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THE WAITING GAME: HOW PREINDICTMENT DELAY THREATENS DUE PROCESS AND FAIR TRIALS

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Preindictment delay is an issue rarely heard of in South Dakota criminal law. Within the legal system, we have two primary safeguards against bringing stale charges—the Sixth Amendment right to a speedy trial and the applicable statute of limitations. Unfortunately, where there is prosecutorial discretion, there will be prosecutorial misconduct, negligence, or indifference. The innocent stand to lose so much from an unjustified and lengthy delay, prior to their indictment, resulting from the prosecution's gross negligence or malicious intent. Where a defendant stands unaccused for any length of time without proper justification, she will continue to lose her case and opportunity to present a compelling defense, while the State's evidence remains preserved. She might lose juvenile jurisdiction, witnesses might pass, memories will fade, and physical evidence will be lost, resulting in a significant advantage to the State. Whether a delay results from an accidental misplacement of a file, or from an intentional strategic decision by a prosecutor, we must preserve the beauty that is the right to due process and a fair trial. A defendant can move for a dismissal on the grounds of "preindictment" or "pre-accusation" delay. This Constitutional defense protects criminal defendants from time-worn claims which they may no longer have the capacity to defend against, even though the statute of limitations has not yet run. The standard is vague on this issue, which has not appeared before the South Dakota Supreme Court in over thirty-five years. Other states have been racing ahead of South Dakota to close this crack and give clear guidance to their lower courts, and the issue is ripe for clarification by the South Dakota Supreme Court.

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I. INTRODUCTION

Every day for months there is a police car waiting outside your house.[1] Every day for months, your children are taunted and bullied at school. *Murderer.* People are always whispering behind your back, and their eyes follow you everywhere you go. You have always enjoyed the small-town life, until now, when it seems like the whole world has turned their backs on you and your family. *Killer.* After nearly a month of detectives following you to work, your boss suggests that you take an unpaid leave-of-absence. The police presence is hurting the image of the local bakery where you work. *Liar.*

Three months ago, you found your three-year-old son dead in his crib. You remember everything so vividly. His blue lips, his cold hands, and your tears on his face, as you tried desperately to bring him back. You did everything you could. Your family was destroyed, and even worse, through the rumor mills and gossip of small-town life everyone believes that *you* killed your own toddler son.

After months of interviews, interrogations, whispers, and pejorative eyes, it seems that the police have lost interest in the breadcrumbs they had followed to you. Slowly, cautiously, and optimistically, you believe this nightmare is finally behind you. Your family finally begins to put life back together and move past this tragedy. The town forgets, and for the next fifteen years, your family becomes whole again, until you hear the word that drains the color from your face and the hope from your heart—*indictment.*

After fifteen years, surely this mess is over. Your family has moved on, the town has moved on, and you're innocent! How could a jury possibly take you from your kids, your family, your *life*, so many years later? After speaking to your attorney, you learn there is no statute of limitations on murder. The county coroner who performed the autopsy on your son has passed, and his primary care physician has long since moved away and forgotten your family. You do not even remember the name of the babysitter who cared for him the night before he passed, and you yourself have done everything to block the events of that day from your mind. Your recollections have faded, as have the memories of everyone you would have called to your defense. You have nothing. You have no evidence, you have no defense, and you are out of time.

Courts have held that there is no remedy available for preindictment delay under the Sixth Amendment[2] to the United States Constitution, for the right to a

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1. While this a hypothetical, it is derived from many cases read by the author and is meant to illustrate the following principle:

> It is monstrous to put a man back on trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to be forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? . . . It would be very unjust to put him on trial.

Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607, 607 (1990).

2. U.S. CONST. amend. VI.

speedy trial does not attach until after a criminal defendant is indicted.[3] Where then lies the remedy for a defendant who has lost the ability to present an adequate defense when a prosecutor has purposefully or negligently delayed the indictment for so long?[4] The Supreme Court of the United States has stated that statutes of limitation are the primary safeguards for a defendant seeking relief from overly stale charges while recognizing that the statutes cannot fully define the rights of a defendant prior to indictment.[5]

This comment will attempt to shed some light on the semi-obscure issue of preindictment delay by first explaining the narrow hole that exists between the applicable statute of limitations and the Constitutional safeguards within the Fifth and Sixth Amendments.[6] After assessing the evolution of circuit postures and how several states have approached the issue, this comment will analyze how current law in South Dakota is ready to be supplemented with an updated decision and additional considerations to ensure that defendants within the state are protected from overbearing and oppressive delays prior to trial.[7] Other scholars have examined this issue on a national scale,[8] but this comment will focus on South Dakota and its neighboring jurisdictions to highlight the vagueness of South Dakota's existing law.[9]

Courts and scholars have addressed and criticized the issue of "Preindictment delay"[10] for many years now.[11] Generally, preindictment or pre-accusation delays are considered to be a delays on the part of the government to bring charges in a timely manner that result in some type of prejudice against the defendant and advantage to the prosecutor in a criminal trial.[12] On the one hand, we assume

3. *See infra* II (explaining that there is no relief under the Sixth Amendment for those who allege preindictment delay).

4. *See infra* II.A (discussing the possible remedies or lack thereof for those who suffer from a delay prior to indictment).

5. United States v. Marion, 404 U.S. 307, 324 (1971).

6. *See infra* II (exploring the procedural history of preindictment delay in the United States).

7. *See infra* II.C, III-IV (explaining the limited history of preindictment delay in South Dakota, comparing to other jurisdictions, and making policy suggestions).

8. Goldfarb, *supra* note 1, at 607. *See generally* Artemio Rivera, *A Case for the Due Process Right to a Speedy Extradition*, 50 CREIGHTON L. REV. 249 (2017); Michael Cleary, Comment, *Pre-Indictment Delay: Establishing a Fairer Approach Based on* United States v. Marion *and* United States v. Lovasco, 78 TEMP. L. REV. 1049 (2005); Eli DuBosar, Comment, *Pre-Accusation Delay: An Issue Ripe for Adjudication by the United States Supreme Court*, 40 FLA. ST. U. L. REV. 659 (2013).

9. *See infra* II.C (highlighting states with novel approaches and states geographically near South Dakota).

10. The terms "preindictment" delay and "pre-accusation" delay should be considered interchangeable for the purposes of this comment. In general, they reference a delay between the commission of a crime and the formal indictment, while still within the statute of limitations, that results in prejudice to the defendant or an advantage to the prosecution. *Marion*, 404 U.S. at 324.

11. *See infra* II (showing the broadest history of the term "preindictment delay"). *See generally* United States v. Lovasco, 431 U.S. 783 (1977); *Marion*, 404 U.S. 307; United States v. Jackson, 504 F.2d 337 (8th Cir. 1974).

12. *See, e.g.*, DuBosar *supra* note 8 (giving an overview of preindictment delay as it has been addressed by the Supreme Court); 11 DUNNELL MINN. DIG. CRIM. L. § 5.10, § 5.10(d)-(e) nn.1808-14 (2019) (giving an overview of preindictment delay). Formal accusation is triggered by arrest, indictment, or other official accusation. Doggett v. United States, 505 U.S. 647, 655 (1992). *See generally Lovasco*, 431 U.S. 783; *Marion*, 404 U.S. 307; United States v. Crouch, 51 F.3d 480 (5th Cir. 1995); *Jackson*, 504 F.2d 337; Taylor v. United States, 238 F.2d 259 (D.C. Cir. 1956) (defining, collectively, "preindictment

defendants are protected from stale charges by the state statute of limitations,[13] but in some instances, there is no applicable state statute of limitations for the crime, and the delay is tactical, oppressive, and without justification.[14]

While some defendants have argued the Sixth Amendment guarantees of a speedy trial apply prior to indictment, the Supreme Court has repeatedly rejected that contention.[15] Facially, the Sixth Amendment protects against an unreasonable restraint of liberties by ensuring that all criminal defendants "shall enjoy the right to a speedy and public trial."[16] However, "[t]he Sixth Amendment's guarantee of a speedy trial is applicable only after a person has been 'accused' of a crime."[17] Some may cite to the history of English common law in an effort to establish that the framers intended for the right to a speedy trial to extend to those who stand unaccused for extended periods of time; dating as far back as the twelfth century in England, it was recognized that special rules governed the accused.[18] However, the Court has always quickly dismissed such claims and has stated, "[t]he framers could hardly have selected less appropriate language if they had intended the speedy trial provisions to protect against pre-accusation delay."[19]

In cases where a person stands unaccused for month or years, we rely on the state statute of limitations to protect against the bringing of stale charges; however, the Supreme Court has conceded that the statute of limitations cannot fully define the rights of a criminal defendant who stands unaccused for an extended length of time.[20] Where there has been an intentional, unreasonable delay prior to indictment that results in actual and substantial prejudice to the defendant, the Due Process Clause of the Fifth Amendment may require that the charges be dismissed.[21]

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delay"); Iowa v. Trompeter, 555 N.W.2d 468 (Iowa 1996) (exemplifying how a prosecutor might benefit from a tactical delay of indictment).

13. *Marion*, 404 U.S. at 323-24.

14. *See* SDCL § 23A-42-1 (1939 & Supp. 1960, 2005) (illustrating that South Dakota has no statute of limitations on Class A, Class B, or Class C felonies).

15. *See, e.g.*, *Lovasco*, 431 U.S. at 788; *Marion*, 404 U.S. at 313; *Doggett*, 505 U.S. at 655; *Jackson*, 504 F.2d at 338.

16. U.S. CONST. amend. VI.

17. *Marion*, 404 U.S. at 307. "[Formal accusation is] triggered by arrest, indictment, or other official accusation." *Doggett*, 505 U.S. at 655.

18. PATRICK DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 82 (1958).

19. *Marion*, 404 U.S. at 314-15; *see also id.* at 314-15 nn.6-7 (explaining the historical context of the Sixth Amendment).

20. *Id.* at 324 ("[T]he statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. . . . the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the preindictment delay in this case caused substantial prejudice to the appellees' rights to a fair trial and that the delay was an intentional device to gain a tactical advantage over the accused.").

21. *Id.* at 324; DUNNELL *supra* note 12, at §5.10 (d)-(e) (articulating the circumstances where pre-accusation delay could result in a due-process violation under the Fifth Amendment, under certain facts). "[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). If it is possible to remedy the prejudice without dismissal, those avenues should be explored, so long as they preserve the concept of fair play and substantial justice. Goldfarb, *supra* note 1, at 664. When possible, the judge should consider remedies short of dismissal. Goldfarb, *supra* note 1, at 664 n.287 ("For example, some prejudice might be mitigated by letting evidence

While many courts agree that there is a potential Due Process violation when there is an intentional delay in bringing charges against a criminal defendant, courts disagree about the proper test to apply as well as what set of facts would lead to a dismissal as a result of the delay.[22] This is the hole in our criminal justice system known as preindictment delay.[23]

II. BACKGROUND AND HISTORY

One of the earliest references to preindictment delay occurred in 1956, in *Taylor v. United States*, where the D.C. Circuit Court of Appeals determined that a three-year delay in indicting a criminal defendant substantially prejudiced his ability to present an adequate defense and call witnesses to support his claims.[24] The *Taylor* court considered other factors in this case (including the government's failure to inform the defendant that he had been indicted) but observed that a three-year delay "certainly prevented [Taylor] or his attorney from preparing a proper defense."[25] The court ultimately found that because the defendant lost his ability to present a compelling defense due to the prosecution's misconduct, in combination with other factors, justice required that the indictment be dismissed and the defendant be found not guilty as a matter of law.[26]

In this background and history section, Part A will discuss the two landmark Supreme Court cases that the circuits and states have interpreted and developed over time into the different approaches used across the nation. Part B will discuss the evolution of preindictment caselaw in the circuits and discuss the different

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of the delay and its impact come before the jury. Judges might then consider relaxing the rules of evidence (for example, admitting otherwise inadmissible hearsay evidence when it is very likely corroborative of direct evidence that would have been available but for the delay); drafting jury instructions relating to the problem of the delay (for example, instructing jurors that they may draw an inference that evidence lost due to delay would have been favorable to the accused); or allowing defense counsel to argue favorable inferences drawn from the evidence shown to have once existed although it is now no longer available.").

22. *Compare* United States v. Bater, 594 F.3d 51(1st Cir. 2010) (holding that a defendant will rarely establish that substantial prejudice resulted from an intentional tactical delay on the part of the prosecution), *and* United States v. Cornielle, 171 F.3d 748 (2d Cir. 1999) (ruling that a defendant bears the heavy burden of establishing that the government intentionally delayed his trial and that he suffered actual and substantial prejudice as a result), *and* United States v. Crouch, 84 F.3d 1497 (5th Cir. 1996) (requiring a showing that the prosecution intentionally delayed prosecution in search of a tactical advantage), *with* United States v. Ray, 578 F.3d 184 (2d Cir. 2009) (requiring a balancing test of length of delay and the conduct of both the prosecution and the defendant), *and* United States v. Miller, 20 F.3d 926 (8th Cir. 1994) (holding that the prejudice suffered by a pre-accusation delay must be weighed against the reason given by the government for the delay), *and* Howell v. Barker, 904 F.2d 889 (4th Cir. 1990) (stating the Supreme Court's holdings in *Marion* and *Lovasco* mandate a balancing test for each case of preindictment delay), *and* United States v. Corona-Verbera, 509 F.3d 1105, 1112 (9th Cir. 2007) ("[The defendant] must satisfy both prongs of a two-prong test"). *But see* United States v. Jackson, 446 F.3d 847 (8th Cir. 2006) (adopting the strict two-prong approach demonstrated in other circuits). The more recent Eighth Circuit cases have been notably inconsistent with prior holdings and are moving towards the strict two-prong approach seen in the Fifth Circuit. *Id.* at 849. Notably, the Fourth and Ninth Circuits also only require a showing of "actual prejudice" instead of "substantial prejudice." *See infra* II.A (discussing the history of preindictment delay).

23. *See supra* text accompanying notes 5-22 (introducing and summarizing preindictment delay).

24. Taylor v. United States, 238 F.2d 259, 262 (D.C. Cir. 1956).

25. *Id.* at 261.

26. *Id.*

approaches taken. Part C will provide a more detailed look into several states with novel approaches and the states geographically closest to South Dakota for a comparison to neighboring jurisdictions. A complete list of what approach each state or circuit has taken can be found in Appendixes A and B.

A. *MARION* AND *LOVASCO*

The Supreme Court directly addressed the issue of pre-accusation delay without any other aggravating factors in *United States v. Marion*.[27] In *Marion*, the defendants had been involved in selling and installing various home improvement appliances and were allegedly using fraudulent business practices over the course of several years.[28] They were indicted in April of 1970 for crimes that allegedly occurred between March of 1965 and February of 1967.[29] Throughout the length of the delay, a series of newspaper articles outlined the United States' Attorney's investigation and claims that indictments would soon follow.[30]

Defendants asserted the government delayed indictment for over three years, which resulted in a violation of their constitutional rights under the Fifth and Sixth Amendments.[31] They alleged no specific prejudice, only that the delay was "unreasonably oppressive and unjustifiable" and that they were "bound to have been seriously prejudiced by the delay of at least three years."[32]

The Court discussed why the Sixth Amendment is not to be considered in cases involving activities prior to indictment[33] and reasoned that the applicable state statute of limitations can act as the appropriate safeguard against stale claims.[34] Yet, the Court took a deeper dive:

> Nevertheless, since a criminal trial is the likely consequence of our judgement 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 the trial that the preindictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was

27. United States v. Marion, 404 U.S. 307, 307 (1971).
28. *Id.* at 308-09.
29. *Id.*
30. *Id.* at 309.
31. *Id.* at 308-09.
32. *Id.* at 307.
33. *Id.* at 313-15; *see supra* text accompanying notes 16-19 (explaining why no protections or remedies lie within the Sixth Amendment).
34. *Marion*, 404 U.S. at 323.

> an intentional device to gain a tactical advantage over the accused.[35]

The Court declined to outline the exact circumstances that would lead to such a dismissal described above but noted that "actual prejudice" to a defense could result from even short and justifiable delay, so the Court stated that justice requires making a "delicate judgment based on the circumstances of each case."[36] Given that the defendants did not allege any actual prejudice or intentional delay in *Marion*, the Court reversed and found for the government.[37]

In a concurrence joined by Justices Brennan and Marshall, Justice Douglas disagreed that the protections of the Sixth Amendment were not meant to extend to situations of preindictment delay and contended that public policy demands criminal defendants be indicted promptly—first, to remove alleged criminals from the streets, and second, because a delay *prior* to indictment can result in more destruction to a defense than a delay post-indictment.[38] Justice Douglas further asserted that negligent and unintentional delays are equally as damaging to a defense as strategic delays, and the reason of the government's delay should be balanced against its length and the resulting prejudice to the defendant.[39]

Less than ten years later, the issue was revisited by the Supreme Court in *United States v. Lovasco*.[40] Eugene Lovasco was indicted in March of 1975 for possession of stolen firearms and dealing in firearms without a license.[41] The transgressions occurred more than eighteen months before any formal allegations were made, and in that time, two other individuals who had knowledge of or had been involved in the alleged transactions had passed away.[42] At trial, the government made no effort to explain or justify the lengthy delay, but on appeal, insisted there had been a valid reason for the investigative delay.[43]

The key differentiating facts of *Lovasco* in the eyes of the Court were: (1) the delay of seventeen months was intentional on the part of the government; and (2) the defendant was able to establish prejudice based on the deaths of two witnesses and probable co-defendants.[44] The Court explained, as it did in *Marion*, that

35. *Id.* at 324 (emphasis added).

36. *Id.* at 324-25.

37. *Id.* at 325-26.

38. *Id.* at 331, (Douglas, J., concurring) ("At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his.").

39. *Id.* at 334 (1971) (Brennan, J., concurring) ("A negligent failure by the government to ensure a speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent the deliberate misuse of the criminal process by public officials.").

40. United States v. Lovasco, 431 U.S. 783 (1977).

41. *Id.* at 784.

42. *Id.* at 785-86.

43. *Id.* at 786-87.

44. *Id.* at 785-86. The government made no attempt to explain or justify the delay; it only denied the assertion that there was no ongoing investigation during the delay. *Id.*

"[establishing proof of prejudice] makes a due process claim concrete and ripe for adjudication, [but does not make a due process] claim automatically valid."[45]

The Eight Circuit found that the cause of delay—the government's hope that more defendants would surface—was unjustifiable.[46] However, the Supreme Court overruled and reasoned that the Due Process Clause does not allow for courts to abort criminal proceedings because they might disagree with a prosecutor's judgment on when to bring charges.[47] Based on the government's assertion of a valid investigative delay, the majority found[48] that the prejudice suffered was not so great as to overcome the need to conclude an investigation prior to bringing charges.[49] Again, the Court declined to illustrate the exact set of circumstances "in which pre-accusation delay would require dismissing prosecution."[50]

B. HOW THE CIRCUIT COURTS HAVE INTERPRETED *MARION* AND *LOVASCO*

Every circuit has addressed the issue of preindictment delay, in some form or another.[51] While each approach has been a bit different, most have found their way either to the strict two-prong approach that the Fifth Circuit initially developed or some sort of balancing test.[52] A summary of how each circuit approaches the issue can be found in Appendix A.

The Fifth Circuit took the lead in interpreting *Marion* and *Lovasco*.[53] Within five years of the Court's decision in *Lovasco*, the Fifth Circuit authored over ten opinions on the issue of preindictment or pre-accusation delay.[54] In *United States*

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45. *Id.* at 789.

46. *Id.* at 790-91.

47. *Id.* The Court notes the important public policy in allowing prosecutorial discretion for the timing of indictment. *Id.* at 791-92.

48. Justice Stevens notes in his dissent that since the government made no attempt to explain or justify the delay at trial, the Supreme Court was now improperly finding facts that were not supported by the record and, essentially, making the prosecution's case for them. *Id.* at 798 (Stevens, J., dissenting).

49. *Id.* at 795 (majority opinion) ("[I]nvestigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" (citations omitted)).

50. *Id.* at 796. *Lovasco* highlights an interesting distinction overlooked by similar comments—a defendant must specifically allege any prejudice he suffered, but here, the majority was not bothered that the government had not placed a justification for the delay on the record. *Id.* This could be a further reflection of the Court's desire to protect the government's prosecutorial discretion by not holding the government to the same standards as the accused. *See* text accompanying note 13 (discussing the expectation that statute of limitations sufficiently protects the accused).

51. *See infra* Appendix A (giving an overview of caselaw in each circuit).

52. *See* text accompanying notes 66-67 (explaining the strict two-prong test for preindictment delay); *infra* Appendix A (describing each circuit's approach).

53. *See infra* note 54 (showing the number of cases that the Fifth Circuit authored in a short period of time).

54. *E.g.*, United States v. Townley, 665 F.2d 579 (5th Cir. 1982); 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.

v. Townley, the Fifth Circuit made an effort to amalgamate all of its most recent opinions into one cohesive opinion.[55]

Townley involved a defendant who was prosecuted for mail fraud while executing a scheme to sell vending machines.[56] The defendant claimed that his business partner had also misled him, and he had believed, in good faith, that he was involved with a legitimate business.[57] Townley was indicted after a forty-six-month delay that left him unable to locate witnesses or build an effective defense, and that also allowed his "business partner" to disappear.[58] The *Townley* court constructed *Marion* and *Lovasco* into a basic balancing test:

> [T]he accused bears the burden of proving the prejudice and, if the threshold requirement of proof of actual prejudice is not met, the inquiry ends there. Once actual prejudice is shown, it is necessary to engage "in a sensitive balancing of the government's need for an investigative delay . . . against the prejudice asserted by the defendant." The inquiry turns on "whether the prosecution's actions violated 'fundamental conceptions of justice' or the communities' sense of fair play and decency."[59]

The *Townley* court specifically dismissed the government's contention that a defendant can *never* succeed on a preindictment delay claim, absent the showing of an intentional delay on the part of the prosecution to gain a tactical advantage at trial,[60] but the Fifth Circuit later flipped its position.[61]

In *United States v. Crouch*, defendants were indicted on several counts of conspiracy and bank fraud.[62] The court initially followed *Townley*, stating that no showing of bad faith on the part of the prosecution was necessary, and dismissed the defendants' indictment.[63] However, after an en banc rehearing, the Fifth Circuit expressly rejected the *Townley* approach, stating, "the Supreme Court . . . has refused to recognize a claim of preindictment delay absent some bad faith or improper purpose on the part of the prosecution."[64] The court recoiled from the notion expressed in *Townley* that *Marion* and *Lovasco* implied a balancing test and noted that many other circuits had come to the same conclusion.[65] The

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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).

55. *Townley*, 665 F.2d at 581-82.

56. *Id.* at 580-81.

57. *Id.*

58. *Id.* at 580-81, 584-85.

59. *Id.* at 581-82 (first citing *Brand*, 556 F.2d at 1317 n.7; and then citing *Shaw*, 555 F.2d at 1299) (citations omitted). This foreshadows the modern strict-two prong tests that we see across many circuits today. *See generally* DuBosar, *supra* note 12 at 665-69 (giving additional analysis on *Marion* and *Lovasco*).

60. *Townley*, 665 F.2d at 582.

61. *See, e.g.*, United States v. Crouch, 84 F.3d 1497, 1499-1500 (5th Cir. 1996) (holding that showing an intentional delay on behalf of the prosecution is not necessary).

62. *Id.* at 1500.

63. *Id.* at 1499-1500.

64. *Id.* at 1510.

65. *Id.* at 1510-12.

Crouch court settled on a strict two-prong approach.[66] For a defendant to bring a successful claim of preindictment delay: (1) there must be proof of actual and substantial prejudice; and (2) the prosecution must have "purposely delayed the indictment to gain a tactical advantage or for other bad faith purpose."[67]

The Fifth Circuit's opinion in *Crouch* is the best illustration of the approaches taken in the First, Second, Third, Sixth, Tenth, and Eleventh Circuits.[68] In these circuits, where the statute of limitations has not run, there must be a showing of actual and substantial prejudice to the defendant that results from an intentional delay on the part of a prosecutor with nefarious intentions.[69]

The Fourth and Ninth Circuits expressly reject the strict two-prong approach adopted in most other circuits.[70] Both circuits operate under a balancing test, similar to that in *Townley*, and have stated that balancing the alleged prejudice against the government's interest and justification for the delay is preferable to a black letter rule on the issue.[71] Furthermore, the Ninth Circuit expressly states that intent or recklessness on the part of the prosecution is not "an essential ingredient" to a claim of preindictment delay, placing their standard at direct odds with those circuits following the strict two-prong approach.[72] However, it is worth noting that the caselaw out of the Fourth Circuit cites to *Townley*,[73] which has since been overruled.[74]

66. *Id.* at 1500.

67. *Id.*

68. *See id.* at 1511-12 (discussing the current position of each circuit at length in the Fifth Circuit's opinion). While the language varies and is not exact, they all yield similar results on the issue of preindictment delay and place the same requirements and expectations on both parties. *Id.*

69. *See generally* United States v. Crooks, 766 F.2d 7 (1st Cir. 1985) (representing the test in each circuit); United States v. Hoo, 825 F.2d 667 (2d Cir. 1987) (same); United States v. Ismaili, 828 F.2d 153 (3d Cir. 1987) (same); United States v. Brown, 959 F.2d 63 (6th Cir. 1992) (same); United States v. Thomas, 404 F. App'x 958 (6th Cir. 2010) (same); United States v. Engstrom, 965 F.2d 836 (10th Cir. 1992) (same); United States v. Hayes, 40 F.3d 362 (11th Cir. 1994) (same); United States v. Oliva, 909 F.3d 1292 (11th Cir. 2018).

70. *See infra* notes 71-72 and accompanying text (explaining the tests applied in both circuits).

71. United States v. Automated Med. Lab'ys, Inc., 770 F.2d 399, 403-04 (4th Cir. 1985) (establishing a balancing test under *Marion* and *Lovasco*); Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990) ("Rather than establishing a black-letter test for determining unconstitutional preindictment delay, the Court examined the facts in conjunction with the basic due process inquiry: 'whether the action complained of . . . violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions" . . . and which define "the community's sense of fair play and decency."'" (quoting United States v. Lovasco, 431 U.S. 783, 790 (1977))); United States v. Moran, 759 F.2d 777, 781 (9th Cir. 1985) ("[T]he length of the pre-indictment delay and the reason for that delay must be weighed to determine if due process has been violated." (citing United States v. Mays, 549 F.2d 670, 678 (9th Cir. 1977))).

72. *Moran*, 759 F.2d at 782.

73. *Automated Med. Lab'ys., Inc.*, 770 F.2d at 404.

74. *See* United States v. Crouch, 84 F.3d 1497, 1509-10 (rejecting the approach taken in *Townley*).

The Seventh Circuit's position was unclear for a time on the issue of preindictment delay,[75] but the most recent decision in *United States v. Hagler*[76] seems to solidify the balancing approach taken by the Fourth and Ninth Circuits.[77] There, the Seventh Circuit stated the defendant "bears the burden of proving that the delay caused actual and substantial prejudice to his right to a fair trial."[78] If prejudice can be shown, the burden shifts to the government to prove that the delay was not to gain a tactical advantage or for any impermissible purpose.[79] Lastly, the court should balance the reason for the delay against the prejudice suffered to determine if there was a due process violation.[80] This new approach appears to expand upon the balancing test seen in *Townley* and in the Fourth and Ninth Circuits and formally places a burden on the government to prove a good-faith reason for the delay prior to the balancing test.[81]

At the time that *Crouch* was decided, the Eighth Circuit was unclear on if it adopted a strict two-prong approach or a balancing test, and the Fifth Circuit notes this in the opinion.[82] Later, different panels within the circuit applied the rule differently resulting in conflicting law within the circuit.[83]

In both *United States v. Stierwalt* and *United States v. Scoggins*, the Eighth Circuit held there can be no due process violation resulting from a lengthy preindictment delay where there is no showing that the government caused the delay with the intent to harass or gain a tactical advantage at trial.[84] However, the Eighth Circuit took a drastically different approach in *United States v. Miller*, where it appeared to adopt a balancing test by considering the extent of the prejudice and without a required showing of an intentional delay.[85] The court did

75. *Compare* United States v. Sowa, 34 F.3d 447, 450 (7th Cir. 1994) (requiring a showing of an intentional delay to gain a tactical advantage at trial, but also balancing the government's justification against the alleged prejudice to the trial), *and* United States v. Pardue, 134 F.3d 1316, 1319-20 (7th Cir. 1998) (mirroring the holding in *Sowa* but placing a burden on the state to prove a good faith purpose), *with* United States v. Wallace, 326 F.3d 881, 886 (7th Cir. 2003) (adopting a strict two-prong approach as seen in the Fifth Circuit).

76. United States v. Hagler, 700 F.3d 1091 (7th Cir. 2012).

77. *Id.* at 1099.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Compare id.* at 1099, *with* United States v. Automated Med. Lab'ys., Inc., 770 F.2d 399, 403-04 (4th Cir. 1985) (establishing a balancing test with no formal burden on the government), *and* Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990) (stating the Fourth Circuit's preference for a basic balancing test over a bright line rule), *and* United States v. Moran, 759 F.2d 777, 781 (9th Cir. 1985) (balancing the reason for the delay against the prejudice suffered, without expressly shifting burden to the government). Many of the cases state the government must provide a *reason* for the delay, but do not expressly shift a burden to the government to prove their actions were taken in good faith. *Moran*, 759 F.2d at 781.

82. United States v. Crouch, 84 F.3d 1497, 1512 n.15 (5th Cir. 1996) (citing United States v. Stierwalt, 16 F.3d 282 (8th Cir. 1994); United States v. Scoggins, 992 F.2d 164 (8th Cir. 1993); United States v. Miller, 20 F.3d 926 (8th Cir. 1994)) (illustrating that the Eighth Circuit applied both a strict two-prong approach and a balancing test between 1993 and 1994, resulting in conflicting rules).

83. *Compare Stierwalt*, 16 F.3d at 285 (8th Cir. 1994), *and Scoggins*, 992 F.2d at 166-67 (8th Cir. 1993), *with Miller*, 20 F.3d at 931-32 (8th Cir. 1994).

84. *Crouch*, 84 F.3d at 1512 n.15 (first citing *Stierwalt*, 16 F.3d 282; then citing *Scoggins*, 992 F.2d 164; and then citing *Miller*, 20 F.3d 926).

85. *Miller*, 20 F.3d at 931-32.

so without citing or referencing *Scoggins* and *Stierwalt*.[86] This resulted in the court handing down three conflicting rulings in a two-year span on the issue of preindictment delay, and it left an unclear standard until *United States v. Jackson* was decided in 2006.[87]

The current approach in the Eighth Circuit looks remarkably similar to the strict two-prong approach in the Fifth Circuit,[88] and appears to have been adopted in an effort to differentiate the Fifth and Sixth Amendment claims, which the district court had mistakenly mingled.[89] In *Jackson*, the defendant was indicted in 2001 on charges of conspiracy to commit sexual assault after he solicited an undercover agent (posing as a fourteen-year-old girl) to meet him in a park to engage in sexual acts.[90] The charges were dismissed, but after the case was passed between multiple agents in the U.S. Attorney's office, new charges were brought in 2005, and Jackson moved to dismiss, arguing that his Fifth and Sixth Amendment rights had been violated by the lengthy delay.[91] In relation to his Fifth Amendment claims of preindictment delay, the Eighth Circuit ruled that a defendant caries two burdens of proof: "(1) [that] 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."[92]

C. HOW THE STATES STACK UP

There is healthy split among the states on the issue of preindictment delay, with over half of the states adopting the strict two-prong test and the other half either rejecting the strict two-prong test or lacking a clear position on the issue.[93] A complete summary of the relevant caselaw in each state can be found in Appendix B.

Thirty states have adopted some type of two-prong approach, including Alabama, Alaska, Arizona, Arkansas, Connecticut, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming.[94] Some of these two-prong approaches are quite progressive, but many

86. *Id.*

87. *Crouch*, 84 F.3d 1497, 1512 n.15 (first citing *Stierwalt*, 16 F.3d 282; then citing *Scoggins*, 992 F.2d 164; and then citing *Miller*, 20 F.3d 926); United States v. Jackson, 446 F.3d 847, 849-52 (8th Cir. 2006).

88. *See supra* text accompanying note 67 (explaining the Fifth Circuit approach).

89. *Jackson*, 446 F.3d at 849-51.

90. *Id.* at 848.

91. *Id.* at 848-49.

92. *Id.* at 849.

93. DuBosar, *supra* note 12, at 671-84; *see also infra* Appendix B (detailing the binding caselaw in each state).

94. *See generally infra* Appendix B.

of them mirror the strict and traditional approach set forth in the circuits.[95] Thirteen states adopt some form of a balancing test, including California, Florida, Hawaii, Illinois, Louisiana, Maine, Montana, New Hampshire, Ohio, Oregon, South Carolina, Washington, and West Virginia.[96] The remaining states have either not taken up the issue, or their position is unclear.[97] While other scholars have a done a great deal of research and discussion on how different states have tackled the issue of preindictment delay, this comment will highlight states with unique or progressive approaches, and states which are geographically closest to South Dakota[98]:

1. Alaska

Alaska's stance on preindictment delay has varied very little in the last thirty years.[99] While the burden of proof rests squarely on the defendant to prove the claim in its entirety, the threshold appears to be lower, requiring only proof that the delay was "unreasonable" and that actual prejudice was suffered.[100] Under the *Alaska v. Mouser* standard, the court then must "[weigh] the reasonableness of the justification [of the delay] against the degree of prejudice to the defendant."[101] Notably absent from this approach is the language that requires bad faith of the prosecution, implying that *any* unreasonable delay on the part of the government may be considered grounds for dismissal under a preindictment delay defense, but this has yet to be explored by the court.[102]

2. California

The California Supreme Court recognizes the state standard differs from that of the Ninth Circuit.[103] In *California v. Nelson*, the court reasoned that *Marion* and *Lovasco* stood for the proposition that a violation of due process has occurred when a defendant proves actual prejudice and when a delay is "undertaken to gain

95. *See generally infra* Appendix B.

96. *See generally infra* Appendix B.

97. *See generally infra* Appendix B.

98. *See generally* DuBosar. at 671-84 (outlining the various approaches taken by many states in 2013); *infra* Appendix B (detailing the binding caselaw in each state).

99. *Compare* Alaska v. Mouser, 806 P.2d 330, 336 (Alaska 1991) (asserting that a defendant must prove the absence of a good-faith reason for the delay and the fact of prejudice), *with* Alaska v. Wright, 404 P.3d 166, 172 (Alaska 2017) ("[A]sserting a due process claim of pre-accusation delay must prove both unreasonable delay and actual prejudice.").

100. *Wright*, 404 P.3d at 172.

101. *Mouser*, 806 P.2d at 336 (quoting Alexander v. Alaska, 611 P.2d 68, 70 (Alaska 1988)).

102. *See Mouser*, 806 P.2d at 336 (refraining from requiring bad faith on the part of the government to succeed on a claim of pre-accusation delay); *Wright*, 404 P.3d at 172 (refraining from requiring bad faith on the part of the government in order for a defendant to succeed on a claim of pre-accusation delay). Note that this is a vibrant contrast to the strict two-prong approach seen in many other states. *See generally infra* Appendix B (detailing the binding caselaw in each state).

103. California v. Nelson, 185 P.3d 49, 55 (Cal. 2008).

a tactical advantage over the accused, or delay incurred in a reckless disregard of circumstances known to the prosecution . . ."[104]

The court purposefully points out that "under California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process."[105] Additionally, whether or not a delay was incurred negligently or purposefully is irrelevant, but it will be weighed in the balancing test against the prejudice.[106] Where the prosecution intentionally delays indictment in an effort to gain a tactical advantage over the defendant, a relatively weak showing of prejudice would be sufficient to succeed on a claim, whereas a delay incurred as a result of negligence on the part of the prosecution would require a stronger showing of actual prejudice to the defendant.[107]

3. Iowa

Early on, Iowa appears to adopt a balancing test that weighs the reasonableness of the delay, against the actual prejudice caused by the delay.[108] Later, the court clarifies that a defendant "must show that the state's delay in charging him was unreasonable, and that he was actually prejudiced by the delay."[109] Since the defendant in Iowa v. *Isaac* failed to allege actual prejudice suffered and intentional delay on the part of the prosecution, the court stated that the 105-day delay of indictment until after the suspect's eighteenth birthday did not constitute a violation and declined to presume, on behalf of the defendant, that the delay was intended to deprive him of juvenile jurisdiction.[110] Less than a year later, a defendant was deprived of juvenile jurisdiction under a similar set of facts due to an improper and lengthy delay on the part of the prosecution.[111] This time, the defendant did properly allege actual prejudice and intentional delay, and he succeeded on his preindictment claim.[112] Remarkably, in *Iowa v. Trompeter*, the

104. *Id.* at 56.

105. *Id.* at 58.

106. *Id.*

107. *Id.* In a 2017 unpublished opinion, the California Court of Appeals formally created a three-part test for preindictment delay: (1) the defendant must show prejudice as a result of the delay; (2) the prosecution must show justification for the delay; and (3) the Court must balance the harm suffered by the delay against the state's reason for the delay. California v. Ramirez-Serrano, No. 15NCR10459, 2017 Cal. Ct. App. LEXIS 622, at *5 (Cal. Ct. App. Jan. 27, 2017); *see also*, California v. Willis, No. 170279, 2019 Cal. Ct. App. LEXIS 2978, at *10 (Cal. Ct. App. Apr. 29, 2019) (illustrating another test used to balance justification against prejudice suffered).

108. Iowa v. Hall, 395 N.W.2d 640, 642-43 (Iowa 1986).

109. Iowa v. Isaac, 537 N.W.2d 786, 788 (Iowa 1995) (holding that the prosecution's intentional preindictment delay of 105 days until after the defendant's eighteenth birthday is not a constitutional violation where the defendant fails to allege how he was prejudiced, and that it was intentional).

110. *Id.* at 788 (noting that the defendant failed to properly allege the prejudice). The court implies here that this procedural error may have been determinative for the defendant. *Id.*

111. Iowa v. Trompeter, 555 N.W.2d 468, 469 (Iowa 1996).

112. *Id.* at 470-71 (holding that the prosecutor's intentional delay to bring charges for over three years was intended to deprive the defendant of juvenile jurisdiction). This is notably one of the few times that a defendant has prevailed on a claim of preindictment delay. *Id.*

court did not require a showing that the delay was intentional and in bad faith at trial in its analysis, despite acknowledging that it had been alleged.[113]

4. *Minnesota*

The Minnesota Supreme Court has issued conflicting rulings on the issue of preindictment delay—some following the strict two-prong approach, others opting for a slightly weaker standard.[114] In *F.C.R.*, the court stated that "[t]o establish a violation of the due process clause due to preindictment delay, a defendant must prove both actual prejudice and improper state purpose."[115] Later, the court ruled in *Jurgens* that a defendant must prove that the delay "caused substantial prejudice to [defendant's] right to a fair trial and that the delay was an intentional device to gain a tactical advantage over the accused."[116] The latter approach looks remarkably similar to the Fifth Circuit's strict two-prong approach.[117] Most recently, Minnesota held fast to the lower threshold of *F.R.C.*, requiring only "improper state motive" and not the stricter standard of "intent to gain a tactical advantage."[118]

5. *Montana*

In one of the earliest decisions issued on preindictment delays post *Marion* and *Lovasco*, the Montana Supreme Court declined to set a definitive standard for proving preindictment delay but did make citing references to both *Marion* and its own conflicting decision.[119] Several years later in *Montana v. Krinitt*,[120] the court admits the uncertainty and attempts to clarify the standard for preindictment delay: "[u]pon a showing that the defendant suffered actual and substantial prejudice from the delay, the court must then weigh the justification for the delay, as well as the absolute length of the delay, to determine if due process has been denied."[121]

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113. *Id.* at 470 ("To 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.").

114. *Compare* Minnesota v. F.C.R., 276 N.W.2d 636, 639 (Minn. 1979), *with* Minnesota v. Jurgens, 424 N.W.2d 546, 550-51 (Minn. Ct. App. 1988).

115. *F.C.R.*, 276 N.W.2d at 639.

116. *Jurgens*, 424 N.W.2d at 550.

117. *See supra* text accompanying note 67, at 14 (explaining the test applied in the Fifth Circuit).

118. *Cf.* Minnesota v. Lussier, 695 N.W.2d 651, 655 (Minn. 2005) (adopting the "improper state motive" threshold); *see also* Minnesota v. Pedraza, No. A14-0539, 2015 Minn. Ct. App. LEXIS 258, at *10 (Minn. Ct. App. Mar. 23, 2015) (same). *But see* Minnesota v. Vollmer, No. C9-00-1118, 2001 Minn. App. LEXIS 374, at *4, *7 (Minn. Ct. App. Apr. 10, 2001) (adopting language from another Minnesota Supreme Court case requiring the appellant to prove "the delay was used by the prosecution to gain tactical advantage at trial" (quoting Minnesota v. Hanson, 285 N.W.2d 487, 489 (Minn. 1979))).

119. Montana v. Goltz, 642 P.2d 1079, 1082-83 (Mont. 1921) ("[D]efendant neither asserted and proved the State's improper intent nor proved actual prejudice resulting from the delay; therefore, the difference between [Montana's precedential] standard and the *Marion* standard is not determinative here.").

120. Montana v. Krinitt, 823 P.2d 848 (Mont. 1991).

121. *Id.* at 851 ("Because past decisions of this Court and other courts have left some uncertainty as to the appropriate standard to be applied, we take this opportunity to clarify Montana law on this issue.").

The court also distinguished that negligent conduct would not weigh as heavily in the balancing test as an intentional delay, implying that, under the correct set of facts, the court might consider *negligent conduct* on the part of the government that causes a delay prior to indictment to be a violation of due process.[122]

6. *Nebraska*

Nebraska follows the strict two-prong approach as seen in the Fifth Circuit.[123] In *Nebraska v. Glazebrook*,[124] the court definitively stated "[d]ismissal under the Due Process Clause is only proper if the defendant shows (1) the prosecuting authority's delay in filing charges caused substantial prejudice to the defendant's right to a fair trial; and (2) the delay was an intentional device to gain an unfair tactical advantage over the defendant."[125] There has been little deviation from this stance, and it has been reaffirmed as recently as 2016.[126]

7. *North Dakota*

North Dakota has scarcely addressed the issue of preindictment delay and has not taken up the issue since the 1980s.[127] The single case that directly discusses the issue of preindictment delay is not particularly specific as to if the test is a strict two-prong or a balancing test but does state that "[a] due process inquiry considers 'the reasons for the delay, as well as the prejudice to the accused.'"[128] The Fifth Circuit, along with the Fourth and Ninth Circuits, used the same language from *Lovasco* when arriving at the *Townley* test, so one could speculate that should the North Dakota Supreme Court take up the issue, it might lean towards such a balancing test.[129]

8. *South Dakota*

South Dakota's stance on the issue of preindictment delay is perhaps even more elusive. In the singular case in which the South Dakota Supreme Court addressed the topic, the court ruled that a thirteen-month delay of indictment did not violate due process where the prosecution was able to provide a good-faith reason for the delay.[130] The prosecution stated that the delay was on the part of

122. *Id.* at 852 (citing United States v. Mays, 549 F.2d 670, 677-78 (9th Cir. 1977)).

123. Nebraska v. Glazebrook, 803 N.W.2d 767 (Neb. 2011).

124. *Id.* at 777.

125. *Id.*

126. Nebraska v. Oldson, 884 N.W.2d 10, 62 (Neb. 2016) ("The due process claimant's burden is a 'heavy' one, requiring a showing of both substantial and actual prejudice resulting from the delay and bad faith on the part of the government." (quoting Nebraska v. Hettle, 848 N.W.2d 582, 596 (Neb. 2014))).

127. North Dakota v. Denny, 350 N.W.2d 25 (N.D. 1984); North Dakota v. Hoagie, 424 N.W.2d 630 (N.D. 1988); North Dakota v. Melin, 428 N.W.2d 227 (N.D. 1988).

128. *Denny*, 350 N.W.2d at 28 (citing United States v. Lovasco, 431 U.S. 783, 790 (1977)).

129. *See supra* II.B (explaining the language used by the Fifth Circuit).

130. State v. Stock, 361 N.W.2d 280, 283 (S.D. 1985).

law enforcement, and it was due to the multiple ongoing, undercover investigations that overlapped multiple jurisdictions.[131] The court explained its reasoning:

> [T]he due process clause of the Fifth Amendment would require dismissal of the indictment if it were shown that the preindictment delay had caused substantial prejudice to the defendant's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the defendant. . . .
>
> . . . .
>
> . . . [T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.[132]

This language, again, is reminiscent of *Townley*, and implies that the court favors a balancing test of the prejudice suffered against the reason for the delay, particularly after the court states that "'even the legitimate excuse of a continuing undercover investigation may be stretched to the breaking point; at some point, the accused's right to due process of law must prevail.' Moreover, we hold that the burden of establishing justification for pre-accusatorial delay rests squarely upon the state."[133]

The court also spent a lengthy amount of time rehashing the Supreme Court's analysis of prosecutorial discretion.[134] Justice Wollman discussed the necessity of allowing the prosecution to continue investigating and bringing charges only when they are ripe and complete and when the prosecutor is satisfied that he can prove guilt beyond a reasonable doubt.[135]

In his dissent, Justice Henderson was unpersuaded that the state had met its burden of proof in justifying the delay.[136] He opined that a valid investigatory delay would clearly be a good-faith justification for the delay; however, the fact that Stock was serving time in a federal prison should not be a factor in assessing if due process was satisfied: "[i]f a state files a detainer against a federal prisoner, that state is under a constitutional obligation to make a good faith effort to try the accused within a reasonable time."[137] Justice Henderson would have remanded the case back to the trial court for additional fact-finding on the reason for the delay.[138]

This lone 3-2 decision has left the issue up for interpretation in South Dakota courts.[139] The lack of concise language leaves room to fairly debate the South

131. *Id.* at 282.
132. *Id.* at 282-83.
133. *Id.* at 284 (quoting United States v. Jackson, 504 F.2d 337, 340 (8th Cir. 1974)) (citation omitted).
134. *Id.* at 283.
135. *Id.*
136. *Id.* at 285 (Henderson, J., dissenting).
137. *Id.*
138. *Id.* at 286.
139. *Id.* at 284 (majority opinion).

Dakota Supreme Court's intentions, but thirty-five years later, the issue is ripe for reconsideration in light of changing trends and public policy.[140]

South Dakota circuit court are already struggling with this issue. In *State v. Duong*, the prosecution referred to the issue of preindictment delay as a "novel Constitutional claim" with no statutory remedy, despite the fact that it has been adjudicated not only in the Supreme Court of the United States, but also in many surrounding states.[141]

In this Second Circuit decision, the defendant stood accused of felony burglary for more than three years while he served time in the South Dakota State Penitentiary, convicted of another crime that took place after the alleged burglary.[142] While the defendant was in custody on the second offense, he confessed to the Minnehaha County burglary, and the Sioux Falls Police Department was notified of Duong's confession and whereabouts.[143] While Duong was incarcerated, he turned eighteen.[144] He was subsequently arrested, and his case was brought in Circuit Court instead of Juvenile Court, where it was revealed that detectives had not conducted any investigations or taken any action on his case since he was arrested, confessed, and was incarcerated in Sioux Falls, more than three years prior.[145]

In an eight-page opinion issued by Judge Zell, the court states that twenty-one months elapsed between the conclusion of all reports and the indictment.[146] The delay was deemed inexcusable, the court cited to *Stock* in noting, "[e]ven the legitimate excuse of a continuing undercover investigation may be stretched to the breaking point; at some point, the accused's right to due process of law must prevail," and the court ruled that the state had not met its burden in justifying the length of delay, as there was no ongoing investigation.[147] The court also found that Duong had suffered "actual and substantial prejudice" when his arrest report was completed prior to his eighteenth birthday, yet he was still deprived of juvenile jurisdiction.[148] The charges against Duong were dismissed on the grounds of a Fifth Amendment Due Process violation of Duong's rights under *Stock* and controlling United States Supreme Court caselaw.[149]

140. *Id.* at 283-84.

141. *Id.* at 5; *see also supra* II.C (explaining the adjudication of preindictment delay cases in surrounding states, such as Iowa, Minnesota, and North Dakota).

142. *Duong*, 2020 49CRI17-9948 at 2-3.

143. *Id.*

144. *Id.* at 3.

145. *Id.*

146. *Id.* at 6.

147. *Id.* (quoting State v. Stock, 361 N.W.2d 280, 284 (S.D. 1985)).

148. *Id.* at 7.

149. *Id.* at 8.

III. ANALYSIS: DOES *STATE V. STOCK* HOLD WEIGHT, THIRTY-FIVE YEARS LATER?

A. VAGUENESS IS A SUBSTANTIAL BURDEN ON A DEFENDANT

A key question is which of the two tests would the South Dakota Supreme Court apply today if a defendant were seeking dismissal due to preindictment delay? *Stock* offers little guidance for a would-be appellant, other than a requirement of "actual prejudice."[150] While the court in *Stock* demonstrated its support and concern for protecting prosecutorial discretion,[151] other language in the opinion suggests that South Dakota was not prepared to adopt a standard where excessive delay as a result of negligence on the part of the state, or even ongoing investigations, can never be grounds for dismissal.[152]

The problem with leaving such a vague standard is that it hinders a criminal defendant's ability to present an argument that is pleasing to the court, both at trial and on appeal.[153] Thirty-five years later, the case leaves more questions than answers, one of which being is it even relevant? The lack of a standard is a mighty hurdle for any would-be appellant.

There is also evidence that many people in the South Dakota criminal justice system are unaware that preindictment delay could be a defense or remedy available to them under the Due Process Clause of the Fifth Amendment.[154] In *Duong*, the Minnehaha State's Attorney argued that nothing in the state statute justified the dismissal of charges and that the claim was one of novelty under the Fifth Amendment, despite the fact that it has been litigated in nearly every circuit and state since the 1970s.[155]

B. THE PROBLEM WITH PREJUDICE

The problem with the required showing of prejudice in most jurisdictions is that it is unfair to shoulder a criminal defendant with the burden to prove the subjective intention of the prosecutor when only the prosecutor will have that information.[156] Additionally, requiring that the conduct be intentional fails to recognize that negligent conduct can be equally as damning as intentional conduct,

150. *Stock*, 361 N.W.2d at 282-83. *But see infra* III.B (discussing why the prejudice prong is also problematic and daunting for a defendant).

151. *See supra* text accompanying notes 134-33 (discussing the importance of allowing for prosecutorial discretion).

152. *See supra* text accompanying notes 132-31 (discussing the Court's reluctance to adopt the strict standards).

153. *Stock*, 361 N.W.2d at 282-83 (illustrating the non-specific and low standard of South Dakota's current test).

154. State v. Duong, 2020 49CRI17-9948 at 5 (calling the issue a "novel constitutional claim").

155. *Id.* at 5-6; *see also infra* Appendixes A and B (showing that a majority of states and circuits have caselaw on the issue of preindictment delay, including South Dakota).

156. Mikel Steinfeld, *Rethinking the Point of Accusation: How the Arizona Court of Appeals Erred in* State v. Medina, 7 PHX. L. REV. 329, 338 (2013).

and it is unjust to punish the defendant for the conduct of the state.[157] Courts have justified a laundry list of negligent delays, all resulting in a detriment to the defendant.[158] Prejudice can result from a variety of persecutorial delays, ranging from legitimate investigatory or administrative errors to excuses as frivolous as delaying indictments for prosecutors to go on vacations or honeymoons.[159] Justice and fairness would favor a system where that party who is primarily responsible for the prejudice and unfairness suffer the consequences, even if that means forgoing prosecution, when the prejudice is so great that a fair trial is no longer possible.[160]

A key problem with *Stock* is that the court is very unclear on what type of prejudice would need to be shown to have a charge dismissed on the grounds of preindictment delay.[161] The *Stock* court notes that a valid investigatory delay was adequate justification to overcome the resulting prejudice but also notes that an on-going investigation may not always be enough.[162] This implies that the level of prejudice might, at some point, outweigh a valid investigatory delay, increasing the need for a more concise standard of prejudice.[163] Our criminal justice system relies on a "retrospective reconstruction of events," and even a short delay could result in significant erosion of memories, recollections, and other testimonial evidence that could hold significant value to the defense.[164]

Even in *Marion* and *Lovasco*, the Supreme Court declined to define what set of circumstances would lead to a dismissal under the allegation of improper preindictment delay;[165] however, the Court did cite to jurisdictions that had taken up the issue.[166] It is worth noting, if not obvious, that defendants rarely succeed on the claim of preindictment delay.[167] Even for cases involving juvenile jurisdiction, it seems that a defendant is rarely able to make the requisite showing of actual prejudice in a way that satisfied the courts.[168] As one court noted:

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157. Goldfarb, *supra* note 1, at 647.

158. *Id.* at 626-27.

159. *Id.*

160. *Id.* at 647-48.

161. State v. Stock, 361 N.W.2d 280, 284 (S.D. 1985) (stating simply that the defendant failed to establish the requisite prejudice that is generally necessary in a due process claim).

162. *Id.* at 283-84.

163. *Id.* at 284.

164. Goldfarb, *supra* note 1, at 611-13 (illustrating the importance of putting would-be defendants and witnesses on notice so they can dedicate their powers of recall to reconstructing the events).

165. United States v. Marion, 404 U.S. 307, 324 (1971) ("[W]e 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."); United States v. Lovasco, 431 U.S. 783, 797 (1977) ("We therefore leave to the lower courts, in the first instance, the task of applying the settled principles . . . to the particular circumstances of individual cases.").

166. *Marion*, 404 U.S. at 324 n.17.

167. *See supra* text accompanying note 112 (illustrating the lone case in this comment where a defendant succeeds in having charges dismissed on the grounds of preindictment delay).

168. *See, e.g.*, Washington v. Calderon, 684 P.2d 1293, 1297 (Wash. 1984) ("A deliberate delay to circumvent the juvenile justice system violates due process."); *In re* Kaleb K., 889 A.2d 1019, 1024-25 (Md. 2006) (holding that actual prejudice by loss of juvenile jurisdiction can be overcome by a good-faith justification by the state).

> [Two-prong preindictment analysis] 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.[169]

Regardless of whether a court employs a balancing test or strict two-prong approach, a defendant is always required to show resulting prejudice from the preindictment delay before the court will take up the issue for consideration, and the expectations of the courts can vary drastically.[170] The gap widens when one compares courts that employ a balancing test because the results and expectations can vary significantly between jurisdictions.[171] As this gap and the length of the delay expand, expecting a criminal defendant to stand trial and present an adequate defense after a certain length of time becomes more unreasonable.[172] The statute of limitations is, again, always the primary safeguard from the bringing of overly stale charges, but where there is no justifiable reason to delay the indictment, there must be a point where the delay offends the interest of fairness and justice.[173]

One item to consider is the lack of any statute of limitations on Class A, Class B, and Class C felonies in the state of South Dakota.[174] While an innocent person may find themselves relieved and wanting to forget all circumstances surrounding a horrifying false accusation, they could actually be forgetting information useful to presenting a compelling defense for murder charges that could resurface many years later.[175] As the Court stated in *Marion*: "[a]t least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences."[176]

This leads to the ethical question known as "Blackstone's Ratio."[177] It is impossible to truly know a person's guilt or innocence in many criminal

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169. Tennessee v. Gray, 917 S.W.2d 668, 673 (Tenn. 1996).

170. *See supra* II.B-C (discussing how requirements and outcomes vary across circuits and states).

171. *Compare supra* II.C.7 (holding to a relatively vague and low standard of prejudice that must be proved), *with* II.C.6 (requiring a showing of "substantial prejudice").

172. Minnesota v. Jurgens, 424 N.W.2d 546, 551 (Minn. Ct. App. 1988) (summarizing what evidence was no longer available to the defendant twenty-two years after the alleged murder took place); United States v. Marion 404 U.S. 307, 323-24 (1971) ("Since appellees rely only on potential prejudice and the passage of time . . . and that event occurred within the statute of limitations.") The court held that potential prejudice will never suffice. *Id.*

173. United States v. Ewell, 383 U.S. 116, 122 (1966).

174. SDCL § 23A-42-1 (2005).

175. *Marion*, 404 U.S. at 331 (Douglas, J., concurring); SDCL § 23A-42-1 (2014).

176. *Marion*, 404 U.S. at 331.

177. Emily Ekins, *Policing in America: Understanding Public Attitudes Towards the Police. Results from a National Survey*, CATO INST. 59 (2016), https://www.cato.org/sites/cato.org/files/survey-reports/pdf/policing-in-america-august-1-2017.pdf (citing Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174-77 (1997)).

proceedings.[178] As a result, "societies must grapple with what type of 'mistakes' they will tolerate more—sometimes punishing or scrutinizing innocent people or sometimes allowing guilty people go free."[179] While legislative intent was clearly to allow prosecution at any time for certain felonies, the court must recognize a point where an unjustifiable or intentional delay undoubtedly harms those innocent people who long ago lost their ability to present a compelling defense.[180] An *innocent* person who stands unaccused and in the dark as to an investigation undoubtedly suffers more prejudice than one that has knowledge of his alleged crimes.[181] As the court looks to the future, it must establish the point at which protection of the innocent prevails over the prosecution of the wicked.[182]

IV. POLICY SUGGESTIONS

At the time the Supreme Court heard *Marion* and *Lovasco*, it may not have imagined that gross negligence or indifference on the part of the government could ever violate due process, yet this is the course many state and federal courts have adopted.[183] In fact, some would contend that the Court never intended to establish the strict two-prong test most courts have used—the Court was simply making a statement of what showing could be made on a due process claim, but it declined to elaborate on the proper standard for each instance of preindictment delay.[184] After the Supreme Court stated the statute of limitations cannot be the sole source of law that protects from the bringing of stale charges, the Court specifically instructed the states to *find* those circumstances that require dismissal.[185] It is

178. *Id.*

179. *Id.*

180. SDCL § 23A-42-1 (2014); United States v. Marion, 404 U.S. 307, 332 (1971); Ekins, *supra* note 177.

181. *Cf. Marion*, 404 U.S. at 330-31 (Douglas, J., concurring).

182. Ekins, *supra* note 177, at 59. The issue of preindictment delay is not unique to the United States, but how the United States plans to approach a defense of preindictment delay when they are contemplating a defendant's rights under extradition proceedings should be taken into consideration. *See generally* Rivera, *supra* note 8 (substantially discussing a defendant's right to a speedy extradition and the consideration U.S. Courts should be giving to Due-Process rights in the proceedings). While extradition is not a criminal proceeding, individuals are entitled to present a defense and thus are afforded the right to due process. *Id.* Many of the same concerns that exist for delaying a criminal indictment apply to extradition proceedings, including the need for recollection of facts and preservation of evidence, and the courts have opted to apply the due process analysis from *Lovasco* to extradition proceedings. *Id.* The Court might decline to address this issue if it ever appears before the South Dakota Supreme Court again, but it is an item for consideration in the broader conversation of due process concerns.

183. *Marion*, 404 U.S. at 331 (Douglas, J., concurring) ("Those [preindictment] delays may result in the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories."); *see also* Cleary, *supra* note 8, at 1069 ("This two-pronged mandatory test is established neither in *Marion* nor *Lovasco*. While the Court in these two cases recognized a defendant's due process protection from pre-indictment delay, the Court did not establish the type of bright-line, two-pronged test that the majority of circuit courts have extracted from the decisions.").

184. Goldfarb, *supra* note 1, at 623 ("Because the appellee had claimed neither actual prejudice nor intentional delay, the Court expressly declined to elaborate a standard. . . . [T]he Court was establishing the due process ceiling to the problem. Several circuits, however, have fixed the ceiling and the floor in identical locations . . . .").

185. *Marion*, 404 U.S. at 324; United States v. Lovasco, 431 U.S. 783, 797 (1977).

time for South Dakota to find and define those circumstances, and the court should adopt a balancing test that includes a cause of action for negligent conduct that results in oppressive delay.

It would first be appropriate to define what type of prejudice would trigger a due process violation. The South Dakota Supreme Court held in *Stock* that loss of concurrent sentencing certainly prejudiced the defendant, but it was not enough to tip the scales when the justification was investigatory delay.[186] The Supreme Court of the United States has held that the death of a witness does not necessarily result in the requisite showing of prejudice and neither does the passing of time; however, courts in general have not always considered how such a delay could prejudice a possibly innocent defendant who had no knowledge that she should be preserving evidence for a defense down the road.[187]

The South Dakota Supreme Court should also adopt a standard that emphasizes the effect of the prejudice on the defendant's constitutionally protected rights instead of the intent of the prosecutor. Judges have fallen into an intent-centered track of analysis in preindictment delay, but as discussed, "[a] negligent failure by the government to ensure a speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause . . . ."[188] The foundations of our criminal justice system are designed to protect individual liberties from oppressive government action and intrusion, so the perception and hardships of those individuals affected should be central to the analysis.[189]

All defendants in South Dakota would benefit from setting a clear standard of what type of prejudice needs to be alleged to trigger a review of preindictment delay. As South Dakota precedent leans towards a balancing test, the need to establish a clear standard for a requisite showing of prejudice is important. A new standard may tip the scale in favor of the defendant when the reason for the delay is not intentional conduct but mere negligence or indifference in prosecuting.[190] It would be helpful for the court to define what types of prejudice might rise to the level of a due-process delay, either alone or in conjunction with each other.[191] Additionally, the court should elaborating on how those instances of prejudice might weigh against negligent versus intentional delays.[192] This would create a roadmap for future defense attorneys, defendants, and other actors in the criminal justice system.

The problem with the strict two-prong approach is that defendants may only find relief where they can provide proof that a prosecutor maliciously and

186. State v. Stock, 361 N.W.2d 280, 286 (S.D. 1985) (Henderson, J., dissenting) ("[H]e very well could have received a concurrent sentence. Therein, alone, lie prejudice.").

187. Goldfarb, *supra* note 1, at 657; *Marion*, 404 U.S. at 331.

188. *Marion*, 404 U.S. at 334 (1971).

189. *Id.*

190. *Stock*, 361 N.W.2d at 282-84 (showing that *Stock* employs a balancing test); *see also supra* II.C (examining how courts in other states generally balance prejudice against reason for the delay).

191. *See supra* II.B-C (illustrating the various approaches the court could take on the issue).

192. *Id.*

intentionally delayed their proceedings to gain an advantage over them at trial.[193] Showing actual prejudice has proven to be a nearly insurmountable burden on its own, and proving the subjective intent of the prosecution is nearly impossible.[194] Yet, where the state has presented no justifiable reason for a lengthy and prejudicial delay, perhaps resulting from extreme and gross negligence or indifference, the defendant will be the party to suffer from the mistake.[195] Justice would favor a system where the party responsible for an improper delay suffers the consequences.[196]

While a large number of circuits and states adopted the strict two-prong approach, as time has moved on, many states have begun to recognize the problems associated with such a test.[197] A strict two-prong test requires intentional delay to trigger protection for a defendant who faces an unreasonable, unjustified, and oppressing delay, and many states have begun to recognize the impracticability of requiring such a high burden of proof of a defendant.[198] This standard provides an unfairly strong shield for prosecutorial misconduct and incompetence at the defendant's expense, and South Dakota has the opportunity to establish better standards that favor justice over uncertainty.

Given the existing state of the law, a balancing test seems to be the most likely and most appropriate path moving forward.[199] Though *Stock* was never a clear standard, that is likely because it was adopted before many states and circuits landed on their current approaches.[200]

A balancing test such as the one existing in Montana would consider: (1) the prejudice suffered by the defendant; (2) the prosecution's justification for the delay; and (3) the absolute length and necessity of the delay and balance them to determine if due process was denied.[201] This open and transparent balancing test would allow substantial discretion to the court to apply the law to each unique set of circumstances while still respecting the legislative intent behind our state statute of limitations.[202] This would require the state to justify all delays resulting in any prejudice, thereby safeguarding due process while also allowing great prosecutorial discretion so long as it does not offend the right to a fair trial.[203] The

193. United States v. Crouch, 84 F.3d 1497, 1500 (5th Cir. 1996).

194. *See supra* text accompanying notes 161-163 (explaining the problem with an unclear standard for the required showing of prejudice).

195. *Id.*

196. Goldfarb, *supra* note 1, at 647.

197. *See supra* II.A-C (discussing the different approaches taken by states and how the procedural history has evolved in those jurisdictions).

198. *Supra* II.A-C.

199. *See generally supra* II.C (analyzing the state of the law in South Dakota).

200. *See supra* II.B-C (illustrating that *Stock* was decided many years prior to many of the standing decisions around the country).

201. *See supra* text accompanying notes 108-113, 119-122 (identifying Iowa and Montana's approaches).

202. *Id. See generally*, SDCL §§ 23A-42-1 to -5 (2014); *State v. Stock*, 361 N.W.2d 280, 284 (S.D. 1985) (showing the court's concern with allowing prosecutorial discretion and flexibility to the state when it chooses to bring charges).

203. Montana v. Krinitt, 823 P.2d 848, 851-54 (Mont. 1991).

court would be able to consider whether such a delay was proportional to the State's reasoning and also protect those defendants who no longer have the ability to present a compelling defense due to the resulting prejudice.

The court might also consider defining these terms with more specificity but refraining from establishing a formal test as it did in *Stock*.[204] As the law stands, the court could engage any test it sees fit. If the requisite burdens for both the prosecution and the defense could be established, the court could leave discretion to the trial courts to apply those standards to each unique set of facts.

Regardless of the path the court ultimately takes, it is important to revisit the issue of prejudice resulting from preindictment delay, which has not been heard by the South Dakota Supreme Court in thirty-five years.[205] Trial courts would benefit from direction from the South Dakota Supreme Court, and the time is right to flesh out the circumstances that would require dismissal after an unjustifiable preindictment delay.[206]

V. CONCLUSION

Preindictment delay is an issue ripe for adjudication and reconsideration by the South Dakota Supreme Court. *Stock*, even in its infancy, was a vague standard with little guidance for trial courts and would-be defendants looking to find relief under the defense of unreasonable preindictment delay. The South Dakota Supreme Court has the opportunity to create a clear and fair standard that balances the prejudice suffered by a defendant against the justification and reason for the preindictment delay. The issues of Due Process and substantial fairness are, and will continue to be, moving targets. However, in this instance, South Dakota is in a position to pin down those Constitutional protections that we hold dear and carve out this area of the law accordingly.

204. *Stock*, 361 N.W.2d at 282-83 (showing the court left a vague standard).

205. *Id.* at 284. *Stock* was decided in 1985. *Id.*

206. United States v. Marion, 404 U.S. 307, 324 (1971); United States v. Lovasco, 431 U.S.783, 797 (1977).

Appendix A: Binding Precedent in Each Circuit

Circuit	Analysis	Applicable Caselaw
First Circuit	An indictment brought within the applicable statute of limitation is, constitutionally speaking, late only if the delay significantly prejudices the defendant and the government purposely delayed the indictment to gain an unfair or tactical advantage at trial over the accused, or for other bad-faith purposes.	*United States v. Crooks*, 766 F.2d 7, 11 (1st Cir. 1985).
Second Circuit	While there is no bright-line rule in the Second Circuit, the Court ruled that dismissal is appropriate when there has been a showing of "substantial prejudice" and that the government improperly delayed prosecution in order to gain a tactical advantage. This is closely in line with other circuits and the "strict two-prong" approach.	*United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987).
Third Circuit	To obtain a dismissal on the grounds of preindictment delay under the Due Process Clause, a defendant must provide evidence (1) that the government intentionally delayed bringing the indictment in order to gain some advantage over him; and (2) that this intentional delay caused "actual prejudice" to his case.	*United States v. Ismaili*, 828 F.2d 153, 167 (3d Cir. 1987).
Fourth Circuit	The Fourth Circuit has declined to outline a black-letter rule and opted for a case-by-case balancing test. The burden is on the defendant to prove actual prejudice. And the court must balance the prejudice suffered with the government's justification for the delay and determine if the delay "violates the fundamental conceptions of justice" or "the community's sense of fair play and decency."	*Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990) (quoting *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403-04 (4th Cir. 1985)).
Fifth Circuit	The Fifth Circuit adopts a strict two-prong approach that requires: (1) proof of actual and substantial prejudice; and (2) the prosecution must have purposely delayed the indictment to gain a tactical advantage or for some other nefarious purpose.	*United States v. Crouch*, 84 F.3d 1497, 1500 (5th Cir. 1996).

Sixth Circuit	Preindictment delay violates due process if the defendant can show: (1) his right to a fair trial was substantially prejudiced; and (2) the delay was intentional in an effort to gain a tactical advantage of the accused.	*United States v. Thomas*, 404 F. App'x. 958, 961 (6th Cir. 2010).
Seventh Circuit	The defendant bears the burden of demonstrating that the delay caused actual and substantial prejudice to his right to a fair trial. The burden then shifts to the government to show that the delay was not used to gain a tactical advantage or for some other nefarious purpose. The court then balances the government's reasons and the suffered prejudice to determine if the defendant was denied due process.	*United States v. Hagler*, 700 F.3d 1091, 1099 (7th Cir. 2012).
Eighth Circuit	The defendant must establish: (1) that the delay resulted in actual and substantial prejudice to his defense; and (2) that the government's motive for the delay was to gain an advantage at trial or to harass him.	*United States v. Jackson*, 446 F.3d 847, 849 (8th Cir. 2006).
Ninth Circuit	The defendant need not show intent or reckless behavior to succeed on a claim of preindictment delay so long as the prejudice suffered outweighs the government's reason for the delay. Negligent conduct may tip the scale in favor of a defendant that suffers substantial prejudice.	*United States v. Moran*, 759 F.2d 777, 781-82 (9th Cir. 1985).
Tenth Circuit	The burden rests with the defense to show both actual prejudice and that the delay was purposeful in order to gain a tactical advantage.	*United States v. Engstrom*, 965 F.2d 836, 839 (10th Cir. 1992).
Eleventh Circuit	The defendant must show that the reason for the delay violates our "fundamental concepts of justice." He must also show that his defense suffered substantial prejudice and that the delay was a deliberate action by the government to gain a tactical advantage.	*United States v. Hayes*, 40 F.3d 362, 365 (11th Cir. 1994) (quoting *United States v. Lovasco*, 431 U.S. 783, 790-91 (1977)). *But see United States v. Olivia*, 909 F.3d 1292, 1301-02 (11th Cir. 2018) (balancing negligence on the part of the government against the length of the delay).

Appendix B: Binding State Precedent

State	Analysis	Applicable Caselaw
Alabama	Strict two-prong. While the state supreme court has not yet ruled on the issue, most of the state of Alabama adopts the strict two-prong approach. A defendant must show that the delay caused actual prejudice to his defense and that the delay was deliberate on the part of the government to gain a tactical advantage.	*Craft v. Alabama*, 90 So. 3d 197, 219-20 (Ala. Crim. App. 2011) (quoting *Alabama v. Prince*, 581 So. 2d 874, 878 (Ala. Crim. App. 1991)).
Alaska	Progressive two-prong. Alaska requires only a showing of actual prejudice and unreasonable delay on the part of the government. The inference is that once a defendant can prove actual prejudice, any finding that the delay was unreasonable will warrant dismissal of the charges.	*Alaska v. Wright*, 404 P.3d 166, 172 (Alaska 2017); *see also Alaska v. Mouser*, 806 P.3d 330, 336 (Alaska Ct. App. 1991) ("The prohibition against preindictment delay protects the accused from improper or unreasonable conduct by the government in the bringing of a criminal charge. Although this prohibition can operate to preclude conviction after a relatively short period of delay, it is triggered only if the accused can demonstrate that the delay in filing charges was unreasonable and resulted in actual prejudice.").
Arizona	Strict two-prong. "A person claiming a due process violation must show that the prosecution intentionally slowed proceedings to gain a tactical advantage or to harass the defendant, and that actual prejudice resulted."	*Arizona v. Lacy*, 929 P.2d 1288, 1294 (Ariz. 1996) (citing *Arizona v. Broughton*, 752 P.2d 483, 486 (Ariz. 1988)).

Arkansas	Strict two-prong. The Due Process Clause of the Fifth Amendment only requires dismissal if the defendant can show that the delay caused him substantial prejudice and that such prejudice was an intentional device used to gain a tactical delay at trial.	*Watson v. Arkansas*, 188 S.W.3d 921, 928 (Ark. 2004).
California	Balancing test. After a defendant makes the requisite showing of prejudice, the reason for the delay is balanced against the prejudice suffered—no matter if the delay is incurred negligently or intentionally, any unreasonable delay will require dismissal.	*California v. Nelson*, 185 P.3d 49, 55-58 (Cal. 2008); *see also*, *California v. Cowan*, 236 P.3d 1074, 1101 (Cal. 2010) ("[N]egligent, as wells as purposeful, delay in bring charges may, when accompanied by a showing of prejudice, violate due process.").
Colorado	Unclear. Some caselaw was decided before *Lovasco*, but it appears to be good law. Early caselaw suggests negligent conduct may give rise to a dismissal, while the later cases suggest only malicious conduct justifies dismissal.	*Compare Colorado v. Small*, 631 P.2d 148, 157 (Colo. 1981), *with Colorado v. McClure*, 756 P.2d 1008, 1012-13 (Colo. 1988).
Connecticut	Strict two-prong. A defendant must show that actual and substantial prejudice resulted from the delay and that that the delay was wholly unjustifiable.	*Connecticut v. Roger B.*, 999 A.2d 752, 757 (Conn. 2010) (quoting *Connecticut v. Morrill*, 498 A.2d 76, 86 (Conn. 1985)).
Delaware	Unestablished. The Court briefly mentions the issue of preindictment delay but only mentions a requirement of actual and substantial prejudice.	*Ellington v. Delaware*, 557 A.2d 752, 752 (Del. 1990).
Florida	Balancing test. "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."	*Rogers v. Florida*, 511 So. 2d 526, 531 (Fla. 1987); *see also Overton v. Florida*, 976 So. 2d 536, 560 (Fla. 2007) (following the balancing approach set forth in *Rogers*).

Georgia	Strict two-prong. There must be a showing of inordinate delay that caused actual prejudice to the defendant and was a deliberate device intended to gain a tactical advantage.	*Jackson v. Georgia*, 614 S.E.2d 781, 783 (Ga. 2005) (citing *Wooten v. Georgia*, 426 S.E.2d 852, 855 (Ga. 2005); *see also Manley v. Georgia*, 640 S.E.2d 9, 10 (Ga. 2007) (following a strict two-prong approach).
Hawaii	Balancing test. "[W]hen a defendant alleges a violation of due process based on preindictment delay, the court must employ a balancing test, considering actual substantial prejudice to the defendant against the reasons asserted for the delay."	*Hawaii v. Keliiheleua*, 95 P.3d 605, 610 (Haw. 2004) (quoting *Hawaii v. Higa*, 74 P.3d 6, 10 (Haw. 2003)).
Idaho	Strict two-prong. The burden lies with the defendant to show that his right to a fair trial was significantly prejudiced by the delay, which was an intentional device to gain an advantage at trial over the accused.	*Idaho v. Kruse*, 606 P.2d 981, 983 (Idaho 1980) (citing *Idaho v. Murphy*, 584 P.2d 1236, 1239 (Idaho 1978)).
Illinois	Balancing test. "We require the trial court to engage in this inquiry by balancing the actual and substantial prejudice to the defendant with the reasonableness of or reasons for the delay."	*Illinois v. Lawson*, 367 N.E.2d 1244, 1249 (Ill. 1977).
Indiana	Strict two-prong. While the Supreme Court has not been so explicit as some states in labeling the test, the court clearly requires some showing of actual prejudice and bad faith on the part of the government. The Indiana Appellate Court has been slightly more clear than the state supreme court.	*Crawford v. Indiana*, 669 N.E.2d 141, 147 (Ind. 1996). *But see Marshal v. Indiana,* 832 N.E.2d 615, 626 (Ind. Ct. App. 2005) (holding that a defendant must establish actual and substantial prejudice, in addition to bad faith on the part of the government, to succeed on a claim of preindictment delay).

Iowa	Progressive two-prong. "To 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."	*Iowa v. Trompeter*, 555 N.W.2d 468, 470 (Iowa 1996).
Kansas	Strict two-prong. "Two questions are considered in questioning whether there has been an impermissible encroachment on defendant's due process rights: (1) Has the delay prejudiced the accused's ability to defend, and (2) was the delay a tactical device to gain advantage over the defendant?"	*Kansas v. Crume*, 22 P.3d 1057, 1062 (Kan. 2001).
Kentucky	Strict two-prong. "Dismissal is required only where there is a showing of both substantial prejudice and intentional delay to gain a tactical advantage."	*Kirk v. Kentucky*, 6 S.W.3d, 823, 826 (Ky. 1999) (citing *Reed v. Kentucky*, 738 S.W.2d 818, 820 (Ky. 1987)); *see also Walker v. Kentucky*, No. 2006-SC-000480-MR, 2007 Ky. WL 2404508, at *2-3 (Ky. Aug. 23, 2007) (applying the strict two-prong test).
Louisiana	Balancing test. "[T]he proper approach in determining whether an accused has been denied due process of law preindictment . . . or pre-arrest delay is to measure the government's justifications for the delay against the degree of prejudice suffered by the accused."	*Louisiana v. Clark*, 220 So. 3d 583, 653 (La. 2016) (quoting *Louisiana v. Schrader*, 518 So. 2d 1024, 1028 (La. 1988)), *vacated on other grounds*, 138 S.Ct. 2671 (2018).
Maine	Balancing test. After the accused has demonstrated actual and unjustifiable prejudice, the court will inquire as to the reason for the delay, and balance the two.	*Maine v. Rippy*, 626 A.2d 334, 338 (Me. 1993).

Maryland	Strict two-prong. A defendant asserting a preindictment delay must establish actual prejudice and that the delay was intentional on the part of the state to gain a tactical advantage at trial.	*Clark v. Maryland*, 774 A.2d.1136, 1156 (Md. 2001); *see also Glover v. Maryland*, 792 A.2d 1160, 1172 n.12 (Md. 2002) (referencing *Clark* in a lengthy analysis of delay).
Massachusetts	Strict two-prong. "If, in addition to causing prejudice, delay has been intentionally undertaken to gain a tactical advantage over the accused or has been incurred in reckless disregard of known risks to the putative defendant's ability to mount a defense, dismissal is appropriate." While the court's intent here was to follow the strict-two prong approach, the court does make reference to the possibility of reckless or negligent delays requiring dismissal under the correct circumstances.	*Massachusetts v. Imbruglia*, 387 N.E.2d 559, 565 (Mass. 1979); *Massachusetts v. Dame*, 45 N.E. 3d 69, 77 (Mass. 2016).
Michigan	Strict two-prong. While the state supreme court has declined to take up the issue, the appellate courts have moved towards the strict two-prong approach. "A prearrest delay that causes substantial prejudice to a defendant's right to a fair trial and that was used to gain tactical advantage violates the constitutional right to due process."	*Michigan v. Woolfolk*, 848 N.W.2d 169, 172 (Mich. Ct. App. 2014); *see also Michigan v. Mercer*, 752 N.W.2d 470, 470 (Mich. 2008) (declining to rule on the issue of preindictment delay).

Minnesota	Unclear. While some caselaw adopts a looser standard for the second prong—requiring only "improper state purpose"— some hold tight to the strict two-prong approach.	*Minnesota v. Lussier*, 695 N.W.2d 651, 655 (Minn. 2005) (adopting the "improper state motive" threshold). *See also, Minnesota v. Pedraza*, No. A14-0539, 2015 Minn. Ct. App. LEXIS 258, at *10 (Minn. Ct. App. Mar. 23, 2015) (same). *But see Minnesota v. Vollmer*, No. C9-00-1118, 2001 Minn. Ct. App. LEXIS 374 at *4, *7 (Minn. Ct. App. Apr. 10, 2001) (adopting language from another Minnesota Supreme Court case requiring the appellant to prove "the delay was used by the prosecution to gain tactical advantage at trial" (quoting *Minnesota v. Hanson* 285 N.W.2d 487, 489 (Minn. 1979))).
Mississippi	Strict two-prong. "[The] Court adopted the two-prong test in *Hooker*, which held that in order for a defendant to prevail on such a claim there must be a showing that (1) the preindictment delay prejudiced that defendant, and (2) the delay was an intentional device used by the government to obtain a tactical advantage over the accused."	*Killen v. Mississippi*, 958 So. 2d 172, 189 (Miss. 2007) (citing *Hooker v. Mississippi*, 516 So. 2d 1349, 1351 (Miss. 1987)); *Roberts v. Mississippi*, 234 So. 3d 1251, 1268 (Miss. 2017) (applying the strict two-prong test); *Robinson v. Mississippi*, 247 So. 3d 1212, 1233-34 (Miss. 2018) (same).

Missouri	Strict two-prong. "To be entitled to dismissal of an information for preindictment delay, a defendant must show two things: (1) that the preindictment delay caused substantial prejudice to his right to a fair trial, *and* (2) 'that the delay was an intentional device to gain a tactical advantage over the accused.'"	*Missouri v. Scott*, 621 S.W.2d 915, 917 (Mo. 1981) (citing *United States v. Marion*, 404 U.S. 307, 323 (1971)).
Montana	Progressive balancing test. "Upon a showing that the defendant suffered actual and substantial prejudice from the delay, the court must then weigh the justification for the delay, as well as the absolute length of the delay, to determine if due process has been denied." The Court notes that negligent conduct would not be weighed as heavily in the balancing test as intentional conduct.	*Montana v. Krinitt*, 823 P.2d 848, 849 (Mont. 1991) (citing *United States v. Mays*, 549 F.2d 670, 677-78 (9th Cir. 1977)).
Nebraska	Strict two-prong. To succeed on a preindictment delay claim, the defendant must establish (1) substantial prejudice to the defendant's right to a fair trial and (2) the delay was an intentional device to gain an unfair tactical advantage over the defendant.	*Nebraska v. Glazebrook*, 803 N.W.2d 767, 777 (Neb. 2011).
Nevada	Strict two-prong. To succeed on a claim of preindictment delay, the accused must demonstrate actual and substantial prejudice suffered, as well as well as the intent of the government to gain a tactical advantage over the accused through the delay.	*Wyman v. Nevada*, 217 P.3d 572, 578-79 (Nev. 2009); *see also Coleman v. Nevada*, No. 63440, 2014 Nev. WL 1424521, at *2 (Nev. Apr. 10, 2009) (holding that where a defendant has not shown substantial delay and bad faith on the part of the government, his burden has not been met).

New Hampshire	Balancing test. "'[T]he defendant must initially show that actual prejudice has resulted from a delay. Once such a showing has been made, the trial court must then balance the resulting prejudice against the reasonableness of the delay.'"	*New Hampshire v. Knickerbocker*, 880 A.2d 419, 423 (N.H. 2005) (alteration in original) (quoting *New Hampshire v. Philibotte,* 459 A.2d 257, 277 (N.H. 1983).
New Jersey	Strict two-prong. In 2006, the state supreme court adopted the strict two-prong approach, requiring that it be shown that the delay was an intentional device to gain a tactical advantage at trial that caused actual prejudice to his defense.	*New Jersey v. Townsend*, 897 A.2d 316, 325 (N.J. 2006). Note that this case has a lengthy subsequent appellate history extending for ten years, but the Court has not since touched the issue of preindictment delay. *See generally New Jersey v. Townsend*, 207 A.3d 770 (N.J. 2019).
New Mexico	Strict two-prong. "We adopt a two-prong test requiring a defendant to prove prejudice and an intentional delay by the state to gain a tactical advantage. We believe this test best comports with the position of the United States Supreme Court as articulated in *Lovasco* and *Marion*."	*Gonzales v. New Mexico*, 805 P.2d 630, 632 (N.M. 1991; *New Mexico v. Morales*, 236 P.3d 24, 31 (N.M. 2010) (following the strict two-prong approach).
New York	Unclear. New York has rejected the strict two-prong approach, but the factors the courts use keep the test from fitting neatly into either category: "[t]hose factors are not simply the extent of the delay but also the reasons for the delay, the nature of the underlying charge, whether there has been an extended period of pretrial incarceration, and whether there is any indication that the defense has been impaired by reason of the delay."	*New York v. Vernace*, 756 N.E.2d 66, 67 (N.Y. 2001) (citing *New York v. Taranovich*, 335 N.E.2d 303, 305 (N.Y. 1975)).

North Carolina	Strict two-prong. A defendant must show that the delay actually prejudiced the conduct of his defense and that it was engaged in by the government for no purpose other than to gain a tactical advantage over the accused.	*North Carolina v. Swann*, 370 S.E.2d 533, 537 (N.C. 1988).
North Dakota	Unclear. North Dakota has only scarcely addressed the topic and only cites to *Lovasco* in saying "[a] due process inquiry considers 'the reasons for the delay, as well as the prejudice to the accused.'"	*North Dakota v. Denny*, 350 N.W.2d 25, 28 (N.D. 1984) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).
Ohio	Balancing test. "Once a defendant produces evidence of actual prejudice, the burden shifts to the state to produce evidence of a justifiable reason for the delay." The courts must then balance the two.	*Ohio v. Jones*, 69 N.E.3d 688, 692 (Ohio 2016).
Oklahoma	Unclear. The state court of criminal appeals cited to *Marion*, stating that it is necessary to both identify the prejudice suffered and the reason for the delay. It continues its analysis even after it determines that minimal prejudice was suffered, and determines whether there was a valid, investigative reason for the delay. This suggests that the court might prefer a balancing test but could still be applying a less structured version of the strict two-prong test.	*Fritz v. Oklahoma*, 811 P.2d 1353, 1366-67 (Okla. Cr. App. 1991).
Oregon	Balancing test. "[P]reindictment delay violates due process only when (1) the government intentionally delayed for tactical advantage and (2) that delay substantially prejudiced the defendant."	*Oregon v. Stokes*, 248 P.3d 953, 960 (Or. 2011).

Pennsylvania	Strict two-prong. The court required a showing of actual prejudice to the defense and that the conduct was either in bad faith or *reckless*; here, the court adds recklessness to the list of improper justifications for delay.	*Pennsylvania v. Scher*, 803 A.2d 1204, 1221 (Pa. 2002).
Rhode Island	Strict two-prong. "[I]n order for defendants to prevail on a due-process claim, they must demonstrate not only that the preindictment delay caused them actual prejudice but additionally that the prosecution intended such delay in order to gain some tactical advantage."	*Rhode Island v. Vanasse*, 593 A.2d 58, 64 (R.I. 1991).
South Carolina	Balancing test. First, the defendant must prove actual and substantial prejudice, then the Court should consider the reason for the delay and balance it against the prejudice suffered.	*South Carolina v. Lee*, 653 S.E.2d 259, 260 (S.C. 2007).
South Dakota	Unclear. The Court did not fully discuss which test it would apply since it was found that the delay was caused by a valid, ongoing investigation.	*South Dakota v. Stock*, 361 N.W.2d 280, 282-83 (S.D. 1985).
Tennessee	Strict-two prong. While the state Supreme Court has broken down two prongs into three over time, the concept is most accurately mirrored by the strict two prong approach; however, the Court has made exceptions to consider special circumstances in each case.	*Tennessee v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996). *But see Tennessee v. Utley*, 956 S.W.2d 489, 495 (Tenn. 1997) ("Thus, given the unique facts in *Gray* . . . the trial court must consider only the length of the delay, the reason for the delay, and the degree of prejudice to the accused. We indicated, however, that in other cases involving a pre-arrest delay, the due process inquiry continues to be guided by *Marion*.").

Texas	Strict two-prong. The state Supreme Court has not directly addressed the issue, but the court of criminal appeals has settled on a two-prong test: (1) prejudice to one's ability to defend themselves; and (2) proof of some bad faith purpose on the part of the state.	*Texas v. Krizan-Wilson*, 354 S.W.3d 808, 817-18 (Tex. Crim. App. 2011).
Utah	Strict two-prong. A defendant must show both actual prejudice and bad faith (on the part of the government).	*Utah v. Hales*, 152 P.3d 321, 333 (Utah 2007).
Vermont	Strict two-prong. In Vermont, a court should consider both the actual prejudice suffered, as well as the reason for the delay.	*Vermont v. King*, 165 A.3d 107, 112-13 (Vt. 2016).
Virginia	Strict two-prong. "[T]o gain dismissal of criminal charges because of pre-arrest or preindictment delay, a defendant must establish that '(1) the prosecutor intentionally delayed indicting [the defendant] to gain a tactical advantage *and* (2) the defendant incurred actual prejudice as a result of the delay.'"	*Morrisette v. Virginia*, 569 S.E.2d 47, 52 (Va. 2002) (quoting *United States v. Amuny*, 767 F.2d 1113, 1119 (5th Cir. 1985)).
Washington	Balancing test. "The defendant must show that he was prejudiced by the delay and, in making its due process inquiry, the court must consider the reasons for the delay as well as the prejudice to the accused."	*Washington v. Oppelt*, 257 P.3d 653, 656 (Wash. 2011) (quoting *Washington v. Calderon*, 684 P.2d 1293, 1296 (Wash. 1984)).
West Virginia	Balancing test. "[T]he initial burden is on the defendant to show that actual prejudice has resulted from the delay. Once that showing has been made, the trial court must then balance the resulting prejudice against the reasonableness of the delay."	*West Virginia ex rel. Knotts* v. *Facemire*, 678 S.E.2d 847, 856 (W. Va. 2009).

Wisconsin	Strict two-prong. "[A] defendant claiming a due process violation based on preindictment delay must show: '(1) actual prejudice as a result of delay; and (2) the delay arose out of an improper purpose, [such as to] give the State a tactical advantage over the defendant."'	*Wisconsin v. McGuire*, 786 N.W.2d 227, 237 (Wis. 2010) (quoting *Wisconsin v. MacArthur*, 750 N.W.2d 910, 922 (Wis. 2008)).
Wyoming	Strict two-prong. As there are no statues of limitations in Wyoming, the state Supreme Court requires a showing of "substantial prejudice to [appellant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."	*Remmick v. Wyoming*, 275 P.3d 467, 470-71 (Wyo. 2012) (quoting *Story v. Wyoming*, 721 P.2d 1020, 1027 (Wyo. 1986)).

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