STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2006AP1379-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

BRUCE DUNCAN MACARTHUR,

Defendant-Appellant-Cross-Respondent.

On Court of Appeals Certification of Appeal from a Pretrial Order Entered in the Circuit Court for Dodge County, The Honorable Daniel W. Klossner, Presiding

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NONPARTY BRIEF OF FATHER DONALD J. MCGUIRE

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ARGUMENT

Father Donald J. McGuire respectfully submits this brief in support of Father Bruce Duncan MacArthur's position that the age-based limitations period first enacted in 1993, rather than the catch-all "six years plus tolling" provision, applies to an alleged sexual assault of a child not yet time-barred as of the effective date of the 1993 amendments. Father McGuire also concurs in Father MacArthur's implicit position that this Court erred in *State v. Wilson*, 149 Wis.2d 878, 440 N.W.2d 534 (1989), in requiring an improper prosecutorial motive before prejudicial delay in filing criminal charges violates due process.[1]

[1] Although the state defends the constitutionality of the "public resident" tolling provision in Wis. Stat. §939.74(3), State's Response Brief at 22-24, MacArthur has not challenged that provision and its validity is not before this (continued...)

A. The Age-Based Limitations Period as Enacted in 1993 Controls All Charges of Sexual Assault of a Child Not Already Time-Barred as of the Date of its Enactment

"[O]nce a statute of limitations has run, the party relying on the statute has a vested property right in the statute-of-limitations defense." *State v. Haines*, 2003 WI 39, ¶13, 261 Wis.2d 139, 661 N.W.2d 72. The question here, however, is what limitations period to apply.

Prior to 1989, limitations periods for Wisconsin felony charges were straight-forward. With limited exceptions, the statutes provided that "prosecution for a felony must be commenced within 6 years . . . after the commission thereof." Wis. Stat. §939.74(1) (1955 to 1988). The six-year period was tolled, however, during the time when "the actor was not publicly a resident within this state." Wis. Stat. §939.74(3) (1955 to 1988).

In 1988, the Legislature added Wis. Stat. §939.74(2)(c) as an alternative limitations period for child sex assaults:

> (c) A prosecution for violation of s. 948.02, 948.03, 948.04, 948.05, 948.06 or 948.08 may be commenced within the time period specified in sub. (1) or by the time the victim reaches the age of 21 years, whichever is later.

1987 Wis.Act 332, §27. By its terms, however, this enactment applied only to offenses committed on or after its effective date of July 1, 1989. *Id.* §65.

In 1993, the Legislature amended §939.74(2)(c) to remove the six-year alternative limitations period for child sex assaults and to instead require that such charges "shall be commenced before the victim reaches the age of 26 or be barred." 1993 Wis.Act 219. The age limit subsequently was raised to 31, *see* 1997 Wis.Act 237, §722c, and then 45, *see* 2003 Wis.Act 279, §9, but the basic language stayed the same.

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[1](...continued)
Court.

In contrast to the 1988 amendments that applied only to offenses committed after its effective date, *see* 1987 Act 399, §3203(57)(ag), the Legislature expressly provided that the subsequent amendments apply to offenses not barred from prosecution on the effective date of the provision. *E.g.*, 1993 Wis. Act 219, §7.

As the circuit court held (A-Ap:102-03), the language and legislative history of §939.74(2)(c) sets a "hard-and-fast cutoff barring any and all prosecutions" once the alleged victim reaches the specified age. The state argues, and the circuit court found, however, that §939.74(2)(c) does not apply here because the statute expressly refers to the current statutory sections for sexual offenses against children under Chapter 948, while MacArthur is charged under the predecessor statutes in effect in 1966-72. The state is wrong.

First, statutes of limitations are to be "liberally construed in favor of repose." *United States v. Habig*, 390 U.S. 222, 227 (1968). This is consistent with their purpose to provide a fair balance between the state's ability to prosecute and the defendant's right to present a defense:

> These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. As this Court observed in *Toussie v. United States*, 397 U.S. 112, 114-15 (1970):
>
> > "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."

United States v. Marion, 404 U.S. 307, 322-23 (1971) (footnote omitted). *See also Stogner v. California*, 539 U.S. 607, 615-16 (2003).

Second, despite the statute's failure to expressly cite the predecessor statutes to those cited, it applies by implication and by statutory history to any prosecution for alleged sexual assaults of minors, including those brought under predecessor statutes to those listed. *Cf.*, *In re Detention of Pharm*, 238 Wis.2d 97, ¶¶16-22, 617 N.W.2d 163 (Ct. App. 2000) (language of sexual predator statute, although expressly citing only to current statutory sections covering child sexual assault, applies as well to predecessor statutes such as Wis. Stat. §944.11); *State v. Irish*, 210 Wis.2d 107, 565 N.W.2d 161 (Ct. App. 1997) (same).

As demonstrated in MacArthur's opening brief at 10-14, there is a continuous line from the 1965 child sexual assault statutes, through the statutes of the 1993 amendments, to the present version of that offense contained in §948.02. For the same reasons that the Court of Appeals found the express reference to §948.02 in the sexual predator statute to incorporate predecessor statutes such as §944.11, *see Pharm*, *supra*, the statutory reference to §948.02 in the statute of limitations necessarily incorporates all prior versions of that offense.

Moreover, the requirement in §939.74(2)(c) that prosecution shall commence before an alleged victim turns 26 (1993 amendment) or 45 (2003 amendment) embodies the public policy in this state that there comes a point beyond which it is unfair to prosecute a person even for the crime of child sexual assault. *See, e.g.*, *Marion*, 404 U.S. at 322-23 (discussing beneficial purposes of statutes of limitations). It was undoubtedly to avoid the specter of cases such as the present one involving the prosecution of an 86-year-old man for allegations from 35 to 40 years ago that the legislature required that commencement of prosecution must take place before the alleged victim is 45. That public policy cannot be fulfilled if that section is interpreted as applying only to prosecutions under the current child sexual assault statute and as not applying to prosecutions under the predecessor statutes such as §944.11.

Third, although Wis. Stat. §§990.06 and 991.07 provide that a new limitations statute generally applies prospectively, that presumption does not apply where, as here, the legislature expressly provided otherwise. In enacting the 1993 amendments, mandating that a child sex offense "shall be commenced before the victim reaches the age of 26 years or be barred," the Legislature expressly provided that this provision "applies to offenses not barred from prosecution on the effective date of this subsection." 1993 Wis. Act. 219, §7. There thus is no question that the amendments apply retroactively. *See also State v. Haines*, 2003 WI 39, ¶8, 261 Wis.2d 139, 661 N.W.2d 72 (so holding).

Fourth, the purpose of amending §939.74(2)(c) to allow prosecution until the alleged child-victim reached a particular age was to give him or her time to mature and recover from any trauma sufficiently to report the alleged abuse to police. According to the 1993 Bill Request (11/16/1992) contained in the legislative history of the 1993 amendments (copy of relevant portions attached as Amicus-App. 1-9), "[v]ictims of child abuse often fear coming forward and sometimes repress the memory of abuse into middle age." That purpose does not, however, support an open-ended tolling of the limitations period simply because the alleged abuser happens to reside outside the state. The defendant's absence from the state can have no rational connection to the time needed for the alleged victim to recover enough to report the abuse to the police, a fact the Legislature apparently recognized given the absence of any such tolling provision applicable to the age-based limitations period under §939.74(2)(c) for time the defendant resided outside the state.

The legislative history to the 1993 amendments further supports the fact that the legislature did not intend to grant some open-ended tolling of the limitations period in child sex cases. As originally proposed, 1993 Assembly Bill 250 provided for just the limitless period desired by the state here, providing that prosecution for serious child sex offenses "may be commenced at any time." 1993 Assembly Bill 250, §10. However, the Legislature expressly rejected that version,

ultimately providing that such charges "shall be commenced before the victim reaches the age of 26 or be barred."

Nor does a supposed general purpose to extend the limitations periods in child sex cases support the state's view that the age-based limitations periods apply *only* to offenses allegedly committed on or after July 1, 1989. Indeed, that purpose requires just the opposite result. In its efforts to save its prosecution in this extraordinary case, the state's interpretation of the limitations statutes results in a *much shorter* limitations period for the far more common type of child sex offense where the alleged perpetrator resides in Wisconsin.

Specifically, to reach its desired result here, the state must construe the general, six-year limitations period as applying to *all* child sex offenses taking place before July 1, 1989. Under the state's theory, therefore, any child sex offense committed before that date would have to have been charged within six years or be barred (absent the rare circumstance of the defendant's removal from the state). None of those cases, in the state's view, are subject to the lengthened limitations periods under subsequent law - a child molestation committed on June 30, 1989 would be barred after June 30, 1995, while one committed the following day could be filed until the child turned 45.

The state's analysis thus does not make sense. Nothing suggests that the Legislature, in lengthening the limitations periods for child sex crimes, concerned itself with the possibility that a few rare cases such as this might be barred under the new standard when they would not have been barred due to tolling under the old. Even if the Legislature thought about tolling in such cases, it no doubt deemed it sufficient to allow the state to file such charges up until the alleged victim turned 45.

B. By Requiring Improper Prosecutorial Motive in Addition to Prejudicial Delay in Charging to Establish a Due Process Violation, this Court Erred in *State v. Wilson*, 149 Wis.2d 878, 440 N.W.2d 534 (1989)

Although "[t]he statute of limitations is the principal device . .

. to protect against prejudice arising from a lapse of time between the date of an alleged offense and an arrest," it is not the only standard when considering the due process consequences of such a delay. *State v. Wilson*, 149 Wis.2d 878, 440 N.W.2d 534, 544 (1989). *See, e.g.*, *United States v. Gouveia*, 467 U.S. 180, 192 (1984). In *Wilson*, this Court announced a due process test requiring the defendant raising such a claim to establish not only actual prejudice arising from the delay but also that the delay resulted from an improper motive or purpose such as to gain a tactical advantage over the accused. 440 N.W.2d at 544.

With all due respect, the Court misconstrued the authorities upon which it relied in stating its two-pronged due process test. Except in extraordinary circumstances, due process focuses on the fairness of the trial rather than the bad faith of the prosecutor. *E.g.*, *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (prosecutor's failure to disclose exculpatory evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). The principle of due process "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id.* A careful reading of the authorities upon which the *Wilson* Court relied, moreover, reveals that the United States Supreme Court never intended to require a showing of improper prosecutorial motive in every case.

The *Wilson* majority cites *United States v. Lovasco*, 431 U.S. 783 (1979), *United States v. Marion*, 404 U.S. 307 (1971), and *United States v. Gouveia*, 467 U.S. 180 (1984), for its improper prosecutorial motive requirement. *Wilson*, 440 N.W.2d at 544. However, *Gouveia* does not stand for that proposition. The narrow issue before the Court in *Gouveia* was whether the respondents were entitled to the appointment of counsel while they were in administrative segregation in a federal prison before any formal adversary judicial proceedings had been initiated against them. While discussing why the Sixth Amendment right to counsel does not attach prior to initiation of formal proceedings, the Court minimized the need for counsel to avoid intentional prosecutorial delay in such circumstances, noting in dictum

that "the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove the Government delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." *Gouveia*, 467 U.S. at 192. However, this off-hand remark was intended to show the existence of constitutional protections against a perceived danger on intentional delay, not to limit or fully define due process protections.

The *Gouveia* Court cites *Lovasco* and *Marion* in support of the remark quoted above. However, neither of these cases suggest that the only way a defendant can establish a due process claim is to prove improper motive or purpose. In *Marion*, the appellees claimed that their due process and speedy trial rights were violated due to the prosecutor's negligence or indifference in investigating the case and presenting it to a grand jury. *Marion*, 404 U.S. at 310. In rejecting their contentions, the United States Supreme Court found that their due process claims were speculative and premature because actual prejudice had not been shown. *Id*. at 326. However, the court did discuss principles concerning the reasons for a pre-charge delay:

> . . . we need not, and could not now, determine when and in what circumstances actual prejudice resulting from preaccusation delays requires the dismissal of the prosecution. . . . 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. It would be unwise at this juncture to attempt to forecast our decision in such cases.

Id. at 324.

Plainly, *Marion* does not stand for the proposition that proof of improper motive is necessary to establish a due process claim. At most, *Marion*, stands for the proposition that proof of prejudice is a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.

Lovasco also does not stand for the proposition that the only way a defendant can establish a due process claim is to prove evil motive or purpose. In *Lovasco*, the respondent alleged that a pre-indictment delay of 17 months violated his due process rights because two material defense witnesses had died. *Lovasco*, 431 U.S. at 785-86. The Supreme Court held that the lower courts erred in dismissing the indictments based on Lovasco's claim of prejudicial delay. *Id*. at 797. The Court reasoned that the unsworn statements of the government's counsel during the appellate process demonstrated that the delay was in good faith and due to an on-going investigation. *Id*. at 796.

In reaching this conclusion, however, the *Lovasco* Court affirmed its prior statements in *Marion* that the due process inquiry must be flexible and depend on the particular circumstances of each case:

> In *Marion*, we conceded that we could not determine the abstract circumstances in which preaccusation delay would require dismissing prosecutions. 404 U.S. at 294. More than five years later that statement remains true. Indeed in the intervening years so few defendants have established that they were prejudiced by delay that neither this court not any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. We therefore leave to 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. We simply hold that in this case the lower courts erred in dismissing the indictment.

Lovasco, 431 U.S. at 797.

Thus *Lovasco* merely stands for the proposition that "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790. It does not mandate that due process is violated only when delay is caused by an improper prosecutorial purpose.

Wilson's "improper motive or purpose" language thus is not

mandated by the Supreme Court. For the reasons stated in the *Wilson* dissent, the appropriate test requires the Court to balance the actual prejudice suffered by the defendant against the reasons for the delay. 440 N.W.2d at 546-48 (Heffernan, Ch.J., dissenting).

Because the improper prosecutorial motive requirement in *Wilson* thus is not supported by the authorities it cites, Father McGuire respectfully asks that it be overruled.

CONCLUSION

For these reasons, as well as the reasons stated in MacArthur's Briefs, Father McGuire asks that the Court (1) hold that the age-based limitations period in §939.74(2)(c), rather than the six-years-plus-tolling provision in §939.74(1), applies to charges under predecessor child sexual assault statutes and (2) overrule *Wilson* to the extent that it requires a showing of improper prosecutorial motive in every case.

Dated at Milwaukee, Wisconsin, February 11, 2008.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,978 words.

_____
Robert R. Henak

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