

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**ON APPEAL FROM THE COURT OF APPEALS**

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**PEOPLE OF THE STATE OF MICHIGAN,**

**Plaintiff-Appellee,**

**vs**

**Supreme Court No. 135811**

**CHARLES WILLIAM MERCER, JR.,**

**Defendant-Appellant.**

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**Court of Appeals No.281006  
Ingham CC 07-000118-FC**

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**BRIEF OF THE PROSECUTING ATTORNEYS  
ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE  
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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### **Jurisdictional Statement and Statement of the Facts**

The Prosecuting Attorneys Association of Michigan, as Amicus Curiae, adopt the Jurisdictional Statement and Statement of the Facts as thoroughly presented in the People's brief.

## Statement of the Question

### I.

**Statutes of limitations---when the legislature chooses to impose them---provide the primary guarantee against the bringing of "stale" charges. When the bringing of charges does not violate the statute of limitations, does due process bar the proceedings only for oppressive delay—a showing of substantial prejudice to the defense occurring because of the delay, and that the delay was purposeful on the part of the government in order to gain a tactical advantage?**

**Appellee answers, "Yes"**

**Appellant answers, "No"**

**Amicus answers, "Yes"**

## Argument

### I.

**Statutes of limitations---when the legislature chooses to impose them---provide the primary guarantee against the bringing of "stale" charges. When the bringing of charges does not violate the statute of limitations, due process bars the proceedings only for oppressive delay—a showing of substantial prejudice to the defense occurring because of the delay, and that the delay was purposeful on the part of the government in order to gain a tactical advantage.**

The due process clause of the United States Constitution forbids the deprivation of any person of life, liberty, or property without due process of law.<sup>1</sup> The Supreme Court first addressed pre-indictment delay where the statute of limitations time had not run in *United States v Marion*,<sup>2</sup> There the Court recognized that due process may come into play when a defendant claims that he has suffered prejudice due to the passage of time between the time of the crime and the time of his arrest or formal charging( prearrest or preindictment/precharging delay), but only under certain circumstances.<sup>3</sup> The issue before this Court revisits the *Marion* decision and its progeny. For an accused to establish a constitutional deprivation due to an alleged delay in charging where the statute of limitations has not yet run he or she must prove not only a passage of time between the time offense and charging, but that this passage of time is oppressive. Put another way, the accused must

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<sup>1</sup>United States Constitution, Amend V (Federal) and XIV (the States). In Michigan, see Article I, § 17 (which is to be interpreted consistent with the meaning of the federal provision). See e.g. *Roy v. Rau Tavern, Inc.*, 167 Mich.App. 664 (1988).

<sup>2</sup>*United States v Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

<sup>3</sup>*United States v Marion*, supra 464, 30 L. Ed. 2d 468 (1971). The Sixth Amendment guarantees an accused the right to a speedy trial and comes into play once a person has been arrested or indicted. *Barker v Wingo*, 407 U.S. 514 (1972).

show actual and substantial prejudice in the presentation of the defense, (harm), intentionally caused by the State so as to gain some tactical advantage.

**A. Statute of Limitations provide the primary guarantee against stale charges**

The statutes of limitation are the primary guarantee against stale charges. And, It must be remembered that prosecutors are not constitutionally obligated to file charges against a suspect as soon as they have probable cause and before they believe that they can establish guilt beyond a reasonable doubt.<sup>4</sup> Indeed, one of the standards for consideration in charging under the ABA Standards is whether sufficient proof exists to show guilt beyond a reasonable doubt, not simply probable cause.<sup>5</sup> And there is no constitutional requirement that prosecutors file charges as soon as they marshal enough evidence that arguably could prove guilt beyond a reasonable doubt—a quantitative and qualitative judgment that belongs to the prosecutor—but before their investigations are complete.<sup>6</sup> The prosecutor has “wide discretion” in delaying charging “limited only by the requirement that it not violate those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’ ”<sup>7</sup> Fundamental conceptions of justice are not violated when the prosecutor waits not only until he or she has probable cause to file charges, but until he or she determines that the case can be proven beyond a reasonable doubt—again, a judgment that belongs to the prosecutor.<sup>8</sup> “From the perspective of potential defendants, requiring prosecutions to commence when probable cause is established is undesirable because it would increase the likelihood of unwarranted charges being filed and would add to the time during which defendants

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<sup>4</sup>*United States v Lovasco*, 431 U.S. 789, 789-790, 97 S.Ct. 2044, 2048-2049, 52 L. Ed. 2d. 752 (1977) .

<sup>5</sup> ABA Standards on the Prosecution Function, 3-3.9.

<sup>6</sup>*Lovasco* at 792-795, 97 S.Ct., at 2049-2051.

<sup>7</sup>*Id.*, at 790, 97 S.Ct. 2044.

<sup>8</sup>*Id.*

stand accused, but untried....[and] formal accusation may interfere with the defendant's liberty....disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and friends.”<sup>9</sup>

The Court in *Marion*, though agreeing that the “[p]assage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself,” also recognized that “[p]ossible prejudice is inherent in any delay, however short; it may also weaken the Government's case.”<sup>10</sup> The Court further acknowledged that “actual prejudice to the defense may result from the shortest and most necessary delay.”<sup>11</sup> In fact, two principal reasons were noted for declining to apply the Sixth Amendment to pre-indictment delay. First, “[a]llowing inquiry into when the police could have arrested or when the prosecutor could have charged would raise difficult problems of proof. As one court said, ‘the Court would be engaged in lengthy hearings in every case to determine whether or not the prosecuting authorities had proceeded diligently or otherwise.’”<sup>12</sup> Second, and more prominently: “ ‘the applicable statute of limitations ... is the primary guarantee against bringing overly stale criminal charges.’ ”<sup>13</sup> The Court thus recognized that “[s]uch statutes [of limitations] represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice....”<sup>14</sup> An analysis of any delay in charging, then, must start with the statute of limitations, not the Due Process Clause, as those statutes provides the *primary* guarantee against

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<sup>9</sup>Id. At 791, 97 S. Ct. 2049.

<sup>10</sup>Id. at 321-22, 92 S.Ct. at 464 (footnote omitted).

<sup>11</sup>Id. At 324, 92 S Ct at 465.

<sup>12</sup>Id. at 321 n. 13, 92 S.Ct. at 464 n. 13.

<sup>13</sup>quoting *United States v Ewell*, 383 U.S. 116, 122, 86 S.Ct. 773, 777, 15 L.Ed.2d 627 (1966).

<sup>14</sup>Id. at 322, 92 S.Ct. at 464.

bringing a late or overly “stale” criminal charge, with the protection of the public as well as the concerns of law enforcement taken into consideration by legislators.<sup>15</sup>

Courts have recognized that the various “Statutes of limitation ... 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.” 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. And, because such statutes are fixed by the legislature and not decreed by courts on an ad hoc basis, they “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>16</sup>

Where the statutes of limitations have not tolled and an accused is claiming oppressive prearrest/preindictment delay, the due process clause requires certain conditions be met before criminal charges may be dismissed.

**B. The Due Process Clause protects against oppressive delay in charging—charges that are not only delayed, but purposefully so so as to cause prejudice to the presentation of the defense, where that tactic succeeds.**

It is clear that the "Fifth Amendment's due process clause plays a limited role in assuring that the government does not subject a defendant to oppressive delay,"<sup>1</sup> for the Supreme Court has recognized that "the interests of the suspect and society are better served if, absent bad faith or extreme prejudice to the defendant, the prosecutor is allowed sufficient time to weigh and sift

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<sup>15</sup>404 U.S., at 322, 92 S.Ct., at 464 (quoting *Public Schools v Walker*, 9 Wall. 282, 288, 19 L.Ed. 576 (1870)).

<sup>16</sup>404 U.S., at 322, 92 S.Ct., at 464. And the decision, as with charges of murder, that there *is no* period of limitations for certain offenses, is itself a legislative judgment that as to these offenses, given their seriousness, alleged staleness will not preclude prosecution, leaving the only question with regard to delay one of due process, which, given the legislative judgment, must require something more than a passage of even substantial time, but a form of misconduct on the part of the State.

evidence to ensure that an indictment is well founded."2 As a result, a defendant must overcome a high hurdle when contending that a "delay" in charging that does not violate any statute of limitations is violative of the due-process clause. For an accused to demonstrate that a passage of time between the offense and the charge constitutes a "delay" that is also oppressive, an accused must, in addition to demonstrating a substantial passage of time, also show both actual and substantial prejudice to the presentation of his defense and that the government intentionally delayed charging for the purpose of gaining a tactical advantage or to harass. It is for this reason that not every delay in prosecution, nor every showing of prejudice to an accused, results in a due process dismissal of the charges. To show a violation of "those 'fundamental conceptions of justice'—an oppressive delay—" a defendant must prove that (1) there was a delay in charging;<sup>3</sup> (2)"that it the delay caused substantial prejudice to the right to a fair trial and, (3) the Government intentionally delayed indictment in order to gain a tactical advantage over the accused."<sup>4</sup> It should also be noted that this standard is very strict and is intended to limit the inquiry of the judiciary. Defendant bears a heavy burden in showing that he has been the victim of a fundamentally unfair process. And, "[j]udges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions' of fairness ...."<sup>5</sup> "[Courts] are to determine only 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.'"<sup>6</sup>

A due process claim of oppressive delay places a heavy preliminary burden on an accused of demonstrating both actual and substantial prejudice as well as purposeful delay by the prosecution to gain a tactical advantage. In other words, even when the statute of limitations is not violated, due process has a role to play to prevent governmental misconduct that damages the defendant's opportunity to present the defense. Thus, it is true that the "statute of limitations does not fully define an accused's rights with respect to the events occurring prior to (arrest or) indictment."<sup>7</sup> The Due Process Clause has a limited role to play in protecting against those overly stale charges that

affect an accused's right to a fair trial where the delay was purposeful to cause that sort of harm—it addresses those charges that are deemed not only stale, but also in this sense oppressive.<sup>8</sup> The Supreme Court in *Lovasco* referred to its prior *Marion* decision and clarified the role of the due process clause in this context, stating that showing actual prejudice makes a due process claim "concrete and ripe for adjudication," but not automatically valid.<sup>9</sup> Prejudice is a necessary but not sufficient requirement to make out a due-process violation, as "no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution."<sup>10</sup> Along with staleness or delay, prejudice is a necessary, but not sufficient element of a due process violation claim. Also required is misconduct by the Government—delay for the purpose of disadvantaging the accused.

In *Marion* the Court recognized that it could not in the abstract determine the circumstances where preaccusation delay will require dismissing criminal charges. The Court reiterated that recognition in *Lovasco*, adding "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...."<sup>11</sup>

### **1. Prong One: Actual and Substantial (Oppressive) Prejudice Caused By the Delay**

What sort of delay is oppressive? The Supreme Court has recognized that the statute of limitations for the most part guards against possible, as distinguished from actual, prejudice that results from the passage of time between the crime and arrest or charge.<sup>12</sup> *Marion* first discussed the need for showing actual and substantial prejudice when claiming oppressive (that is, cognizable under the due process clause) delay by the prosecution. And after *Marion*, the Supreme Court next addressed pre-indictment delay in *United States v. Lovasco*, which again involved a dismissal before

trial.<sup>13</sup> Both the district court and the court of appeals found that the delay not only caused actual prejudice to the accused but was also " 'unjustified, unnecessary, and unreasonable.' " <sup>14</sup>

To establish the first prong that the delay caused actual and substantial prejudice, the defendant must demonstrate that the delay caused actual and substantial prejudice to the defendant's right to a fair trial. The defendant's burden in this regard is quite stringent; that is, the defendant must do more than make hollow allegations of prejudice.<sup>15</sup> The Seventh Circuit said the burden of showing prejudice must be "an exacting one," which cannot be based upon mere speculative harm.<sup>16</sup> Instead, the defendant's allegations of actual and substantial prejudice must be "specific, concrete, and supported by the evidence."<sup>17</sup> "Vague and conclusory allegations of prejudice resulting from the passage of time and absence of witnesses are insufficient to constitute a showing of actual prejudice."

"To prove actual prejudice, a defendant must specifically identify witnesses or documents lost during delay properly attributable to the government."<sup>18</sup> It is not sufficient for a defendant to make speculative or conclusory claims of possible prejudice as a result of the passage of time.<sup>19</sup> Nor may a defendant establish actual prejudice without "relat[ing] the substance of the testimony which would be offered by the missing witnesses or the information contained in lost documents in sufficient detail to permit a court to assess accurately whether the information is material to the accused's defense."<sup>20</sup> Finally, it is defendant's burden to show that the lost testimony or information is not available through another source.<sup>21</sup> So, in order to prove actual and substantial prejudice, the defendant must show more than mere speculative harm. The allegations of prejudice must be specific, concrete, and supported by the evidence.<sup>22</sup> But, a showing of actual and substantial prejudice alone is totally insufficient to demonstrate an oppressive due process delay in charging. Lavasco stated, "[i]n our view, investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused' ...."<sup>23</sup> Lovasco added a footnote noting 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.<sup>24</sup> Decisions before Lavasco generally construed Marion as holding that (1) the statute of limitations was the primary guarantee against bringing overly stale criminal charges and (2) that dismissal on due process grounds requires both actual and substantial prejudice as well as intentional delay by the government to gain a tactical advantage.<sup>25</sup>

## **2. Prong Two: Delay was done with Oppressive Motives/Bad Faith/ Done to Gain Tactical Advantage**

Both actual and substantial prejudice and an improper purpose/bad faith is required for a delay in charging dismissal. Since Lovasco, the overwhelming majority of decisions from the federal circuits have recognized the two-prong test of: (1) substantial prejudice resulted from the delay and that (2) the delay was an intentional measure in order to gain a tactical advantage."<sup>26</sup> Marion found that the due process is only violated where the delay not only "caused substantial prejudice" but also "was an intentional device to gain tactical advantage."<sup>27</sup> Marion reversed the dismissal there because "there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them."<sup>28</sup> Likewise, Lovasco rejected the claim that actual prejudice from a delay in charging is sufficient to cause dismissal.<sup>29</sup> Lovasco refused to proscribe investigative delay because such "delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'"<sup>30</sup> Most importantly, rather than remanding for reconsideration in light of its principles, Lavasco flatly held that the dismissal of the indictment was error despite the findings of both the district court and the Court of Appeals that the delay not only caused actual prejudice to the accused but was also " 'unjustified, unnecessary, and unreasonable,'"<sup>31</sup> there being no evidence of purposeful delay done to gain an advantage.

Lavasco recognized that investigative delay is fundamentally unlike delay undertaken by the Government solely "to gain tactical advantage over the accused."<sup>32</sup> " 'Rather than deviating from

elementary standards of fair play and decency,' a prosecutor abides by them [standards of fair play and decency] if he or she refuses to seek indictments until completely satisfied that prosecution is justified and the evidence will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of "orderly expedition' to that of 'mere speed.'"<sup>33</sup> And all the more so when the case is not even presented to the prosecutor for decision by the police, on their view that the case lacks sufficient evidence even to present for possible charging. The Court in *Lovasco* saw no injustice done when a prosecutor acted "to prosecute a defendant following investigative delay" and saw no deprivation of due process, "even if his defense might have been somewhat prejudiced by the lapse of time."<sup>34</sup>

In sum, to demonstrate oppressive delay in charging, a delay that would bring into play the constitution even though no statute of limitations has been violated, an accused must show both actual and substantial prejudice to the presentation of his defense as well as bad motive on the part of the prosecution demonstrating that the delay was purposefully done to harm the presentation of the defense. Actual and substantial prejudice simply is not enough. That actual and substantial prejudice which must be caused by the delay must also have been done to gain a tactical advantage over the defense. The failure to prove these two prongs is the failure to demonstrate a claim of oppressive due process delay. Where that claim cannot be made out, the statutes of limitations are the only source of remedy for an accused.

### **C. Conclusion**

The various statutes of limitation concerning criminal offenses represent the legislative judgment about the balance of equities in a situation involving the possibly tardy assertion of an otherwise valid criminal charge. These statutes limit an accused's 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 after a specified period of time, taking into account the loss of

memory and evidence as it relates to both the accused and the prosecution. For delays following arrest or formal charging, the Sixth Amendment requires a balancing test. For delays before arrest or formal charging, but still within the statute of limitations period, an accused must demonstrate two prongs—(1) that the delay caused him actual and substantial prejudice to the presentation of his defense, and (2) that the delay was done with a bad motive, one which was purposeful to harm the presentation of the defense and to gain tactical advantage—to demonstrate a violation of due process so as to gain dismissal though the statute of limitations has not run. Where an accused cannot make out these two prongs, the due process claim of oppressive delay must be dismissed. Unlike the Sixth Amendment speedy-trial test, the test is not a balancing test—no balancing was indicated in *Marion* and *Lavasco*.

There has come to be some confusion in application of these principles in some case decisions; though all appear to require both prongs be met, some place an initial burden on the defendant to show prejudice and then shift the burden to the prosecution to prove a nonoppressive motive; that is, that the delay was not intentional to gain a tactical advantage. And some decisions suggest that, as with a Sixth Amendment claim, there is a “balancing” done concerning the prejudice suffered and the reasons for the delay. We need look no further than our own decisions to see this confusion. Michigan cases make reference to both *Marion* and *Lavosco*, but some have introduced a balancing test of sorts where defendant need only carry half of the burden by making a showing of actual and substantial prejudice caused by the delay, and then the prosecution must carry a burden of persuasion that the delay was reasonable or had fair and reasonable justification.<sup>17</sup> But there is

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<sup>17</sup> *People v Loyer*, 169 Mich App 105, 120 (1988); *People v McIntire*, 232 Mich App 71, 93 (1998); *People v Herndon*, 246 Mich App 371, 390 (2001); *People v Cain*, 238 Mich App 95 (1999).

no balancing of prejudice and the reason for the delay; the delay *must* have been accomplished in bad faith or the claim fails, as other Michigan cases have recognized.<sup>18</sup>

This court should end this confusion. Michigan has been inconsistent in its rule of law, requiring on some occasions that both the prejudice and bad-faith prongs be met by the accused<sup>19</sup> as a condition for making out a due-process claim, on others that substantial prejudice be shown before the burden shifts to the prosecution to prove “good” or benign motives, and on still others employing a balancing of prejudice and the reasons for delay.<sup>20</sup>

Amicus would note also that instructive in this regard are due-process claims concerning alleged failures of the government to preserve potentially exculpatory evidence. The loss of evidence of unknown probative value, “of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant” does not violate due process unless the police lost the evidence in bad faith.<sup>21</sup> And the defendant bears the burden of showing that the police acted in bad faith.<sup>22</sup>

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<sup>18</sup> See fn 3.

<sup>19</sup>To warrant dismissal due to pre-arrest delay, “there must be actual and substantial prejudice to the defendant’s right to a fair trial and an intent by the prosecution to gain a tactical advantage.” *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000); *People v Walker*, 276 Mich App 528, 545; 741 NW2d 843 (2007); “To be substantial, the prejudice to the defendant must meaningfully impair his ability to defend against the charges against him in such a manner that the outcome of the proceedings will likely be affected.” *Crear*, supra at 166. “An unsupported statement of prejudice ... is not enough, nor are undetailed claims of loss of physical evidence, witness memory loss, or witness death.” *Walker*, supra at 546; see also *Crear*, supra at 166. And see *People v Leigh*, 182 Mich App 96 (1989).

<sup>20</sup>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 ... that the prejudice resulting from the delay outweighs any reason provided by the state.” *People v Bisard*, 114 Mich App 784, 790; 319 NW2d 670 (1982).

<sup>21</sup>*Arizona v Youngblood*, 488 U.S. 51, 57-58; 109 S Ct 333; 102 L.Ed.2d 281 (1988); *People v Cress*, 250 Mich App 110, 155; 645 NW2d 669 (2002), vacated in part on other grounds 468 Mich. 678 (2003).

<sup>22</sup>*People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

Because neither *Marion* nor *Lavasco* nor the vast majority of federal cases require a “balancing” of prejudice as against the reasons for delay, instead requiring, as a necessary matter, a showing of intentional delay done to gain a tactical advantage (that is, bad faith), this court should reject a balancing test and find that the limited role due process plays in this circumstance is one of providing a remedy for substantial harm to the defense, done by the government on purpose, through the device of intentional delay.

***RELIEF***

***WHEREFORE***, the Prosecuting Attorneys Association of Michigan, as Amicus Curiae in support of the People of the State of Michigan request that this Honorable Court adopt a strict two prong test with the burden of proof on defendant to show: (1) actual and substantial prejudice caused by the prearrest delay; and (2) a bad motive by the prosecution in delaying the charging decision—a delay purposefully made to gain a tactical advantage over the defendant.

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