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Pre-Accusation Delay: An Issue Ripe for Adjudication by the United States Supreme Court

Eli DuBosar

I. INTRODUCTION

Imagine you are arrested and formally charged with a crime you did not commit, or a crime for which you had a good defense at the time of the offense and for some time thereafter. The police chose to arrest and charge you the day before the five-year statute of limitations was set to run. You had no idea you were even being investigated up until the time of your arrest. Because of the lapse in time prior to your arrest, your ability to defend yourself from the charges brought against you has been severely hampered. Perhaps you had alibi witnesses or eyewitnesses that you could have called at trial to support your case if the prosecution had formally charged you at an earlier time—witnesses whose testimony would have all but confirmed your innocence. Due to the five years that passed, however, those witnesses are either deceased, cannot be found, or cannot remember anything from that far back. You have no other witnesses that you can call to support your defense and rebut the prosecution’s case.

Situations of pre-accusation delay like the one described above are not protected by the Speedy Trial Clause of the Sixth Amendment. 1

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1. A similar and more detailed “illustration” can be found in Phyllis Goldfarb, When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions, 31
That is because the “speedy trial provision . . . [is] ‘an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.’”

However, the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused’s defense. . . . Arrest is a public act that may seriously interfere with the defendant’s liberty . . . and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Conversely, the distinct constitutional anchors and purposes of the Fifth Amendment’s Due Process Clause make it a more appropriate safeguard in situations involving pre-accusation delay. Ordinarily, statutes of limitation act as the primary safeguard against pre-accusation delay, but the Supreme Court has recognized that “the Due Process Clause has a limited role to play in protecting against

WM. & MARY L. REV. 607, 611-12 (1990), where the author describes facts similar to those in a case that she litigated. Id. at 611 n.18.

2. See United States v. Marion, 404 U.S. 307, 313-22 (1971). The Speedy Trial Clause of the Sixth Amendment is not the focus of this Note but will be referred to at times. Thus, it bears mentioning the general approach that the Supreme Court set forth for analyzing speedy trial claims: “The approach . . . is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.” Barker v. Wingo, 407 U.S. 514, 530 (1972). Factors to consider—“[t]hough some courts might express them in different ways”—are:


4. Id. at 324-26. Courts refer to this delay as pre-accusation delay, pre-indictment delay, pre-arrest delay, and other similar terms. Throughout this Note, I will use the phrase “pre-accusation delay” because the topic involves delay prior to formal accusation. Formal accusation is “triggered by arrest, indictment, or other official accusation.” Doggett v. United States, 505 U.S. 647, 655 (1992). When one formally becomes an “accused,” speedy trial protections under the Sixth Amendment come into play.

5. See id.; see also U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”). The pre-accusation delay covered in this Note does not encompass the pre-arrest delay situation confronted in Doggett, where the defendant had previously been indicted but not arrested. See Doggett, 505 U.S. at 648-50. Thus, although he had not been arrested, he was nonetheless formally accused at the time of his arrest and his claim was examined under the Sixth Amendment. See id. at 652. Rather, this Note deals with pre-accusation delay cases where the defendant has not been formally accused in any sense. See, e.g., United States v. Lovasco, 431 U.S. 783 (1977); Marion, 404 U.S. 307.
oppressive delay.”⁶ Even if the statute of limitations in a given case has not run, pre-accusation delay may cause a defendant to “be deprived of life, liberty, or property, without due process of law,” in violation of the Fifth Amendment.⁷

While pre-accusation delay carries this potential due process violation, courts dispute the proper test to apply in determining whether a violation did in fact occur.⁸ All courts require actual prejudice; some require the prejudice to be substantial as well.⁹ Also, most courts require bad faith or intentional, tactical delay by the government in addition to prejudice; some courts, however, do not require a showing of bad faith but instead—after a finding of prejudice—balance the government’s reasons for the delay against the prejudice.¹⁰

Part II of this Note examines the leading United States Supreme Court cases on pre-accusation delay, as well as the framework the Court set out for lower courts confronting the issue. Part III discusses the test applied by the different circuit courts of appeals. Specifically, it explores the evolution of the approach established by the United States Court of Appeals for the Fifth Circuit, discusses which circuits agree with the Fifth Circuit and which circuits do not, and then looks at the conflicting cases decided by the Seventh Circuit. Part IV examines how the states approach the issue of pre-accusation delay. It categorizes each of the states in a manner similar to the federal circuits and also separately reviews cases from a few states with unclear positions. This is the first piece to complete a fifty-state survey on the issue of pre-accusation delay. Part V analyzes some disputes over the proper test to use and argues that it is time for the Supreme Court to again review the issue, as it has not done so in thirty-five years, and much confusing jurisprudence has emerged from various courts in that time.

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⁶ Lovasco, 431 U.S. at 789.
⁷ See U.S. Const. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”); U.S. Const. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”); Marion, 404 U.S. at 324 (“Since a criminal trial is the likely consequence of our judgment and since appellees may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the appellees’ rights with respect to the events occurring prior to indictment. 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-accusation 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.” (citations omitted)).
⁸ See infra Parts III-IV.
⁹ See infra Parts III-IV. One possible exception is New York, as it is unclear whether New York courts require prejudice at all. See infra pp. 682-83.
¹⁰ See infra Parts III-IV.
II. BACKGROUND: SUPREME COURT JURISPRUDENCE ON PRE-ACCUSATION DELAY

In 1971, the United States Supreme Court officially recognized for the first time that pre-accusation delay caused by the prosecution in a criminal case may result in a violation of a defendant’s due process rights.\(^\text{11}\) In establishing this major development in criminal law jurisprudence, the Supreme Court expressly rejected the contention that a defendant’s Sixth Amendment speedy trial rights are applicable in a situation involving pre-accusation delay.\(^\text{12}\) Instead, the Court distinguished speedy trial rights, finding they only apply after one becomes an “accused.”\(^\text{13}\) What makes the potential due process violation so exceptional is that it adds a constitutional protection to supplement the protection already afforded by statutes of limitation in the context of pre-accusation delay.\(^\text{14}\) Statutes of limitation provide “the primary guarantee against bringing overly stale criminal charges.”\(^\text{15}\) The Supreme Court has noted that

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\text{[t]he 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.}\(^\text{16}\)
\]

These observations have led the Court to conclude it is not necessary “to press the Sixth Amendment into service” to address pre-accusation delay.\(^\text{17}\)

Even though the Sixth Amendment is not at play, examining whether potential due process violations exist under the Fifth or Fourteenth Amendment is necessary because statutes of limitation do not “fully define” an individual’s rights prior to indictment or arrest.\(^\text{18}\) Furthermore, statutes of limitation do not curtail the prosecution of capital offenses and certain other crimes; prosecution of those offenses

\(^{11}\) Marion, 404 U.S. at 324-26.
\(^{12}\) Id. at 313-22.
\(^{13}\) Id. at 313; see also supra notes 2, 5.
\(^{14}\) Marion, 404 U.S. at 322-24. However, as will be discussed further, not all states have statutes of limitations, and even states that do have them do not necessarily have them for all crimes. See infra Part V.
\(^{15}\) Marion, 404 U.S. at 322 (quoting United States v. Ewell, 383 U.S. 116, 122 (1966)).
\(^{16}\) Id. at 323 (quoting Toussie v. United States, 397 U.S. 112, 114-15 (1970)).
\(^{17}\) Id.
\(^{18}\) Id. at 324. “[T]he Due Process Clause has a limited role to play in protecting against oppressive delay.” United States v. Lovasco, 431 U.S. 783, 789 (1977).
can be initiated at any time absent a due process violation.\textsuperscript{19} It is well-established that dismissal of a case is required by the Due Process Clause when pre-accusation delay results in substantial prejudice to a defendant’s right to a fair trial, if that “delay was an intentional device to gain tactical advantage over the [defendant].”\textsuperscript{20} With respect to the prejudice inquiry, however, the exact amount of prejudice that must be demonstrated for a due process violation to be recognized is unclear. In addition, it is not evident whether prevailing on a claim requires that the delay constitute “an intentional device to gain a tactical advantage,” or whether recklessness, gross negligence, or even simple negligence by the government may suffice.\textsuperscript{21} The Supreme Court did not directly answer this question in \textit{Marion}.\textsuperscript{22} Rather, it asserted that due process claims based on pre-accusation delay should be considered and disposed of on a case-by-case basis, acknowledging that very short delays can cause prejudice to a defendant’s case, but that dismissal is not warranted by “every delay-caused detriment.”\textsuperscript{23}

Approximately five-and-a-half years after \textit{Marion}, the Supreme Court further considered pre-accusation delay in \textit{United States v. Lovasco}.\textsuperscript{24} While the Court did introduce a few additional principles, it did not fully clarify the level of prejudice required and again refrained from explicitly stating whether intentional delay for tactical purposes is required or whether something less could lead to a successful claim.\textsuperscript{25} The Court did, however, address its statement in \textit{Marion} that “[e]vents of the trial may demonstrate actual prejudice, but at the present time [defendants’] due process claims are speculative and premature.”\textsuperscript{26} From this sentence flows the notion that although proof of actual prejudice does not make a claim “automatically valid,” it does make it “concrete and ripe for adjudication.”\textsuperscript{27} Therefore, demonstrating actual prejudice is necessary—but not sufficient—to prove a due process violation based on pre-accusation delay.\textsuperscript{28} Examining a claim brought in response to the delay also requires “consider[ing] the reasons for the delay as well as the prejudice to the accused.”\textsuperscript{29}

\begin{itemize}
\item [20.] See, e.g., \textit{Marion}, 404 U.S. at 324. In \textit{Marion}, “the Government concede[d] that the Due Process Clause . . . require[s] dismissal . . . if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to [one’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” Id.
\item [21.] See id. at 324-26.
\item [22.] See generally id.
\item [23.] Id. at 324-25.
\item [24.] 431 U.S. 783 (1977).
\item [25.] See generally id.
\item [26.] Id. at 789 (quoting \textit{Marion}, 404 U.S. at 326).
\item [27.] Id.
\item [28.] Id. at 790.
\item [29.] Id.
In Lovasco, the Court recognized that the judiciary’s only task in resolving due process claims concerning pre-accusation delay is to determine whether the delay “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.’ While delays may sometimes rise to that level, judges should afford deference to a prosecutor’s decision as to when to seek an indictment rather than imposing their own personal views. A prosecutor has no duty to file charges if she does not think she can prove her case beyond a reasonable doubt, even if there is probable cause to proceed; she is also not necessarily duty-bound to file charges at the very moment she first believes she can prove guilt beyond a reasonable doubt. The imposition of a contrary requirement would carry many negative consequences. As part of its discussion in Lovasco, the Court distinguished “investigative delay” from “delay undertaken by the Government solely ‘to gain tactical advantage over the accused,’ ” finding that “investigative delay is not so one-sided.” The Court held that prosecuting a defendant subsequent to investigative delay does not violate the Due Process Clause, even if

30. Id. (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)).
31. Id. (quoting Rochin v. California, 342 U.S. 165, 173 (1952)).
32. See id.
33. Id. at 791.
34. See id. at 791-93 (“To impose such a duty ‘would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.’ 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 stand accused but untried. . . . From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is equally unacceptable because it could make obtaining proof of guilt beyond a reasonable doubt impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited. And from the standpoint of the courts, such a requirement is unwise because it would cause scarce resources to be consumed on cases that prove to be insubstantial, or that involve only some of the responsible parties or some of the criminal acts. . . . [In addition, a rule] compelling a prosecutor to file public charges as soon as the requisite proof has been developed against one participant on one charge would cause numerous problems in those cases in which a criminal transaction involves more than one person or more than one illegal act. . . . [I]nsisting on immediate prosecution once sufficient evidence is developed to obtain a conviction would [also] pressure prosecutors into resolving doubtful cases in favor of early—and possibly unwarranted—prosecutions.” (footnotes and citations omitted)).
35. Id. at 795 (quoting United States v. Marion, 404 U.S. 307, 324 (1971)).
36. Id. The Government again conceded intentional, tactical delay that causes substantial prejudice constitutes a due process violation. The Government, however, further conceded 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.” Id. at 795 n.17 (quoting Brief for United States at 32-33 n.25, Lovasco, 431 U.S. 783 (No. 75-1844)).
the delay caused some prejudice.\textsuperscript{37} In closing, the Court reiterated that lower courts should consider these claims on a case-by-case basis.\textsuperscript{38}

III. HOW THE CIRCUIT COURTS OF APPEALS HAVE INTERPRETED AND APPLIED \textit{MARION} AND \textit{LOVASCO}

\textbf{A. The Fifth Circuit’s Strict Two-Prong Approach}

Following the Supreme Court’s decision in \textit{Lovasco} on June 9, 1977,\textsuperscript{39} and preceding the Fifth Circuit’s opinion in \textit{United States v. Townley} on January 11, 1982,\textsuperscript{40} the Fifth Circuit issued roughly thirteen written opinions discussing \textit{Marion}, \textit{Lovasco}, and the issue of pre-accusation delay.\textsuperscript{41} Then, in \textit{Townley}, the court attempted to clarify its position and resolve questions that arose over the years from the way it disposed of pre-accusation delay cases.\textsuperscript{42} Despite ruling in favor of the government in \textit{Townley},\textsuperscript{43} the court adopted a test (hereinafter “\textit{Townley} test”) that was less stringent than what the government proposed.\textsuperscript{44} The court recognized that \textit{Marion} and \textit{Lovasco} require actual prejudice, as well as consideration of the reasons for the delay.\textsuperscript{45} Thus, under the \textit{Townley} test, a defendant must first prove the government’s delay caused actual prejudice to her case.\textsuperscript{46} If the defendant is unable to demonstrate actual prejudice, then the claim automatically fails.\textsuperscript{47} If the defendant, however, successfully proves actual prejudice, then the \textit{Townley} test requires that the trial

\textsuperscript{37} Id. at 796.
\textsuperscript{38} Id. at 797. The Supreme Court noted, as in \textit{Marion}, it still “could not determine in the abstract the circumstances in which pre[-]accusation delay would require dismissing prosecutions.” Id. at 796 (citing \textit{Marion}, 404 U.S. at 324). Significantly, “in the intervening years [between \textit{Marion} and \textit{Lovasco}] so few defendants . . . established that they were prejudiced by delay that neither [the Supreme Court] nor any lower court . . . had a sustained opportunity to consider the constitutional significance of various reasons for delay.” Id. at 796-97.
\textsuperscript{39} See id. at 783.
\textsuperscript{40} 665 F.2d 579 (5th Cir. 1982), rejected by United States v. Crouch, 84 F.3d 1497 (5th Cir. 1996) (en banc).
\textsuperscript{41} See United States v. Hendricks, 661 F.2d 38 (5th Cir. 1981); United States v. Nixon, 634 F.2d 306 (5th Cir. 1981); United States v. Durnin, 632 F.2d 1297 (5th Cir. 1980); United States v. Surface, 624 F.2d 23 (5th Cir. 1980); United States v. Marino, 617 F.2d 76 (5th Cir. 1980); United States v. Blevins, 593 F.2d 646 (5th Cir. 1979); United States v. Ramos, 586 F.2d 1078 (5th Cir. 1978); United States v. Parker, 586 F.2d 422 (5th Cir. 1978); United States v. Willis, 583 F.2d 203 (5th Cir. 1978); United States v. Medina-Arellano, 569 F.2d 349 (5th Cir. 1978); United States v. West, 568 F.2d 365 (5th Cir. 1978); United States v. Brand, 556 F.2d 1312 (5th Cir. 1977); United States v. Shaw, 555 F.2d 1295 (5th Cir. 1977).
\textsuperscript{42} See generally 665 F.2d 579.
\textsuperscript{43} Id. at 580.
\textsuperscript{44} See id. at 582.
\textsuperscript{45} Id. at 581 (citing \textit{West}, 568 F.2d at 367); see also United States v. Lovasco, 431 U.S. 783 (1977); United States v. Marion, 404 U.S. 307 (1971).
\textsuperscript{46} See \textit{Townley}, 665 F.2d at 581-82.
\textsuperscript{47} Id.
court “engage ‘in a sensitive balancing of the government’s need for an investigative delay . . . against the prejudice asserted by the defendant.’ ” 48 The Townley panel said Marion and Lovasco “do not stand for the proposition ‘that governmental interests not amounting to an intentional tactical delay will automatically justify prejudice to a defendant.’ ” 49 According to the court, while this assertion conflicted with scattered dicta from previous Fifth Circuit cases, it was consistent with the court’s holdings in earlier decisions. 50

Townley remained good law until 1996, whereupon the Fifth Circuit granted an en banc rehearing in United States v. Crouch and rejected the Townley test. 51 The indictment in Crouch was initially dismissed by the trial court, and it was subsequently affirmed on appeal by a divided panel of Fifth Circuit judges. 52 After the en banc rehearing, the court abandoned its position from Townley and instead held that bringing a successful claim of pre-accusation delay requires proof of actual, substantial prejudice and “that the prosecution purposely delayed the indictment to gain tactical advantage or for other bad faith purpose.” 53 Although the court announced this new test, it still held that the defendant failed to even meet his burden of demonstrating actual and substantial prejudice, as opposed to simply potential prejudice. 54 According to the court, “[e]vents of the trial may demonstrate actual prejudice, but at the present time appellees’ due process claims are speculative and premature.” 55

In rejecting Townley, the Fifth Circuit noted it was “not strictly bound by prior panel decisions.” 56 Nonetheless, it asserted that its holding remained in accord with the majority of its prior decisions

48. Id. at 582 (quoting United States v. Brand, 556 F.2d 1312, 1317 n.7 (5th Cir. 1977)).
49. Id. (quoting Brand, 556 F.2d at 1317 n.7).
50. Id.; see also id. at 582 n.2 (“The statement is for the most part found in decisions that found that the defendant did not meet the threshold requirement of proving actual prejudice, so that the government’s justification for the delay was not brought into issue: United States v. Hendricks, 661 F.2d 38 (5th Cir. 1981); United States v. Ramos, 586 F.2d 1078, 1079 (5th Cir. 1978); United States v. Willis, 583 F.2d 203, 207 (5th Cir. 1978); United States v. Avalos, 541 F.2d 1100, 1107 (5th Cir. 1976); United States v. Butts, 524 F.2d 975, 977 (5th Cir. 1975). The general statement of the governmental malice requirement is also found in at least two other decisions, but there the reason for the government’s delay was factually reviewed and found justified (as in Lovasco) by investigative needs: United States v. Nixon, 634 F.2d 306, 309–10 (5th Cir. 1981); United States v. Durnin, 632 F.2d 1297, 1299 (5th Cir. 1981).”).
51. See United States v. Crouch, 84 F.3d 1497 (5th Cir. 1996) (en banc). Interestingly, as will be discussed below, even though Townley is no longer good law in the Fifth Circuit, the Fourth Circuit’s test mirrors the Townley test. See infra Part III.C. In addition, the Townley test was adopted by Florida courts and remains good law in Florida. See infra pp. 678–79.
52. 84 F.3d at 1499.
53. Id. at 1500.
54. Id.
55. Id. (quoting United States v. Marion, 404 U.S. 307, 326 (1971)).
56. Id. at 1509. Precedent from prior panels can only be overturned by the court sitting en banc. See, e.g., Ruiz v. Estelle, 666 F.2d 854, 857 n.5 (5th Cir. 1982).
even if language to the contrary existed in scattered opinions.57 The court then further discussed its rationale for requiring intentional, tactical delay or some other bad-faith purpose.58 It reasoned that neither Marion nor Lovasco referred to “balancing” or “weighing” prejudice against the reasons given for the delay.59 The court also observed that the Supreme Court’s language in United States v. Gouveia,60 “albeit in dicta,” appeared to support its interpretation of Marion and Lovasco.61 It noted that most circuit courts of appeals stood in agreement with its holding.62 Moreover, the court offered two further explanations to support its reasoning.63 First, it asserted, “[h]istorically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property,”64 meaning “the Due Process Clause . . . is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property.”65 Second, the court stated that finding a due process violation when the government acted in good faith could lead to separation-of-powers issues.66

After concluding its discussion of bad faith, the court reviewed the prejudice requirement.67 It reiterated that the prejudice prong is not met by merely demonstrating presumptive or potential prejudice, but that “actual” prejudice must be shown.68 In addition, the court asserted that the prejudice has to be “substantial” as well.69 According to the court, requiring actual, substantial prejudice is consistent with the notion of due process,70 and “deprivation [of life, liberty, or property, without due process of law] will normally occur only by

57. Crouch, 84 F.3d at 1508-09. On that note, the court mentioned a handful of post-Marion, pre-Lovasco cases, as well as numerous other post-Lovasco cases decided by the Fifth Circuit with similar holdings. See id. at 1508, 1509 n.9.
58. See id. at 1510-14.
59. Id. at 1510.
61. Crouch, 84 F.3d at 1510; Gouveia, 467 U.S. at 192 (“But applicable statutes of limitations protect against the prosecution’s bringing stale criminal charges against any defendant, and, beyond that protection, 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 in presenting his defense.” (citations omitted)). The Supreme Court in Gouveia, however, merely repeated what it said in Marion. That is, dismissal is required under the stated circumstances. This does not mean, however, that dismissal is required only under these circumstances.
62. Crouch, 84 F.3d at 1511-12. See infra Part III.B. for a discussion of cases from those circuits.
63. See Crouch, 84 F.3d at 1512-14.
64. Id. at 1513 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).
65. Id. (quoting Davidson v. Cannon, 474 U.S. 344, 347 (1986)).
66. Id.
67. See id. at 1514-23.
68. Id. at 1515.
69. Id.
70. Id.
conviction, and not simply by trial itself.”

Relying on United States v. MacDonald and United States v. Marion, the Fifth Circuit then stated that one who is unsuccessful in proving pre-accusation delay prior to trial can always raise the claim again following trial, with a greater chance of prevailing at that point. From this, the court concluded that “a far stronger showing is required to establish the requisite actual, substantial prejudice pretrial than would be required after trial and conviction.” The court even went a step further and remarked, “it is difficult to imagine how a pretrial showing of prejudice would not in almost all cases be to some significant extent speculative and potential rather than actual and substantial.”

B. Other Circuits Using a Strict Two-Prong Approach

When the Fifth Circuit decided Crouch, it noted that the First, Second, Third, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits agreed with the rule it applied; that is, when the statute of limitations

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71. Id. at 1516; see also U.S. CONST. amend. V. Interestingly, by parenthetical, the Fifth Circuit compares the following statements made by the Supreme Court in Olim v. Wakinekona, 461 U.S. 238, 230 (1983): “Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.” Crouch, 84 F.3d at 1516 (quoting Olim, 461 U.S. at 250).

72. 435 U.S. 850 (1978). In relying on MacDonald, the Fifth Circuit analogized to the Supreme Court’s statement that “[u]nlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not . . . encompass a ‘right not to be tried’ which must be upheld prior to trial if it is to be enjoyed at all.” Crouch, 84 F.3d at 1516 (quoting MacDonald, 435 U.S. at 861). To further support its contention, the Fifth Circuit also mentioned the following language from MacDonald:

Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. . . . The essence of a defendant’s Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. Normally, it is only after trial that that claim may fairly be assessed.

Id. (quoting MacDonald, 435 U.S. at 858-59). Interestingly, even though the Fifth Circuit analogized to the Speedy Trial Clause here, it had just concluded saying the trial court’s reliance on Doggett v. United States, 505 U.S. 647 (1992), was misplaced, because Doggett involved a case of post-indictment delay brought under the Sixth Amendment. Crouch, 84 F.3d at 1515.

73. 404 U.S. 307 (1971). The Fifth Circuit mentioned the Supreme Court’s statement that “[e]vents of the trial may demonstrate actual prejudice, but at the present time appellees’ due process claims are speculative and premature.” Crouch, 84 F.3d at 1516 (quoting Marion, 404 U.S. at 326). In a parenthetical, the Fifth Circuit also mentioned the Supreme Court’s statement in MacDonald that “[t]he denial of a pretrial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial—when prejudice can better be gauged—would also be denied.” Id. (quoting MacDonald, 435 U.S. at 858-59).

74. Crouch, 84 F.3d at 1516.

75. Id.

76. Id.

77. Id. at 1511-12. The opinion cited the following cases from those circuits: United States v. Crooks, 766 F.2d 7 (1st Cir. 1985); United States v. Hoo, 825 F.2d 667 (2d Cir. 1987); United States v. Ismaili, 828 F.2d 153 (3d Cir. 1987); United States v. Brown, 959
has not run, “dismissal for [pre-accusation] delay requires a showing not only of substantial, actual prejudice, but also that the prosecutor intentionally delayed [formal accusation] to gain tactical advantage or to advance some other improper purpose.” An updated examination of cases from those circuits indicates that they all—with the exception of the Seventh Circuit, which has not been clear on its position—still appear to require intentional, tactical delay or some other bad-faith purpose instead of a more flexible balancing test. Interestingly though, in considering the separate but related issue of whether a delay prior to resentencing violates the Due Process Clause, the Second Circuit has employed a balancing test (instead of a strict bad-faith requirement), despite vehemently analogizing to the context of due process violations based on pre-accusation delay. This, at least in part, seems to weigh against the Fifth Circuit’s deliberateness rationale.

F.2d 63 (6th Cir. 1992); United States v. Sowa, 34 F.3d 447 (7th Cir. 1994); United States v. Engstrom, 965 F.2d 836 (10th Cir. 1992); United States v. Hayes, 40 F.3d 362 (11th Cir. 1992); and United States v. Mills, 925 F.2d 455 (D.C. Cir. 1991). These opinions do not use identical language, but they all essentially require intentional, tactical delay or some other type of bad faith.

78. Crouch, 84 F.3d at 1511.
79. In fact, the Fifth Circuit’s interpretation of the Seventh Circuit case it cited in Crouch was not entirely accurate. See infra Part III.D.
80. See, e.g., United States v. Bater, 594 F.3d 51, 54 (1st Cir. 2010) (“Excessive pre-accusation delay can sometimes, albeit rarely, violate the Fifth Amendment’s Due Process Clause if the defendant shows both that the ‘delay caused substantial prejudice to his right to a fair trial’ and that ‘the government intentionally delayed indictment . . . to gain a tactical advantage.’ ” (quoting United States v. Picciandra, 788 F.2d 39, 42 (1st Cir. 1986))); United States v. Cornielle, 171 F.3d 748, 752 (2d Cir. 1999) (“A defendant bears the ‘heavy burden’ of proving both that he suffered actual prejudice because of the alleged pre-accusation delay and that such delay was a course intentionally pursued by the government for an improper purpose.”); United States v. Beckett, 205 F.3d 140, 150-51 (3d Cir. 2000) (“The defendant can make out a claim under the Due Process Clause only if he can show both (1) that the delay between the crime and the federal indictment actually prejudiced his defense; and (2) that the government deliberately delayed bringing the indictment in order to obtain an improper tactical advantage or to harass him.”); United States v. Schaffer, 586 F.3d 414, 424 (6th Cir. 2009) (“In this circuit, dismissal for pre-accusation delay ‘is warranted only when the defendant shows substantial prejudice to his right to a fair trial and that the delay was an intentional device by the government to gain a tactical advantage.’ ” (quoting United States v. Greene, 737 F.2d 572, 574 (6th Cir. 1984))); United States v. Abdush-Shakur, 465 F.3d 458, 465 (10th Cir. 2006) (“To prevail on such a claim, the defendant must prove (1) the delay resulted in substantial prejudice to his rights, and (2) the prosecution intentionally delayed prosecution in order to gain a tactical advantage.”); United States v. Foxman, 87 F.3d 1220, 1222 (11th Cir. 1996) (“If[, . . . dismissal to [be] proper, [one must show] that pre-indictment delay caused him actual [and] substantial prejudice and that the delay was the product of a deliberate act by the government designed to gain a tactical advantage.”); Mills, 925 F.2d at 464 (“Such delay offends due process if the defendant can carry the burden of showing (1) that the government delayed bringing the indictment in order to gain a tactical advantage; and (2) that the delay caused him actual and substantial prejudice.”” (quoting United States v. Fuesting, 845 F.2d 664, 669 (7th Cir. 1988))).
81. See United States v. Ray, 578 F.3d 184, 199-202 (2d Cir. 2009).
82. See supra text accompanying notes 64-65.
Significantly, the Eighth Circuit was omitted from the Fifth Circuit’s list in *Crouch*. The reason for this is because of conflicting decisions issued by the Eighth Circuit in the years leading up to *Crouch*, which the Fifth Circuit at least recognized in a footnote. Specifically, the Eighth Circuit’s 1994 decision in *United States v. Miller*, which used a balancing test, conflicted with its decision in *United States v. Stierwalt* from earlier that year, as well as its decision in *United States v. Scoggins* from the previous year. As the Fifth Circuit noted, *Miller* did not reference either case. Although the Eighth Circuit has issued conflicting decisions on pre-accusation delay, its more recent cases appear to be in accord with the Fifth Circuit.

C. Circuits that Reject the Strict Two-Prong Test

Contrary to the Courts of Appeals that require proof of bad faith to prevail on a claim of pre-accusation delay where “actual prejudice” is found to exist, the Fourth and Ninth Circuits balance the prejudice against the reasons offered by the government to justify the delay. Significantly, the Fourth Circuit only cited the now-overruled *Townley* decision when it adopted this approach in *Automated Medical Laboratories*. In discussing its reasons for utilizing a balancing test in another case, the Fourth Circuit explained that the Supreme Court’s mandate of a case-by-case inquiry makes a balancing test more appropriate than a black-letter rule. The Ninth Circuit has applied

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83. See 84 F.3d at 1512 n.15.
84. 20 F.3d 926 (8th Cir. 1994).
85. 16 F.3d 282 (8th Cir. 1994).
86. 992 F.2d 164 (8th Cir. 1993).
87. *Crouch*, 84 F.3d at 1512 n.15.
88. See, e.g., *United States v. Jackson*, 446 F.3d 847, 849 (8th Cir. 2006) (“In contrast to the balancing test used in Sixth Amendment cases, defendants claiming a due process violation for pre-indictment delay must carry the burden of proof on two separate elements. The defendant must establish that: (1) the delay resulted in actual and substantial prejudice to the presentation of his defense; and (2) the government intentionally delayed his indictment either to gain a tactical advantage or to harass him.” (citing United States v. Sturdy, 207 F.3d 448, 452 (8th Cir. 2000))).
89. See, e.g., *United States v. Uribe-Rios*, 558 F.3d 347, 358 (4th Cir. 2009) (“First, we ask whether the defendant has satisfied his burden of proving ‘actual prejudice.’ Second, if that threshold requirement is met, we consider the government’s reasons for the delay, ‘balancing the prejudice to the defendant with the Government’s justification for delay.’ ” (citing United States v. Automated Med. Labs., Inc., 770 F.2d 399, 403-04 (4th Cir. 1985)); *United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007) (“[The defendant] must satisfy both prongs of a two-part test. First, he must prove ‘actual, non-speculative prejudice from the delay.’ Second, the length of the delay is weighed against the reasons for the delay . . . .” (citations omitted)). As these two cases show, the Fourth and Ninth Circuits only require “actual prejudice,” rather than “actual and substantial prejudice.” The Third Circuit also appears to not require “substantial” prejudice, even though it agrees with the Fifth Circuit on bad faith. *See United States v. Beckett*, 208 F.3d 140, 150-51 (3d Cir. 2000); *United States v. Ismaili*, 828 F.2d 153, 167 (3d Cir. 1987).
90. See 770 F.2d at 403-04.
similar reasoning and has also explained that Marion and Lovasco do “not set out intent or recklessness as required standards of fault.”

D. No Clear Position in the Seventh Circuit

In the years leading up to Crouch, the Seventh Circuit issued conflicting decisions on pre-accusation delay. Its position is still not entirely clear. Interestingly, when the Fifth Circuit discussed the other circuits in agreement with its approach in Crouch, it mentioned the Seventh Circuit and cited United States v. Sowa in support. In Sowa, the Seventh Circuit never did clearly adopt the same approach as the Fifth Circuit in Crouch. In fact, the court in Crouch may have been partially incorrect with the manner in which it categorized Sowa. The Sowa opinion states intentional, tactical delay is required, but it also asserts that “once the defendant has proven actual and substantial prejudice, the government must come forward and provide its reasons for the delay. The government’s reasons are then balanced against the defendant’s prejudice to determine whether the defendant has been denied due process.” This was echoed in United States v. Pardue, a case the Seventh Circuit decided after the Fifth Circuit decided Crouch. Yet, a more recent case from the Seventh Circuit considered intentional, tactical delay to be a requirement but said nothing about the balancing test used in the circuit’s previous cases and failed to mention Sowa or Pardue. As the foregoing demonstrates, the Seventh Circuit still appears conflicted over the proper test.

IV. THE STATES

Many opinions on pre-accusation delay have been issued by the different U.S. Courts of Appeals since Marion and Lovasco, but an examination of how the states handle the issue is also important. Not all of the states can be categorized as cleanly as the circuits, but this Part nevertheless attempts to categorize the fifty states and dives into a further discussion of the approach followed by a handful of

92. United States v. Moran, 759 F.2d 777, 781 (9th Cir. 1985).
93. See United States v. Hollins, 811 F.2d 384, 387-88 (7th Cir. 1987) (“Within this circuit there is conflicting authority as to whether, after a showing of actual and substantial prejudice has been made by the defendant, the defendant then bears the additional burden of proving that the government delayed the indictment for a tactical advantage or some other impermissible purpose, or if the burden is then shifted to the government to show why the pre-indictment delay was necessary.” (citations omitted)); see also Hoo v. United States, 484 U.S. 1035, 1036 (1988) (White, J., dissenting) (denial of cert.).
94. 34 F.3d 447 (7th Cir. 1994).
95. See United States v. Crouch, 84 F.3d 1497, 1512 (5th Cir. 1996).
96. See Sowa, 34 F.3d at 450.
97. Id. at 451.
98. See United States v. Pardue, 134 F.3d 1316, 1319 (7th Cir. 1998).
99. See United States v. Wallace, 326 F.3d 881, 886 (7th Cir. 2003).
Significantly, while the individual protections provided by the U.S. Constitution establish a floor to which the states must adhere, it does not put a ceiling in place. Thus, states are free to provide greater protections under their own state constitutions.

A. States Using a Strict Two-Prong Approach

States that use a strict two-prong test requiring bad faith, an improper purpose, harassment, deliberate action, or recklessness as a prong include: Alabama, Arizona, Arkansas, Connecticut, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina,

100. In conducting searches on Westlaw to determine how each state approaches pre-accusation delay cases, the author used the following search terms: (Marion or Lovasco) & (pre/3 delay) & “due process”.
102. A few states discussed in this section allow recklessness to meet part two of the test. Nonetheless, they have been placed in this category because they still adhere to a strict two-part test as opposed to a more lenient balancing test.
103. Actual prejudice is the other prong. Most of these states also require the actual prejudice to be substantial.
104. See infra pp. 673-74.
107. See, e.g., State v. Morrill, 498 A.2d 76, 86 (Conn. 1985) (“In order to establish a due process violation because of pre-accusation delay, the defendant must show both that actual substantial prejudice resulted from the delay and that the reasons for the delay were wholly unjustifiable, as where the state seeks to gain a tactical advantage over the defendant.”).
109. See infra p. 674.
110. See infra pp. 674-75.
112. See, e.g., Kirk v. Commonwealth, 6 S.W.3d 823, 826 (Ky. 1999). The Kentucky Supreme Court has interpreted Marion to require intentional, tactical delay. See Reed v. Commonwealth, 738 S.W.2d 818, 820 (Ky. 1987).
113. See, e.g., Clark v. State, 774 A.2d 1136, 1156 (Md. 2001).
114. See, e.g., Commonwealth v. Imbruglia, 387 N.E.2d 559, 565 (Mass. 1979). Recklessness will satisfy the second prong in Massachusetts. See, e.g., id.
115. See, e.g., State v. Anderson, 275 N.W.2d 554, 555 (Minn. 1978). The Minnesota Supreme Court has not evaluated pre-accusation delay cases in much depth. Nonetheless, it falls in this category because it interprets Lovasco to require intentional, tactical delay. See id.
116. See, e.g., Killen v. State, 05-KA-01393-SCT ¶ 69 (Miss. 2007). According to the Mississippi Supreme Court, it adopted the requirement of intentional delay from the United States Supreme Court. See id.
117. See, e.g., State v. Scott, 621 S.W.2d 915, 917 (Mo. 1981).
119. See infra p. 675.
120. See State v. Townsend, 897 A.2d 316, 325 (N.J. 2006). New Jersey interprets the federal standard as requiring deliberate government action, and it appears to apply the same standard under state law as well. See id.

ALABAMA. The Alabama Supreme Court does not appear to have encountered any cases that are on-point. The Alabama Court of Criminal Appeals, however, has reviewed a number of pre-accusation delay cases and has adopted the following position:

The law is well-settled that in order to establish a due process violation due to pre-accusation delay, a defendant must show (1) that the delay caused actual prejudice to the conduct of his defense, and (2) that the delay was the product of deliberate action by the government designed to gain a tactical advantage. A defendant is charged with a heavier burden of proof in showing a pre-accusation delay due process violation than in showing a denial of his speedy trial rights.

124. While Oklahoma’s position is not entirely evident, it does appear to require intentional, tactical delay. See Fritz v. State, 811 P.2d 1353, 1367 (Okla. 1991) (“The delay in the present case was not a ‘tactical’ delay designed to impair the ability of the [defendant] to mount an effective defense.”).
125. See infra pp. 675-76.
127. See, e.g., State v. Krizan-Wilson, 354 S.W.3d 808, 817 (Tex. Crim. App. 2011) (“This Court . . . has held for more than two decades that, in order to establish a due-process violation, [a defendant] has the burden of proving both prejudice and that an intentional delay was designed to give the state a tactical advantage.”). The Texas Court of Criminal Appeals has final appellate jurisdiction in state criminal cases in Texas. See Court Structure of Texas, Tex. CTS. ON-LINK, http://www.courts.state.tx.us/ (last updated Mar. 8, 2013).
128. See State v. Hales, 2007 UT 14, ¶¶ 42-49, 152 P.3d 321. In Hales, the Utah Supreme Court noted that its previous cases on pre-accusation delay were inconsistent with regard to the proper test. Id. ¶ 45. As a result, it took the opportunity to clarify its position, stating that “[a]s a matter of federal law . . . the defendant [must] show (1) actual prejudice and (2) delay for the purpose of gaining a tactical advantage or for another bad faith motive.” Id. ¶ 49.
129. See State v. Beer, 2004 UT 99, ¶ 39, 177 Vt. 245, 864 A.2d 643, overruled on other grounds by State v. Brillon, 2008 VT 35, 183 Vt. 475, 955 A.2d 1108; see also State v. Ellis, 542 A.2d 279, 282 (Vt. 1988) (“[T]he United States Supreme Court has held that, to prove a violation of due process, the defendant must show both that he suffered actual prejudice to the conduct of his defense and that the delay was intentional and caused by a desire to gain tactical advantage.”) (citing United States v. Marion, 404 U.S. 307, 324 (1971))).
130. See Morrisette v. Commonwealth, 569 S.E.2d 47, 52 (Va. 2002).
131. See, e.g., State v. McGuire, 2010 WI 91, ¶ 45, 328 Wis. 2d 289, 786 N.W.2d 227.
The court of criminal appeals has suggested recklessness may satisfy the second prong in Alabama.\(^{135}\) With regard to the prejudice prong, the prejudice must be actual and substantial.\(^{136}\)

**IDAHO.** In Idaho, the clear position is that “[b]efore a due process violation can be found, a defendant must show that the pre-[-]accusation delay ‘...caused substantial prejudice to [defendants’] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.’”\(^{137}\) Significantly, in *State v. Wilbanks*, the Idaho Supreme Court concluded that *Marion requires* this position.\(^{138}\) Moreover, *Wilbanks* was decided prior to *Lovasco*.\(^{139}\) Nonetheless, the Idaho Supreme Court maintained its pre-*Lovasco* position in later cases without considering the additional framework elicited by the U.S. Supreme Court in *Lovasco*.\(^{140}\)

**INDIANA.** The Indiana Supreme Court has not unequivocally asserted what it considers to be the proper test to utilize in adjudicating claims of pre-accusation delay. Nonetheless, it has used language indicating that it agrees with the strict bad-faith approach. In one of its on-point cases, the court found no due process violation, reasoning in part that the “defendant has not shown that the delay in his prosecution was a deliberate attempt by the State to gain unfair advantage.”\(^{141}\) In addition, at least one case decided in the Indiana Court of Appeals has stated that intentional, tactical delay is required.\(^{142}\)

**IOWA.** At first glance, Iowa appears to use a balancing test, but a further examination of relevant Iowa Supreme Court cases leads to a contrary conclusion. In *State v. Trompeter*, the court said that “[t]o prove a pre-accusatorial delay violated due process, the defendant must show: (1) the delay was unreasonable; and (2) the defendant’s defense was thereby prejudiced.”\(^{143}\) It further asserted that a balancing test must be undertaken.\(^{144}\) Interestingly, *State v. Lange* was one of the cases *Trompeter* cited to support its statement about the balancing

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136. *Prince*, 581 So. 2d at 878.
139. *Wilbanks* was decided in 1973 and *Lovasco* was decided in 1977.
140. *See* cases cited *supra* note 137.
143. 555 N.W.2d 468, 470 (Iowa 1996). *State v. Brown* modified the holding in *Trompeter*, but it seems to have only done so by imposing what the court called a “more manageable statement,” one that now looks at whether there is actual prejudice before determining whether the delay was unreasonable. 656 N.W.2d 355, 363 & n.6 (Iowa 2003).
144. *Trompeter*, 555 N.W.2d at 470.
test. However, also stated another proposition that seems to be at odds with conducting a balancing test. Regarding the actual prejudice prong, the court in \textit{Lange} stated that “[t]he actual prejudice must result from the State’s ‘intentional attempt to gain a tactical advantage by delaying the initiation of charges.’” Therefore, Iowa has been placed in this category.

\textbf{NEVADA.} In Nevada, proving a due process violation based on pre-accusation delay requires a showing of bad faith. Specifically, a defendant must demonstrate “(1) that he or she suffered actual, non-speculative prejudice from the delay; and (2) that the prosecution intentionally delayed bringing the charges in order to gain a tactical advantage over the [defendant], or that the prosecution delayed in bad faith.” Interestingly, the Nevada Supreme Court cited two cases in support of this strict, two-prong test: \textit{Lovasco} and \textit{DeGeorge}. Obviously, that is not the clear holding of \textit{Lovasco}. More importantly, however, \textit{DeGeorge} is a Ninth Circuit case, and like in other Ninth Circuit cases, the court applied a balancing test rather than adopting a strict bad-faith requirement. Moreover, throughout its discussion, the Nevada Supreme Court also cited other Ninth Circuit cases to support its contrary analysis.

\textbf{PENNSYLVANIA.} The Pennsylvania Supreme Court discussed pre-accusation delay at length in \textit{Commonwealth v. Snyder}, and subsequently built upon that discussion in \textit{Commonwealth v. Scher}. Claims of pre-accusation delay in Pennsylvania are analyzed in the same manner under the federal and state constitutions. The court in \textit{Scher} recognized:

\begin{quote} [A] two-prong test emerged from \textit{Marion} and \textit{Lovasco} to establish a due process claim for pre-[accusation] 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.\end{quote}

\begin{footnotesize}

\footnotetext{145. See id.; see also State v. Lange, 531 N.W.2d 108 (Iowa 1995).}
\footnotetext{146. \textit{Lange}, 531 N.W.2d at 111 (quoting State v. Wagner, 410 N.W.2d 207, 210 (Iowa 1987)).}
\footnotetext{148. See cases cited supra note 147.}
\footnotetext{149. See generally \textit{Lovasco}, 431 U.S. 783.}
\footnotetext{150. See \textit{DeGeorge}, 380 F.3d at 1210; see also supra Part III.C.}
\footnotetext{151. See \textit{Wyman}, 217 P.3d at 579.}
\footnotetext{152. 713 A.2d 596 (Pa. 1998).}
\footnotetext{153. 803 A.2d 1204 (Pa. 2002).}
\footnotetext{154. See id. at 1215 (“[W]ith respect to claims of violation of due process caused by pre-arrest delay, ‘our analysis is the same pursuant to both due process clauses.’”) (quoting \textit{Snyder}, 713 A.2d at 602)).}
\footnotetext{155. Id. at 1217.}
\end{footnotesize}
As the court proceeded, it further clarified that negligence alone will not violate due process and instead required the defendant to show intentional conduct, bad faith, or recklessness by the government.\textsuperscript{156}

\section*{B. States that Reject the Strict Two-Prong Test}

States that reject the strict two-prong test include: Alaska,\textsuperscript{157} California,\textsuperscript{158} Florida,\textsuperscript{159} Hawaii,\textsuperscript{160} Illinois,\textsuperscript{161} Louisiana,\textsuperscript{162} Maine,\textsuperscript{163} Montana,\textsuperscript{164} New Hampshire,\textsuperscript{165} North Dakota,\textsuperscript{166} Ohio,\textsuperscript{167} Oregon,\textsuperscript{168} South

\begin{footnotesize}
\textsuperscript{156} See id. at 1221-22 (“We agree with this rationale that negligence or due diligence in the conduct of a criminal investigation is not the appropriate standard for deciding whether delay in indictment deprives a defendant of due process. As a result, the test that we believe is the correct one must take into consideration all of the facts and circumstances surrounding the case, including: the deference that courts must afford to the prosecutor’s conclusions that a case is not ripe for prosecution; the limited resources available to law enforcement agencies when conducting a criminal investigation; the prosecutor’s motives in delaying indictment, and; the degree to which the defendant’s own actions contributed to the delay. Therefore, to clarify the standard established in Snyder, we hold . . . the defendant must first show that the delay caused him actual prejudice, that is, substantially impaired his or her ability to defend against the charges. The court must then examine all of the circumstances to determine the validity of the Commonwealth’s reasons for the delay. Only in situations where the evidence shows that the delay was the product of intentional, bad faith, or reckless conduct by the prosecution, however, will we find a violation of due process. Negligence in the conduct of a criminal investigation, without more, will not be sufficient to prevail on a due process claim based on pre-arrest delay.” (footnote omitted)).

\textsuperscript{157} See infra p. 677.

\textsuperscript{158} See infra pp. 677-78.

\textsuperscript{159} See infra pp. 678-79.

\textsuperscript{160} See, e.g., State v. Higa, 74 P.3d 6, 10 (Haw. 2003).

\textsuperscript{161} See People v. Lawson, 367 N.E.2d 1244, 1248 (Ill. 1977) (“[T]he defendant must come forward with a clear showing of actual \textit{and} substantial prejudice. . . . If the [defendant] satisfies 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.”). In \textit{Lawson}, the court denied the State’s petition for rehearing, but in doing so, it issued a supplemental opinion to address \textit{Lovasco}, which was released shortly after the initial \textit{Lawson} opinion. The court’s position remained the same. See id. at 1249 (“The court’s conduct of the inquiry requires the defendant to come forward with a clear demonstration of actual and substantial prejudice before the State presents a showing of reasonableness. The court then balances the competing interests. This is consistent with the \textit{Lovasco} requirement of a demonstration of prejudice to the defendant and an inquiry into the reasonableness of the delay.”). Even though the Illinois Supreme Court clearly announced its position in \textit{Lawson}, at least one intermediate appellate court in Illinois has failed to follow the supreme court. See People v. Totzke, 974 N.E.2d 408, 414 (Ill. App. Ct. 2012).

\textsuperscript{162} See, e.g., State v. Schrader, 518 So. 2d 1024, 1028 (La. 1988).

\textsuperscript{163} See, e.g., State v. Rippy, 626 A.2d 334, 338 (Me. 1993) (“[T]he defendant must first demonstrate ‘actual and unjustifiable prejudice’ resulting from the delay. Only then do we inquire as to the reasons for the delay offered by the State and determine, whether, on balance, the delay remains unjustified.” (citations omitted)).

\textsuperscript{164} See, e.g., State v. Passmore, 2010 MT 34, ¶ 29, 355 Mont. 187, 225 P.3d 1229. In Montana, negligence can be considered, but when courts conduct the balancing test, negligence is not weighed as heavily as deliberate government action. \textit{Id}.


\textsuperscript{166} See, e.g., State v. Denny, 351 N.W.2d 102, 104 (N.D. 1984). Significantly though, while the North Dakota Supreme Court recognized the requirement of actual prejudice in \textit{Denny}, it did not find actual prejudice, but proceeded to “balance[] the reasonableness of

Carolina,\textsuperscript{169} Washington,\textsuperscript{170} and West Virginia.\textsuperscript{171} Most of these states use a balancing test after finding actual prejudice.

\textbf{ALASKA.} Alaska has not explicitly adopted a balancing test, but it has rejected the strict approach used by the majority of federal and state courts. Under state law in Alaska, a successful claim requires proving unreasonable delay and actual prejudice.\textsuperscript{172} The state must provide reasons for the delay, but the defendant has the burden of establishing prejudice and that the state’s justifications were unreasonable.\textsuperscript{173} In a previous case, Alaska notably considered this test to be the proper analysis under the United States Constitution as well.\textsuperscript{174} While Alaska did not explicitly adopt a balancing test in \textit{Gonzales},\textsuperscript{175} it did expressly reject the strict bad-faith approach.\textsuperscript{176} However, Alaska’s inquiry looks into the reasonableness of the delay before considering actual prejudice; this seems to indicate that if anything is to be balanced, it is only whether the government’s reason(s) fall on the side of reasonable or unreasonable rather than how they balance against the actual prejudice where prejudice is found.

\textbf{CALIFORNIA.} Similar to the Nevada Supreme Court, albeit with a different result, the California Supreme Court has, to a certain degree, deviated from the Ninth Circuit’s interpretation of the law governing pre-accusation delay. Pursuant to the California Constitution, California courts first require actual prejudice.\textsuperscript{177} Upon a finding of actual prejudice, the prosecution is asked to provide reasons to justify the delay against the alleged prejudice.\textsuperscript{178} Even if it did so mistakenly, it seems pretty clear that North Dakota’s intent is to follow the same approach as the other balancing states. See \textit{id.}; \textit{see also} State v. Weisz, 356 N.W.2d 462, 464 (N.D. 1984) (“The reasonableness of the delay must be balanced against the prejudice to the accused.”).

\begin{itemize}
  \item \textsuperscript{167} \textit{See infra} p. 679.
  \item \textsuperscript{168} \textit{See State v. Stokes,} 248 P.3d 953, 960-64 (Or. 2011).
  \item \textsuperscript{169} \textit{See, e.g.,} State v. Lee, 653 S.E.2d 259, 260 (S.C. 2007). Like Wyoming, South Carolina has no statutes of limitation for criminal offenses. \textit{See Powell, supra} note 132, at 147.
  \item \textsuperscript{170} \textit{See infra} pp. 679-81.
  \item \textsuperscript{171} \textit{See, e.g.,} State \textit{ex rel.} Knotts v. Facemire, 678 S.E.2d 847, 856 (W. Va. 2009).
  \item \textsuperscript{172} \textit{State v. Gonzales,} 156 P.3d 407, 411 (Alaska 2007).
  \item \textsuperscript{173} \textit{Id.} at 412.
  \item \textsuperscript{174} \textit{See Burke v. State,} 624 P.2d 1240, 1242 (Alaska 1980) (“Two factors are to be considered under both federal and state law: (1) the reasonableness of the delay and (2) the resulting harm to the accused.” (quoting \textit{Coffey v. State,} 585 P.2d 514, 519 (Alaska 1978))). Unlike \textit{Burke, Gonzales} only mentions “[state due process challenges]” when it introduces the same two-part test used in \textit{Burke.} \textit{See Gonzales,} 156 P.3d at 411.
  \item \textsuperscript{175} \textit{See generally Gonzales,} 156 P.3d 407.
  \item \textsuperscript{176} \textit{See id.} at 411 n.23 (“The state argues that we should explicitly adopt the prevailing standard in most federal jurisdictions: a presumption that the state is acting reasonably in cases of delay unless the defendant can show that the state is acting in bad faith. We decline to adopt that approach at this time.”).
  \item \textsuperscript{177} \textit{See, e.g.,} People v. Cowan, 236 P.3d 1074, 1101 (Cal. 2010); People v. Nelson, 185 P.3d 49, 54 (Cal. 2008).
\end{itemize}
the delay. Finally, California courts balance the prejudice to the defendant and the prosecution's justifications. Moreover,

[under the California standard, “negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process. This does not mean, however, that whether the delay was purposeful or negligent is irrelevant.” Rather, “whether the delay was purposeful or negligent is relevant to the balancing process. Purposeful delay to gain advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.” The justification for the delay is strong when there is “investigative delay, nothing else.”

The California Supreme Court’s handling of these cases is significant because, despite acknowledging federal law on the topic “is not entirely settled,” the court appears to be under the impression that the United States Constitution requires a showing of intentional, tactical delay or bad faith. Thus, it seems to follow the same approach as the Ninth Circuit on state law grounds; ironically, however, the California Supreme Court appears to disagree with the Ninth Circuit’s interpretation of federal law.

**FLORIDA.** In Rogers v. State, the Florida Supreme Court approved use of the Townley test in pre-accusation delay cases, a test Florida’s First District Court of Appeal previously adopted in Howell v. State. Specifically,

[when a defendant asserts a due process violation based on pre-accusation delay, he bears the initial burden of showing actual prejudice. . . . If the defendant meets this initial burden, the court then must balance the demonstrable reasons for delay against the gravity of the particular prejudice on a case-by-case basis. The outcome turns on whether the delay violates the fundamental conception of justice, decency and fair play embodied in the Bill of Rights and fourteenth amendment.

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178. See cases cited supra note 177.
179. See cases cited supra note 177.
180. Cowan, 236 P.3d at 1101 (citations omitted).
181. Nelson, 185 P.3d at 55.
182. See id. (“Regarding the federal constitutional standard, we have stated that ‘a claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant.’ ” (quoting People v. Catlin, 26 P.3d 357, 373 (Cal. 2001))).
183. See Rogers v. State, 511 So. 2d 526, 531 (Fla. 1987); Howell v. State, 418 So. 2d 1164, 1170 (Fla. 1st DCA 1982).
184. Rogers, 511 So. 2d at 531; see also United States v. Townley, 665 F.2d 579, 581-82 (5th Cir. 1982); Howell, 418 So. 2d at 1170.
Even though Townley is no longer good law in the Fifth Circuit, the Townley test remains the correct test in Florida. The First District Court of Appeal recently noted in Hope that Overton and Rivera—decided eleven years and two years, respectively, after Crouch—continued to apply the Townley test that was adopted in Howell and Rogers. Significantly, neither Overton nor Rivera noted that the Townley test was subsequently rejected by the en banc Fifth Circuit in Crouch.

**OHIO.** Ohio’s approach resembles the general balancing approach. State v. Luck is a leading Ohio case on pre-accusation delay. In Luck, the court recognized that actual prejudice is a prerequisite if one is to succeed with a claim of pre-accusation delay. However, it held that determining at trial whether a defendant was actually prejudiced by the delay requires balancing the asserted prejudice against other admissible evidence. If actual prejudice is found, the second part of the test from Lovasco then requires finding no justifiable reasons for the delay. Of course, deliberate delay is an unjustifiable reason. In Ohio, however, negligence and error in judgment by the state are also unjustifiable if the state stops investigating and subsequently chooses to prosecute without obtaining additional evidence. When negligence or error in judgment constitutes the reason for the delay, “[t]he length of delay will normally be the key factor in determining whether” it was justifiable. At least one appellate case in Ohio has interpreted Luck to mean “court[s] must balance the prejudice suffered by the accused with the state’s reason for the delay.”

**WASHINGTON.** State v. Calderon marked the first time the Washington Supreme Court reviewed pre-accusation delay following Lovasco. In Calderon, the court reiterated that demonstrating prejudice is required to prove the delay violated a defendant’s due

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185. See supra Part III.A.
186. See State v. Hope, 89 So. 3d 1132, 1136-37 (Fla. 1st DCA 2012); see also Overton v. State, 976 So. 2d 536, 560 (Fla. 2007); Rivera v. State, 717 So. 2d 477, 483 (Fla. 1998).
187. Hope, 89 So. 3d at 1136-37.
188. See generally Overton, 976 So. 2d 536; Rivera, 717 So. 2d 477.
189. See 472 N.E.2d 1097 (Ohio 1984).
190. See id. at 1102.
191. Id. at 1102, 1104. Specifically, in Luck, the court stated that “[t]he prejudicial factors enumerated by defense counsel (the deaths of witnesses, the fading of memories, and the loss of evidence), when balanced against the other admissible evidence in this case, show that the defendant has suffered actual prejudice by the fifteen-year delay in prosecution.” Id. at 1104.
192. Id. at 1105.
193. See id.
194. Id.
195. Id.
198. See Oppelt, 257 P.3d at 656.
process rights and that the inquiry requires consideration of the prejudice and the reasons for the delay. According to the court, “[i]f the [government] is able to justify the delay, the court must undertake a further balancing of the [government]’s interest and the prejudice to the [defendant].”

In *Oppelt*, the court upheld the general approach it applied in *Calderon* and agreed that a balancing test should be used as the final step. The court, however, slightly modified its *Calderon* holding; it clarified that the due process test requires balancing, irrespective of whether the government’s reasons for the delay are justified. Thus, the test, simply stated, is that (1) the defendant must show actual prejudice from the delay; (2) if the defendant shows prejudice, the court must determine the [government’s] reasons for the delay; (3) the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution.

The court recognized that Washington courts have advanced conflicting interpretations of what must be balanced. As a result, it clarified that the reasons for the delay and the resulting prejudice must be balanced against each other. On the other hand, the delay itself and the government’s interest are not balanced against the prejudice.

The *Oppelt* court also discussed its rationale for proceeding with its three-part test, which concluded with the balancing prong. It stated that the distinct, bright-line approaches urged by the parties confused the proper analytical framework to apply “in answering the core question of whether the government action violates fundamental conceptions of justice.” According to the court, mere negligence could result in a due process violation, but to survive the balancing test, the prejudice would have to be greater than that required in a case involving deliberate delay or bad faith. The court voiced its agreement with the Fourth and Ninth Circuits, which have also stated that “negligent delay can violate due process.” Moreover, it stated that answering whether government behavior “violates fundamental

200. *Id.* (citing United States v. Saunders, 641 F.2d 659 (9th Cir. 1980)).
201. *See Oppelt*, 257 P.3d at 656-60.
202. *See id.*
203. *Id.* at 659.
204. *Id.*
205. *Id.*
206. *See id.*
207. *See id.* at 657-59.
208. *Id.* at 658.
209. *Id.* at 658, 660.
210. *Id.* at 658.
conceptions of justice . . . does not necessarily turn on the intent of the government actors. 211

C. States Without a Clear Position

The States discussed in this section cannot be appropriately placed into either of the two main categories, as their positions are unclear.

COLORADO. Colorado’s approach is unclear due to the inconsistencies in its case law on pre-accusation delay. In People v. Small, the court asserted that a successful claim requires proving actual prejudice and “[i]ntentional or negligent misconduct” by the government. 212 The Small court did not mention balancing in its due process analysis, however; 213 it only did so in its discussion of speedy trial. 214 Still, despite the court’s willingness to consider negligent misconduct in Small, the Colorado Supreme Court had previously stated in People v. Hutchinson that “mere displeasure . . . with a delay in the district attorney’s issuance of the arrest warrant does not justify the dismissal of charges against the defendant, at least in the absence of a showing that the delay was an intentional device to gain a tactical advantage.” 215 Furthermore, in discussing a similar issue in People v. McClure, the Colorado Supreme Court’s analysis muddied the waters with respect to what it considers to be the proper test by making intentional, tactical delay a mere factor—as opposed to a requirement. 216

DELAWARE. In Preston v. State, a pre-Lovasco case, the Delaware Supreme Court interpreted Marion to require actual and substantial

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211. Id.
213. See generally id.
214. See id. at 154-56.
215. 557 P.2d 376, 377 (Colo. 1976). Unlike Small, Hutchinson was decided before Lovasco, but both cases appear to be good law.
216. See generally 756 P.2d 1008 (Colo. 1988). In McClure, the Colorado Supreme Court used an approach similar to the one it used in People v. Hall, 729 P.2d 373 (Colo. 1986). The court stated the following in Hall:

Unlike the right to a speedy trial, there is no constitutional right to a speedy arrest. However, a point can be reached where the delay is so great that the prejudice to the defendant caused by it—due to faded memories of parties and witnesses, loss of contact with witnesses, and loss of documents—becomes so great that due process and fundamental fairness require that the charges be dismissed.

This court has recognized “certain key factors” to be examined in this inquiry, which include: (1) loss of defense witnesses; (2) whether the delay was purposeful and intended to prejudice the defendant; (3) the kind and quantum of evidence available to the prosecution; and (4) general considerations of justice and fair play. This list is not exhaustive.

Id. at 375 (citations omitted). Both McClure and Hall followed the court’s approach in People ex rel. Coca v. District Court of the Seventh Judicial District, 530 P.2d 958 (Colo. 1975).
prejudice or intentional, tactical delay. In a 1990 case, the court issued an order that cited Preston in stating that same disjunctive proposition. A few months later, the court issued another order that also cited Preston; this time, however, the court only stated that “[t]o prevail on the issue of pre-[accusation] delay, a defendant must show that he was actually and substantially prejudiced by the delay.” Where Delaware stands today is unclear, but as discussed above, actual prejudice is necessary—but not sufficient—to bring a successful claim of pre-accusation delay, at least under federal law.

MICHIGAN. The path followed in Michigan is unclear, as the Michigan Supreme Court has not yet adjudicated a claim of pre-accusation delay on the merits. It had the opportunity to do so in People v. Mercer but chose not to. Instead, it remanded the case on other grounds. The dissent vehemently objected to the majority’s decision to avoid the issue. As the dissent stated,

I would address [this] jurisprudentially significant issue . . . . By failing to resolve this issue, this Court will potentially subject defendant to an unfair trial. . . . Further, by evading the opportunity to resolve the proper standard applicable to similar pre-[accusation] delay cases, this Court potentially subjects many more defendants in this state to stale, unfair prosecutions.

The dissent also noted the split among federal and state courts and that panels on the Michigan Court of Appeals have applied different tests.

NEW YORK. New York initially appeared to reject the strict two-prong test, but developments in New York case law are unclear with regard to whether that is still true today. Nevertheless, the majority and dissenting opinions in People v. Vernace are instructive on New York’s treatment of pre-accusation delay claims under state law. At first glance, New York seemingly analyzes these claims in a markedly similar manner to speedy trial claims. Specifically, New York

220. See supra text accompanying note 28.
221. See 752 N.W.2d 470, 470 (Mich. 2008).
222. See id.
223. See id. at 471-74 (Cavanagh, J., dissenting).
224. Id. at 471 (emphasis added).
225. Id. at 473. A law review article has discussed pre-accusation delay and how it is examined by Michigan courts, see Thomas E. Brennan, Jr., Dismissal and Prearraignment Delay: Time Is of the Essence, 4 COOLEY L. REV. 493, 500-02 (1987), but much time has passed since the publication of that article.
226. See People v. Vernace, 756 N.E.2d 66, 67 (N.Y. 2001) (“In this State, ‘we have never drawn a fine distinction between due process and speedy trial standards’ when dealing with delays in prosecution. Indeed, the factors utilized to determine if a defendant’s
“[c]ourts must engage in a sensitive weighing process of [five] diversified factors.”227 Those factors are: “ '(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay.' ”228 However, despite using this test—one with factors instead of requirements—the court in Vernace echoed the sentiment that “a determination made in good faith to delay prosecution for sufficient reasons will not deprive [a] defendant of due process even though there may be some prejudice to [the] defendant.”229 The dissent, however, opined:

Our case law is well-settled with respect to the effect of such inordinate pre-accusatory prosecutorial delay. In contrast to the holdings of the Supreme Court of the United States under the Due Process Clause of the 14th Amendment, we view an unjustified, protracted pre-indictment delay in prosecution . . . as a deprivation of a defendant’s State constitutional right to due process, without requiring a showing of actual prejudice.

Our settled case law also holds that “[w]here there has been a prolonged delay, we impose a burden on the prosecution to establish good cause.”230 Still, in light of the majority opinion, New York’s case law does not appear to be entirely settled.

SOUTH DAKOTA. South Dakota’s approach cannot be definitively categorized. In State v. Stock, which appears to offer a better discussion of pre-accusation delay than any other South Dakota Supreme Court case, the court did not mention anything about balancing.231 It also seemed to stray away from the approach of the states that require deliberate or reckless action, but it did not do so in a manner that is strong enough to suggest it rejects the strict two-prong test.232
TENNESSEE. Tennessee’s overall position is unclear, as it seems to alter its test for pre-accusation delay cases depending on certain circumstances. In State v. Dykes, the court of criminal appeals said obtaining relief requires “prov[ing] that (a) there was a delay, (b) the accused sustained actual prejudice as a direct and proximate result of the delay, and (c) the State caused the delay in order to gain tactical advantage over or to harass the accused.”233 Almost six years later, in State v. Gray, the Tennessee Supreme Court found Dykes “to be inapposite” under Gray’s facts.234 The court found Gray to be different because it involved a delay of forty-two years, rather than only one year like in Dykes.235 In addition, the court reasoned Dykes was distinguishable because, in that case, “the State had knowledge of the offense from the time of commission. In the instant case there was no such knowledge.”236 The court further stated:

[The Marion-Dykes approach . . . places a daunting, almost insurmountable, burden on the accused by requiring a demonstration not only that the delay has caused prejudice but also that the State orchestrated the delay in order to obtain a tactical advantage. Thus, under the facts before us, application of so stringent a standard would force a result we would consider unconstitutional, unwarranted, and unfair. To accomplish justice while preserving Gray’s right to a fair trial requires, in our view, a less stringent standard.

Today we articulate a standard by which to evaluate pre-accusatorial delay and hold that an untimely prosecution may be subject to dismissal upon Fifth and Fourteenth Amendment due process grounds and under Article I, §§ 8 and 9, of the Tennessee Constitution even though in the interim the defendant was neither formally accused, restrained, nor incarcerated for the offense. In determining whether pre-accusatorial delay violates due process, 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.237

About a year and a half later, the court further expounded upon its standard in State v. Utley.238 Lingering questions, however, led the court to return to the topic in State v. Carico shortly thereafter to clarify where it stood in light of Dykes, Gray, and Utley.239 It noted that “Utley . . . limited the test adopted in Gray to cases in which the State had no knowledge that a criminal offense had been committed.”240

234. 917 S.W.2d 668, 671 (Tenn. 1996).
235. Id.
236. Id.
237. Id. at 673.
238. See 956 S.W.2d 489, 495 (Tenn. 1997).
239. See generally State v. Carico, 968 S.W.2d 280 (Tenn. 1998).
240. Id. at 284-85.
Furthermore, “[a]s recognized in Utley, a showing that ‘the delay was an intentional device to gain a tactical advantage over the [defendant]’ is a significant factor in determining if the defendant’s due process rights have been violated.”241 Thus, where Tennessee stands, in a sense, varies case by case.

V. A FURTHER ANALYSIS OF PRE-ACCUSATION DELAY AND A CALL FOR SUPREME COURT ACTION

As it currently stands, successfully proving that pre-accusation delay caused a violation of a defendant’s rights under the Due Process Clause is difficult in both federal and state courts.242 It is hard to imagine that the Supreme Court envisioned it being so difficult when the Court established the protection. Although proving this constitutional violation is not easy, a test that does not require intentional, tactical delay or bad faith still likely results in the extra occasional dismissal for defendants who were greatly prejudiced by the delay—quite possibly innocent defendants. With actual prejudice being a prerequisite to that dismissal under nearly any test, the defendant is already faced with a heavy burden.243 Perhaps that burden of proving actual prejudice is not nearly enough though, and the conduct of government actors (i.e., the police and/or the prosecution) matters. As discussed in this Note, every federal circuit and almost every state has spoken on this issue,244 but the Supreme Court has not addressed it since 1977.245 The time has come. This Part will further explore pre-accusation delay and advocate that the Supreme Court reconsid-er the issue, and ultimately decide what it holds to be the proper test for adjudicating these claims.

Existing Supreme Court jurisprudence on the issue has unequivocally stated that the Sixth Amendment’s Speedy Trial Clause has distinct purposes from the Fifth Amendment’s Due Process Clause and is thus inapplicable in the pre-accusation delay context.246 State courts in New York have nevertheless chosen to apply the speedy tri-
al test to these due process claims.\textsuperscript{247} In addition, courts in other states have drawn parallels between the two constitutional protections, and at least one law review article has done the same.\textsuperscript{248} This is in spite of the fact that the Supreme Court has expressly stated that a defendant’s rights with regard to pre-accusation delay under the Due Process Clause are different from her Sixth Amendment speedy trial rights in multiple ways:

> In our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an “accused”\ldots

> On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been “accused” in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused\ldots\textsuperscript{249}

> The framers could hardly have selected less appropriate language if they had intended the speedy trial provision to protect against pre-accusation delay\ldots\textsuperscript{250}

> It is apparent also that very little support for appellees’ position emerges from a consideration of the purposes of the Sixth Amendment’s speedy trial provision\ldots\textsuperscript{251}

> [Therefore, the] possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context.\textsuperscript{252}

The Supreme Court’s pronouncements currently make drawing parallels between the two provisions inappropriate, at least under federal law. The above language from \textit{Marion} demonstrates that the Supreme Court was unwavering in stating that the analysis under the Fifth and Sixth Amendments should remain separated from one another in this context. Additionally, while not restating the exact same language verbatim in \textit{United States v. Lovasco}, the Supreme Court still strongly reiterated the difference between the Fifth and Sixth Amendment rights at play.\textsuperscript{253} Whether examining the two con-

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\textsuperscript{247} See supra pp. 682-83.
\textsuperscript{248} See \textit{Cleary}, supra note 243 at 1066-68, 1074-76.
\textsuperscript{250} \textit{Id.} at 314-15.
\textsuperscript{251} \textit{Id.} at 320.
\textsuperscript{252} \textit{Id.} at 322 (emphasis added).
\textsuperscript{253} \textit{See} 431 U.S. 783, 788-89 (1977) ("We held that as far as the Speedy Trial Clause of the Sixth Amendment is concerned, [pre-accusation] delay is wholly irrelevant, since our analysis of the language, history, and purposes of the Clause persuaded us that only a formal indictment or information or else the actual restraints imposed by arrest and
stitutional protections side-by-side should be appropriate is another matter. Only if the Supreme Court chose to retreat from its earlier, robust differentiation of the two rights would it be proper for courts to compare them in choosing which test to implement. This does not mean a balancing test is inappropriate to use in analyzing these due process claims; it only means that speedy trial jurisprudence is an inappropriate area of law from which to adopt such a balancing test.

Aside from policy considerations, one of the primary distinctions between pre-accusation delay claims and speedy trial claims is that the former, unlike the latter, has “other mechanisms [e.g., statutes of limitation] to guard against possible as distinguished from actual prejudice.” While generally true, this is not always the case. For example, no statutes of limitation exist for any criminal offenses committed in Wyoming and South Carolina. Similarly, Kentucky, North Carolina, and West Virginia do not have statutes of limitation in place for any felonies. In addition, prosecutions of certain offenses, including capital offenses, are not affected by statutes of limitation. Perhaps the speedy trial balancing test elicited in Barker v. Wingo should apply to claims of pre-accusation delay when criminal offenses do not have any applicable statute of limitations. Per-

holding to answer a criminal charge engage the particular protections of that provision.” (quoting Marion, 404 U.S. at 320)).

254. See United States v. MacDonald, 456 U.S. 1, 8 (1982) (“The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.”).

255. Marion, 404 U.S. at 322.

256. See supra notes 132, 169.

257. See KY. REV. STAT. ANN. § 500.050(1) (West 2012).

258. See, e.g., State v. Taylor, 713 S.E.2d 82, 90 (N.C. 2011) (quoting State v. Johnson, 167 S.E.2d 274, 279 (N.C. 1969)). It is noteworthy that in State v. Swann, 370 S.E.2d 533 (N.C. 1988), the North Carolina Supreme Court stated that “[w]e do not believe the Court’s holding in Marion was based on the fact that there was a statute of limitations. Nevertheless in U.S. v. MacDonald, there was no statute of limitations and the Court held the speedy trial clause does not apply to the pre-accusatory period.” Id. at 536 (citation omitted). While the North Carolina Supreme Court is correct that the Speedy Trial Clause did not apply to the pre-accusation delay claim in MacDonald, the facts of MacDonald (which involved murder charges) still depict a situation very different from that of Marion and Lovasco. Moreover, the Supreme Court majority in MacDonald did not discuss, let alone even mention, that the lack of an applicable statute of limitations in the case did or did not have any effect on the due process analysis. In fact, the Court even stated that the “interest” of “prevent[ing] prejudice to the defense caused by passage of time . . . is protected primarily by the Due Process Clause and by statutes of limitations.” MacDonald, 456 U.S. at 8 (emphasis added). Only the dissent mentioned the fact that there was no applicable statute of limitations in MacDonald. See id. at 17 n.1 (Marshall, J., dissenting).


260. See supra text accompanying note 19.

261. See supra note 2.
haps another test that presumes prejudice after a certain period of
time should be adopted under those circumstances. Whatever the an-
swer is, it is one that must come from the Supreme Court.

In Marion and Lovasco, the Court addressed pre-accusation delay
claims where applicable statutes of limitation also existed. Marion
involved charges of fraudulent business practices, and the indict-
ment in that case was brought prior to the expiration of the statute of
limitations. Lovasco involved charges of possession of stolen fire-
arms and dealing in firearms without a license. The delay in filing
the indictment was approximately a year and a half, meaning it
was filed before the five-year statute of limitations expired. Thus,
at the very least, the Supreme Court should once again take up this
issue of pre-accusation delay to address what should happen when the
due process claim is asserted in conjunction with a case lacking an
applicable statute of limitations. As one law review article stressed,
without applicable statutes of limitation, “the Due Process Clause be-
comes the sole means of shielding an accused from prejudicial delay.”

Determining which test is more appropriate for analyzing pre-
accusation delay claims under the Due Process Clause and which test
better flows from the language in Marion and Lovasco is not an easy
task. Clearly it has confused many courts, which have adopted inter-
pretations all over the map. Starting with the prejudice prong, it is
well-established that, at least under federal law, actual prejudice is
required. This is another way in which one’s due process rights against
pre-accusation delay are manifestly different from one’s speedy trial
rights. In the former, actual prejudice is necessary but not suffi-
cient. In the latter, prejudice is neither necessary nor sufficient.

With pre-accusation delay, some courts require “actual, substi-
tual prejudice,” while other courts merely require “actual prejudice”;
but through and through, the applications of both sets of courts seem
to be markedly similar with respect to the prejudice prong. They all
require prejudice that is clear-cut and non-speculative—essentially
prejudice on steroids. Having the Supreme Court clarify some details
surrounding prejudice in relation to pre-accusation delay would cer-
tainly provide some much needed guidance to lower courts. After all,
approximately thirty-five years have passed since Lovasco. And while

263. Id. at 324.
265. Id.
266. See 18 U.S.C. § 3282 (1970) (providing for a five-year statute of limitations for
non-capital offenses).
267. Daraie, supra note 132, at 189.
268. See supra Parts III-IV.
269. See supra Part II.
270. See supra note 2.
the Supreme Court could not concretely state what constituted prejudice then, because only five or six years had passed since Marion,271 it could likely do so now due to the much larger period of time that has passed and the thousands of additional cases on pre-accusation delay that have emerged from lower courts in that period.

Where the gap really comes into play with regard to courts’ interpretations of Marion and Lovasco, though, is how those courts examine the government’s reasons for the delay;272 typically under prong two of the due process test for pre-accusation delay.273 As discussed above, after finding actual prejudice, “consider[ing] the reasons for the delay as well as the prejudice to the accused” is also necessary.274 In addition, for a due process violation to occur, the delay must “violate[] 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.’ ”275 No party would dispute that an intentional, tactical delay satisfies prong two, something the government even conceded in Marion.276 As a result, it is puzzling why some courts do not recognize that recklessness should also satisfy prong two. After all, in Lovasco, the government renewed its concession from Marion and made the additional concession 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.”277 It should not matter that the Supreme Court recognized the government’s new concession regarding recklessness by footnote.

While recklessness should surely be recognized as an improper reason, the more problematic question is whether negligence should also be deemed improper and whether prong two should entail a bal-

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271. See United States v. Lovasco, 431 U.S. 783, 796-97 (1977) (“In Marion we conceded that we could not determine in the abstract the circumstances in which pre[-]accusation 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.” (citation omitted)).

272. Indeed, even the en banc Fifth Circuit in United States v. Crouch, 84 F.3d 1497 (5th Cir. 1996), which was steadfast in the position it adopted, acknowledged “that neither Marion nor Lovasco is crystal clear on this issue, and each opinion contains some language that can give comfort to either view.” Id. at 1510.

273. The reasons for the delay typically constitute prong two, but not always. Some courts that require bad faith or intentional, tactical delay may choose to examine that prong first, probably because it may be easier to dispose of the case on that ground, rather than having to pursue an analysis of prejudice.

274. Lovasco, 431 U.S. at 790; see also supra text accompanying note 29.

275. Lovasco, 431 U.S. at 790; see also supra text accompanying notes 30-31.


277. Lovasco, 431 U.S. at 795 n.17.
ancing test over the stricter approach. Negligence is without a doubt unlike legitimate investigative delay. Moreover, a balancing test that recognizes negligence as improper is certainly the fairer approach for defendants raising these due process claims. In addition, courts that employ these balancing tests, which take negligence into account, have asserted that negligence is assigned less weight than bad faith or recklessness which should at least put advocates of the stricter bad-faith approach somewhat at ease. Nevertheless, only the Supreme Court can properly inform us whether a balancing test is the most appropriate approach and whether it is in line with Marion and Lovasco.

VI. CONCLUSION

The Due Process Clause issue of pre-accusation delay is ripe for Supreme Court review. Marion and Lovasco, the leading cases in this area of law, were both decided in the 1970s. Since that time, the Supreme Court has not decided any cases dealing with the identical pre-accusation delay issue. On the other hand, every U.S. Court of Appeals and courts of almost every state have weighed in since then. This Note not only updates the positions of the federal circuits, but it also provides the first fifty-state survey on this “jurisprudentially significant issue.” As many of the federal and state cases cited in this Note demonstrate, courts often become easily confused over the relevant due process analysis. Also, unlike in 1977, enough cases have now been decided by lower courts to allow the Supreme Court to comfortably review the issue in greater depth. As a result, the Court should now have what it needs to further, and more concretely, expand on its analysis from Lovasco.

278. See Cleary, supra note 243, at 1073-74.
279. See, e.g., supra pp. 677-78 (California), 679-81 (Washington).
280. See supra text accompanying note 224.
281. As an aside, although this Note does not discuss the issue of what standard of review courts should apply, that is another related issue the Supreme Court could weigh in on, or at least a topic that could be written about in the future. A very deferential standard of review can certainly be quite influential upon an appellate court in its review of pre-accusation delay. See, for example, State v. Hope, 89 So. 3d 1132, 1137 (Fla. 1st DCA 2012), where the appellate court seemingly awarded great deference to the trial court’s decision to dismiss the defendant’s case based on pre-accusation delay.