348; 262 NW2d 653 (1978) ..... 10

*Hatfield v Keesee*, 995 F2d 1066; 1993 WL 204215 ..... 5

*In re Contempt of Dudzinski*, 257 Mich App 96; 667 NW2d 68 (2003) ..... 5

*Jenny v Perkins*, 17 Mich 28 (1868) ..... 10

*Lenawee County v Nutten*, 234 Mich 391; 208 NW 613 (1926) ..... 10

*Lothian v Detroit*, 414 Mich 160; 324 NW2d 9 (1982) ..... 13

*Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976) ..... 6

*Missouri, Kansas & Texas R Co v Harriman*, 227 US 657; 33 S Ct 397; 57 L Ed 690  
 (1913) ..... 12

*Mooney v Holohan*, 294 US 103; 55 S Ct 340, 341; 79 L Ed 791 (1935) ..... 4, 9

*Nicklin v Henderson*, 352 F3d 1077 (CA 6, 2003) ..... 5

*Order of R Telegraphers v R Express Agency*, 321 US 342; 64 S Ct 582; 88 L Ed 788  
 (1944) ..... 12, 14

*People v Bisard*, 114 Mich App 784; 319 NW2d 670 (1982) ..... 7-9

*People v Collins*, 388 Mich 680; 202 NW2d 769 (1972) ..... 6

*People v Cross*, 202 Mich App 138; 508 NW2d 144 (1993), lv den 445 Mich 912  
 (1994) ..... 6

*People v Herndon*, 246 Mich App 371; 633 NW2d 376, 391 (2001) ..... 8

*People v McIntire*, 232 Mich App 71; 591 NW2d 231 (1998), rev'd on other grounds  
 461 Mich 147; 599 NW2d 102 (1999) ..... 8

*People v Vander[V]liet*, 444 Mich 52; 508 NW2d 114 (1993) ..... 6

*People v White*, 208 Mich App 126; 527 NW2d 34 (1994) ..... 8

*Riddlesbarger v Hartford Insurance Co*, 74 US 386; 19 L Ed 257 (1869) ..... 12

*Sloan v Silberstein*, 2 Mich App 660, 676; 141 NW2d 332 (1966) ..... 13

*Smith v Sprague*, 244 Mich 577; 222 NW 207 (1928) ..... 13

*St. Louis Public Schools v Walker*, 76 US 282, 288; 19 L Ed 576 (1870) ..... 11

*Toussie v US*, 397 US 112; 90 S Ct 858; 25 L Ed 2d 156 (1970) ..... 11

*Tray v Whitney*, 35 Mich App 529; 192 NW2d 628 (1971) ..... 13

*US v Ewell*, 383 US 116, 122; 86 S Ct 773, 777; 15 L Ed 2d 627 (1966) ..... 10, 11

*US v Gouveia*, 467 US 180; 104 S Ct 2292, 2299-2300 (1984) ..... 12

*US v Habig*, 390 US 222; 88 S Ct 926; 19 L Ed 2d 1055 (1968) ..... 11

*US v Lovasco*, 431 US 783; 97 S Ct 2044; 52 L Ed 2d 752 (1977) ..... 1, 2, 4, 5, 7, 10, 12

*US v Marion*, 404 US 307; 92 S Ct 455; 30 L Ed 2d 468 (1971) ..... 2, 4, 5, 8, 10-12

*Walker v Schultz*, 175 Mich 280, 293; 141 NW 543 (1913) ..... 13

CONSTITUTIONS, STATUTES, COURT RULES

US Const, Ams V and XIV ..... 1

Const 1963, art 1, § 17 ..... 1

FRE 404 and 403 ..... 6

MRE 609 ..... 6

MCL 15.243 ..... 6

**STATEMENT OF QUESTIONS PRESENTED**

- I. Whether the constitutional due process standard for dismissal of a criminal prosecution based on prearrest delay requires a showing by the 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?

Defendant-Appellant answers, “No.”

Amicus answers, “No.”

Plaintiff-Appellee answers, “Yes.”

The trial court answers, “No.”

The Court of Appeals answered, “Yes.”

- II. In cases involving pre-arrest delay, should this court apply a two prong balancing test and look at the prejudice to the defendant and whether the State has offered a reason for the delay which justifies the prejudice to the defendant?

Defendant-Appellant answers, “Yes.”

Amicus answers, “Yes.”

Plaintiff-Appellee answers, “No.”

The trial court answers, “Yes.”

The Court of Appeals answered, “No.”

## ARGUMENTS

**I. THE CONSTITUTIONAL DUE PROCESS STANDARD FOR DISMISSAL OF A CRIMINAL PROSECUTION BASED UPON PRE-ARREST DELAY DOES NOT REQUIRE THAT THE DEFENDANT DEMONSTRATE BOTH PREJUDICE AND THAT THE PROSECUTION INTENDED TO GAIN A TACTICAL ADVANTAGE BY MEANS OF THE DELAY. AN INTENT TO GAIN A TACTICAL ADVANTAGE IS BUT A FACTOR FOR THE COURT'S CONSIDERATION IN ITS ANALYSIS.**

The Due Process Clause of the United States Constitution and the Michigan Constitution require that criminal defendants be provided with a fair trial, not merely a “good faith” attempt at a fair trial. US Const, Ams V and XIV; Const 1963, art 1, § 17. In this case, Dr. Mercer has been denied the opportunity to present a full defense due to the prosecution’s inordinate delay in bringing this case. Even if the delay were the result of mere negligence, the resulting prejudice to Dr. Mercer as a result of the delay has deprived him of his guaranteed right to due process of law. To require that in addition to substantial and actual prejudice to his case as a result of the delay, which he has shown, he must also demonstrate that the prosecutor delayed bringing the prosecution in order to gain a tactical advantage at trial unduly restricts the protections of the Due Process Clause.

**A. Constitutional due process does not require a showing by the defendant who has been substantially and actually prejudiced by the delay that the prosecution’s delay was an intentional device to gain a tactical advantage before a case can be dismissed.**

The due process clause protects against delays prior to arrest or arraignment that violate “‘fundamental conceptions of justice’ which define ‘the community’s sense of fair play and decency,’” and lie at the base of our civil and political institutions. *US v Lovasco*, 431 US 783, 790; 97 S Ct 2044; 52 L Ed 2d 752 (1977). Despite Michigan Court of Appeals’ opinions suggesting the contrary, the United States Supreme Court has

never formally adopted a bad faith requirement in the Fifth Amendment Due Process pre-arrest delay context. Neither *US v Marion*, 404 US 307; 92 S Ct 455; 30 L Ed 2d 468 (1971), nor *Lovasco, supra*, can reasonably be read to require a demonstration of bad faith delay before a case may be dismissed on due process grounds. While bad faith, defined as a deliberate prosecutorial delay in bringing a criminal case for the purpose of gaining a tactical advantage at trial, would certainly provide grounds for a dismissal of delayed criminal charges resulting in prejudice to a defendant, the High Court has never limited the inquiry to this fact pattern. Nor should this Court adopt a test which requires a finding that the prosecutor intentionally delayed bringing the prosecution in order to gain a tactical advantage at trial before a case must be dismissed on the basis of pre-arrest delay. Both *Marion* and *Lovasco* agree that the due process inquiry must consider the *reasons for the delay* as well as the prejudice to the accused. *Lovasco, supra* at 790. They do not require that the accused demonstrate bad faith, nor would it be logical to require the accused to demonstrate either bad faith or indeed advance any reasons for the delay in prosecution.

To suggest that demonstrating bad faith is the only way in which the Due Process Clause can be violated when analyzing pre-arrest delay claims is not correct and should not be the standard in Michigan jurisprudence. Simply put, a showing of bad faith is unnecessary where the defendant has been greatly prejudiced by the delay. Justice Stevens recognized in his concurring opinion in *Arizona v Youngblood*, 488 US 51; 109 S Ct 339 (US Ariz, 1988), that “there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.”

*Id.* at 61. The point is, when the defendant has been so prejudiced by a delay in prosecution that a criminal trial would be fundamentally unfair to the accused, due process does not require a demonstration of bad faith.

Bad faith is currently limited to situations where the Government's actions in delaying prosecution were intentionally designed to gain a tactical advantage at trial. This type of bad faith by its very nature can only be proved by showing exactly how the police and prosecution handled the investigation and evidence, how thoroughly the investigation was considered, and why the police and prosecution took the actions they did. In order to determine this when the delay is many years after the alleged crime was originally investigated, the original prosecutors and investigators must be available to testify or, at a minimum, their original files must be made available for review.

The police and prosecution's files are a unique, contemporaneously prepared history of the handling of an investigation and considerations regarding prosecution. In an action such as this where the prosecution is brought against a man decades after the decedent's death, where there has been substantial and actual prejudice as a result of the delay, the need for the information contained in the prosecution and police files is not only substantial, but overwhelming. Generally, absent information provided by the police or prosecution who were involved in the case at its inception, examination of these files may be the only means by which a defendant can discover the information necessary to prove bad faith. Without access to this information and witnesses involved in the decision-making process, it would be impossible to even begin to show bad faith.

If circumstances or the passage of time prevents discovery of bad faith, defendants constitutionally should not be held to this standard. In cases of long delay where

investigative files become lost or have been purged and critical witnesses who took part in the investigation and decision making are deceased, bad faith, as it has been defined, can never be demonstrated and, in cases where the delay has resulted in substantial and actual prejudice to the defendant's ability to be given a fair trial and fully present a defense, the requirement of such a demonstration before a case may be dismissed is patently unfair and would be a violation of constitutional due process principles.

Safeguarding the liberty of citizens against deprivation through the action of the Government, whether in bad faith or not, embodies the "fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340, 341; 79 L Ed 791 (1935). To deprive a defendant of his due process right to receive a fair trial because of an inability to demonstrate the mental processes of government agents is patently wrong and violates fundamental conceptions of justice, as well as the community's sense of fair play. Clearly, regardless of intent, or lack thereof, governmental actions that result in a defendant's receiving an unfair trial constitute a deprivation of due process. Requiring the accused to demonstrate bad faith makes no logical sense and is contrary to United States Supreme Court precedent. Indeed, the Supreme Court in *Marion* stated:

To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases.

*Marion, supra* at 325.

Both *Marion* and *Lovasco* agree that courts cannot determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions.

*Lovasco, supra* at 796 (citing *Marion, supra* at 324). However, it seems apparent that the

“delicate judgement” referred to in *Marion* is a reference to the need to balance the competing interests of the accused and the government.

In *Lovasco*, the Supreme Court stated that neither they nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay and they therefore left it to the lower courts to apply the settled principles of due process discussed by the High Court to the particular circumstances of individual cases. *Lovasco, supra* at 796-797. The *Lovasco* Court simply held in the case before it that to prosecute a defendant following *investigative delay* does not deprive him of due process, even if his defense might have been *somewhat* prejudiced by the lapse of time. *Lovasco, supra* at 796.

**II. IN ANALYZING PRE-ARREST DELAY CLAIMS, TRIAL COURTS SHOULD APPLY A BALANCING TEST TO CONSIDER THE PREJUDICE TO THE DEFENDANT AS A RESULT OF THE DELAY AND THE PROSECUTION’S REASONS FOR THE DELAY AND DETERMINE WHETHER THE DEFENDANT CAN BE GIVEN A FAIR TRIAL. ONE OF MANY FACTORS THE COURT MAY CONSIDER WOULD BE WHETHER THE DELAY WAS AN INTENTIONAL DEVICE TO GAIN A TACTICAL ADVANTAGE.**

Courts are well experienced in employing balancing tests in a number of areas in both criminal and civil cases. For discrimination cases, the Sixth Circuit uses a balancing test to determine whether a settlement agreement was entered into knowingly and voluntarily. *Nicklin v Henderson*, 352 F3d 1077, 1080 (CA 6, 2003) In public employee discharge cases based on alleged violations of the First Amendment, courts use a “balancing test” in determining whether such violations have occurred. *Hatfield v Keesee*, 995 F2d 1066; 1993 WL 204215, 3. Courts use a balancing test when determining whether speech constitutes an imminent threat to the administration of justice. *In re Contempt of Dudzinski*, 257 Mich App 96, 102; 667 NW2d 68 (2003). Resolution of

whether procedural issues are constitutionally sufficient requires a balancing of governmental and private interests that are affected. *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976). Decisions regarding the admissibility of other acts evidence is also subject to a balancing test. In Freedom of Information Act (FOIA) cases, if the public record qualifies as a frank communication exempt from disclosure under FOIA, trial courts must engage in a balancing test to determine if the public interest in encouraging frank communication clearly outweighs the public interest in disclosure. MCL 15.243(1)(m). *Bukowski v Detroit*, 478 Mich 268; 732 NW2d 75 (2007).

Balancing tests are also used when determining the admissibility of evidence at trial. When the other acts evidence has some probative value, the question of admissibility necessarily requires the familiar balancing task entrusted to trial judges under Federal Rules of Evidence 404(b) and 403, and their state counterparts. *People v Vander[V]liet*, 444 Mich 52; 508 NW2d 114 (1993). A prior conviction may be used to impeach a witness's credibility if the conviction satisfies the criteria set forth in Michigan Rules of Evidence 609, which, under subsection (a)(2)(B), requires the employment of a balancing test. MRE 609(b); *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993), lv den 445 Mich 912 (1994).

Courts have long utilized a balancing test when analyzing speedy trial claims, which includes factors of importance to the determination of a defendant's due process right to a fair trial in pre-arrest delay claims. *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Collins*, 388 Mich 680; 202 NW2d 769 (1972).

Balancing tests advocated by states in the context of pre-arrest delay claims demonstrate a recognition that where there is extensive unexplained or unjustifiable delay which

irreparably harms a criminal defendant, a Court has an obligation to dismiss the charges to satisfy the constitutional mandates of due process.

Michigan courts previously have considered and analyzed the views held by various jurisdictions and rationally held that a balancing test was the most appropriate way to resolve the due process claims in pre-arrest delay cases. *People v Bisard*, 114 Mich. App 784, 791; 319 NW2d 670 (1982). The *Bisard* Court reasoned that the best approach was to apply a two-part balancing test to determine if an oppressive pre-arrest delay violated a defendant's due process rights. *Id.* at 791. The court adopted a test where the prejudice from the delay was weighed against the reasons for the delay. This Court should summarily adopt the approach outlined in *Bisard* or grant leave to appeal.

As the Court stated in *Bisard*:

We believe that Illinois' interpretation of *Lovasco* provides an appropriate method of balancing the state's interest in delaying certain prosecutions with a defendant's need for a prompt trial. When a delay is deliberately undertaken to prejudice a defendant, little actual prejudice need be shown to establish a due process claim. Where, however, there is a justifiable reason for the delay, the defendant must show more-that the prejudice resulting from the delay outweighs any reason provided by the state.

*Id.* at 790.

Bad faith, as it has been defined, is only a factor for the trial court to consider when deciding whether too much time has lapsed and too much prejudice to the defendant has resulted because of that lapse to be able to afford a fair trial. Should this Court feel that "bad faith" must play a specific role in pre-arrest delay decisions, then this Court should give the term "bad faith" a broader definition which would encompass negligence; particularly where the negligence results in the loss or destruction of constitutionally material and exculpatory evidence. In *Lovasco, supra*, the Government

expanded their previous concession in *Marion, supra*, by stating that a due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense. *Lovasco, supra* at 796. At a minimum, by the Government's own concession, the term "bad faith" encompasses recklessness. Ultimately, Defendant-Appellant avers bad faith should be a question of reasonableness under the circumstances.

**A. Once an accused comes forward with evidence of prejudice as a result of the delay, the burden must shift to the prosecution to explain the delay.**

Appellate panels in Michigan have at times held that the accused bears the burden of demonstrating bad faith on the part of the prosecution. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). The more reasoned approach does not saddle an accused with this insurmountable burden. After the prosecution has advanced its reasons for the delay, the Court may then consider the explanation for the delay, whether the delay was deliberate, and whether undue prejudice attached to the defendant. *People v Herndon*, 246 Mich App 371, 390; 633 NW2d 376, 391 (2001) (citing *People v McIntire*, 232 Mich App 71, 94; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147; 599 NW2d 102 (1999), discussing *Bisard, supra* at 791.

The *Bisard* approach to analyzing pre-arrest delay claims appropriately sets forth who should bear the burden of production and persuasion. The Court held that, once a defendant has shown some prejudice, the prosecution bears the burden of persuading the Court that the reason for the delay is sufficient to justify whatever prejudice resulted. "This approach places the burden of coming forward with evidence of prejudice on the

defendant, who is most likely to have facts regarding prejudice at his disposal. The burden of persuasion rests with the state, which is most likely to have access to facts concerning the reasons for delay and which bears the responsibility for determining when an investigation should end.” *Bisard, supra* at 791.

Thus, the reasoned approach to analyzing claims of pre-arrest delay is to require first that the accused demonstrate how he has been prejudiced by the delay in bringing the prosecution. If the accused is unable to demonstrate prejudice, then the Court need go no further in analyzing the pre-arrest delay claim. If, however, the accused demonstrates prejudice as a result of the delay, the burden then shifts to the prosecution to demonstrate the Government’s reasons for the delay and persuade the Court that the proffered reasons for the delay are sufficient to justify whatever prejudice resulted. In the end, due process is satisfied if the accused can be given a fair trial, which includes a right to present a full defense. The balancing test advocated by Defendant-Appellant would adequately balance the competing equities of the parties involved, and provide the appropriate due process safeguard to the liberty of citizens against deprivation through the action of the Government, whether malicious or not. The balancing test utilized in these cases embodies the “fundamental conceptions of justice which lie at the base of our civil and political institutions.” *Mooney, supra* at 112.

**B. In cases where there is no statute of limitations, due process plays a more significant role in the Court’s analysis of pre-arrest delay claims.**

Limitations periods created by statute are grounded in a number of worthy policy considerations. They encourage the prompt recovery of damages, *Buzzn v Muncey Cartage Co*, 248 Mich 64, 67; 226 NW 836 (1929); they penalize plaintiffs who have not

been industrious in pursuing their claims, *First Nat'l Bank of Ovid v Steel*, 146 Mich 308; 109 NW 423 (1906); they “afford security against stale demands when the circumstances would be unfavorable to a just examination and decision,” *Jenny v Perkins*, 17 Mich 28, 33 (1868); they relieve defendants of the prolonged fear of litigation, *Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974); they prevent fraudulent claims from being asserted, *Bailey v Glover*, 88 US 342; 22 L Ed 2d 636 (1875); and they “remedy . . . the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.” *Lenawee County v Nutten*, 234 Mich 391, 396; 208 NW 613 (1926). In general, statutes of limitations are regarded as procedural, not substantive, in nature. *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978); *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971).

In *Marion*, the Supreme Court noted that statutes of limitations provide predictable, legislatively enacted limits on prosecutorial delay, and provide “the primary guarantee, against bringing overly stale criminal charges.” *Marion, supra* at 322, quoting *US v Ewell*, 383 US 116, 122; 86 S Ct 773, 777; 15 L Ed 2d 627 (1966). But the Supreme Court went on to acknowledge that the “statute of limitations does not fully define the . . . [defendants’] rights with respect to the events occurring prior to indictment,” and that the Due Process Clause plays a role in protecting against oppressive delay. *Marion, supra* at 324.<sup>1</sup>

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<sup>1</sup> When discussing pre-arrest delay cases brought within the applicable statute of limitations, the *Lovasco* Court characterized the role of due process as limited. *Lovasco, supra* at 788-789.

The Supreme Court discussed in some detail the purpose of statutes of limitations in criminal cases in *Marion, supra* at 322-323:

The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in *United States v. Ewell, supra*, 386 U.S. [116], at 122, 86 S.Ct., at 777, ‘the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges.’ Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they ‘are made for the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defence.’ [*St. Louis*] *Public Schools v. Walker*, 9 Wall. [76 US] 282, 288, 19 L.Ed. 576 (1870). These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant’s right to a fair trial would be prejudiced.<sup>14</sup> As this Court observed in *Toussie v. United States*, 397 U.S. 112, 114-115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970):

‘The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.’

There is thus no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function.

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<sup>14</sup> The Court has indicated that criminal statutes of limitation are to be liberally interpreted in favor of repose. *United States v. Habig*, 390 U.S. 222, 227, 88 S.Ct. 926, 929, 19 L.Ed.2d 1055 (1968). The policies behind civil statutes of limitation are in many ways similar. They ‘represent a public policy about the privilege to litigate,’ *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945), and their underlying rationale is ‘to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of

memory.’ *Missouri, Kansas & Texas R. Co. v. Harriman*, 227 U.S. 657, 672, 33 S.Ct. 397, 401, 57 L.Ed. 690 (1913). Such statutes ‘are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected,’ *Riddlesbarger v. Hartford Insurance Co.*, 7 Wall. [74 US] 386, 390, 19 L.Ed. 257 (1869), they ‘promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared,’ *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-349, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944), and they ‘are primarily designed to assure fairness to defendants . . . (C)ourts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.’ *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941 (1965). As in the criminal law area, such statutes represent a legislative judgment about the balance of equities in a situation involving the tardy assertion of otherwise valid rights: ‘The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.’ *Order of Railroad Telegraphers v. Railway Express Agency*, *supra*, 321 U.S., at 349, 64 S.Ct., at 586.

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In both *Marion* and *Lovasco*, the accused was charged with offenses subject to a finite statute of limitation, and the prosecutions of those cases were brought well within those limitation statutes.<sup>2</sup> Thus, the Supreme Court made clear, with the protections afforded by statutes of limitation, due process need only play a limited role. In cases brought within the statute of limitation, the due process would still require the dismissal of an indictment if the Government’s delay caused the defendant actual prejudice in presenting his defense and the delay in bringing the indictment was a deliberate device to gain an advantage over him *US v Gouveia*, 467 US 180, 192; 104 S Ct 2292, 2299-2300 (1984) (citing both *Lovasco, supra* at 789-790, and *Marion, supra* at 324). It is clear from a careful reading of *Marion* and *Lovasco*, however, that whether the delay in bringing the

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<sup>2</sup> *Marion* dealt with a 38 month delay; *Lovasco* dealt with a delay of more than 18 months.

prosecution was a deliberate device to gain a tactical advantage was but one consideration and the High Court did not set out a bright line test when a case may be dismissed on grounds of pre-arrest delay where the accused has been prejudiced as a result of the delay and can no longer be given a fair trial.

The due process consideration in cases where there is no statute of limitation may be likened to the doctrine of laches in civil cases. Laches, a judicially-imposed equitable principle, denotes “the passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant.” *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982)(quoting *Tray v Whitney*, 35 Mich App 529, 536; 192 NW2d 628 (1971)). Laches differs from the statutes of limitation in that ordinarily laches is not measured by the mere passage of time. *Smith v Sprague*, 244 Mich 577; 222 NW 207 (1928); *Chamski v Wayne Co Board of Auditors*, 288 Mich 238; 284 NW 711 (1939); *Chesnow v Nadell*, 330 Mich 487; 47 NW2d 666 (1951). Rather, attention is focused on the prejudice occasioned by the delay in prosecution of an action. As a general rule, “[w]here the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot . . . be recognized.” *Walker v Schultz*, 175 Mich 280, 293; 141 NW 543 (1913). As Michigan Supreme Court stated in *Lothian*, “Simply stated, “laches [is concerned] with the effect of delay,” while “limitations are concerned with the fact of delay.” *Lothian, supra* at 168 (quoting *Sloan v Silberstein*, 2 Mich App 660, 676; 141 NW2d 332 [1966]).

Without a finite statute of limitation, courts must rely on the Due Process Clause to assure fairness and “promote justice” “by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have

faded, and witnesses have disappeared.” *Order of R Telegraphers, supra* at 348-349. Finite statutes of limitation represent a legislative judgment about the balance of equities in a situation involving the tardy assertion of otherwise valid rights: “The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Id.* at 349. But when there is no statute of limitation, what mechanism balances the equities in a criminal case? The mechanism must be found in the Due Process Clause. If the passage of time and resulting actual and substantial prejudice deprives the accused of the constitutional right to a fair trial, then the principles of fairness and the fundamental conceptions of justice which lie at the base of our civil and political institutions would demand that such cases brought by the Government be dismissed.

**RELIEF REQUESTED**

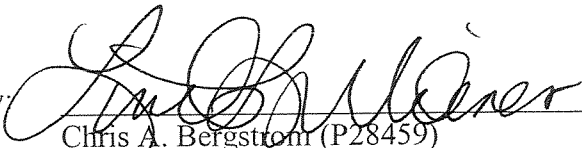
For the reasons set forth above, Defendant moves this Court to:

1. Reinstatement of the dismissal order.
2. Grant leave to appeal.

Respectfully submitted,

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