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Prearrest Delay: Is Ross Still Boss?

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Prearrest Delay: Is *Ross* Still Boss?

The right to a speedy trial is within the scope of protection afforded by the sixth amendment[1] and Rule 48(b)[2] of the Federal Rules of Criminal Procedure. This protection has traditionally been limited to postarrest situations.[3] In the 1965 case of *Ross v. United States*,[4] the United States Court of Appeals for the District of Columbia dismissed an indictment against a criminal defendant because an unreasonable and prejudicial prearrest delay violated the fifth amendment due process rights of the defendant. Although some groundwork for such a startling decision had previously been laid by various federal courts around the country,[5] *Ross* was unprecedented. With the announcement of *Ross*,

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1. U.S. CONST. amend. VI provides:
   In all criminal prosecutions, the accused shall enjoy the *right to a speedy and public trial*, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. [Emphasis added].
2. FED. R. CRIM. P. 48(b) provides:
   Dismissal
   . . . .
   (b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.
3. Both the sixth amendment and FED. R. CRIM. P. 48(b) have been traditionally applied to delays occurring *after* indictment, or to delays occurring between arrest and indictment. *See, e.g.*, Kroll v. United States, 433 F.2d 1282 (5th Cir. 1970); Estrella v. United States, 429 F.2d 397, 400 (9th Cir. 1970); United States v. Grayson, 416 F.2d 1073, 1076 (5th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970); Benson v. United States, 402 F.2d 576 (9th Cir. 1968); United States v. Feinberg, 383 F2d 60, 65 (2d Cir. 1967); Terlikowski v. United States, 379 F.2d 501, 505 (8th Cir. 1967); Nickens v. United States, 323 F.2d 808, 809 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 905 (1964); Harlow v. United States, 301 F.2d 361 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962); Hoopengarner v. United States, 270 F.2d 465 (6th Cir. 1959); Parker v. United States, 252 F.2d 680, 681 (6th Cir.), *cert. denied* 356 U.S. 964 (1958). There have been three basic arguments against the inclusion of preprosecution delays within the scope of a right to speedy trial: (1) the statute of limitations should be the exclusive control over preprosecution delays; (2) the "potential defendant" is not yet an "accused" and therefore has not been restricted by any criminal sanctions (*i.e.*, deprivation of liberty, property, and dignity); (3) a handicap to law enforcement authorities would ensue in their efforts to apprehend criminals. For an excellent discussion and rebuttal of these arguments, see, 20 STAN. L. REV. 476, 490 (1968).
4. Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965).
5. Simmons v. United States, 338 F.2d 804 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965), stated that a violation of due process could arise in a prearrest delay situation if it was prejudicial, purposeful or oppressive, and caused by the deliberate act of the government. *See also* Nickens v. United States, 323 F.2d 808, 810 n.2 (D.C. Cir. 1963); Hardy v. United States, 343 F.2d 233,

the fifth amendment due process clause[6] now provided prearrest protection for potential defendants against unreasonable and prejudicial delay in bringing criminal charges, even though such charges were brought within the period allowed by the applicable statute of limitations.[7]

This article will explore the reasons for and the result of prearrest delay and, after discussing the *Ross* precedent, will delineate the *Ross*-type cases in all the federal circuits and thus hopefully establish a comprehensible trend.

Why Prearrest Delays?

When discussing prearrest delays, clarity demands that we classify the topic under two general headings—undercover situations and nonundercover situations. The former category will encompass the vast majority of cases.[8]

The prime example of an undercover situation occurs in narcotics investigatory procedures. It is common for a police undercover agent to make a series of narcotics purchases from unsuspecting "dealers" in a given geographical area. The undercover agent's effectiveness would be grossly diminished if he had to issue a warrant for the arrest of a seller upon each sales transaction. His undercover identity would be useless for further investigation. In addition, because his cover had been "blown," any simultaneous investigation of other offenders would have to be curtailed, perhaps prematurely, before a charge could be made. And finally, by revealing an agent's identity prematurely, that agent's well-being is placed in danger.

The narcotics undercover agent is unique in the field of police espionage because he deals with the offenders in an abbreviated fashion, (*i.e.*, a brief street encounter with a quick exchange of money for narcotics) and he may buy from a "dealer" on only one occasion. On the basis of that one contact, the officer must establish sufficient evidence for a warrant: the date and place of the sale, and a description of the seller. At the termination of his investigation, usually months after most of the purchases have been made, the officer files charges against all of the individuals who have sold narcotics to him. Unless there were

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234 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 984 (1965); Sanchez v. United States, 341 F.2d 225, 228 n.3 (9th Cir.), *cert. denied*, 382 U.S. 856 (1965); Wilson v. United States, 335 F.2d 982, 984-86 (D.C. Cir. 1964) (dissenting opinion from denial of rehearing en banc); Taylor v. United States, 238 F.2d 259 (D.C. Cir. 1956); United States v. Parrott, 248 F. Supp. 196, 202 (D.D.C. 1965).

6. U.S. CONST. amend. V provides: "No person shall be . . . deprived of life, liberty, or property without due process of law; . . . ."

7. *Ross* and subsequent cases professed the principle that the statute of limitations merely represented the "outer limits" of time within which formal charges could be brought. Due process considerations should take precedence over this "outer limit" in dealing with prearrest delays.

8. Approximately 72 percent of the cases reviewed by this writer were found to be of the narcotics-undercover type.

other witnesses to the transactions, the government's cases rest solely on the memory and "sketchy" notes of the undercover agent. In non-narcotics undercover situations (*e.g.*, infiltration of a so-called "radical" group such as the Weathermen or Youth International People's Party) longer periods of undercover work are called for. The agent must win the acceptance and confidence of the group in order to be included in their "potentially criminal" plans. When the agent feels that he has sufficient evidence to bring charges against the group or certain individuals within it, he discards his undercover role and prepares for the arrest and indictment. His true identity may also have to surface at a time before the criminal act, *e.g.*, a bombing has occurred, in an effort to abort the group's planned endeavor. More than likely his notes are voluminous in comparison with the narcotics agent's brief diary. In addition, while the narcotics agent has a multitude of difficult identifications and arrests to make, the undercover "radical" has no problem with identifying the members of the group against whom charges will be brought. Also, since the undercover agent's primary purpose is a preventative one, cases involving such a "radical" group usually result in conspiracy charges against the individuals. The argument is made that the elements of proof of a conspiracy are not particularly stringent,[9] certainly they are less stringent than those the narcotics agent must prove. The narcotics agent on the other hand has a fairly difficult task. He has little face-to-face contact with "potential defendants", and he encounters many more of these "potential defendants" than any other type of undercover agent. He must be able to testify convincingly as to the time and place of the transactions, and his notes and memory must be utilized to positively identify the defendant and withstand any cross-examination pressure from the defense.

The nonundercover situation of prearrest delays also breaks down into two categories. The first occurs when lengthy investigation is necessary because of the nature of the offense involved.[10] Such lengthy investigation is required to

9. A conspiracy is defined as "a combination between two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means." R. PERKSIN, CRIMINAL LAW 613 (2d ed. 1969). Proof of conspiracy requires showing of the nature of the agreement, participation, the mental state of the conspirators, and an overt act taken toward completion of the conspiracy. 1 WHARTON'S CRIMINAL LAW AND PROCEDURE 171-221 (1st ed.1957).

10. United States v. Halley, 431 F.2d 1180 (9th Cir. 1970), a 17 month delay in prosecuting a bank robber was held nonprejudicial and necessary for the investigatory processes; United States v. Orsinger, 428 F.2d 1105, 1114 (D.C. Cir. 1970), a five year delay in a prosecution for mail fraud was held reasonable because of the extended investigation necessary into the complicated affairs of the defendant and his corporations; United States v. Parrott, 425 F.2d 972 (2d Cir. 1970), investigation of the complex criminal deeds of defendants allowed for a three year delay in a conspiracy to sell unregistered securities; United States v.Feldman, 425 F.2d 688 (3d Cir. 1970), investigation provided ample justification for a 42 month delay in prosecution for concealing assets in a bankruptcy proceeding.

insure against the false arrest of innocent people. The delay in this category of cases is generally reasonable as part of the inherent difficulties in proving a particular crime.[11] The second category of nonundercover delay occurs when the police have probable cause to arrest an individual but for one reason or another fail to do so for a period of time.[12] If the police effort in these instances was diligent and normal the courts have held that such delays were not purposeful, *i.e.*, intentional on the part of the law enforcement officials, and therefore they were reasonable.

Effects of Delay—Prejudice

Prejudice from prearrest delays occurs in two ways. First it negatively affects the defendant's ability to defend himself. This can occur due to a lapse of memory on the part of the defendant. During the entire period of delay the future defendant is unaware that he will eventually be called upon to answer for his whereabouts and conduct on the specific date of the alleged offense. Ordinarily, unless he has a stable frame of reference, *i.e.*, steady employment, he will be unable to attach any particular significance to the day or days in question and thus will not be able to recall where he was or whom he saw. Prearrest delay is especially acute in the case of narcotics offenders who may easily be prejudiced by an inability to remember events which allegedly occurred months before arrest and by an inability to obtain witnesses to verify an alibi defense.[13] Besides the problem of recalling his exact whereabouts, the accused's defense could also suffer by the death or disappearance of witnesses who could have testified on his behalf[14] and establish an alibi defense or perhaps

11. *See* cases cited in note 10 *supra*.

12. United States v. McCray, 433 F.2d 1173, 1175 (D.C. Cir. 1970), a ten month delay after offense of "larceny after trust" held not violative of defendant's due process rights because defendant was aware that police were looking for him five days after the offense was committed. United States v. Lewis, 433 F.2d 1146, 1148 (D.C. Cir. 1970), three and one-half month delay after robbery and assault was held not violative of defendant's due process rights because of the exigencies of the investigative and indictment processes and by defendant's enrollment in the Air Force. *But see* Jones v. United States, 402 F.2d 639 (D.C. Cir. 1968), in which the court remanded the case for a determination of possible prejudice where defendant was arrested for a robbery seven months after the victim had identified defendant from photographs. The delay was seemingly inexplicable since defendant lived and worked in the immediate vicinity for the entire seven-month period; United States v. Wahrer, 319 F. Supp. 585 (D. Alas. 1970), an eight month delay justified reversal of conviction of unlawful possession of firearms where the nature of the crime required no lengthy investigation and there was no other reason for delay.

13. In his dissent to Powell v. United States, 352 F.2d 705, 711 (D.C. Cir. 1965), Judge Skelly Wright stressed this very point concerning narcotics offenders: "The people in this subculture simply do not have desk pads and social calendars to assist them in determining where they were at a particular time many months before. They live from day to day and one day is very much like another."

14. *See* United States v. Haulman, 288 F. Supp. 775 (E.D. Mich. 1968); *cf.* United States v. Smalls, 438 F.2d 711 (2d Cir. 1971).

substantiate a defense of entrapment.[15] The second situation resulting in prejudice to the defendant affects identification procedures. This is especially true in narcotics cases. As was previously discussed, the narcotics agent makes numerous transactions in very similar circumstances and with many different dealers. How can he be sure that the right man is in the defendant's chair? Is it not likely that after a few months his memory of the brief encounter is clouded as to the distinguishing characteristics of the narcotics dealer? In these cases a court looks to how the identification by the agent was carried out. An identification made during a face-to-face re-encounter under similar conditions is considered more effective than one made as the agent sifts through a stack of photographs of known narcotics addicts and offenders. The court will naturally consider whether the identification was corroborated by other witnesses to the transactions. If not, the agent's notebook must be carefully scrutinized: How much does he rely on his notes?[16] How complete a description of the defendant is contained in his notebook?[17] How much experience does the agent have?[18] And of course how long was the delay?[19]

An Examination of Ross *and* Woody*—Precedent Setters?*

Ross v. United States was a narcotics delay case in which the United States Court of Appeals for the District of Columbia held that a balance must be struck between the public interest served by undercover narcotics investigation by the police, and the prejudice to the defendant stemming from the method of investigation and the reasonableness of the police conduct. The court reversed Ross' conviction and found: (1) a purposeful, *i.e.*, intentional seven month delay[20] by the police between the time of the alleged sale and the swearing out of a warrant even though the defendant was continuously available for arrest during the entire period; (2) that the appellant was a man of little intelligence,[21] was employed irregularly, and was making a plausible claim of inability to recall or reconstruct the day of the offense; and (3) that the undercover agent, a rookie policeman, also showed the effects of the passage of time since he admitted having no personal recollection of the incident and testified largely while referring to his notes.[22] The officer's testimony was also uncorroborated as to the identity of the defendant in one of many similar transactions over a long period of time.

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15. *See* United States v. Curry, 284 F. Supp. 458 (N.D. Ill. 1968).
16. *See* Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965).
17. *See* Woody v. United States, 370 F.2d 214 (D.C. Cir. 1966).
18. *See* Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965).
19. *Id.* at 213.
20. *Id.* at 215.
21. *Id.* at 213.
22. *Id.* at 214.

In *Woody v. United States*[23] where the facts were similar to those in *Ross*,[24] Chief Judge Bazelon found that the police investigative methods resulted in prejudice to the accused. He held that the police have a positive obligation to minimize prejudice and increase their efforts to reduce the risk of erroneous convictions. He further stated that "[R]isks are created where, for example, the delay is unreasonably lengthy or wholly unnecessary, or where the police have it within their power to enhance the reliability of their method of identification without jeopardizing their undercover investigation, yet fail to do so."[25] Both Chief Judge Bazelon and Judge McGowan, who concurred in the reversal of the conviction, spoke in terms of distinguishing factors and special circumstances which warranted reversal. For Bazelon, the failure of the arresting officer to notice the two-inch facial scar on the appellant and the clothing he (defendant) was wearing when the officer normally recorded such characteristics in his contemporaneous notes, cast grave doubts as to the effectiveness of the identification.[26] Judge McGowan stated that the delay of four months was not so unreasonable as to warrant reversal absent special circumstances. However, the death of one potential witness and the unwillingness of another to testify, constituted "potential prejudice which goes well beyond the usual protestation of inability to remember."[27] The dissenting opinion of Judge (now Chief Justice) Burger framed the issue rather clearly as not being a question of whether or not there was prejudice to the defendant's case, but simply whether the identification was adequate. Burger differed from McGowan in his assessment of prejudice. He maintained that the application of *Ross* to any specific case turns on three operative elements: (1) the length of the purposeful delay; (2) the basis of identification; and (3) the effect of the delay in rebutting the identification, *i.e.*, the resulting prejudice.[28] "It is the existence of a purposeful delay and a *Ross*-type identification that permits a lesser degree of prejudice to reverse; without those factors, the narcotics defendant would be required to show substantial and specific prejudice."[29] Thus Burger felt that because the delay was of only four months, a greater showing of prejudice had to be made, which prejudice was not sufficient in *Woody* to require reversal. Burger felt that Woody's identification process was more reliable than Ross'[30] and that no great quantum of prejudice resulted from the

23. 370 F.2d 214 (D.C. Cir. 1966). *See* Note, 80 HARV. L. REV. 1361 (1967).

24. Actually, the alleged offense arose out of the same series of transactions as that in the *Ross* case.

25. 370 F.2d at 216-7.

26. *Id.* at 217.

27. *Id.* at 219.

28. *Id.* at 220.

29. *Id.* at 220-21.

30. *Id.* at 221. The undercover agent identified Woody from photographs within a week to ten days after the alleged offense.

death of a "key" defense witness. Such prejudice is only speculative.[31]

1965-1971: Requiem for Ross *and* Woody*?*

In retrospect it seems that Judge Burger's dissent in *Woody* foreshadowed the downfall of the due process argument with respect to prearrest delays. Since 1965, when *Ross* and *Woody* were decided, all the federal circuits have merely paid lipservice to their holdings. There is a paucity of decisions in which a reversal of a conviction has been granted on the grounds of unnecessary prearrest delay.[32] On the other hand there is a plethora of prearrest delay decisions which have upheld convictions; these are distinguished from *Ross* and *Woody* in five general ways: (1).the delay was of such a short duration as to be considered reasonable; (2) the government had valid justification for the delay; (3) the accused's defense was not prejudiced by the delay; (4) even if prejudiced, the accused failed to raise the argument before the trial ended; (5) the prearrest delay is controlled solely by the statute of limitations. One or more of these distinctions was used by the federal courts in their efforts to avoid a *Ross*-type result. For the sake of clarity, each of these points will be discussed briefly.

The Delay

In *Jackson v. United States*[33] the court stated that the delay in arrest may be so great that prejudice can be presumed unless the government can show otherwise. However, no other federal court has expounded on the dictum in

31. *Id.* at 222. Even if Woody had been arraigned the very day of the offense the witness would not have been able to testify at his trial since she died 3½ months later. Woody's case had not reached the trial stage by that time.

32. Jones v. United States, 402 F.2d 639 (D.C. Cir. 1968), the court had difficulty in ascertaining the justification for a seven month delay in a robbery case. Defendant lived at his mother's house and worked a few blocks from the situs of the crime for the entire seven month period. The court remanded the case with instructions for the district court to determine what prejudice had evolved, and what if any justification there was for the delay. Godfrey v. United States, 358 F.2d 850 (D.C. Cir. 1966), the court divided the four month delay into two periods. The first two months were reasonable because of the undercover agent's retention of his undercover role, but once the government issued the arrest warrant the last two months proved prejudicial with no justification. United States v. Wahrer, 319 F. Supp. 585 (D. Alas. 1970), the court held that there was no explanation for an eight month delay. There was no complicated investigation required for an unlawful possession of firearms charge. Defendant had shown prejudice by his lapse of memory and loss of a witness. United States v. Haulman, 288 F. Supp. 775 (E.D. Mich. 1968), the court held that a two year delay from the time when the government had sufficient evidence to prosecute a federal banking violation was sufficiently prejudicial in that six witnesses had died within that span. United States v. Curry, 284 F. Supp. 458 (N.D. Ill. 1968), narcotics offenses and arrest was prejudicial because the defendant could not locate the undercover agent for purposes of an entrapment defense.

33. 351 F.2d 821 (D.C. Cir. 1965).

Jackson and thus there has been no formula derived as to the exact point of time prejudice can be presumed. Rather, in *Worthy v. United States*[34] the court stated that a four month delay did not even require inquiry into the reasonableness of the police purpose for such a delay. The four months were simply accepted as justifiable. However, soon after *Worthy*, the *Woody* decision was handed down[35] in which the court *did* inquire into the reasonableness of a four month delay. In many cases the courts have merely based their decision on the premise that the delay was insignificant and therefore reasonable.[36]

Justification for Delay

Even if there is a delay between offense and arrest, the government may have valid reasons for it. In narcotics cases the justification for delay lies in the protection and further use of the investigatory agent by withholding his identity for a period of months. In nonnarcotics cases the delay may be justified by the necessity of lengthy investigation or difficulty in locating the defendant.[37]

Resulting Prejudice

Even if there is delay without valid justification the defendant must still make a showing of prejudice. This may take the form of prejudice to his defense in that his memory has faded concerning his whereabouts on the date of the alleged offense, or in that a defense witness has died or is unobtainable at the time of trial. Prejudice may also be manifested by identification problems. However, many courts have sidestepped this issue by considering corroborated testimony,

34. 352 F.2d 718 (D.C. Cir. 1965).

35. 370 F.2d 214 (D.C. Cir. 1966).

36. *D.C. Circuit*: King v. United States, 369 F.2d 213 (1966) (seven months); Daniels v. United States, 357 F.2d 587 (1966) (eight weeks); Bey v. United States, 350 F.2d 467 (1965) (3 ½ months). *Seventh Circuit*: United States v. Escobedo, 430 F.2d 603 (1970) (two weeks). *Ninth Circuit*: Jordan v. United States, 416 F.2d 338 (1969) (three months). *Tenth Circuit:* United States v. Kellerman, 432 F.2d 371 (1970) (two weeks); Acree v. United States, 418 F.2d 427 (1969) (four months).

37. *D.C. Circuit*: United States v. McCray, 433 F.2d 1173 (1970) (diligent effort by police to locate defendant for ten months); United States v. Lewis, 433 F.2d 1146 (1970) (investigation and location of defendant held justification for delay); United States v. Orsinger, 428 F.2d 1105 (1970) (complicated investigation for mail fraud); Powell v. United States, 352 F.2d 705 (1965) (intent to protect identity of undercover agent); Bey v. United States, 350 F.2d 467 (1965) (protect identity of undercover agent). *Second Circuit*: U.S. *ex. rel.* Robinson v. Deegan, 315 F. Supp. 324 (S.D.N.Y. 1970) (unintentional delay of five months in narcotics case.). *Third Circuit*: United States v. Morris, 308 F. Supp. 1348 (E.D. P.A. 1970) (delay to gather more evidence against a narcotics ring). *Seventh Circuit*: United States v. Napue, 401 F.2d 107 (1968), *cert. denied*, 393 U.S. 1024 (1969) (to protect undercover agent); United States v. Panczko, 367 F.2d 737 (1966), *cert. denied*, 385 U.S. 1009 (1967) (prosecution preparation for counterfeiting case), *Ninth Circuit*: United States v. Snyder, 429 F.2d 1242 (1970) (protect key witness); Whitted v. United States, 411 F.2d 107 (1969) (gather more evidence against other violators); Wilson v. United States, 409 F.2d 184, *cert. denied*, 394 U.S. 983 (1969) (protect identification and use of undercover agent).

the experience and reliability of the undercover agent, and the fact that the evidence may be documentary as factors lessening the prejudice to the defendant.[38]

Waiver

If the defendant does not raise the issue of a due process violation caused by delay at least by the end of his trial, he will be barred from raising it on appeal or attacking it collaterally.[39]

Statute of Limitations

Some jurisdictions have utilized the statute of limitations to dodge the due process argument. They have held that the only protection afforded a potential

38. *D.C. Circuit*: United States v. Moss, 438 F.2d 147 (1970) (defendant could recall all relevant events); Dancy v. United States, 395 F.2d 636 (1968) (no prejudice because there were witnesses to the transactions and no identification problems); Brooke v. United States, 385 F.2d 277 (1967) (no identification problem, defendant had steady employment to serve as a frame of reference for recall); Worthy v. United States, 352 F.2d 718 (1965) (no identification problem); Powell v. United States, 352 F.2d 705 (1965) (defendant testified in considerable detail). *First Circuit*: United States v. Frost, 431 F.2d 149 (1970) (defendant had reason to remember offense and suffered no memory lapse). *Second Circuit*: United States v. Smalls, 438 F.2d 711 (1971) (witnesses were available); United States v. Parrott, 425 F.2d 972 (1970) (documentary evidence); United States v. Feinberg, 383 F.2d 60 (1967) (defendant was on notice that police were investigating one week after the offense). *Third Circuit*: United States v. Feldman, 425 F.2d 688 (1970) (defendant had notice of investigation one month after offense); United States v. Childs, 415 F.2d 535 (1969) (no identification problem since witness was a lifelong friend of defendant). *Fourth Circuit*: United States v. Baker, 424 F.2d 968 (1970) (agent had a number of contacts with defendant, thus no identification difficulty). *Fifth Circuit*: Holsen v. United States, 392 F.2d 292 (1968) (defendant failed to show prejudice in narcotics case where there was a delay of nine months). *Seventh Circuit*: United States v. Lee, 413 F.2d 910 (1968); United States v. Milstein, 401 F.2d 51 (1968) (defendant showed no loss of memory); United States v. Deloney, 389 F.2d 324 (1968) (defendants failed to show prejudice to their ability to defend). *Eighth Circuit*: United States v. Golden, 436 F.2d 941 (1971) (general inability to recall held not to be prejudice); United States v. Peterson, 302 F. Supp. 1232 (D. Minn. 1969) (corroborated testimony prevented identification prejudice). *Ninth Circuit*: Estrella v. United States, 429 F.2d 397 (1970) (defendant showed no memory loss by his specific testimony); United States v. Stanley, 422 F.2d 826 (1969) (no identification problem); United States v. Erickson, 325 F. Supp. 712 (D. Alas. 1971) (defendant knew that he was suspect in bank robbery only four months after offense).

39. *D.C. Circuit*: Hardy v. United States, 381 F.2d 941 (1967) (cannot raise issue collaterally). The remainder of the cases cited in this footnote all held that a reversal of conviction would not be proper because the defendant failed to raise the issue of due process violation by the end of trial. *D.C. Circuit*: Roy v. United States, 356 F.2d 785 (1965); Jackson v. United States, 351 F.2d 821 (1965). *Second Circuit*: United States v. Smalls, 438 F.2d 711 (1971); United States v. Parrott, 425 F.2d 972 (1970); United States v. Henry, 417 F.2d 267 (1969); Chapman v. United States, 376 F.2d 705 (1967); United States v. Sanchez, 361 F.2d 824 (1966). *Fourth Circuit*: United States v. Harbin, 377 F.2d 78 (1967). *Seventh Circuit*: United States v. Kotakes, 440 F.2d 342 (1971). *Ninth Circuit*: Estrella v. United States, 429 F.2d 397 (1970); Benson v. United States, 402 F.2d 576 (1968); United States v. Erickson, 325 F. Supp. 712 (D. Alas. 1971).

defendant against stale prosecution lies in the application of the statute of limitations. Some jurisdictions have followed this traditional approach but have allowed for an exception if the defendant can exhibit prejudice and an unreasonable delay.[40]

Conclusions and Recommendations:

Since the federal circuits have not adhered to the rationale of *Ross*, and since the Supreme Court has yet to rule directly on this due process issue.[41] the central issue of prearrest delay is still unanswered. The fact of the matter is that a delay of some months does present a real problem to certain defendants, especially in narcotics cases. The narcotics offender has no reason to believe that the police have focused their suspicion on him and therefore, any alibi defense is usually prejudiced by lack of memory. Concededly, it is impractical to arrest every narcotics offender immediately. Some delay is necessary

> [b]ecause there are no other ways of doing these things. But the police testimony was that, in planning and managing these undercover operations no account whatsoever was taken of a defendant's interest in being appraised quickly of what he is charged with having done. We will never know whether or not these operations can, with no serious impairment of the public interest, be differently arranged until their planning has at least taken this factor into account. We have heretofore recognized that some adverse impact upon this interest of the accused is inseparable from the undercover approach, and that a not inconsiderable period of delay may be justifiable in the balancing of public and private interests.[42]

The danger of prejudice due to misidentification can be lessened to a degree by the use of multiple transactions with the one person, and by different undercover agents if necessary. Corroboration would then be present in all

40. The following cases all held that the applicable statute of limitations should be the sole protection for the potential accused. *First Circuit*: Schlinsky v. United States, 379 F.2d 735 (1967). *Second Circuit*: United States v. Capaldo, 402 F.2d 821 (1968). *Fifth Circuit*: Kroll v. United States, 433 F.2d 1282 (1970); Whatley v. United States, 428 F.2d 806 (1970); McConnell v. United States, 402 F.2d 852 (1968), *cert. denied*, 394 U.S. 933 (1969). *Sixth Circuit*: Lothridge v. United States, 441 F.2d 919 (1971); United States v. Harris, 412 F.2d 471 (1969); Hoopengarner v. United States, 270 F.2d 465 (1959). *Ninth Circuit*: United States v. Halley, 431 F.2d 1180 (1970).

41. *See* Justice Brennan's discussion of the relevant issues in prearrest delay in Dickey v. Florida, 398 U.S. 30, 43-47 (1969) (concurring opinion); In United States v. Ewell, 383 U.S. 116 (1966), the court held that the statute of limitations is "usually considered the primary guarantee against bringing overly stale criminal charges." *Id.* at 122; and in Hoffa v. United States, 385 U.S. 293 (1966), the court said that "there is no constitutional right to be arrested." *Id.* at 310 (dictum).

42. Lee v. United States, 368 F.2d 834, 835 n.2 (D.C. Cir. 1966).

cases. If there is difficulty in obtaining corroboration of identity, a system should be instituted whereby one agent makes more buys from fewer "dealers." The agent would then have fewer potential defendants to remember and would have a clearer picture in his mind of those with whom he had dealt on more than one occasion. Also it might be practical to have the narcotics agent surface and make the arrests personally in a shorter period of time. This would require a larger staff of undercover agents, but perhaps a revolving assignment schedule to different geographical areas could be adopted by the police administration.[43] Finally, "the documentary record" on identification could be improved, since it appears to consist at the moment of random and unsystematic note-taking by individual officers. A standard form, with a check list of identification features and other details, and designed to serve as a continuing file on the defendant in which all observations are to be entered, would appear to be worth consideration."[44]

A statutory scheme outlining a time limit within which an accused must be arrested and brought to trial may also be a solution. However, to avoid unwanted litigation in our overcrowded court system, issues such as reasonableness and justification of the delay, resulting prejudice, will somehow have to be kept to a minimum. Those issues, though necessarily decisive in determining whether there has been a statutory violation, can be reduced to that minimum by establishing in the statute an upper and lower cut-off point for prearrest delay. For example, a defendant could not raise the issue of prearrest delay if the delay was not at least four months; the government, however, would face a presumption of prejudice with a delay of over eight months. Therefore, in a situation where the delay is less than four months the issue cannot be raised. If it is over eight months there would only be one issue to decide, *i.e.*, whether the government had valid justification for the delay in order to overcome the presumed prejudice to the defendant. The entire range of issues would be dealt with only when the delay was four to eight months.

Ross v. United States presented a sound constitutional doctrine for the protection of potential defendants. The *Ross* rationale was a guarantee of fairness to an accused when injustice arose from an *avoidable* and *unreasonable* delay by the government. Since our legal system takes great pains to protect the innocent until they are proven guilty, it would seem that instead of being overlooked and distinguished by our courts, *Ross* should be further developed into a well-organized constitutional protection for the accused in order to prevent serious prejudice to their defense.

Cary S. Griffin

43. Undercover narcotics operations resulting in delays of less than four months have been quite successful in New York City. Note, 41 N.Y.U.L. REV. 638, 644 (1966).

44. Dancy v. United States, 395 F.2d 636, 639 n.3 (D.C. Cir. 1968).