

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN GRAHAM, a.k.a.
JOHN BOY PATTON, and
VINE RICHARD MARSHALL, a.k.a.
RICHARD VINE MARSHALL, a.k.a.
DICK MARSHALL,
Defendants.

Case No. CR 08-50079

DEFENDANT MARSHALL'S
MEMORANDUM OF LAW
IN SUPPORT OF HIS
MOTION TO DISMISS DUE TO
PRE-ACCUSATORY DELAY

BACKGROUND SUMMARY

In 2004, the government indicted Arlo Looking Cloud and John Graham for the murder of Anna Mae Aquash. The government has never sought an indictment against Theda Clarke, who is alleged to have directed Looking Cloud and Graham in the killing of Aquash and to have driven the victim to her place of execution in December 1975. Looking Cloud was convicted of murder and sentenced to life in prison in 2004. In the summer of 2008, after his conviction had been affirmed by the Court of Appeals, Looking Cloud entered into a cooperation agreement with the government. In 2008, Looking Cloud told law enforcement investigators that he saw Richard Marshall give a handgun to Theda Clarke in the bedroom of his home in Allen, South Dakota in December 1975. Based on Looking Cloud's accusation, the government contends Richard Marshall aided and abetted Looking Cloud, Clarke and Graham in the murder of Aquash. Prosecutors sought an indictment against Richard Marshall for first degree murder in the summer of 2008—33 years after the crime charged.

Defendant Marshall submits that in an evidentiary hearing, he can establish that the pre-indictment delay of more than three decades has caused actual and substantial impairment of his ability to present a defense and that reckless delay by the government has resulted in an unfair

strategic advantage over the Defendant.

Marshall moves to dismiss on the grounds that he has been denied his constitutional right to fundamental fairness and due process of law by the pre-accusation delay of a third of a century between crime and indictment.

I

THE CONSTITUTION PROVIDES FOR PROTECTION AGAINST PREJUDICIAL PRE-ACCUSATORY DELAY

The Fifth Amendment's Due Process Clause protects a defendant from unreasonable pre-indictment delay. United States v. Marion, 404 US 307, 92 S.Ct. 455 (1971); United States v. Gladney, 474 F.3d 1027 (8th Cir. 2007).

If a pre-accusation delay by the government has harmed the defendant by impairing his ability to defend himself against the charge, he may move for a dismissal on the grounds that he has been denied the fundamental fairness that is the essential guarantee of the Due Process clause. Courts have held that to prevail on such a claim, a defendant must show that he has suffered actual prejudice from the delay and that the prosecution intentionally or recklessly delayed the indictment for strategic advantage or to harass the defendant. United States v. Taylor, 603 F.2d 732, 735 (8th Cir. 1979). In Taylor, Gladney, and all the other cases in which the Eighth Circuit Court of Appeals has considered this issue, the crimes charged were crimes that had a statute of limitations and the Court based its ruling on its legal determination that the statute of limitations, rather than the Due Process Clause, was the primary source of protection of citizens from overly stale prosecutions.

The seminal case on the right of a defendant for dismissal as a result of pre-indictment delay is United States v. Lovasco, 431 US 783, 97 S.Ct. 2044 (1977). In that case, the Court considered the circumstances in which the Constitution requires that an indictment be dismissed because of delay between the commission of the offense and the initiation of a prosecution.

In Lovasco, the Court reversed a dismissal of an indictment charging illegal firearms crimes where there had been 18 months of pre-indictment delay. In its decision, the Court re-affirmed the law set forth in United States v. Marion, 404 US 307, 92 S.Ct. 455 (1971), that because statutes of limitations provide "the primary guarantee, against bringing overly stale

criminal charges”, Marion at 320, the Due Process Clause has a limited role in protecting the defendant against oppressive delay. The Court stated that “Marion makes clear that proof of prejudice is a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reason for the delay as well as the prejudice to the accused.” 97 S.Ct. at 2048-49.

Due Process would be violated where pre-accusatory delay causes real prejudice to the defendant’s ability to defend against the accusation and the government has delayed the indictment to gain a tactical advantage over the accused. Due Process would also be violated where there is prejudice and the government’s delay was in reckless disregard for the risk of prejudice caused by delay. In Lovasco, the Court quoted with approval a concession made by the government: “A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.” Lovasco, footnote 17; see also United States v. Jackson, 446 F.3d 847 (8th Cir. 2006).

The Court of Appeals for the Eighth Circuit has held that to prove a violation of the Due Process Clause’s protection against pre-indictment delay, the defendant must establish that (1) the delay resulted in actual and substantial prejudice to the presentation of the defense and (2) the government intentionally delayed his indictment either to gain a tactical advantage or to harass him. United States v. Haskell, 468 F.3d 1064 (8th Cir. 2006). The defendant has the burden of establishing actual, as opposed to speculative, prejudice; to prove actual prejudice, a defendant must specifically identify witnesses or documents lost during delay properly attributable to the government. Sturdy at 453. If the defendant establishes actual prejudice, the Court will then inquire into the government’s reason for the delay. United States v. Sturdy, 207 F.3d 448 (8th Cir. 2000).

The Lovasco case did not impose a burden on the defendant to prove that the government intentionally delayed the prosecution for tactical advantage; only that the Court should inquire into the reasons for the delay in bringing charges, if the defendant proves delay caused prejudice.

II

DEFENDANT CAN ESTABLISH PRE-ACCUSATORY DELAY HAS CAUSED SUBSTANTIAL PREJUDICE TO HIS ABILITY TO PRESENT A DEFENSE AND TO CONFRONT HIS ACCUSERS.

As a result of 33 years of pre-indictment delay, defendant Marshall has lost two witnesses who could have directly supported the testimony given by Richard Marshall's ex-wife in Arlo Looking Cloud's trial: that there were no guns in the Marshalls' home in Allen on the night that Theda Clarke, Arlo Looking Cloud and John Graham went to their home with Anna Mae Aquash.

If the government had brought this accusation within the first 17 years after the crime, before the witness died in 1992, defendant Marshall's mother Cora Galligo would have testified that the defendant had a strong motive *not* to have any firearms in his home: he was out on bond on a state court felony case, and as a condition of his release, he was prohibited from having any firearms in his possession or in his home; that the defendant's stepfather, Joseph Galligo, took possession of all firearms in Richard Marshall's home—a rifle and a shotgun—in the spring of 1975 to comply with the Court's bond conditions; and that there were no guns in the Marshall home in December 1975. Joseph Galligo, who died in the early 1980s, would have testified to the same facts.

The government's case, for all practical purposes, rests entirely on the credibility of a cooperating witness, Arlo Looking Cloud, who is serving a life sentence for Aquash's murder. Looking Cloud has other credibility issues: he has a lifelong history of drug abuse, alcohol abuse and chronic criminality, and he gave numerous prior accounts of his crime that are inconsistent with the one he is now telling the government. Given the inherent problems with Looking Cloud's credibility, the testimony of these two witnesses, Cora and Joseph Galligo, could well have established a reasonable doubt as to the veracity of Arlo Looking Cloud's claim that he saw the defendant hand a gun and a box of shells to Theda Clarke in his home in December 1975. Given the factual context of the case, the prejudice caused to the accused by the loss of these witnesses' testimony is real and substantial.

Moreover, the defendant should be given an opportunity to offer proof in a hearing of

specific instances wherein he has lost potentially exculpatory evidence as a result of the inevitable deterioration of witnesses' memories. For example, Looking Cloud was interviewed in the presence of his attorney by law enforcement officers in November, 1994 about the kidnapping and murder of Aquash. One of the questioners asked him when he first became aware that someone had a gun; he was specifically asked if the first time he knew that someone had a gun or saw the gun was when Graham pulled it out and shot Aquash. Looking Cloud answered the question: he started to say he thought it was "after..."—then the tape recording stopped, interrupting his answer, and the rest of his answer was not recorded. There were about six witnesses present during that interview, and in all likelihood, none of them will remember the answer that Looking Cloud gave to that question 14 years ago. If, as seems clear from the context and language of the question and his partial answer, Looking Cloud answered the question by saying that the first time he saw a gun that night was "after" Graham pulled it out and shot Aquash, then his prior statement completely contradicts his claim that he saw Richard Marshall give a gun to Theda Clarke earlier that night.

Defendant Marshall contends that he can present evidence that the delay of a third of a century between the crime and the initiation of the prosecution, and the natural and foreseeable deterioration of memory, has resulted in loss of testimony about critical statements, conversations and events, and that as a result, the defendant has lost valuable exculpatory evidence that could have seriously impeached and discredited the testimony that would be given by prosecution witnesses, particularly Arlo Looking Cloud.

The defendant can put forth evidence that sometime during the last seven last years, at least one critical witness who would discredit Looking Cloud became unavailable as a witness, due to the infirmities of age: Theda Clarke.

In a hearing, Richard Marshall can demonstrate with concrete and definitive proof that the government's 33 year delay in bringing an accusation against him has irrevocably impaired his right and his ability to present evidence to defend himself against the government's accusation.

III

THE GOVERNMENT'S DELAY OF 33 YEARS EVIDENCED A RECKLESS DISREGARD FOR THE LIKELIHOOD OF IRREPARABLE PREJUDICE TO THE DEFENDANT'S ABILITY TO DEFEND HIMSELF AGAINST THE CHARGE

The cases cited stand for the proposition that when a defendant is indicted before an applicable statute of limitations has run, to prevail on a motion to dismiss for pre-indictment delay, a defendant must prove two things: (1) prejudice and (2) either intentional bad faith or reckless disregard by the government of a foreseeable risk of substantial prejudice.

Here, the defendant submits that he can adduce evidence in a hearing to show actual prejudice and reckless disregard for a foreseeable risk of prejudice caused by pre-indictment delay, which has resulted in giving the government an unfair tactical advantage over the defendant.

The defendant can offer evidence that prosecution witness Serle Chapman acted as a cooperating witness during the investigation of this case. In 2001, Chapman, while operating under a pretext that he was researching a book on the American Indian Movement (AIM), interviewed many American Indians, including Richard Marshall, who had been involved with the Movement in the 1970s. Unbeknownst to the Indian people he was interviewing, Chapman was gathering evidence for the FBI on the Aquash killing and other matters, turning over his tape-recordings and notes of his interviews to federal investigators.

Chapman maintains that some 7 years ago he had an unrecorded telephone conversation with Richard Marshall and that Marshall made a statement to him which the government contends would be admissible as an adoptive admission under FRE Rule 801(d)(2)(B). See: Defendant's Motion in Limine #1.¹ If in fact Chapman made this information known to the government 7 years ago, then the government waited for 7 years to act on the evidence of Chapman.

¹ Richard Marshall denies and contests both the facts that are alleged by Chapman and the legal argument of the government that he made any statement to Chapman that would be an admission under FRE Rule 801(d)(2)(B), and has moved the Court for a hearing on the admissibility of such evidence. See: Motion in Limine #1.

Similarly, the government knew in 2001 that Theda Clarke, who was then in her 70s, claimed to be in the early stages of Alzheimer's disease. Yet the government waited for seven years to indict Richard Marshall, by which time Clarke was no longer available as a witness to contest the accusation made by Looking Cloud that the defendant Marshall gave her a gun on a December night 33 years ago.

That delay by the government in initiating a prosecution would constitute reckless disregard for the inevitable prejudice to the accused that would result from pre-indictment delay, which would satisfy the second prong for dismissal under Lovasco and its progeny.

Richard Marshall can prove both that pre-accusatory delay impaired his ability to defend against the charge and that the delay by the government evidenced a reckless disregard for the inevitable prejudice that such delay would cause.

IV

IN A MURDER CASE WHERE THERE HAS BEEN A PRE-ACCUSATORY DELAY OF 33 YEARS, DUE PROCESS WOULD REQUIRE DISMISSAL IF THE DEFENDANT CAN SHOW THAT THE DELAY CAUSED SUBSTANTIAL PREJUDICE TO HIS ABILITY TO PRESENT A DEFENSE, REGARDLESS OF WHETHER THERE IS GOVERNMENTAL BAD FAITH.

In the cases cited herein, the indictments were brought within the period prescribed by a statute of limitations, and the courts applied a two-pronged test to determine if defendants were denied due process. Under that test, in order to prevail, a defendant must prove both (1) prejudice and (2) either governmental intent to delay the prosecution to gain a tactical advantage or recklessness. See: United States v. Jackson, 446 F.3d 847 (8th Cir. 2006).

_____ The defendant submits that the test to be applied in this case should be different because this case is a murder case. Because the charge is murder, this case is distinguished from practically all the appellate cases on pre-indictment delay because here there is no statute of limitations to protect the defendant from an overly stale criminal prosecution. While it may be reasonable and just to require a defendant to meet an extraordinary burden of proof to show he has been denied fundamental fairness by pre-accusatory delay in a case where the government

brought the charge within the time allowed by a statute of limitations, it is neither just nor reasonable to put that same burden of proof on a defendant who is charged with a crime that has no statute of limitations—particularly in a case where the government brings its accusation against the defendant a third of a century after the crime was committed.

As the Supreme Court stated in Marion and Lovasco and as the Court of Appeals stated in United States v. Jackson, 446 F.3d 847 (8th Cir. 2006), a defendant who moves for dismissal of an indictment for pre-indictment delay has a high hurdle to overcome in terms of burden of proof precisely because the main protection that the law provides against unfair pre-accusatory delay is the applicable statute of limitations. With only one exception, which will be addressed herein below, all of reported appellate cases cited in this memorandum in which the courts required the defendant to prove both prejudice and governmental bad faith involve criminal charges other than murder; in those cases there was an applicable statute of limitations and the prosecutions were initiated before the applicable statute of limitations ran. In all these cases, the Due Process Clause played a “limited role” precisely because a statute of limitations was available to protect defendants from the inherent unfairness of having to defend against a criminal case that was initiated years, or even decades, after the crime.

That is not the case here. Here, where the accusation is first degree murder, the most serious crime the government can charge, one where there is a mandatory sentence of life imprisonment on conviction, the accused has no protection from a statute of limitations.

The United States Supreme Court stated in Stogner v. California, 539 U.S. 607, 615-616, 123 S.Ct. 2446 (2003) that “a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict.” (Citing: United States v. Marion, 404 US 307, 322, 92 S.Ct. 455 (1971)). “And that judgment typically rests, in large part, upon evidentiary concerns--for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable.” (Citing United States v. Kubrick, 444 US 111, 117, 100 S.Ct.352 (1979)). “Indeed, this Court once described statutes of limitations as creating ‘a presumption that renders proof unnecessary.’”

A statute of limitations creates an irrebuttable legal presumption that a defendant’s ability to defend against the charge has been irrevocably prejudiced after a certain period of time.

If this defendant had been charged with kidnapping or aggravated assault or attempted murder or any crime less serious than murder, the law would presume as a proven fact that the defendant could not be fairly called upon to defend against the accusation because of the passage of time and the inevitable damage to one's ability to defend against a charge that is caused by the passage of time. But because this is a murder case, the defendant has no such protection. The Due Process Clause, with its guarantee of fundamental fairness, is the defendant's only source of protection from untimely prosecutions for murder.

The defendant's right to fundamental fairness requires that Due Process must play a greater role in protecting the defendant who is charged with murder than it would in those cases where there is a statute of limitations—especially here, where the prosecution was initiated 33 years after the crime.

At this stage of his research, counsel has found only one reported federal appellate decision in which a convicted defendant appealed a murder conviction on grounds of pre-indictment delay. The case is also the only reported federal appellate decision that counsel has found to date that involves a pre-indictment delay of more than 3 decades. In United States v. Avants, 367 F.3d 433 (5th Cir. 2004), the defendant was prosecuted for murder in federal court 34 years after the crime. In his appeal, he raised the issue of pre-indictment delay and appealed the trial court's finding of fact that there was no improper government motive in delaying the prosecution. The Court of Appeals followed established precedent in that circuit and ruled that the defendant had the burden of proving improper governmental motive for the delay, and affirmed the trial court's finding of fact that there had been sufficient proof put forth to support a finding that the government had intentionally delayed the prosecution for a tactical reason. The Fifth Circuit Court of Appeals rejected defendant's argument that neither Due Process nor Lovasco required the defendant to prove improper governmental motive for the delay.

In that Fifth Circuit case, there is nothing in the decision to indicate that the appellant Avants raised an argument that Due Process requires that murder indictments should be subjected to a different and less onerous test because of the absence of any statute of limitations. Moreover, Avants is distinguishable from the facts in this case because the defendant in Avants was actually tried and acquitted of the murder in state court some thirty years earlier and within

the state's statute of limitations period, so much of the evidence was preserved and was presented at a time when the crime was recent.

Because of the fundamental legal difference between murder and crimes where a prosecution must be commenced within a time prescribed by a statute of limitations, this case is distinguishable from all Eighth Circuit cases that address Due Process challenges to pre-indictment delay. No reported Eighth Circuit appellate decision has ruled that a defendant who is indicted for murder, who is not protected by a statute of limitations, must carry the same burden of proof that defendants who are protected by statutes of limitations must carry. Therefore, defendant Richard Marshall submits that this Court is not constrained to follow Eighth Circuit precedent that sets forth the two-pronged test that has been applied in non-murder cases.

As far as counsel has yet been able to determine, this is a case of first impression, in that no federal court, and certainly not the Eighth Circuit of Appeals, has decided this specific legal question: in a murder case, where there is no statute of limitations, does the defendant who moves to dismiss the indictment on grounds of pre-accusatory delay bear the same burden of proof that he would have to bear in a case where there is a statute of limitations to protect him against overly stale prosecutions; or, if the defendant can prove actual prejudice, should the Court then balance the prejudice caused by delay against the government's reasons for delay, without requiring the defendant to prove improper prosecutorial motive?

Defendant Richard Marshall respectfully submits that in a murder case which is initiated more than three decades after the crime, the test and burden of proof should be different than those that apply in cases where the crime charged has a statute of limitations to protect the accused. Defendant Marshall submits that if the defendant accused of murder meets the first burden he is required to meet by Lovasco, by showing actual and substantial prejudice caused by pre-accusatory delay, then the Court should balance the prejudice caused by the delay against the government's reasons for the delay; and unless the government can prove by a preponderance of the evidence that its reasons for delaying the initiation of prosecution are so compelling that they outweigh the prejudice to the defendant, then Due Process would require dismissal, without requiring the defendant to prove bad faith by the government.

The defendant submits that in a murder case where there is no statute of limitations, the proper test should be the one set forth by the Fourth Circuit Court of Appeals in Howell v. Barker, 904 F.2d 889 (4th Cir. 1990). In that case, the Fourth Circuit Court of Appeals ruled that if a defendant proves prejudice, he is not required to also prove governmental bad faith; instead, the Court should then make a balancing determination and the issue to be decided should be whether the defendant has been deprived of fundamental fairness. Howell v. Baker was not a murder case and the crime charged—robbery—did have an applicable statute of limitations to protect the defendant from prejudice caused by prosecutorial delay, so the reasoning of the Court in Howell v. Barker is even more compelling in a case where the indictment charges murder and there is no statute of limitations:—

“[I]n both *Lovasco* and *Marion*, the Supreme Court made it clear that the administration of justice, vis-a-vis a defendant's right to a fair trial, necessitated a case-by-case inquiry based on the circumstances of each case. 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.’”

“Applying these principles of due process to the case at hand, we cannot agree with the position taken by the State of North Carolina and those other circuits which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation. Taking this position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive.

“The better position, and the one previously taken by this Circuit in *United States v. Automated Medical Laboratories*, *supra*, is to put the burden on the defendant to prove actual prejudice. Assuming the defendant can establish actual prejudice, then the court must balance the defendant's prejudice against the government's justification for delay. *Automated Medical Laboratories*, 770 F.2d at 403-04. “The basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates ‘fundamental conceptions of justice’ or ‘the community's sense of fair play and decency.’ ” *Id.* at 404 (citations omitted).”

The Ninth Circuit Court of Appeals also rejects the strict two-pronged prejudice and bad faith test in favor of a balancing test if the defendant shows actual prejudice. United States v.

Ross, 123 F.3d 1181 (9th Cir. 1997). _____

In cases where the government's power to prosecute is constrained by a statute of limitations, the rationale for the test that places a heavy burden on the defendant to prove both prejudice and improper governmental motive is that the statute of limitations is the primary source of protecting the defendant from the unfairness caused by overly stale prosecutions. In a murder case, that rationale disappears. In a murder case, the Court should adopt the test set forth in Howell v. Barker. Here, if defendant Marshall can prove that the government's 33 year delay in bringing a prosecution against him has caused actual substantial prejudice to his ability to present his defense, then the only issue for this Court to decide should be whether the government's action in prosecuting this defendant 33 years after the crime charged in the indictment violates fundamental conceptions of justice or the community's sense of fair play and decency.

Moreover, with regard to the defendant's burden of proving prejudice, in the particular factual and evidentiary context of this case, where the government's case and the defense would turn on the memory of witnesses as to events that are alleged to have occurred and words that are alleged to have been spoken one night 33 years ago, the Court should *presume* prejudice to the accused's ability to defend against the charge and should then put the burden on the government to show why it is not fundamentally unjust to bring a murder prosecution against this defendant a third of a century after the crime.

CONCLUSION

The Defendant requests an evidentiary hearing in which he will have the opportunity to prove that pre-indictment delay has caused actual and substantial prejudice to his constitutional rights to present a defense and to confront his accusers, and to adduce evidence in support of his motion to dismiss. The Court should order an evidentiary hearing in which the court would make findings of fact, and if the Court finds that the Defendant's ability to defend himself against the charge of murder has been substantially prejudiced by pre-indictment delay, and concludes as a matter of law that the defendant has been denied fundamental fairness, then this Court should dismiss the indictment against Richard Marshall with prejudice.

Dated this 15th day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ Dana L. Hanna
Dana L. Hanna
HANNA LAW OFFICE
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com
Attorney for Defendant Richard Marshall

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Dismiss Due to Pre-Accusatory Delay was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 15th day of December, 2008.

/s/ Dana L. Hanna
Dana L. Hanna