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Criminal Procedure—Preaccusation Delay as Violation of Due Process: Absence of Statute of Limitations Is Factor To Be Weighed Against Murder Defendant's Allegations of Actual Prejudice—*State v. Haga*, 8 Wn. App. 481, 507 P.2d 159 (1973), *review denied*, 82 Wn. 2d 1006 (1973).

On July 6, 1966, the wife and an infant daughter of Eric L. Haga were found strangled to death in the Haga home. Although Haga had slept in the house the night of the murders, no evidence linked him directly to the crime. There was, however, evidence that Haga and his wife had separated the previous summer, that Mrs. Haga had lived with another man during the separation, and that Haga had taken out a family life insurance policy shortly before the murders. The prosecuting attorney chose not to prosecute Haga; more than five years later, however, a newly elected prosecutor reopened the case and filed two counts of first degree murder. A jury convicted Haga on both counts.

Haga appealed, arguing that the five year delay between the commission of the crimes and the filing of the murder charges had denied him due process of law under the federal and state constitutions. The state freely admitted that no new evidence had surfaced in the intervening five years, and that the only reason for the filing of charges in 1971 was the change of prosecutors.[1] It was acknowledged that the delay had caused defense witnesses to become unavailable,[2] and that the delay was long enough "to cause concern about the dimming of memories and lost evidence."[3] The Washington Court of Appeals defined what it concluded to be the applicable due process test and held that the five year delay in filing charges did not deny the defendant due process because an evaluation of the entire proceedings failed to reveal a showing of "actual prejudice" to the defendant sufficient to overcome the legislative intent expressed by the absence of a statute of limitations for the crime of murder.[4]

1. State v. Haga, 8 Wn. App. 481, 486, 507 P.2d 159, 163 (1973), *review denied*, 82 Wn. 2d 1006 (1973).
2. *Id.* at 487, 507 P.2d at 164.
3. *Id.* at 488, 507 P.2d at 164.
4. Aside from the due process holding, the *Haga* court found other grounds for reversal—impermissible admission of opinion testimony from a lay-person (the ambulance driver) which gave rise to an inference regarding the guilt or innocence of the

This note will evaluate application of the *Haga* court's due process test, especially in light of *United States v. Marion*,[5] a recent Supreme Court decision focusing on the sixth amendment right to a speedy trial. It is suggested that the *Haga* court set forth an appropriate due process test, but misapplied its own test by incorrectly assuming that absence of a statute of limitations for murder serves in some way to justify an otherwise inexcusable delay in commencing prosecution.

I. *MARION:* LIMITATIONS ON THE RIGHT TO A SPEEDY TRIAL

In *United States v. Marion*,[6] the Supreme Court held that the sixth amendment's guarantee of a speedy trial restricts delays only after a person has been "accused" or charged with a crime.[7] The defendants in *Marion* had been tried within two months of their indictment, thus satisfying their right to a speedy trial; the thirty-eight month delay between their alleged criminal acts and subsequent indictment was irrelevant to their sixth amendment rights. However, the *Marion* Court did not deny that lengthy preindictment delay might have impact on protected constitutional rights. After noting that statutes of limitation provided protection against *potential* prejudice resulting from delays, the Court suggested in dicta that the due process clause afforded additional protection to an accused who demonstrated *actual* prejudice to his defense:[8]

> [I]t 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 the 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-indictment delay in

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defendant and which therefore invaded the prerogative of the jury—and remanded the case for a new trial. On retrial before a jury Haga was again convicted of two counts of first degree murder.

Haga's second conviction also has been appealed; there is a possibility that another court may reconsider the due process issue discussed in this note and reach a contrary conclusion. A discussion of whether such a reconsideration would be barred by res judicata is beyond the scope of this note. Similarly, consideration of whether the six and one-half year delay between the time of the murders and the second trial of Haga violates due process is also beyond the scope of this discussion.

5. 404 U.S. 307 (1971).
6. *Id.*
7. *Id.* at 313.
8. *Id.* at 324–25 (citations and footnotes omitted).

> 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 . . . . However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution . . . . [T]o accommodate the sound administration of justice to the rights of a defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case.

While *Marion* suggests that establishing a due process violation for preaccusation delay is more difficult than showing a sixth amendment violation for delay of trial following indictment, the two tasks are closely related and courts weigh many of the same factors in handling both. For example, in *Barker v. Wingo,*[9] a sixth amendment decision, the Court enumerated four factors which must be weighed in deciding whether a defendant has been deprived of a speedy trial: length of delay, justification for the delay, the defendant's diligence in asserting his rights, and the degree of prejudice occasioned by the delay. In preaccusation delay cases, courts consider the same factors; the difference lies in the relative weights and presumptions assigned to them. In *Barker,* the Court weighed the length of the delay and the government's reason for it against the prejudice to the defendant,[10] and, concluding that the defendant had not wanted a speedy trial,[11] found no violation of the sixth amendment.[12] In reaching this decision, however, the Court labeled the question a close one and stated, "It is clear that the length of delay between arrest and trial—well over five years—was extraordinary."[13]

Perhaps a delay of five years between the commission of a crime and the arrest of a suspect is not "extraordinary." But a five year delay before arrest when all the evidence is available immediately after the crime is committed seems highly unusual, particularly when the only reason given for the delay is the difference in judgment between two prosecutors.[14] Relying on the *Marion* dictum and analogizing from the *Barker* holding, both the length of and the reason for the delay

9. 407 U.S. 514 (1972)
10. *Id.* at 530.
11. *Id.* at 534.
12. *Id.* at 536
13. *Id.* at 533.
14. *See* note 21 *infra.*

seem appropriate factors to consider in making the "delicate judgment based on the circumstances of each case."[15]

II. PREACCUSATION DELAY AS A VIOLATION OF DUE PROCESS: THE *HAGA* TEST

The two essential elements of due process of law are notice and an opportunity to be heard. Implicit in this concept of due process is the right of a defendant in a criminal prosecution to be afforded an adequate period to prepare and present such defenses as he may have. Preaccusation delay may interfere with this ability to defend and therefore may violate due process. As the California Court of Appeal has noted:[16]

> [A]n accused may under some circumstances be deprived of due process of law if the lapse of time between the commission of the offense and the filing of the accusation makes it difficult or impossible for him to adequately prepare his defense . . . .

The due process test that the *Haga* court determined appropriate in preaccusation delay cases (and purported to apply) requires dismissal of the charge "when actual prejudice is shown, and the prosecutor had no reasonable justification for the delay."[17] This test is consistent with *Marion's* suggestion that courts look beyond the statute of limitations in determining whether the defendant's due process rights have been violated by preaccusation delay.[18]

Application of the *Haga* test is therefore a two step process. A court cannot find that a defendant's due process rights have been violated until it finds that the delay has caused "actual prejudice."[19] Once the

15. *See* note 8 and accompanying text *supra*.
16. People v. Alvarado, 258 Cal. App. 2d 756, 66 Cal. Rptr. 41, 43 (1968).
17. 8 Wn. App. at 484–85, 507 P.2d at 162.
18. 404 U.S. at 324, *quoted in Haga*, 8 Wn. App. at 484, 507 P.2d at 162.
19. 8 Wn. App. at 484, 507 P.2d at 162–63. There is an exception to this rule. *See* United States v. Giacalone, 477 F.2d 1273, 1276 (6th Cir. 1973). Also, in a subsequent case. Division III of the Court of Appeal noted in dictum that "[t]he due process clause of the Fourteenth Amendment does include preindictment delay which causes *substantial* prejudice . . . ." State v. Messinger, 8 Wn. App. 829, 839, 509 P.2d 382, 389 (1973) (emphasis added). The use of the term "substantial prejudice" could be interpreted as a shorthand way of saying that the prejudice must outweigh the justification for the delay if dismissal is to be ordered. The *Messinger* court did not find substantial prejudice in a five month prearrest delay. *See* notes 26 and 32 *infra*.

delay has been shown to have resulted in "actual prejudice" to the accused's ability to defend, "[t]he justification for the delay must be balanced against the prejudice to the defendant's ability to offer such evidence as there is in his defense."[20] This formulation indicates that whether a denial of due process is found depends upon whether the justification for the delay outweighs the prejudice to the defendant.

Unfortunately, the *Haga* court's "application" of its test is questionable at best. The court did not claim to find any justification for the delay;[21] instead it relied on the "legislative intent" expressed by the absence of a statute of limitations for murder as a justification.[22] Yet the content of this "legislative intent" was never discussed or defined. This cloudy analysis is clearly at odds with the reasoning used by courts in other jurisdictions in applying similar tests in preaccusation delay decisions.

Such a balancing test was first applied in 1965 in *Ross v. United States*,[23] where the District of Columbia Court of Appeals held that a seven month delay between an alleged narcotics sale to an undercover agent and the seller's subsequent arrest was without justification and was so likely to have prejudiced the defendant that he had been denied a fair trial in violation of the due process clause of the fifth amendment. The court recognized a "substantial public interest" in effective police work and the need for undercover agents in narcotics law enforcement,[24] but concluded that the continuing secrecy concerning the undercover investigation had become so unnecessary that it "fail[ed] to balance the scale against appellant's accelerating need to know that . . . . he was ultimately going to be charged with having committed a crime . . . ."[25] The court concluded that, because the

20. 8 Wn. App. at 487, 507 P.2d at 164.
21. *Id.* at 486, 507 P.2d at 163:

The sole reason for the delay was the apparent difference of opinion between the prosecuting attorney in office at the time of the crime and his successor . . . as to whether there was sufficient evidence on which to prosecute.

. . . .

THE COURT: What was there available to a prosecutor in 1971 that was not available to a prosecutor in 1965?

PROSECUTOR: I would have to say that either the evidence was the same or that the people who reviewed the case in 1966 weren't as thorough as the people who reviewed the case in 1971.

22. *Id.* at 489, 507 P.2d at 165.
23. 349 F.2d 210 (D.C. Cir. 1965).
24. *Id.* at 212.
25. *Id.* at 213.

length of the delay was unjustified and the appellant had a "plausible claim" of prejudice to his defense, reversal was necessary.[26] This reasoning has also been adopted by the California Supreme Court in *Jones v. Superior Court*,[27] where the court found that police delay in arresting a defendant for sale of heroin was "clearly unreasonable" because "it advanced no proper police purpose. The 'buy program' was completed and formal charges had been filed. No additional witnesses were being sought, and petitioner could have readily been promptly located and arrested."[28]

The fact that preaccusation delay serves a legitimate law enforcement purpose does not per se foreclose a defendant's due process claim. As the California Court of Appeal noted in *People v. Wright*, the fact that the public interest is served[29]

> does not mean, however, that the public interest must always prevail. The accused has substantial rights which must be protected, and the delay between the alleged offense and the time of arrest must not result in a deprivation of due process .... [T]he question in this type of case must be resolved by balancing interests ....

In other words, to be justified, a preaccusation delay must serve a legitimate public interest which outweighs the defendant's right to be given notice of the charges to be brought against him.

Decisions following *Ross* have elaborated further on the application of the due process test in preaccusation delay cases. Courts agree that an evidentiary hearing is necessary to determine whether a delay was reasonable when balanced against the resulting prejudice,[30] and that the defendant bears the burden of persuasion with respect to both

26. *Id.* at 215. United States v. Marion, 404 U.S. 307 (1971), could modify *Ross* insofar as the *Ross* court required only a plausible claim of prejudice, for the *Marion* Court noted that statutes of limitation guard against possible prejudice to the defendant, whereas actual prejudice must be shown to establish a due process claim, 404 U.S. at 323–24. However, *Marion* did not rule out the possibility that prejudice could be presumed from circumstances surrounding the delay, such as the passage of time alone; *cf.* Dickey v. Florida, 398 U.S. 30 (1970) (Brennan, J., concurring); *cited in Haga,* 8 Wn. App. at 486, 509 P.2d at 163.

27. 3 Cal. 3d 734, 478 P.2d 10, 91 Cal. Rptr. 578 (1970).

28. 3 Cal. 3d 734, 478 P.2d at 14, 91 Cal. Rptr. at 582.

29. 2 Cal. App. 3d 732, 82 Cal. Rptr. 859, 861 (1966). *Accord,* Godfrey v. United States, 358 F.2d 850 (D.C. Cir. 1966).

30. United States v. Marion, 404 U.S. 307, 326; People v. Sobiek, 30 Cal. App. 3d 458, 471, 106 Cal. Rptr. 519, 527 (1973) (in the speedy trial context, no inquiry should be made into the reasonableness of the delay until prejudice has been shown).

parts of the test;[31] they differ on what suffices to establish prejudice.[32] Most agree in principle that there must be a *showing* of "actual" or "substantial" prejudice,[33] and that the defendant's mere assertion that the passage of time has placed a burden on his ability to remember and locate witnesses will not suffice.[34] Where the alleged prejudice involves the disappearance of witnesses it has been held that some offer must be made concerning the substance, as well as the unavailability, of the missing testimony.[35] The defendant might demonstrate, for example, that the witnesses are unavailable, that their testimony is material and relevant to the case, and that the defendant has exercised due diligence in his attempt to find them.[36]

After actual prejudice to the defendant has been established, courts must determine whether it can be outweighed by any of the various justifications the state may assert. Police undercover work in enforcement of drug laws is one of the most commonly recognized justifications for preaccusation delay.[37] Others include heavy caseloads,[38]

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31. United States v. Wilson, 346 F. Supp. 371, 375 (E.D. Pa. 1972); People v. Sobiek, 30 Cal. App. 3d 458, 471, 106 Cal. Rptr. 519, 527 (1973).

32. In a subsequent case, the Washington Court of Appeals dismissed a similar due process claim based on preaccusation delay by noting that "there has been no showing of any unusual circumstances indicating defendant was prejudiced by the failure to formally charge him until [5 months after the crime]." State v. Messinger, 8 Wn. App. 829, 839, 509 P.2d 382, 389 (1973). The "unusual circumstances" language probably means there was no showing of actual prejudice beyond what would be inferred from the mere passage of five months' time.

33. United States v. Marion, 404 U.S. 307, 326 (1971); United States v. Dukow, 453 F.2d 1328, 1330 (3d Cir. 1973); United States v. Wilson, 357 F. Supp. 619, 620–21 (E.D. Pa. 1973); United States v. Wilson, 346 F. Supp. 371, 374–76 (E.D. Pa. 1972); State v. Messinger, 8 Wn. App. 829, 839, 509 P.2d 382, 389 (1973).

There may be two exceptions to the absolute rule of a necessity of showing actual prejudice. First, if it can be shown that the delay was for the purpose of harassment or to enable the Government to gain some tactical advantage over the defendant, a showing of actual prejudice may not be necessary. *See Marion*, at 324–25. *See also* United States v. Churchill, 483 F.2d 268, 275 (1st Cir. 1973) (Coffin, C.J., concurring). Second, in the case of a lengthy delay (8½ years) between "arrest" and trial of a prisoner who was incarcerated and who repeatedly demanded a trial, no actual prejudice need be found. Hoskins v. Wainwright, 485 F.2d 1186, 1192, 1194 (5th Cir. 1973). The *Hoskins* court relied on Smith v. Hooey, 393 U.S. 374 (1969), and Barker v. Wingo, 407 U.S. 514 (1972), to reach this result.

34. United States v. Erickson, 472 F.2d 505 (9th Cir. 1973); People v. Alvarado, 258 Cal. App. 2d 756, 66 Cal. Rptr. 41, 43 (1968); State v. Bryson, 53 H. 652, 500 P.2d 1171 (1972); People v. Love, 39 Ill. 2d 436, 235 N.E.2d 819, 824 (1968).

35. United States v. Dukow, 453 F.2d 1328, 1330 (3d Cir. 1972); United States v. Wilson, 346 F. Supp. 371, 374–76 (E.D. Pa. 1972).

36. State v. Bryson, 53 H. 652, 500 P.2d 1171 (1972); Harris v. State, 489 S.W.2d 303, 308 (Tex. 1973).

37. *See, e.g.*, People v. Wright, 2 Cal. App. 3d 732, 82 Cal. Rptr. 859 (1969); People v. Alvarado, 258 Cal. App. 2d 756, 66 Cal. Rptr. 41 (1968).

38. United States v. Marion, 404 U.S. 307 (1971).

inability to find the defendant,[39] search for evidence or witnesses[40] and lack of police manpower.[41] All have the common characteristic of necessitating delay in order to promote a legitimate law enforcement purpose; they thus serve the public interest and can properly be balanced against the defendant's interest in being promptly arrested and brought to trial.

III. APPLICATION OF THE *HAGA* TEST

To apply its test, the *Haga* court first was required to determine whether the defendant had suffered actual prejudice from the delay—if not, the inquiry with respect to the defendant's due process claim would have ended. The defense alleged that because of the delay in Haga's prosecution, important evidence for both parties had been lost or weakened by the passage of time. Specifically, the defense contended that Haga was unable to remember many details concerning the evening of the murders; the first doctor summoned to the scene of the crime was unable to remember the extent of rigor mortis when he arrived or whether he checked the fingernails of the bodies for evidence of a struggle; other witnesses had forgotten details important to Haga's defense; the police had lost some evidence and other evidence had disappeared.[42] Haga also alleged that his ability to defend on the grounds of mental irresponsibility had been diminished by the delay.[43]

The fact that the delay occurred before rather than after Haga was accused may have enhanced its prejudicial effect. In comparing the effects of pre and postaccusation delay, the *Haga* court noted that although the ramifications of preaccusation and postaccusation delay

39. *See* 18 U.S.C. § 3290 (1969) (fugitives from justice excluded from the protection of the statute of limitations).

40. Note, *Pre-Arrest Delay: Evolving Due Process Standards*, 43 N.Y.U. L. Rev. 722, 741–42 (1968) [hereinafter cited as *Pre-Arrest Delay*].

41. *Id.* at 742.

42. 8 Wn. App. at 487–88, 507 P.2d at 164. For a full list of the defendant's contentions, see *id.*

The *Haga* court never explicitly passed on any of the defendant's allegations, except to admit that the delay was long enough "to cause concern about the dimming of memories and lost evidence," *id.* at 488, 507 P.2d at 164.

43. *Id.* at 487, 507 P.2d at 164. Any defense based on the mental state of the defendant at the time a crime is committed is especially susceptible to the erosion of time. *See, e.g.,* United States v. Chase, 135 F. Supp. 230 (N.D. Ill. 1955), where the court noted in dictum that insanity and other defenses based on the defendant's mental state at the time a crime was committed are especially vulnerable to the passage of time.

are different in some respects, damage to the accused's ability to defend is common to both.[44] Commentators have recognized this similarity, but also have noted that prejudice is likely to be greater when caused by preaccusation delay because[45]

> [t]he charged defendant is at least on notice that a criminal prosecution has been instituted against him and he can marshall evidence and build a defense . . . during the delay period. In contrast, the uncharged defendant is typically unaware that the police are ready to arrest and prosecute him at some future time. He is thus foreclosed from taking any action to forestall the eroding effect that . . . delay . . . will most likely have on his ability to prepare and prove a defense.

This observation seems especially pertinent to *Haga* because, unlike the situation presented by most cases involving preaccusation delay, circumstances surrounding the delay of more than five years in the commencement of Haga's prosecution were likely to lead the defendant to believe that he would *never* be prosecuted for the murders. As the California court noted in *Jones v. Superior Court,* the availability of the defendant for arrest and the lack of apparent justification for delay would increase the prejudicial effects of the delay by giving the defendant a "false sense of security."[46] Similarly, in *Haga,* the most likely suspect was available for prosecution, no police undercover work was involved, and no new evidence was found after the initial investigation had been completed. The decision to prosecute Haga more than five years after the commission of the murders was not prompted by any of the usual justifications for such delays, but was apparently attributed to no more than a different opinion by a

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44. 8 Wn. App. at 485–86, 507 P.2d at 163. Barker v. Wingo, 407 U.S. 514 (1972), *quoted in Haga,* 8 Wn. App. at 485, 507 P.2d at 163, listed three possible consequences of postaccusation delay: (1) Pretrial incarceration, (2) anxiety and concern of the accused and (3) impairment of the accused's ability to defend. Although the *Haga* court recognized only impairment of the accused's ability to defend as a consequence of preaccusation delay, Justice Douglas noted in his concurring opinion in *Marion* that anxiety of the accused is common to both pre and postaccusation delay:

> Undue delay may be as offensive to the right to a speedy trial before as after indictment or information. The anxiety and concern attendant on public accusation may weigh more heavily upon an individual who has not yet been formally indicted or arrested for, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future.

404 U.S. at 330–31 (Douglas, J., concurring).

45. *Pre-Arrest Delay, supra* note 40, at 725.

46. 3 Cal. 3d 734, 741, 478 P.2d 10, 14, 91 Cal. Rptr. 578, 582 (1970).

new prosecuting attorney concerning the merits of the case.[47] The logical inference for Haga to have drawn from the decision not to prosecute immediately was that the case had been permanently dropped.[48]

This inference would be less reasonable in cases where the delay served some law enforcement purpose leading toward prosecution as, for example, where the delay is caused by police undercover work, inability to find the defendant, or the search for evidence or witnesses.[49] Police investigatory work or a potential defendant's proximity to criminal conduct is likely to put him on notice that his arrest remains a possibility;[50] certainly, the conduct of the prosecutor and police will not actually lead him to feel free from prosecution. With notice of possible prosectuion, the potential defendant can protect himself by preserving evidence in his favor and prejudice will not result.

Despite the evidence of prejudice to Haga's defense, the decision is ambiguous as to whether the court made the finding of "actual prejudice" required for dismissal. At one point the court stated "the showing is short of actual prejudice,"[51] but stated inconsistently a few sentences later: "The showing of actual prejudice is *insufficient* . . . " to overcome the legislative intent expressed by the absence of a statute of limitations on prosecutions for murder.[52] Depending upon which statement the analyst relies, either no prejudice was found and dismissal was therefore not required, or the court found actual prejudice but applied a test different from the one it defined earlier in its opinion. These possibilities will be examined in turn.

Relative to the showings of prejudice required by other courts,[53] as evidenced in the cases cited by the *Haga* court itself,[54] the defense seems to have amply demonstrated the "actual prejudice" required by the due process test. As another division of the Washington Court of

47. 8 Wn. App. at 486–87, 507 P.2d at 163.

48. It is clear that a suspect in a criminal investigation has no right to a "speedy" arrest, Hoffa v. United States, 385 U.S. 293, 310 (1966), *cited in Haga,* 8 Wn. App. at 485, 507 P.2d at 163; but it is equally well established that "[s]tale claims have never been favored by the law, and far less so in criminal cases." Dickey v. Florida, 398 U.S. 30, 38 (1970).

49. *Pre-Arrest Delay, supra* note 40, at 725.

50. United States v. Erickson, 472 F.2d 505, 508 (9th Cir. 1973).

51. 8 Wn. App. at 489, 507 P.2d at 165.

52. *Id.* (emphasis added).

53. *See* notes 30–36 and accompanying text *supra.*

54. United States v. Iannelli, 461 F.2d 483 (2d Cir. 1972); United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968); State v. Christensen, 75 Wn. 2d 678, 453 P.2d 644 (1969); State v. Rolax, 3 Wn. App. 653, 479 P.2d 158 (1970), *cited in Haga,* 8 Wn. App. at 489, 507 P.2d at 165.

Appeals noted in *State v. Rolax:* "Common examples of prejudice to a defendant are where witnesses have become unavailable or relevant evidence has been destroyed or lost because of the delay."[55] In concluding that "[o]nly where actual prejudice is *shown* is reversal justified,"[56] the *Haga* court cited cases which merely rejected claims of prejudice asserted without specific foundation, such as the defendant's vague claim that he "might have found witnesses" but for the delay.[57] Furthermore, in each of the two cases cited in which actual prejudice was merely alleged, the court seemed as impressed by the government's showing of justification as by the lack of showing of actual prejudice.[58] In *Haga,* the prosecution did not contest the defense's specific allegations of missing witnesses or physical evidence lost by the police nor did it assert any justification for the delay.[59] The court should have found these apparently undisputed allegations sufficient to fulfill the "actual prejudice" requirement of the due process test.

IV. LACK OF STATUTE OF LIMITATIONS AS A JUSTIFICATION FOR PREACCUSATION DELAY

Alternatively, the court's statement that "the showing of actual prejudice must be sufficient to overcome the legislative intent expressed by the absence of a limitation on prosecution for such a crime, before the prosecution should be forbidden"[60] could be interpreted as defining a different due process test for preaccusation delay cases involving crimes without statutes of limitation. Under such a test the legislative decision that there should be no statute of limitations on murder prosecutions defines a public policy which serves as at least a partial substitute for justification of the delay. The court's holding that "[t]he showing of actual prejudice is *insufficient* to amount to a denial of due process when subjected to that criterion"[61] would mean, under this

55. 3 Wn. App. 653, 658, 479 P.2d 158, 160 (1970), *cited in Haga,* 8 Wn. App. at 489, 507 P.2d at 165.
56. 8 Wn. App. at 489, 507 P.2d at 165.
57. United States v. Iannelli, 461 F.2d 485 (2d Cir. 1972).
58. *Id.* at 483; United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968).
59. Although the prosecution disputed the prejudicial effect of the missing evidence, the fact that certain evidence had been lost was conceded by the prosecution, *see* Brief for Respondent, at 12–15, and the *Haga* court seemed to conclude that the evidence had in fact been lost, 8 Wn. App. at 487–88, 507 P.2d at 164.
60. 8 Wn. App. at 489, 507 P.2d at 165.
61. *Id.* (emphasis added).

interpretation, that Haga demonstrated some actual prejudice, but that his showing of prejudice was outweighed when balanced against this legislative policy.

This approach would be inconsistent with the court's definition of the due process test discussed earlier, and with the Supreme Court's dictum in *Marion,* however. The cases cited by the court as authority for this test uniformly required prosecutorial justification; none of them took account of the relevant statute of limitations.[62] Furthermore, use of such a test would ignore *Marion's* dicta that due process claims are to be judged by going beyond a consideration of the relevant statute of limitations and applying due process standards.[63]

Statutes of limitation are intended to protect defendants from potential prejudice resulting from unreasonable delay. They provide this protection by creating an irrebuttable presumption of prejudice after the passage of a specified length of time.[64] The absence of a statute of limitations apparently eliminates this irrebuttable presumption. Legislative removal of a presumption favoring the defendant does not affect the underlying due process rights which the presumption served as a tool to protect;[65] again, such an elimination should not serve as a prima facie justification for prosecutorial delay. The *Haga* court itself quoted *Marion's* statement that *"the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment."*[66]

Reintroducing the statute of limitations to counterbalance the showing of prejudice seems to require circular reasoning, since use of the due process test *presupposes* an absence of protection from an applicable statute of limitations. In all preaccusation delay cases where charges were dismissed on due process grounds the applicable statute of limitations had not yet run; nevertheless, *Marion* clearly suggested that this should not affect the defendant's due process claim.[67] Nor should the total absence of a statute of limitations (in essence a

62. United States v. Hauff, 461 F.2d 1061 (7th Cir. 1972); United States v. Iannelli, 461 F.2d 483 (2d Cir. 1972); United States v. Mones, 336 F. Supp. 1322 (S.D. Fla. 1972), *cited in Haga,* 8 Wn. App. at 485, 507 P.2d at 163.

63. 404 U.S. at 324.

64. United States v. Ewell, 383 U.S. 116 (1966), *quoted in* United States v. Marion, 404 U.S. at 322.

65. 404 U.S. at 323.

66. *Id.* at 324, *quoted in Haga,* 8 Wn. App. at 484, 507 P.2d at 162 (emphasis in original).

67. *Id.*

statute which never runs) affect such a claim. Since the due process test is used only as a last resort when the state has failed to protect fully the constitutional right to due process by providing a statute of limitations adequate to prevent actual prejudice, the state can hardly argue this failure as an ingredient of the test designed to compensate for it. To do so would be to replace the courts with the legislature as the final arbiter of the constitutional guarantee to due process of law.[68]

V. CONCLUSION

By extending in dictum the protection of the due process clause to delays occuring prior to arrest or indictment, the *Marion* Court adopted a middle position between the extremes of extending the guarantee of a speedy trial to preaccusation delay and relying solely on statutes of limitation to protect defendants from the effects of such delays. It is therefore clear from *Marion* that due process claims are not to be judged on the basis of the relevant statute of limitations, or absence thereof, in preaccusation delay cases.

The *Haga* court described the proper test for judging the defendant's due process claim, but misapplied it. Precedents cited by the court itself indicate that Haga probably made a sufficient showing of actual prejudice. Therefore, Haga's showing of prejudice should have been weighed against whatever justification the prosecution had to offer for the five year delay in Haga's prosecution. Since no justification was offered or found, the court should have ordered the charges against Haga dismissed. Instead, under the guise of applying a due process test, the court seized upon the absence of a limitation on murder prosecutions to foreclose the judicial inquiry into due process claims suggested by *Marion*. At a later date the court of appeals may have an opportunity to bring Washington law more directly into line with due process standards set by the United States Supreme Court.

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68. Jones v. Superior Court, 3 Cal. 3d 734, 478 P.2d 10, 13, 91 Cal. Rptr. 578, 581 (1971).

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