

No.

IN THE SUPREME COURT OF THE UNITED STATES

MELVIN SHIELDS, Petitioner

v.

STATE OF KANSAS, Respondent

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT**

PETITION FOR WRIT OF CERTIORARI

PATRICK DUNN
Counsel of Record

KAI TATE MANN
KANSAS APPELLATE DEFENDER OFFICE
700 Jackson, Suite 900
Topeka, KS 66603
(785) 296-5484
E-mail: pdunn@sbids.org

Counsel for Petitioner

QUESTION PRESENTED

In *U.S. v. Marion*, 404 U.S. 307, 322-25 (1971), this Court recognized that pre-charging delay could violate a defendant's due process rights. The *Marion* Court did not establish a test for determining exactly when pre-charging delay violates due process, but cautioned the lower courts that such determinations "will necessarily involve a delicate judgement based on the circumstances of each case." *Marion*, 404 U.S. at 325.

In *U.S. v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), this Court clarified *Marion* and held that while proof of prejudice is required to establish a due process claim, prejudice alone is not dispositive of the issue, as courts are required to "consider the reason for the delay as well as the prejudice to the accused." The *Lovasco* Court described its duty as ascertaining only whether the action of the government "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." *Lovasco*, 431 U.S. at 790 (citations omitted). As for the lower courts, the *Lovasco* Court simply required them to "in the first instance, the task of applying the settled principles of due process . . . to the particular circumstances of individual cases." *Lovasco*, 431 U.S. 796.

Despite *Marion* and *Lovasco* calling for the prejudice suffered by the defendant to be balanced against the reason for the delay to ascertain whether settled principles of due process were violated by the government's pre-charging delay, the Kansas Supreme Court held that to succeed on a pre-charging due process claim defendants must show two things: "First, that the delay caused actual and substantial prejudice; and second, *that the State acted in bad faith.*" *State v. Shields*, 315 Kan. 814, 829-30, 511 P.3d 931, 946 (2022) (emphasis added). Thus, the question presented is this:

Whether a criminal defendant who has established prejudice from the government's pre-charging delay must show that delay was the result of the government's intentional and bad faith tactical decisions to establish a due process violation.

LIST OF PARTIES

The parties to this case are as stated in the caption, Melvin Shields, petitioner, and the State of Kansas, respondent. In the courts below, the petitioner was referred to as appellant-defendant and the respondent was referred to as appellee-plaintiff.

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OPINION BELOW

On direct appeal from conviction, the Kansas Supreme Court held Mr. Shields had not shown his due process rights were violated due to a 13-year delay between the government's discovery of the final piece of evidence and the filing of first degree murder charges. *State v. Shields*, 315 Kan. 814, 829-31, 511 P.3d 931, 945-47 (2022). The Kansas Supreme Court held that to succeed on his pre-trial delay due process claim, Mr. Shields was required to show the State acted in bad faith or was seeking a tactical advantage in waiting 13 years to file the murder charges. *Shields*, 511 P.3d at 945-47.

STATEMENT OF JURISDICTION

The Kansas Supreme Court is the court of last resort in Kansas. The Kansas Supreme Court rejected Mr. Shields' claim that his due process rights were violated by the 13-year pre-charging delay. This Court has jurisdiction under 28 U.S.C. § 1257(a).

The question presented in this case is whether a criminal defendant prejudiced by the State's pre-charging delay is required to show the prejudicial delay was resulted from the government's bad faith tactical decisions to establish a violation of his Due Process rights under the Fifth and Fourteenth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section I of the Fourteenth Amendment to the United States Constitution states the following:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment of the United States Constitution States the following:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On April 27, 1988, J.J. drove her Pontiac Firebird to work at 10:00 A.M. J.J. had plans to have lunch with Steve Ray, who was last seen leaving his place of work at 12:40 P.M.

Later that day, J.J.'s sister, Natalie Jones, returned home and learned J.J.'s purse had been discovered on a service road in Wyandotte County, Kansas. That same afternoon Reginald Reed, J.J.'s cousin, went to a carwash with his friend, where he saw two men washing J.J.'s Pontiac Sunbird. He approached the two men and asked where J.J. was, and one of the men stated that she was at home and had sent them to wash her car. When he returned to his home, he learned that J.J. was missing, and informed J.J.'s mother of what he had seen.

Later that night, Mr. Reed again saw J.J.'s car with three men inside. After blocking the vehicle, he asked the driver where J.J. was, to which the driver responded that she was okay, and another passenger said that they had not done anything to her before reversing and driving away. Mr. Reed attempted to follow the vehicle, but was unable to keep up.

At trial, Mr. Reed identified Mr. Shields as the driver of the Sunbird during both his interactions with the car. However, in a photo lineup given to him by police in 1988, he identified another man, Frank Scott, as the person who definitely was the man at the carwash. He also failed to identify Mr. Shields in

another photo lineup in 2004, but later claimed he actually did identify Mr. Shields.

The next day, April 28, 1988, the bodies of J.J. and Mr. Ray were discovered on a service road with fatal gunshot wounds to the head. J.J.'s hose and underwear were torn exposing her vagina, and a rape kit was collected from both J.J. and Mr. Ray.

On April 29, 1988 J.J.'s car was found in an alley. Police collected cigarette butts, the ashtray, blood samples from the front seats of the vehicle, and fingerprints from the mirror of the vehicle, door handle, and license plate cover. In May of 1988, the rape kits were taken to the Johnson County Crime Lab where samples from the rape kit swabs, J.J.'s panties, and other biological materials were stored into a cryotube.

In 2002, Detective Terry Mast was reviewing cold case files, discovered this case, and sought DNA testing on the items. The materials were tested by the Kansas Bureau of Investigation, and the May 13, 2003 results were entered into CODIS, which identified Mr. Shields as a contributor of the DNA in a full or partial capacity on cigarettes recovered from the car, J.J.'s panties, and the J.J.'s rape kit. However, no further investigation of the case was done once this information was received. The case was again examined in 2006, but again, charges were not filed.

In 2016, the State finally filed charges of two counts of felony murder and premeditated murder. No reason beyond a new prosecutors for the reversal in the charging decision was ever given by the State despite it being in possession of all the evidence used in this case by 2003.

After filing charges, issues with evidence created by the delay arose. The State had problems producing discovery related to the DNA testing, data was lost, and witnesses potentially favorable to Mr. Shields had passed away.

Mr. Shields claimed the pre-charging delay denied him his right to due process under the Fifth Amendment to the United States Constitution. The district court held a hearing and determined that while Mr. Shields had established prejudice due to the delay, his due process rights were not violated because he had not shown the delay was the result of a bad faith tactical decision by the State.

The matter proceeded to trial, where the jury found Mr. Shields guilty of both counts of premeditated first degree murder. Mr. Shields was sentenced to consecutive sentences of life with the eligibility for parole after 15 years.

On direct appeal to the Kansas Supreme Court, Mr. Shields argued *State v. Royal*, 217 Kan. 197, 201, 535 P.2d 413 (1975), the controlling Kansas precedent on due process violations stemming from pre-charging delay, is contrary to this Court's precedent in *U.S. v. Marion*, 404 U.S. 307, 324, 92 S.Ct.455, 30 L.Ed.2d 468

(1971) and *U.S. v. Lovasco*, 431 U.S. 783, 794-96, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). Specifically, Mr. Shields argued that *Royal's* finding reading *Marion* to require Mr. Shields show the pre-charging delay was the result of the State's bad faith.

The Kansas Supreme Court disagreed and reaffirmed *Royal. Shields*, 511 P.3d at. 945-47. The Kansas Supreme Court determined requiring the defendant to show the "State intentionally delayed charging the defendant to gain a tactical advantage or some other improper purpose" was the proper test, comporting to the majority of the federal Circuit Courts of Appeal. *Shields*, 511 P.3d at. 946-47. Finding Mr. Shields had not met this burden, the Kansas Supreme Court found no due process violation, and affirmed Mr. Shields' conviction and consecutive life sentences.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition to clarify the precise test for determining whether pre-charging delay violates due process. Specifically, this Court should clarify that a defendant need not show that the delay was due to intentional bad faith by the State.

Introduction: Pre-charging delay and due process

In *U.S. v. Marion*, 404 U.S. 307, 322-24 (1971), this Court for the first time recognized that while, statutes of limitations offered the primary protection against the government pursuing overly stale charges, they do not offer the only protection. Instead, the *Marion* Court recognized pre-charging delay may violate the Due Process Clause of the Fifth Amendment to the United States Constitution. *Marion*, 404 U.S. at 324-25. This is fortunate for Mr. Shields because in Kansas, murder and other serious crimes are not subject to a statute of limitation. See, K.S.A. 21-5107.

While recognizing due process protections exist, the *Marion* Court was hesitant to establish a particular test or bright line rule establishing when pre-charging due process violation requires dismissal, noting it “need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires dismissal of the prosecution.” *Marion*, 404 U.S. at 324. Instead, the *Marion* Court cautioned that “To accommodate the sound administration of justice to the rights of the defendant to a fair trial will

necessarily involve a delicate judgement based on the circumstances of each case.” *Marion*, 404 U.S. at 325.

That *Marion* declined to articulate a hard, bright line test for establishing pre-charging due process violation is not surprising, and is wholly appropriate. After all, “It has been said so often by this Court and others as to not require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 93 S.Ct. 2593, 2601, 33 L.Ed.2d 484, (1972).

But *Marion* was not wholly without guidance as to what could constitute a due process violation. Instead, in recognizing that statutes of limitations were not the only protection against stale charges, the *Marion* Court accepted the concession by the government that a due process violation occurs “if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellee’s rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” *Marion*, 404 U.S. at 324.

The next, and last case in which this Court analyzed due process pre-charging delay was *U.S. v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). The *Lovasco* Court first clarified that while proof of prejudice is required to establish a due process claim, prejudice alone was not dispositive as “the due process inquiry must consider the reasons for the delay as well as the prejudice

to the accused.” *Lovasco*, 431 U.S. at 790.

Turning to the issue at hand, the *Lovasco* Court demonstrated the same restraint as in *Marion*, explaining its role was to ascertain “only whether the action complained of here, compelling respondent to stand trial after the Government delayed indictment to investigate further 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.” *Lovasco*, 431 U.S. at 790 (citations omitted).

The *Lovasco* Court found that investigative delay does not deprive a defendant due process because the delay of a prosecutor not filing charges until they are completely satisfied such is warranted is in line with “elementary standards of fair play and decency.” *Lovasco*, 431 U.S. at 795-96. But like *Marion*, *Lovasco* is notable in that it did not again necessarily establish a bright line rule of application or set test to establish a pre-charging due process violation.

Instead, the *Lovasco* Court again noted that “In *Marion*, we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. More than five years later, that statement remains true.” *Lovasco*, 431 U.S. 796. As such, the *Lovasco* Court left “for the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances

of individual cases." *Lovasco*, 431 U.S. 796.

From these two cases, it is discernable this Court has yet to speak forcefully on or articulate a bright line test to make out a pre-charging due process violation. Instead, courts are to apply the settled principles of due process, i.e. standards of fair play and decency, based upon the delicate judgment based upon the facts upon each individual case. *Lovasco*, 431 U.S. 790, 795-96 (due process as sense of fair play and decency) and *Marion*, 404 U.S. at 325 (individualized determinations of due process).

Given the above, it is clear this Court's precedent does not require that pre-accusation delay is ONLY a due process violation if it was tactical. Instead, at best, *Marion* and *Lovasco* hint that such tactical delay resulting in prejudice merely one instance that would clearly result in a due process violation. In sum, tactical bad faith delay is used by *Marion* and *Lovasco* as an *example* of an easy, clear cut due process violation. But they are not the only species of due process claims, as such claims are to be dealt with individually and applying standards of fair play and decency, taking account of both the prejudice and the reason for delay. Unfortunately, a great number of jurisdictions have misread both *Marion* and *Lovasco*, and the lower courts have struggled to apply them.

Need to grant certiorari: Three way split of authority

As to pre-charging due process violations, American jurisdictions are

nearly unanimous in finding that a defendant must present prejudice caused by the delay to proceed. Indeed, counsel's research indicates Delaware is the only jurisdiction to not require some prejudice, as a defendant may prevail upon a showing of actual prejudice to the delay, OR the prosecution delayed to get a tactical advantage. See, *Preston v. State*, 338 A.2d 562, 567 (Del. 1975).

But beyond requiring prejudice, the lower courts are divided as to what else is necessary to make a claim of pre-charging due process error. The majority of federal Circuit Courts of Appeal require the defendant to show the prosecution has intentionally acted in bad faith. See, *U.S. v. Lebron-Gonzalez*, 816 F.2d 823, 831 (1st Cir. 1987); *U.S. v. Cornielle*, 171 F.3d 748, 752 (2nd Cir. 1999); *U.S. v. Ismaili*, 828 F.2d 153, 16668 (3rd Cir. 1987); *U.S. v. Crouch*, 84 F.3d 1497, 1511-12 (5th Cir. 1996); *U.S. v. Rogers*, 118 F.3d 466, 474-75 (6th 1997); *U.S. v. Engstrom*, 965 F.2d 836, 839 (10th Cir. 1992); *U.S. v. Hays*, 40 F.3d 362, 365 (11th Cir. 1994); and *U.S. v. Bridgeman*, 523 F.2d 1009, 1112, 173 U.S.App.D.C. 150, 163 (D.C. Cir. 1975).

But the federal Circuits are not unanimous. Instead, the Fourth, Seventh, Eighth, and Ninth Circuits all balance the defendant's prejudice against the government's reasons for the delay. See, *Howell v. Barker*, 904 F.2d 889, 893-96 (4th Cir. 1990) (reading *Marion* and *Lavasco* as instructing court to weigh pre-charging due process issues by balancing prejudice against the government's justification for delay); *U.S. v. Sowa*, 34 F.3d 447, 451-52 (7th Cir. 1994) (government's reasons

for delay balanced against defendant's prejudice, required by precedent and logic), *U.S. v. Ross*, 123 F.3d 1181 (9th Cir. 1997) ("the defendant must show actual prejudice from the delay, and the court must balance the length of the delay with the reasons for the delay"). And while the Tenth Circuit generally does cite the test requiring the defendant show intentional bad faith, there is also precedent indicating that such may not be absolutely necessary, as acts that are less than intentional may result in a denial of due process. See, *U.S. v. Glist*, 594 F.2d 1374, 1378 (10th Cir. 1979)

But amongst the states, things are much more closely divided. Twenty-five states require the defendant to show intentional bad faith upon the government to prevail on a pre-charging due process violation. See, *State v. Royal*, 217 Kan. 197, 201, 535 P.2d 413 (1975); *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (Ariz. 1996); *State v. Prince*, 581 So.2d 874, 878-79 (Ala. Ct. Crim App. 1992); *Hilton v. State*, 288 Ga. 201, 206, 702 S.E.2d 188, 193 (Ga. 2010); *State v. Crockett*, 151 Idaho 674, 679, 263 P.3d 139, 144 (Id. Ct. App. 2011); *Kirk v. Commonwealth*, 6 S.W.3d 823, 826 (Ky. 1999); *Clark v. State*, 364 Md. 611, 631, 774 A.2d 1136, 1147 (Md. Ct. App. 2001); *Ridinger v. State*, 478 P.3d 1160, 1164 (Wyo. 2021); *People v. White*, 208 Mich.App. 126, 134, 527 N.W.2d 34, 38 (Mich. Ct. App. 1994); *Roberts v. State*, 234 So.3d 1251, 1268 (Miss. 2017); *State v. Anderson*, 275 N.W.2d 554, 555 (Minn. 1978); *Wyman v. State*, 125 Nev. 592, 600-02, 217 P.3d 572, 578-79 (Nev.

2009); *State v. Scott*, 621 S.W.2d 915, 917 (Mo. 1981); *State v. Glazebrook*, 282 Neb. 412, 422, 803 N.W.2d 767, 777 (Neb. 2011); *State v. Townsend*, 186 N.J. 473, 489, 897 A.2d 316, 325 (N.J. 2006); *Gonzalez v. State*, 111 N.M. 363, 365, 805 P.2d 630, 632 (N.M. 1991); *Calvert v. State*, 517 P.3d 977, 985 (Ok. Ct. Crim. App. 2022); *State v. McGuire*, 328 Wis.2d 289, 308-13, 786 N.W.2d 227, 237-40 (Wis. 2010); *State v. Hales*, 152 P.3d 321, 333 (Ut. 2007); *State v. King*, 204 Vt. 228, 245, 165 A.3d 107, 118 (Vt. 2016); *State v. McCoy*, 303 N.C. 1, 7-8, 277 S.E.2d 515, 522 (N.C. 1981); *State v. Vanasse*, 593 A.2d 58, 64 (R.I. 1991); *Ibarra v. State*, 11 S.W.3d 189, 193 (Tex. Crim. App. 1990); *Morrisette v. Commonwealth*, 264 Va. 386, 393, 569 S.E.2d 47, 52 (Va. 2002); and *State v. Carico*, 968 S.W.2d 280, 285 (Tenn. 1998).

However, eighteen states employ a different test. In these jurisdictions, instead of the accused having to show intentional bad faith, once prejudice is established, the courts then determine whether due process was violated by weighing the prejudice against the reason for the delay. See, *Scott v. State*, 581 So.2d 887, 891-92 (Fla. 1991); *State v. Wright*, 302 Mont. 527, 533, 17 P.3d 982, 986-87 (2000); *State v. Knickerbocker*, 152 N.H. 467, 468-70, 880 A.2d 419, 422-23 (2005); *State v. Oppelt*, 172 Wash.2d 285, 288-93, 257 P.3d 653, 656-58 (2011); *People v. Lawson*, 67 Ill.2d 449, 459-61, 367 N.E.2d 1244, 1247-49 (Ill. 1977); *People v. Nelson*, 43 Cal. 4th 1242, 1249-57, 185 P.3d 49, 54-59 (Cal. 2008); *State ex rel. Knotts v. Facemire*, 223 W.Va. 594, 601-03, 678 S.E.2d 847, 853-856 (W. Va. 2009); *Scott v.*

State, 263 Ark. 669, 674, 566 S.W.2d 737, 740 (Ark. 1978); *State v. Stokes*, 350 Or. 44, 64, 248 P.3d 953, 965 (Ore. 2011); *People v. Singer*, 44 N.Y.2d 241, 254, 376 N.E.2d 179, 186-87 (Ct. App. N.Y. 1978); *State v. Luck*, 15 Ohio St.3d 150, 154-59, 472 N.E.2d 1097, 1102-06 (Ohio 1984); *State v. Gonzalez*, 156 P.3d 407, 411-12 (Ak. 2007); *State v. Keliiheleua*, 105 Hawai'i 174, 179, 95 P.3d 605, 610 (Haw. 2004); *State v. Smith*, 957 N.W.2d 669, 676-77 (Iowa 2021); *State v. Malvo*, 357 So.2d 1084, 1087 (La. 1978); *State v. Cote*, 118 A.3d 805, 811 (Me. 2015); *State v. Weisz*, 356 N.W.2d 462, 464 (N.D. 1984); *State v. Lee*, 375 S.C. 394, 397, 653 S.E.2d 259, 260 (S.C. 2007).

And finally, there are seven jurisdictions that employ slightly different tests. Colorado requires a showing of prejudice, and government misconduct, but allows for the defendant to show the misconduct was intentional or negligent. *People v. Small*, 631 P.2d 148, 157 (Col. 1981). Connecticut and Indiana require a showing of actual prejudice and no justification for the delay. See, *State v. Morrill*, 197 Conn. 507, 522, 498 A.2d 76, 86 (Conn. 1985) and *Allen v. State*, 813 N.E.2d 349, 366 (Ind. Ct. App 2004). But Massachusetts and Pennsylvania allow for the defendant to show that the delay was either recklessly or intentionally caused. See, *Com. v. Dame*, 473 Mass 524, 530-35, 45 N.E.3d 69, 76-80 (Mass. 2016) and *Com. v. Scher*, 569 Pa. 284, 312-14, 803 A.2d 1204, 1221-22 (Pa. 2002). As covered above, Delaware is unique in that it is the only jurisdiction where a defendant may prevail by showing actual prejudice *or* that the delay was the

result of intentional bad faith. *Preston* 338 A.2d at 567. And lastly, to make a claim of pre-charging due process error in South Dakota, the defendant must show actual prejudice, at which point the State must come forward with a valid good faith reason for the delay. See, *State v. Stock*, 361 N.W. 2d 280, 283-84 (S.D. 1985).

Despite the wide variation in application of *Marion* and *Lovasco*, the one thing almost all the above cases have in common is that they all claim to be the true interpretation of those cases. Compare, *Roberts*, 234 So.3d at 1268 (stating *Marion* and *Lovasco* demand the defendant show the delay was a tactical device to gain advantage) with *Luck*, 472 N.E.2d at 1102-06 (interpreting *Lovasco* and *Marion* for the proposition that negligence or errors of judgement can violate due process when actual prejudice had) and *Preston* 338 A.2d at 567 (*Marion* allows for finding of either actual prejudice or intentional bad faith).

Need to grant certiorari: Resolve the splits

Given this radical split of authority, and all claiming to be a true interpretation of this Court's precedent, Mr. Shields implores this Court to step in and resolve this issue by reaffirming and explicitly stating that *Marion* nor *Lovasco* require a defendant show intentional bad faith on part of the government in order to succeed on a claim of pre-charging delay due process violation. Only this Court can resolve this split, and it should.

And not only does a broad split of authority exist, the majority position, requiring a defendant show intentional bad faith on the part of the government, is furthest from the correct reading of *Marion* and *Lovasco*. As discussed above, those cases clearly stand for the proposition that courts are to apply the settled principles of due process, i.e. standards of fair play and decency, based upon the delicate judgment based upon the facts upon each individual case. *Lovasco*, 431 U.S. at 795-96 (due process as sense of fair play and decency) and *Marion*, 404 U.S. at 325 (individualized determinations of due process).

Requiring defendants to prove intentional bad faith in order to make a due process claim regardless of circumstances is not employing a delicate judgment based on the facts of each case. It is clear this Court's precedent does not require that pre-accusation delay is *only* a due process violation if it was tactical. Instead, at best, *Marion* and *Lovasco* hint that such tactical delay resulting in prejudice merely one instance that would clearly result in a due process violation. In sum, tactical bad faith delay is used by *Marion* and *Lovasco* as an example of an easy, clear cut due process violation.

Further, the current test, placing the burden on the defendant to show the State gained a tactical advantage is unworkable as the State is not required to disclose their tactics, and the defense has no real chance to discover them. A balancing test would require the State to reveal why the delay occurred, so it can

be judged along with the prejudice to the defendant. This is consistent with the traditional notions of fair play and decency, and gives the lower courts an opportunity to actually weigh the individual characteristics of the case, in compliance with *Marion*. Notably, it is probable that such test can be easily cleared by the State if there actually is a reason for the delay extending beyond prosecutorial whimsy. But in this case, State has not come up with any reason for the delay, beyond different prosecutors looking at the case over the decades.

However, it should be questionable as to whether a difference in prosecutors should matter. Mr. Shields is still unaware as to why this prosecution began after until over a decade from the time the State gained the final piece of evidence. The State has never come forward with any reason. As such, it is unreasonable and impossible for Mr. Shields to be able to plead what is in the mind of the State, particularly when the State does not have to come forward with the reason for the delay.

Prosecutorial delay is fully within the hands of the government. After all, there is no constitutional right to be arrested. See, *Lovasco*, 431 U.S. at 792, n. 13. Instead, persons are at complete mercy of the State as to the timing of criminal charges. As such, the only way any court can comply with *Lovasco*'s demand that the courts "consider the reasons for the delay as well as the prejudice to the accused" is to actually balance the prejudice suffered with the reason for the

delay. *Lovasco*, 431 U.S. at 790. But the test applied by the Kansas Supreme Court, the majority of states, and federal Circuit Courts of Appeal strip the essential aspect of *Lovasco* from existence.

This Court is the only entity to resolve this split. And this case offers a clean vehicle from which to just that. The district court found Mr. Shields suffered prejudice from the pre-charging delay, and the Kansas Supreme Court presumed such was supported by the evidence. *Shields*, 511 P.3d at 946-47. Therefore, the sole reason Mr. Shields claim failed in both the district court and in the Kansas Supreme Court was the erroneous requirement Mr. Shields show intentional bad faith conduct. With this case, this Court has a clear opportunity to correct course on this matter, and realign the pre-charging due process analysis to comport with this Court's precedent.

Mr. Shields respectfully requests this Court grant this petition and clarify that a defendant is not required to show intentional bad faith by the government. This Court should further clarify that pre-charging due process violations are to be assessed by weighing the prejudice to the defendant against the reason for the delay, to determine whether the delay violated the traditional sense of fair play and decency, *i.e* due process as required in *Marion* and *Lovasco*.

CONCLUSION

For the foregoing reasons, Mr. Shields respectfully requests this Court grant this petition for certiorari, reverse the Kansas Supreme Court, and remand for determination whether the State's unexplained 13-year charging delay was for reasons beyond fair play and decency, thus violating Mr. Shields' due process rights.

Respectfully submitted,

PATRICK DUNN
Counsel of Record
KAI TATE MANN
KANSAS APPELLATE DEFENDER OFFICE
700 Jackson, Suite 900
Topeka, KS 66603
(785) 296-5484
E-mail: pdunn@sbids.org
Counsel for Petitioner

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