

# Responding to Motions to Dismiss Under Statute of Limitations or for Pre-accusation Delay

An individual's constitutional right to a speedy trial happens once they have been formally charged with a criminal offense. At that point, a well-established body of case law determines the timeframe in which the state must bring a defendant to trial. In cold cases, however, there may have been a delay of months, years, or even decades from the time the crime was committed to the filing of criminal charges. The law pertaining to speedy trial does not address this delay. Rather, the legal effect of delay during this timeframe is analyzed by (1) whether charges have been filed within the time prescribed by the applicable statute of limitations and/or (2) whether, despite the filing of charges within the limitations period, the delay violates the defendant's right to due process.<sup>1</sup>

## Statute of Limitations

Whether a prosecution is barred by the statute of limitations depends on the limitations period prescribed by the jurisdiction's specific statutory provisions, including any exceptions or defined tolling provisions that may delay or halt the running of the limitations period temporarily (which also may be included in case law). In recent years, many jurisdictions have greatly extended the limitations period for serious sexual offenses; statutes in some jurisdictions have entirely eliminated any time limit for charging such crimes.<sup>2</sup> Whether a newly extended statute will apply to a case involving a crime that predates its enactment will generally depend on whether the prior limitations period had run out for that specific crime before the new statute was enacted. An extended statute of limitations can be applied to an offense occurring before the date of its enactment; however, the statute cannot be applied to *revive* a case when the prior limitations period has already expired before the new statute was enacted.<sup>3</sup> To do so would violate the *Ex Post Facto* clause of the U.S. Constitution,<sup>4</sup> and prosecution of such a case is completely barred.<sup>5</sup>

Determining whether the statute of limitations has expired (either the current statute of limitations in effect or a previous one that could have expired before enactment of the new statute) may require consideration of any applicable exceptions or tolling provisions. Factors affecting the running

of the statute in various jurisdictions may include the age of the victim and whether

- ◆ the crime was reported within a specified time and
- ◆ a suspect has been, or could have been, identified (constructive identification) and when that identification was made.

Some statutes specify a limitations period; however, the case can be subsequently revived if DNA testing can identify a suspect.<sup>6</sup> Some statutes may require the state to show diligence in identifying a suspect from DNA, and some states may toll the running of the statute while the suspect is a fugitive or is outside of the jurisdiction. Such provisions may require investigation of the circumstances surrounding efforts to identify the suspect or to locate the identified suspect (or acts on the part of a suspect to avoid arrest) as part of the state's response to a motion to dismiss based on a potentially expired statute of limitations. Furthermore, any extended statute of limitations may apply to specific crimes only; prosecution for other offenses committed at the same time may be time-barred. Whether the statute of limitations will bar conviction on a lesser-included offense that would otherwise be time-barred varies by jurisdiction; a jurisdiction's rules may permit defendants to waive the statute of limitations when defendants seek jury instructions on lesser-included offenses.<sup>7</sup>

## Pre-accusation Delay

Even when charges have been filed within the timeframe of the applicable statute of limitations, the defense may move to dismiss for unconstitutional pre-accusation delay on the grounds that the delay has violated the accused's right to due process of law under the federal or state constitution. The pre-accusation or pre-indictment delay in a cold case may be attributable to one or more of the following factors:

- ◆ Inability to locate the victim or other witnesses for follow-up
- ◆ Perception of insufficient evidence
- ◆ Lack of physical evidence considered necessary for charging

- ◆ Shortage of crime laboratory resources for testing of evidence
- ◆ Misperception of victim credibility based upon lack of understanding of victim responses to trauma during and after the assault
- ◆ Belief held by police or prosecutors that a jury would not convict the defendant (often based upon popular myths and misconceptions about sexual assault).<sup>8</sup>

When formal charges are finally filed within the limitations period, the defense may file a motion to dismiss, alleging that the delay has impaired the defendant's ability to effectively assert a defense and put forth necessary evidence and witnesses.

The legal standard for evaluating claims of pre-accusation delay varies by jurisdiction. Claims alleging a due process violation under the federal constitution will be analyzed, under two leading U.S. Supreme Court decisions, *United States v. Marion*<sup>9</sup> and *United States v. Lovasco*.<sup>10</sup> Based on these court decisions, a claim of violation of due process for pre-accusation delay requires, at minimum, a showing by the defendant of actual prejudice (as opposed to potential or speculative prejudice), as well as some evaluation of why the delay occurred. In *Lovasco*, the court concluded that such claims would have to be evaluated on a case-by-case basis, but that intentional delay for tactical reasons should be distinguished from investigative delay, which involves legitimate investigative reasons to strengthen the prosecution's case.<sup>11</sup> However, the court did not determine (a) the degree of prejudice that must be shown or (b) whether law enforcement negligence or even recklessness would be sufficient to find a due process violation when a defendant can demonstrate actual, substantial prejudice.

State and lower federal courts have, for the most part, adopted one of two approaches to analyzing claims of pre-indictment delay.<sup>12</sup> Most jurisdictions favor the approach that requires the defendant to first make a showing of actual, substantial prejudice and then demonstrate that the state engaged in delay to gain a tactical advantage or for some other improper purpose evidencing bad faith. In some jurisdictions, a showing of reckless conduct on the part of the state will suffice to meet the bad-faith prong of the test.<sup>13</sup> Few jurisdictions approach the analysis in a manner that is more favorable to defendants asserting a claim of unconstitutional delay, and less favorable to the state opposing such a claim.<sup>14</sup> In those jurisdictions, the defense has the burden of showing actual prejudice, but the court will balance the state's reasons for delay against the degree of prejudice to the defendant once that burden is met. A few jurisdictions analyze claims in a manner that cannot be readily categorized under these two approaches.<sup>15</sup>

In addition, claims asserted based on state constitutional grounds may afford a defendant more protection against pre-accusation delay than the due process clause under the 5th and 14th amendments; state courts are free to interpret their own constitutional provisions.

The response to a motion to dismiss for pre-accusation delay first requires a determination of the basis for the claim—whether it is being asserted under the federal constitution, state constitution, or both. State case law and, for claims asserted under the federal constitution, case law in the relevant circuit court of appeals must be reviewed to determine the applicable standard for analysis of the claim.<sup>16</sup> The following arguments may be useful (depending on the jurisdiction's law, the facts of the case, and the circumstances surrounding the delay) in countering these motions:

- ◆ **Defendant has failed to show actual, substantial prejudice.** Every jurisdiction, regardless of the analytic approach adopted, requires the defendant asserting a denial of due process under the federal constitution to prove actual, substantial prejudice (as opposed to speculative prejudice, or the loss of evidence that is insignificant or cumulative). Therefore, the state's first line of defense is to demonstrate that the claimed prejudice is neither actual nor substantial. One can argue that the degree of any claimed prejudice is based upon conjecture rather than actual prejudice and that actual prejudice cannot be effectively ascertained until the evidence on both sides has been fully developed at trial. Denial of a pre-trial motion to dismiss will not prevent the defendant from asserting delay as a basis for a post-conviction appeal. If, in light of all of the evidence, the delay clearly exacted a real cost in terms of ability to defend against the charges, then the appellate court has the power to consider the claim at that time, with a fully developed record.

At the pre-trial stage, this claim is usually argued based upon offers of proof or through testimony. In either situation, the significance of an allegedly missing witness or loss of other evidence may pale in comparison to the strength of the state's case because the case will be developed at trial. Most often, pre-trial claims of prejudice are speculative; they require the court to assume that favorable witnesses or other evidence existed and to speculate about how helpful such evidence is to the defense. Moreover, the facts that allegedly would be proven with any lost evidence might be provable in some other way, making the loss merely cumulative of other evidence available to the defense.

- ◆ **Delay has adversely impacted the state’s case.** Point out that the delay has burdened the state’s case also. The burden of proof beyond a reasonable doubt remains with the state; therefore, the defendant’s claims of prejudice should also be considered in light of the delay’s impact on the state’s case.
- ◆ **Delay caused by defendant’s conduct.** Sex offenders often target victims they perceive as vulnerable—those who are impaired by drugs or alcohol; those who fear reporting the offense due to concerns for their safety or well-being (e.g., undocumented immigrants, victims of intimate partner violence); or those whose credibility may be questioned (e.g., individuals who are trafficked or involved in prostitution). Offenders may also create situations in which victims will be perceived as less credible. The cause of the delay rests partly on the offender’s conduct to the extent that these aspects of victimization contributed to a delay (a) in reporting the offense or (b) in a victim’s ability to participate in the criminal justice process or exploited the criminal justice system’s understanding of the dynamics of sexual violence and victim behavior in response to trauma during any earlier time. The argument should highlight wrongful acts (e.g., witness intimidation, evidence tampering, fleeing to avoid prosecution) if the offender engaged in them to conceal the crime, avoid apprehension, or hinder the investigation.
- ◆ **Public policy supports offender prosecution within the statute of limitations.** If the statute of limitations has been extended by a change in the law, then examine the legislative history of the new statute. There may have been hearings with testimony or reports relied on by the legislature that detail the reasons for extending the statute of limitations. Whether such history exists or not, one can argue that the extension of the statute of limitations for serious sex crimes represents a legislative recognition of the impact of sexual assault on victims and the difficulties victims face in reporting these crimes. Point out that extending the statute of limitations is an effort to remedy past injustices and to foster victim and community safety by identifying sex offenders and holding them accountable. Dismissing a case based upon earlier evidentiary issues, lack of scientific resources, or incomplete understanding of the impact of trauma on sexual assault victims undermines the entire purpose of the legislative enactment that extends the timeframe for prosecution.

- ◆ **Evidence that was previously unavailable should be highlighted.** To the extent that previously unavailable evidence (e.g., new testing procedures; a witness who could not have been identified, interviewed, or located until recently) supports the charges, such new evidence will help to support a decision to move forward with a cold case.

## Denial of Pre-trial Motion to Dismiss

Even if the trial court denies the pre-trial motion to dismiss, the defense may still seek to suggest, at trial, that delay in the state’s investigation unfairly hindered the ability to present a defense. Although the defense is generally permitted to attack the state’s investigation, it should not be permitted to suggest that the jury speculate about evidence not proven to exist. A motion *in limine* filed by the prosecution may help to prevent (during *voir dire*, opening statements, or cross-examination of the state’s witnesses) the mention of hypothetical favorable testimony or other evidence supposedly lost due to the conduct of the investigation. The prosecutor should also carefully prepare witnesses for answering questions permitted by the court about the reasons for delay in bringing the case to trial.

## Conclusion

Motions to dismiss for failure to charge within the applicable statute of limitations require analysis of the statute, including any exceptions or tolling provisions, as it applies to the facts of the case. One can counter motions based upon pre-accusation delay/due process claims by carefully (1) arguing the defendant’s failure to demonstrate actual, substantial prejudice at the pre-trial stage of the proceedings and (2) analyzing the reasons for delay in accordance with the facts and a jurisdiction’s case law. Additionally, one can argue that permitting the prosecution to go forward advances the public policy underlying the statute of limitations. If there were shortcomings in the state’s initial response to a report, then evaluate and acknowledge those shortcomings compared to the practices and the limitations of available training at the time. Point out that this and other cold case sexual assault prosecutions represent the state’s commitment to advance the investigation and prosecution of cases based upon newly available evidence. The victim’s interest in, and right to, justice should also be considered as well as public policy favoring community protection.

References:

1. A case must be dismissed if the defendant's right to due process has been violated.
2. Contact AEquitas for a compilation of statutes of limitations in U.S. jurisdictions for sexual assault offenses.
3. *Stogner v. California*, 539 U.S. 607 (2003).
4. U.S. Const. Art. I § 9, cl. 3.
5. *Stogner*, n.3 *supra*.
6. Such a statute still could not revive a case where the original limitations period had expired before the effective date of the new statute. *See Stogner*, n.3 *supra*.
7. *See*, for example, *Eaddy v. State of Florida*, 638 So.2d 22 (1994) (trial court must accept a defendant's waiver of statute of limitations on lesser-included offense in a capital trial); *Cartagena v. State of Florida*, 125 So.3d 919 (Fla. 4th DCA 2013) (defendant may not waive statute of limitations on lesser-included offense in non-capital trial where related offenses were dismissed on defendant's motion based upon statute of limitations applicable to those offenses); *State of Hawaii v. Timoteo*, 952 P.2d 865 (1997) (defendant who requests jury instruction on lesser-included offense necessarily waives statute of limitations as to that offense); *People v. Kurzawa*, 509 N.W.2d 816 (Mich. Ct. App. 1993), overruled in part on other grounds by *People v. Perry*, 594 N.W.2d 477 (Mich. 1999) (failure to object to the trial court's instruction on a lesser included offense that was barred by the statute of limitations or failure to raise the issue in the trial court constituted waiver). A more unusual approach is taken in New Jersey, where the defendant is entitled to a jury instruction for a lesser-included offense for which the statute of limitations has run, but may not be convicted of that offense. *See State of New Jersey v. Short*, 618 A.2d 316 (N.J. 1993).
8. AEquitas, Justice Management Institute, & Urban Institute. (2017). *Model response to sexual violence for prosecutors (RSVP): An invitation to lead*. Retrieved from <http://www.aequitasresource.org/Model-Response-to-Sexual-Violence-for-Prosecutors-RSVP-An-Invitation-to-Lead.pdf>
9. *United States v. Marion*, 404 U.S. 307 (1971).
10. *United States v. Lovasco*, 431 U.S. 783 (1977).
11. *United States v. Lovasco*, 431 U.S. 795–797 (1977).
12. For an analysis of the approaches taken in various jurisdictions, at least as of the date of publication, see Dubosar, E. (2013). Pre-accusation delay: An issue ripe for adjudication by the United States Supreme Court (p. 659). *Florida State University Law Review*, 40(3), Article 5, 667–690. Retrieved from <https://ir.law.fsu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1004&context=lr>
13. *Id.* at 665–668; 672–676.
14. *Id.* at 668–670; 676–681.
15. *Id.* at 681–685.
16. For assistance, in determining the applicable law in your jurisdiction, consult with your office's appellate unit, with your state attorney general's office, or with AEquitas.

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AEquitas, The Prosecutors' Resource on Violence Against Women