

7.2 Pre-Accusation Delay

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7.2 Pre-Accusation Delay

A. Constitutional Basis of Right

The Sixth Amendment right to speedy trial does not attach before arrest, indictment, or other official accusation, but a defendant is protected from unfair or excessive pre-accusation delay by the Due Process Clause of the Fifth and Fourteenth Amendments. *See United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971). Finding that sometimes pre-accusation delay is necessary to prevent post-accusation delay and that, generally, post-accusation delay is more harmful to a defendant, *Lovasco* emphasized that the due process right to timely accusation is limited. Due process is violated only when the defendant's ability to defend against the charge is impaired by the delay and the reason for the delay is improper. However, even relatively short delays may result in a due process violation in some circumstances. *See infra* § 7.2D, Case Summaries on Pre-Accusation Delay. In addition to protections against pre-accusation delay, the same constitutional due process protections apply to delays in sentencing. *See Betterman v. Montana*, ___ U.S. ___, 136 S. Ct. 1609 (2016) (holding due process may protect against “inordinate delay” in sentencing but finding speedy trial rights inapplicable).

B. Proving Prejudice

To establish a due process violation a defendant must demonstrate prejudice—that is, the defendant must show that the pre-indictment delay impaired his or her ability to defend against the charge. *See United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971); *State v. McCoy*, 303 N.C. 1 (1981). General allegations that the passage of time has caused memories to fade are insufficient. *See State v. Goldman*, 311 N.C. 338 (1984) (prejudice not established by showing that defendant did not recall date in question or could not account for his whereabouts on that date); *State v. Jones*, 98 N.C. App. 342 (1990). Instead, the defendant must establish that pre-accusation delay caused the loss of significant and helpful testimony or evidence. *See State v. Dietz*, 289 N.C. 488 (1976). Counsel also may have an obligation to ameliorate prejudice if possible. *See State v. Hackett*, 26 N.C. App. 239 (1975) (defense motion denied in part because defendant who alleged pre-accusation delay had not tried to remedy memory loss

regarding underlying incident by moving for a bill of particulars or moving for discovery of the information).

C. Reason for Delay

A court reviewing pre-accusation delay not only must find actual prejudice, but also must consider the reason for the delay. *See United States v. Lovasco*, 431 U.S. 783 (1977). Delay in prosecution might be attributable to investigation, negligence, administrative considerations, or an improper attempt to gain some advantage over the defendant. To establish a due process violation, the defendant must show that the delay was intentional or at least the result of gross negligence or deliberate indifference on the part of a state actor.

Delay in violation of due process. U.S. Supreme Court and North Carolina decisions generally require proof of intentional delay by the State to show a due process violation. *See United States v. Gouveia*, 467 U.S. 180 (1984) (stating that due process requires dismissal of an indictment if the defendant proves that the government's delay caused actual prejudice and was a deliberate mechanism to gain an advantage over the defendant); *State v. Graham*, 200 N.C. App. 204 (2009) (applying same two-pronged test).

Proof of intentional delay may not be required in all cases, however. The government in *Lovasco* conceded that recklessness on the part of the State in failing to prosecute may give rise to a due process violation. *Lovasco*, 431 U.S. at 795 n.17; *see also State v. McCoy*, 303 N.C. 1 (1981) (describing showing required for due process violation and suggesting but not resolving that intentional delay may be required to establish violation). Justice Stevens, dissenting in *Lovasco*, suggested further that when the government had no reason for the delay, a constitutional violation may arise. 431 U.S. at 799–800. The Court of Appeals for the Fourth Circuit, interpreting *Lovasco*, has held that the proper approach to determining whether due process is violated is to balance the prejudice to the defendant against the reasons for the delay. *See Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990) (defendant need not demonstrate an improper motive on the part of the prosecutor); *Jones v. Angelone*, 94 F.3d 900 (4th Cir. 1996) (following *Howell*, but noting that most other circuits do not use balancing approach and require a defendant to show that the government intentionally delayed prosecution to obtain an unfair tactical advantage or for other bad faith reasons); *see also State v. Dietz*, 289 N.C. 488 (1976) (in case decided before *Lovasco*, N.C. Supreme Court applied balancing approach).

Excusable delay. Courts have found no violation of due process where a delay in prosecuting a case is attributable to the exigencies of investigation. *See United States v. Lovasco*, 431 U.S. 783 (1977) (investigative delay acceptable; investigation before indictment should be encouraged); *accord State v. Goldman*, 311 N.C. 338 (1984); *State v. Netcliff*, 116 N.C. App. 396 (1994) (holding that pre-indictment delay was acceptable, based in part on end date of undercover drug operation in relation to date of indictment), *overruled in part on other grounds by State v. Patton*, 342 N.C. 633 (1996); *State v.*

Holmes, 59 N.C. App. 79 (1982) (delay excusable where necessary to protect identity of undercover officer).

Also, courts have found no constitutional violation where the delay in prosecution is the result of delay in reporting crimes to law enforcement. *See State v. Martin*, 195 N.C. App. 43 (2009) (delay of six years before Department of Social Services reported sexual offenses against child; DSS is not the prosecution or the State for purposes of delay inquiry); *State v. Stanford*, 169 N.C. App. 214 (2005) (fifteen year delay before victim filed report of sexual offenses committed when she was thirteen and fourteen years old); *State v. Everhardt*, 96 N.C. App. 1 (1989) (offense reported three years after commission), *aff'd*, 326 N.C. 777 (1990); *State v. Hoover*, 89 N.C. App. 199 (1988) (sexual offense against child not reported for six years, then prosecuted promptly).

D. Case Summaries on Pre-Accusation Delay

Due process violation found. In the following cases, the courts found a due process violation.

State v. Johnson, 275 N.C. 264 (1969) (due process violated by four to five year delay in prosecuting defendant where reason for delay was that law enforcement hoped to arrest an accomplice and pressure defendant to testify against the accomplice once he was arrested; court found prejudice where pre-accusation delay led to defendant serving a prison term that might otherwise have run concurrently with earlier sentence)

Howell v. Barker, 904 F.2d 889 (4th Cir. 1990) (due process violated where State conceded that several year delay in prosecuting defendant resulted in lost witness and reason for delay was administrative convenience; court applied balancing test between prejudice and reason for delay)

Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965) (per curiam) (seven month delay between offense and indictment violated due process where undercover officer made hundreds of drug buys during seven month period, officer could not specifically remember defendant, defendant could not recall events of date in question, and delay deprived defendant of opportunity to offer alibi witness)

No due process violation found. In the following cases, the court found no due process violation.

State v. Floyd, 238 N.C. App. 110 (2014) *reversed in part on other grounds*, 369 N.C. 329 (2016) (pre-accusation delay of two years did not cause prejudice where defendant failed to show that significant evidence was lost due to the delay)

State v. Goldman, 311 N.C. 338 (1984) (six year investigative delay in obtaining indictment did not violate due process where only prejudice was defendant's assertions of faded memory about dates and events in question)

State v. McCoy, 303 N.C. 1 (1981) (eleven month delay between offense and trial did not violate either due process or speedy trial right; reasons for delay were hospitalization of defendant and overcrowding of court docket, and defendant was unable to show specific prejudice)

State v. Dietz, 289 N.C. 488 (1976) (four and one half month delay between offense and indictment did not violate due process where reason for delay was to protect identity of undercover officer and only claim of prejudice was faded memory; court applied balancing test between reason for delay and prejudice)

State v. Graham, 200 N.C. App. 204 (2009) (general assertion of prejudice based on faded memory does not show actual prejudice; defendant did not claim that any particular witness would give testimony helpful to him)

State v. Everhardt, 96 N.C. App. 1 (1989) (spouse abuse case where three year delay in initiating prosecution was caused primarily by victim's procrastination in reporting abuse; defendant showed witness unavailability but did not prove that witnesses would have been available at an earlier time), *aff'd*, 326 N.C. 777 (1990)

State v. Hackett, 26 N.C. App. 239 (1975) (six month delay in prosecuting defendant to protect identity of undercover agent did not violate due process)

E. Investigating Pre-Accusation Delay

If there has been a significant delay in bringing charges against your client, you should document the resultant prejudice. The following steps may be helpful.

- If defense witnesses cannot be found, do not automatically assume that your client was mistaken about their identity; investigate the possibility that the witnesses were previously available but have moved away.
- If important records or documents have been destroyed, find out when this occurred.
- If a defense witness can no longer recall significant facts, determine whether the situation would have been different at an earlier date.
- As you obtain access to warrants, witness statements, or other items in the prosecutor's file, establish the chronology and sequence of events. For example, you should note whether a witness complaint predates the arrest warrant by many months; if so, you can point out to the court that the State had the evidence necessary to charge the defendant at an earlier date.
- Collect jail and prison records to establish that your client was in custody during the delay, could have been served with the charges by the State, and was deprived of the opportunity to receive a concurrent sentence.
- Document any other steps taken by the defendant or defense counsel to mitigate potential prejudice stemming from the delay, whether successful or not.

F. Motions to Dismiss

A motion to dismiss for untimely prosecution may be brought under G.S. 15A-954(a)(4), which provides that the court must dismiss the charges in a criminal pleading if violation of the defendant's constitutional rights has caused irreparable prejudice. *See State v. Parker*, 66 N.C. App. 293 (1984). G.S. 15A-954(c) permits such a motion to be made "at any time." However, to avoid the risk of waiver, such motions should be made at or before trial. *See generally State v. Brinkley*, 193 N.C. 747 (1927) (plea of guilty waived statute of limitations defense); *State v. Holder*, 133 N.C. 709 (1903) (statute of limitations defense could not be raised for first time on appeal). A sample motion to dismiss for pre-accusation delay is available in the noncapital motions bank on the Office of Indigent Defense Services (IDS) website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital").

Where there are contested issues of fact regarding a motion to dismiss, the defendant is entitled to an evidentiary hearing. *See State v. Goldman*, 311 N.C. 338 (1984). In the motion to dismiss you should specifically request a hearing. *See State v. Dietz*, 289 N.C. 488 (1976) (failure to hold hearing not error absent defense request).