1977

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Minn. L. Rev. Editorial Board

Criminal Procedure: Due Process Requires Dismissal of Charges Where Government Pre-indictment Delay Prejudices Defense

On July 29, 1970, the Civic Plaza National Bank in Kansas City, Missouri, loaned $30,000 on an unsecured note to the Regular Democrats, an ad hoc political group. The loan was discovered by a bank examiner on January 4, 1971, and on March 15, 1971, the Comptroller of the Currency referred the matter to the Criminal Division of the Department of Justice for possible prosecution of bank president Alexander J. Barket under 18 U.S.C. § 610.[1] One year later, influenced by adverse court decisions and an amendment of the governing statute, the Justice Department declined prosecution, without notifying the United States Attorney for the Western District of Missouri of its involvement.[2] The local United States Attorney, however,

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1. The statute applicable to the prosecution of Barket read in relevant part:

> It is unlawful for any national bank . . . to make a contribution or expenditure in connection with any election to any political office or in connection with any primary election . . . or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.
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> [E]very officer or director of any corporation . . . who consents to any contribution or expenditure . . . and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation [is] willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 610 (1970), *as amended*, 18 U.S.C. § 610 (Supp. V 1975) (section 610 of Title 18 was taken out of Title 18 and transferred to the Federal Election Campaign Act of 1971 as new section 321 of that Act under the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475. *See* SEN. REP. NO. 94-677, 94th Cong., 2d Sess. 10 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 1045, 1054. For the text of the new Act, see Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, tit. I, § 112(2), 90 Stat. 490 (to be codified at 2 U.S.C. § 441b)).

2. United States v. Barket, 530 F.2d 189, 192 (8th Cir. 1976). The government's original interpretation of section 610 was that any loan by a national bank to a political group was illegal. *Id.* at 196. *But see* United States v. First Nat'l Bank, 329 F. Supp. 1251 (S.D. Ohio 1971) (section 610 held violative of due process clause for taking bank's property right to make legitimate, non-preferential loans and violative of the first amendment rights of individuals desiring to use their assets to secure credit on behalf of a particular candidate). Section 610 was amended in 1972 to exclude coverage of bona fide bank loans made in the ordinary course of business. Federal Elections Campaign Act of 1971,

discovered the loan in an independent investigation in late 1973 and, having received Justice Department permission, filed an indictment against Barket on June 12, 1974, for violation of 18 U.S.C. sections 610 and 656.[3] Barket moved for dismissal, alleging prejudice to his ability to defend himself and, alternatively, prosecutorial misconduct. The district court dismissed the indictment, and the United States appealed. The Court of Appeals for the Eighth Circuit affirmed, *holding* that the 47 month delay between the loan and the indictment, caused by the government's negligence and resulting in prejudice to the defense, required dismissal under the due process clause of the fifth amendment.[4] *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976).

The statute of limitations is the primary and traditional source of protection against pre-indictment delay.[5] It is normally the accused's only protection against hardships incident to the passage of time, such as diminished memories, lost evidence,

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Pub. L. No. 92-225, tit. II, § 202, 86 Stat. 10 (codified at 18 U.S.C. § 610 (Supp. V 1975)).

3. The United States Attorney intended to prosecute under 18 U.S.C. § 610 on the theory that the loan was merely a sham and, in fact, an outright contribution to a political group in clear violation of the statute as amended. *See* 530 F.2d at 196; notes 1-2 *supra*. The second ground of indictment was 18 U.S.C. § 656 (1970), which provided:

> Whoever, being an officer, director, agent or employee of . . . any . . . national bank . . . embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . .

4. The district court had held, alternatively, that the government was guilty of prosecutorial misconduct, requiring dismissal under the court's supervisory power to ensure the proper administration of criminal justice. The Eighth Circuit affirmed solely on the basis of prejudicial delay, and declined to consider or rely on the alternative holding. The court remarked in a footnote that although the government's failure to properly exercise its prosecutorial discretion was damaging to the defendant, it did not present a question of constitutional magnitude; as a matter of the internal operating procedures of the executive branch, it was "not subject to judicial oversight or interference." 530 F.2d at 196 n.11.

5. *See* United States v. Ewell, 383 U.S. 116, 122 (1966). The purpose of statutes of limitations is to afford immunity from punishment where the government fails to bring an indictment within the statutory period. *See* Benes v. United States, 276 F.2d 99, 108 (6th Cir. 1960); State v. Tupa, 194 Minn. 488, 494, 260 N.W. 875, 878 (1935). They are based on the legislative judgment that prosecutions should not be allowed after a certain lapse of time because witnesses and evidence necessary to the defense may become unavailable. *See* United States v. Eliopoulos, 45 F. Supp. 777, 781 (D.N.J. 1942).

and missing witnesses.[6] The Supreme Court has recently recognized, however, that in extraordinary cases the due process clause of the fifth amendment may provide an additional safeguard. In *United States v. Marion*,[7] the government appealed from a district court's dismissal for "lack of speedy prosecution" of indictments filed three and one-half years after the defendants' last alleged illegal act. The Court reversed on the ground that the sixth amendment did not apply to cases of pre-indictment delay,[8] but indicated that the protection of the fifth amendment might be available.[9] Emphasizing that the proper interpretation of the due process clause required a careful accommodation of "the sound administration of justice to the rights of the defendant to a fair trial,"[10] the Court noted the government's concession that due process "would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."[11] Since the appellee had not claimed either actual prejudice or intentional delay, the Court declined to develop this due process standard fully. The Court nevertheless implied that prejudice plus some factor short of intentional delay might also tip the due process balance, stating that it need not consider "when and in what circumstance actual prejudice . . . requires the dismissal of the prosecution."[12]

The issue of pre-indictment delay and the interpretation of *United States v. Marion* have posed substantial problems for the

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6. *See* Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 632 (1954).

7. 404 U.S. 307 (1971).

8. The Court held that the "speedy trial" guarantee of the sixth amendment was intended to protect against restraints on liberty, the onus of public accusation, and the possibility of prejudice to the defense. *Id.* at 320. Since only the latter was a potential effect of pre-indictment delay, the court declined to "wrench the Sixth Amendment from its proper context." *Id.* at 322. The amendment would apply only when a potential defendant became an "accused". In *Marion*, that occurred when the appellees were indicted, and since the delay between the return of the indictment and its dismissal was only two months, there was no infringement of the "speedy trial" protection. *Id.* at 325.

9. *Id.* at 324. The purpose of the due process clause of the fifth amendment is, generally, to protect a criminal defendant's right to the "fundamental fairness essential to the very concept of justice". Lisenba v. California, 314 U.S. 219, 236 (1941).

10. 404 U.S. at 325.

11. *Id.* at 324 (footnote omitted).

12. *Id.*

circuit courts.[13] The Eighth Circuit's pre- and post-*Marion* decisions illustrate the general confusion. Four years before *Marion*, in *Terlikowski v. United States*,[14] the defendants appealed from convictions for burglarizing a post office, claiming that the government's two-year investigation before indictment prejudiced

13. Although *Marion* clearly rested on the sixth amendment holding, *id.* at 313, only the Fifth Circuit has correctly viewed the due process discussion as dictum, terming it a simple "caveat" that prejudice might require dismissal where government delay was egregious. United States v. Judice, 457 F.2d 414, 418 (5th Cir.), *cert. denied*, 409 U.S. 886 (1972). Other courts have deemed the language adopted by the Court from the government's brief a determinative test for the acceptable limits of pre-indictment delay, but have disagreed as to what the elements of the test actually are. The Second Circuit assumed that the Court's language was conclusive, but declined to decide whether a showing of both actual prejudice and intentional delay was necessary for dismissal, since the defendant had not shown prejudice and the delay before indictment "redounded to society's benefit." United States v. Finkelstein, 526 F.2d 517, 526 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976). The Ninth Circuit, however, read the Court's dictum as disjunctive, and stated that the due process clause might require dismissal in the face of either deliberate delay *or* substantial prejudice, although it refused to reverse defendant's conviction where neither was shown. United States v. Sand, 541 F.2d 1370, 1373 (9th Cir. 1976). The Third Circuit followed only the first half of *Marion's* dictum, where the defendants argued that excessive delay before indictment was a per se infringement of fifth amendment rights, and held that "the *sole* question . . . [was] whether [the defendants had] shown substantial prejudice." United States v. Dukow, 453 F.2d 1328, 1330 (3d Cir.), *cert. denied*, 406 U.S. 945 (1972) (emphasis added). The Sixth Circuit, reversing a district court dismissal, noted that there was insufficient evidence of prejudice or intentional delay, and professed adherence to what it termed the "general rule that in the *absence* of a showing of intentional government delay actual prejudice must be demonstrated." United States v. Giacalone, 477 F.2d 1273, 1276 (6th Cir. 1973) (emphasis added). The Tenth Circuit stated that the test was conjunctive: "[the law is] clear: the rights of a defendant . . . are not violated in the absence of showing of actual prejudice . . . *and* . . . delay . . . purposefully designed to gain tactical advantage or to harass the defendants." United States v. Beitscher, 467 F.2d 269, 272 (10th Cir. 1972) (emphasis added).

Prior to *Marion*, many commentators argued vigorously for sixth amendment protection against pre-indictment delay. *See, e.g.*, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 485-93 (1968). Some, however, recognized that the issue would be better resolved under the due process clause. *See, e.g.*, Note, *Pre-Arrest Delay: Evolving Due Process Standards*, 43 N.Y.U.L. REV. 722 (1968) (due process should mandate dismissal where the defendant proves prejudice or where the length of the delay permits a presumption of prejudice, and the delay was not caused by a limited category of justifiable circumstances.). Post-*Marion* commentary has generally been limited to brief analyses of the Court's sixth amendment holding. *See, e.g.*, Young, *Speedy Trial Clause is Activated by Indictment*, 58 A.B.A.J. 293 (1972).

14. 379 F.2d 501 (8th Cir.), *cert. denied*, 389 U.S. 1008 (1967).

their case.[15] The court stated that prejudicial delay would constitute a denial of due process only if the Government "deliberately utilized delay to strengthen its position by weakening that of the defense or otherwise impairing [the] defendant's right to a fair trial."[16] A second pre-*Marion* decision, *United States v. Golden*,[17] rejected the defendant's allegation that he had been prejudiced by the government's investigation of related narcotics activities for nine months before indicting him for unlawful sale of heroin. *Golden*, however, modified the *Terlikowski* test by stating that either prejudice to the defense or deliberate prosecutorial delay would violate due process.[18] After *Marion*, *United States v. Houp*[19] apparently retreated from *Golden*'s disjunctive standard and, finding no prejudice, simply quoted *Marion*'s dictum verbatim.[20] More recently, *United States v. Jackson*,[21] upholding a narcotics conviction after an eleven month pre-indictment delay, discarded the language of previous cases and interpreted *Marion* as indicating that "*unreasonable* delay must coincide with prejudice before the due process clause requires reversal."[22] The *Jackson* court formulated a test "involving a process of *balancing* the reasonableness of the delay against any resultant prejudice to the defendant."[23] Each of these decisions rejected the defendant's due process claim on the ground that he failed to demonstrate prejudice. Significantly, each case reached the appellate court after a full trial on the merits. Thus, the court was able to examine the trial record in assessing detriment to the defense.[24]

United States v. Barket was the first Eighth Circuit decision to uphold a claim of prejudicial, pre-indictment delay.[25] The

15. The alleged prejudice arose from the defendants' loss of memory and their inability to obtain witnesses. *Id.* at 503.

16. *Id.* at 505.

17. 436 F.2d 941 (8th Cir.), *cert. denied*, 404 U.S. 910 (1971).

18. *Id.* at 945.

19. 462 F.2d 1338 (8th Cir.), *cert. denied*, 409 U.S. 1011 (1972).

20. *Id.* at 1339-40; *see* text accompanying note 11 *supra*.

21. 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

22. *Id.* at 339 n.2 (emphasis added).

23. *Id.* at 339 (emphasis added).

24. *See, e.g.*, United States v. Golden, 436 F.2d 941, 943 (8th Cir.), *cert. denied*, 404 U.S. 910 (1971) ("It is readily apparent in reviewing the trial transcript that defendant was in no way prejudiced . . . .").

25. In United States v. Lavasco, 532 F.2d 59 (8th Cir.), *cert. granted*, 97 S. Ct. 233 (1976) (No. 75-1844), the court affirmed dismissal of three counts of unlawful possession of stolen firearms because of a prejudicial seventeen month pre-indictment delay. The defendant claimed he was prejudiced by the death of an individual who allegedly would have sup-

decision is immediately distinguishable from its predecessors in that the indictment had been dismissed before trial. Consideration of the merits in assessing prejudice was therefore impossible.[26] Notwithstanding this difficulty, the court adopted the balancing test prescribed in *Jackson*, stating that *Marion* and the fifth amendment required weighing the reasonableness of governmental delay against prejudice to the defense.[27] The test for prejudice was whether the government's delay had " 'impaired the defendant's ability to defend himself.' "[28] The court relied on three factors to find that the defendant had satisfied his burden of proof on that issue. First, the 47 month delay before indictment was longer than the delay in any other Eighth Circuit case in which a due process claim had been raised.[29] Second, the defendant alleged that a number of poten-

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ported his contention that he did not know the guns were stolen. The government was conducting an investigation that might have disclosed the person who stole the weapons. The court upheld the trial court's finding of unreasonableness, stating: "No reason existed for the delay except a hope on the part of the Government that others might be discovered who may have participated in the theft . . . . *Id.* at 61.

26. *But see* note 35 *infra* and accompanying text.

27. 530 F.2d at 193. *Jackson*, however, formulated its test in explicit dissent from the *Marion* dictum, United States v. Jackson, 504 F.2d 337, 339 n.2 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975), while *Barket* adopted *Jackson* as the required test under *Marion*.

28. 530 F.2d at 193 (quoting United States v. Golden, 436 F.2d 941, 943 (8th Cir.), *cert. denied*, 404 U.S. 910 (1971)).

29. Other circuits have found the length of delay alone inconclusive and have, in fact, rejected due process claims involving longer delays than that present in *Barket*, even where separate evidence of prejudice was introduced. *See* United States v. Dukow, 453 F.2d 1328 (3d Cir.), *cert. denied*, 406 U.S. 945 (1972) (55 month delay insufficient to require dismissal notwithstanding defendants' claims of lost witnesses and dimmed memories); United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976) (four and one-half year delay insufficient to require dismissal notwithstanding allegations of hazy memory and loss of exculpatory evidence). *But see* Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965), which reversed a conviction for a narcotics violation where the government delayed seven months after the alleged offense before arresting the appellant. The court noted that the accused kept no diary or other record that could refresh his memory and that an earlier indictment would probably have protected his right to procedural fair play. *Ross* has been severely criticized and limited in many jurisdictions—including the District of Columbia—on grounds that its holding rested largely on judicial misgivings about the adequacy of police identification of suspected narcotics dealers, and was a function of the District of Columbia court's supervisory responsibility for criminal proceedings involving the district police force. *See, e.g.*, United States v. Sanchez, 361 F.2d 824, 825 (2d Cir. 1966). The Eighth Circuit announced its disinclination to apply *Ross* broadly in United States v. Emory, 468 F.2d 1017, 1020 (8th Cir. 1972).

tial witnesses were unable to recall relevant facts surrounding the making of the loan. Third, and most persuasive,[30] the defendant alleged that six material witnesses had died during the delay.[31]

The court determined the reasonableness of prosecutorial delay by balancing factors such as those considered in *Barker v. Wingo*,[32] to arrive at a " 'delicate judgment' based upon the circumstances of [the] case."[33] In *Barker*, a sixth amendment decision, the Supreme Court balanced the length of, and reason for, government delay against the actual prejudice to the defendant and whether he had promptly asserted his sixth amendment rights.[34] In *Barket*, the court noted that the United States Attorney had expressed interest in investigating the defendant in early 1971, but had not done so until late 1973, and that the defendant alleged that his attorney had informed the prosecutor of the 1971 bank investigation prior to the latter's request for permission to indict. The court also discussed the apparent weakness of the government's case, a consideration more properly relevant to the issue of prejudice than to the reasonableness of the government's conduct.[35] It noted that the United States Attorney's staff had expressed doubt as to the wisdom of prosecution and that the disputed loan had been repaid in full before the indictment was filed.[36] Finally, the court found relevant, but not determinative, the fact that the applicable statute of limitations had been shortened to three years after the defend-

30. The Court found that the loss of six witnesses "undoubtedly impaired" the defense. 530 F.2d at 193.

31. The deceased witnesses included five local and state politicians, some of whom allegedly had received proceeds from the disputed loan, and a director of the bank. *Id.*

32. 407 U.S. 514 (1972). *Barker* was a "speedy trial" case where the defendant appealed from a murder conviction in a trial held more than five years after his arrest.

33. 530 F.2d at 193 (quoting United States v. Marion, 404 U.S. 307, 325 (1971)).

34. 407 U.S. at 530-32.

35. The court's reliance on this factor demonstrates some confusion. Other Eighth Circuit pre-indictment delay decisions routinely referred to the strength of the government's case in rejecting defense claims of prejudice, *see, e.g.*, United States v. Norton, 504 F.2d 342, 344 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); *see also* note 24 *supra*; but none looked to that factor in assessing reasonableness. Moreover, since there was no trial record in *Barket*, reliance upon the "weakness of the government's case" was necessarily based upon incomplete data.

36. The loan was repaid, by order of the Comptroller of the Currency, on January 21, 1971, by Barket and others, not including the signer of the note. 530 F.2d at 191.

ant's indictment.[37] These factors convinced the court that the government had negligently discharged its prosecutorial responsibility and that dismissal was therefore required.

Barket's most significant addition to the partial guidelines suggested in *United States v. Marion* is its recognition that unreasonable delay, when coupled with prejudice, warrants dismissal. This standard is appropriate, for it "accommodate[s] the sound administration of justice to the rights of the defendant to a fair trial."[38] When an accused suffers prejudice solely from reasonable governmental delays the detriment to his defense cannot be attributed to prosecutorial fault. Delay is inherent in the criminal process, for substantial time may be required to conclude field operations,[39] ensure the effectiveness and safety of operatives,[40] and determine whether existing evidence warrants prosecution.[41] But delay caused by government ineptitude serves no legitimate societal interest and should not outweigh the defendant's interest in a fair trial. Permitting an individual to remain in jeopardy of criminal sanctions after his defense has been hampered by prosecutorial ineptitude not only violates fair play[42] but condones, even encourages, inefficiency. Thus, *Barket*'s expansion upon the common interpretation of *Marion* as requiring some showing of intentional delay[43] is faithful to the fifth amendment's guarantee of fundamental fairness.

Unfortunately, the *Barket* decision also creates confusion by blurring the distinction between prejudice and unreasonableness. The court placed heavy reliance upon a finding of prejudice to the defense. Yet the court was unable to meaningfully define prejudice[44] or explain with precision why it existed on

37. *Id.* at 194. The court indicated that the five-year limitation period in 18 U.S.C. § 3282 (1970) governed this case. *Id.* at 192 & n.6. Furthermore, the court noted that "Barket cannot benefit directly from Congress' reduction of the statute of limitations to three years subsequent to the filing of the indictment. Section 406(a) of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443 (Oct. 15, 1974), did not affect any proceeding pending on the Act's effective date." *Id.* at 192 n.6. The court nevertheless termed the reduction in the limitations period "relevant."

38. United States v. Marion, 404 U.S. 307, 325 (1971).

39. United States v. Golden, 436 F.2d 941, 945 (8th Cir.), *cert. denied*, 404 U.S. 910 (1971).

40. *See* Ross v. United States, 349 F.2d 210, 212 (D.C. Cir. 1965).

41. Crow v. United States, 323 F.2d 888, 890 (8th Cir. 1963).

42. *Cf.* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957).

43. *See* note 13 *supra*.

44. *See* text accompanying note 28 *supra*.

the given facts.[45] This failure is not surprising. Protection against prejudice from lost testimony, like lost documents and faded memories, generally falls solely within the ambit of the statute of limitations.[46] When the statute bars prosecution, actual prejudice need not be shown; it is conclusively presumed.[47] When the statute has not run, prejudice is generally irrelevant. In cases of pre-indictment delay, where an actual finding of prejudice is a prerequisite to dismissal, the trial record may aid in determining whether prejudice existed, for the court can evaluate the defendant's claim in light of the strength of the government's case.[48] The *Barket* court, however, without a trial record before it, could not gauge the effect of lost testimony except by assuming what a trial record might have revealed;[49] nor could it rely on the presumption of prejudice underlying a statute of limitations case. Thus, any attempt to find actual prejudice would have been extremely difficult. Nevertheless, the court showed little hesitation in stating that the accused's ability to defend himself was "undoubtedly impaired."[50] The court apparently gave the defendant the "benefit of the doubt" on the issue of prejudice because the government's unreasonableness was so convincingly established.[51]

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45. *See* notes 29-31 *supra* and accompanying text. Although the court purported to apply a "not clearly erroneous" standard in affirming the district court's finding of prejudice, 530 F.2d at 196, it appears to have reached the same conclusion on its own. "The loss of these witnesses undoubtedly impaired Barket's ability to defend himself on the crucial issue of whether the $30,000 loan on the books of the bank was actually a loan made in the ordinary course of business or a political contribution." *Id.* at 193.

46. *See* note 5 *supra* and accompanying text.

47. United States v. Marion, 404 U.S. 307, 322 (1971).

48. *See, e.g.*, United States v. Norton, 504 F.2d 342, 344 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). In *Norton*, the court stated that "[i]n so far as prejudice to the appellant is concerned, the only significant allegation of prejudice is in the loss of the informant's testimony. The likelihood that the loss was prejudicial is eased by the reliability of the evidence presented by the government." *Id.*

49. *But see* note 35 *supra* and accompanying text.

50. 530 F.2d at 193.

51. Had the court chosen to scrutinize the accused's allegation of prejudice more closely, it might reasonably have inquired about the availability of other testimony or documentary evidence as a substitute for the testimony lost by the deaths of the six witnesses. Circuit Judge Henley's dissenting opinion expressed concern that the trial court "had merely assumed the truth of Barket's allegation that six possible witnesses . . . would have materially aided the defense." *Id.* at 198.

The court's discussion of unreasonableness creates further confusion. In assessing the prosecution's conduct,[52] the court employed a balancing test in which one factor to be weighed was prejudice to the defense.[53] This accords the finding of prejudice double significance within the due process framework. In other words, although the court's finding of prejudice was apparently influenced by its perception of unreasonable government conduct, its subsequent finding of unreasonableness was strongly shaped by the finding of prejudice. According primary significance to a straightforward determination of reasonableness would be preferable to the court's approach in three respects. First, before trial, the issue of negligence is more amenable to objective proof than is the issue of prejudice. Second, due process protection against prejudice caused by lapse of time is warranted only in cases of government misconduct.[54] Third, given the difficulty of determining prejudice without a trial record, a finding of negligence might be sufficient, as in *Barket*, to give the defendant the benefit of the doubt, and permit him to prevail on the issue of prejudice by supporting his allegations with testimony or affidavits showing that the lost evidence was probably material and possibly exculpatory.

Since the *Barket* procedure does not seem to reduce the difficulty of making the "delicate judgment" involved in pre-indictment delay cases, an alternative approach is warranted. The proposals which follow are intended to facilitate resolution of due process motions at the pretrial level, where, as in *Barket*, no record exists to aid in assessing prejudice. Where the defense alleges prejudice from a loss of material testimony[55] and intentional or unreasonable governmental delay, the courts should require the government to prove[56] by a preponderance of the

52. *See* text accompanying notes 32-36 *supra*.

53. *See* note 35 *supra* and accompanying text.

54. *See* text accompanying notes 7-12 *supra*.

55. In general, the loss of a material witness should be the only factor sufficient to tip the due process balance. *See* United States v. Naftalin, 534 F.2d 770, 773 (8th Cir. 1976) ("The classic type of prejudice is the death or unavailability of a material witness."). However, fundamental fairness requires relief to the defendant *whenever* prejudice stems from wrongful governmental delay. Thus, for example, where the defendant suffers an unreasonable delay of extreme duration, a court might choose to consider allegations of prejudice deriving from loss of physical evidence or hazy memories. *Cf. id.*

56. Although some courts have placed the burden on the issue of reasonableness on the defendant, *see* note 62 *infra*, the better approach is to place this burden on the government, as the Eighth Circuit appar-

evidence that its activities in preparation for indictment and trial were reasonable.[57] This requirement derives from the *Barket* test, but it should not rely upon, or be confused with, a separate determination of prejudice. A determination of prosecutorial negligence should depend not on actual prejudice, but on the risk of prejudice that was reasonably foreseeable.[58] The government could discharge its burden by proving that the social utility[59] of its conduct outweighed the risk of prejudice engendered by that conduct. Since the risk of prejudice is normally a function of the length of the delay,[60] this standard will afford law enforcement officials (and the courts) an objective formula against which to measure the interests necessitating delay. A satisfactory showing might require evidence that the delay was the result of circumstances or activities accruing to the defend-

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ently does. *See, e.g.*, United States v. Lavasco, 532 F.2d 59 (8th Cir.), *cert. granted*, 97 S. Ct. 233 (1976) (No. 75-1844). The government will have better access to information relating to the causes of delay.

57. This requirement subsumes *Marion*'s prohibition of intentional delay, since any deliberate delay would be unreasonable under the standard proposed. *See* text accompanying notes 58-63 *infra*.

58. This is analogous to the general tort law standard that negligence may be determined by balancing the burden of taking adequate precautions against the gravity of possible harm times the likelihood that harm will occur. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

59. *See, e.g.*, United States v. Naftalin, 534 F.2d 770 (8th Cir. 1976) (four and one-half year delay before indictment for securities fraud not per se unreasonable—Security and Exchange Commission's practice of exhausting civil and administrative proceedings before recommending criminal prosecution often produced sanctions sufficient to serve the public interest without criminal prosecution); United States v. Norton, 504 F.2d 342 (8th Cir. 1974) *cert. denied*, 419 U.S. 1113 (1975) (delay to protect informant not unreasonable). *But see* Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965) (continuing undercover narcotics investigation for four months after informer ceased providing new information unreasonable). *Ross* has not been followed, *see* note 29 *supra*, and probably placed too great a burden on law enforcement officers. Moreover, it seems to judge reasonableness by looking at results rather than expectations.

60. Some Eighth Circuit opinions have suggested that deliberate tactical delay may require dismissal without a showing of prejudice. United States v. Naftalin, 534 F.2d 770, 774 (8th Cir. 1976); United States v. Jackson, 504 F.2d 337, 339 n.2 (8th Cir. 1976). In general, however, the likelihood of prejudice will increase as the delay increases. As the length of the delay approaches the running of the statute of limitations, the government's justifications for delay should be more rigorously scrutinized, at least in cases where the defense is likely to be based on evidence that is affected solely by the passage of time. On the other hand, where delay is short and the probability of actual prejudice is remote, the government should not be required to account for its activities in detail, absent a defendant's showing of special circumstances.

ant's benefit, such as plea bargaining. In order to accord proper consideration to society's interest in effective law enforcement,[61] a showing that delay was necessary to preserve an on-going investigation of criminal activity so related to the defendant's alleged offense that early arrest or indictment would jeopardize or terminate it should also constitute a sufficient basis for finding a delay reasonable.

If the government fails to demonstrate reasonableness, the inquiry shifts to a determination of whether the defense has been prejudiced. Courts should require the government to demonstrate[62] by a preponderance of the evidence that the constitutional requirement of fundamental fairness to the accused has been met. It is appropriate to place this burden on the prosecution because conclusively showing prejudice is extremely difficult at the pre-trial stage. The defense should be accorded the "benefit of the doubt" where its allegations of prejudice appear to be supported and where government unreasonableness is established. The government will typically satisfy its burden without difficulty by demonstrating (a) that the accused's contentions of the materiality of missing testimony are unreasonable; (b) that the missing testimony, though material, would be unfavorable to the defense; or (c) that evidence equivalent to that

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61. *See* text accompanying notes 39-41 *supra*.

62. The defendant has traditionally been required to show prejudice. *See, e.g.*, Powell v. United States, 352 F.2d 705, 708 (D.C. Cir. 1965) ("We think that an accused must show two things . . . : that there was no legitimate reason for the delay, and that he was prejudiced by the delay. Appellant bears the burden of establishing his claim . . . ."). It is unclear whether he bears the burden of persuasion, as illustrated by the District of Columbia Circuit's apparent confusion on this issue: issue:

> This is not to say that prejudice must be proved beyond a reasonable doubt, or even by a preponderance of the evidence . . . . Since the delay was the clear responsibility of the Government and was arranged solely for its advantage, the accused should not be forced to labor under an exacting burden of proof, but he must still show a plausible claim.
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> . . . It would be unreasonable to put the burden of negating prejudice on the Government, because in almost all cases the accused will have peculiar knowledge of the facts which might constitute prejudice.

Jackson v. United States, 351 F.2d 821, 823 (D.C. Cir. 1965). *See* Note, *Pre-Arrest Delay: Evolving Due Process Standards*, 43 N.Y.U.L. REV. 722, 734 (1968). Once the defense has made a reasonable showing of prejudice, however, placing the ultimate burden of persuasion on the government would be appropriate since it is the absence of evidence caused by the government's delay that would ordinarily prevent the defense from making a conclusive showing.

alleged to be lost is available from another source.[63] If the government meets its burden on the issue of prejudice, the case will go to trial.[64]

Under the suggested test, if unreasonableness is not found, the court will never reach the issue of prejudice. Thus, some cases will proceed to trial where the accused has suffered actual prejudice. Such "close" cases do not warrant dismissal. Where the prosecution has acted reasonably, prejudice to the accused will be a matter of fortuity, not design. Dismissal under this circumstance would be a "windfall" to the defense at the expense of society's interests in effective law enforcement.[65] This result is clearly undesirable, for the due process clause requires a fair trial, not a perfect one.[66] Dismissal for prejudice resulting from a reasonable delay would frustrate public policy and tip the due process balance too far in favor of the accused.

The test recommended here would reach the same result on the facts of *Barket* that the Eighth Circuit reached. The defendant would allege prejudice from the deaths of six material witnesses, supporting his allegation by showing their close connection with the loan, and would claim that the delay before indictment was unreasonable. The government would be unable to demonstrate that its conduct was reasonable, since the delay furthered no law enforcement goal, while the risk of prejudice it engendered was substantial. Nor would the government be able to disprove the materiality of the missing testimony or point to acceptable substitute evidence. Dismissal would result.[67] Al-

63. *See* United States v. Barket, 530 F.2d 189, 198 (8th Cir. 1976) (dissenting opinion).

64. If the defendant's motion is dismissed and he appeals a subsequent conviction on the claim of prejudicial delay, the appellate court will look to the trial record to determine the likelihood of actual prejudice. *See* note 48 *supra* and accompanying text. If prejudice is found, the court will review the finding of reasonableness to determine whether reversal is warranted.

65. *See* text accompanying notes 38-41 *supra.*

66. Smith v. Smith, 454 F.2d 572, 578-79 (5th Cir. 1971), *cert. denied,* 409 U.S. 885 (1972).

67. The effect of this analysis on the court's decision in United States v. Lavasco, 532 F.2d 59 (8th Cir. 1976), *cert. granted,* 97 S. Ct. 233 (1976) (No. 75-1844), *see* note 25 *supra,* is less clear. Under the proposed test the result would hinge on two factors: (1) whether the government explained its reason for delay at the hearing on the motion to dismiss, and (2) whether the government's belief that the delay could result in further arrests was warranted. If the delay was explained, and if the government was actively conducting an investigation that then appeared to have a significant possibility of success, the dismissal would be reversed.

though the *Barket* court also reached this conclusion, the suggested approach would prove more useful than the *Barket* formulation, since it clearly separates the issues of reasonableness and prejudice, permitting the courts to decide most cases solely on the more objective issue of the reasonableness of the government's conduct. The test would thus promote clarity, predictability, and a just accommodation of individual and societal interests.