

PRE-ARREST DELAYS AND THE RIGHT TO SPEEDY ARREST: APOLOGIA PRO VITA ROSS

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In an unprecedented decision in June, 1965, the United States Circuit Court of Appeals for the District of Columbia dismissed an indictment because an unreasonable and prejudicial pre-arrest delay violated the due process rights of the defendant. *Ross v. United States*¹ arose in the context of a police undercover operation² aimed at curbing narcotics traffic in the District of Columbia. The final three months of the undercover operation were characterized by much repetition in the undercover officer's contacts with narcotics dealers. The circuit court concluded that this period was unnecessary for effective law enforcement,³ and therefore held the delay unreasonable. The court further held that Ross was prejudiced by the delay in that he was deprived of the means to present an alibi defense at trial.

The defendant allegedly sold narcotics to an undercover police officer and, although subsequent to the alleged sale he was continuously available for arrest, seven months elapsed before the initiation of Government action. At trial, Ross was unable to account for himself on the day of the alleged sale because of an apparent lack of memory and an inability to reconstruct the events in question.⁴ Showing the effects of time, the undercover policeman admitted no personal recollection of the incident, and testified largely from a memory refreshed immediately prior to trial by reference to a notebook. Apart from the narcotics, the prosecution's case consisted solely of the officer's testimony that he had purchased narcotics from the defendant. This was sufficient, however, as Ross was convicted and an appeal was taken after which the case was remanded for a determination of the reasonableness of the delay. The district court concluded that the delay *was* reasonable, attributing the lengthy period to the necessity of effective law enforcement. On appeal, however, the circuit court

¹ 349 F.2d 210 (D.C. Cir. 1965).

² Undercover narcotics operations are very commonplace in the United States. Typically, a policeman poses as an addict and makes as many narcotics purchases as possible. The length of time he remains in this covert position usually depends on the success of the operation. At the end of the operation, he emerges to swear out all the complaints at once, using his notebook and memory to identify narcotics dealers from pictures in police files.

³ 349 F.2d at 212-13 nn.1 & 2.

⁴ The court recognized that Ross was

a man of limited education who [was] so circumstanced that there would appear to be very little to differentiate one day from another, especially as they [began] to recede into the past. He kept no diary or other record, received little mail, and, at the time in question, had no regular employment. 349 F.2d at 213.

disagreed and the indictment was dismissed.

The *Ross* decision afforded an opportunity for the development of a novel application of constitutional due process doctrine to the "pre-arrest" stage of criminal investigation.⁵ However, the vague language and sweeping expression employed in the opinion, although common in precedent-setting decisions,⁶ hampered rather than fostered the growth of the *Ross* doctrine, and nearly five years after the decision was handed down much disagreement persists about its meaning, when its rationale should apply, or even whether it should be followed outside the District of Columbia. With few exceptions, other federal courts faced with pre-arrest delay contentions have been reluctant to pay more than lip-service to the decision. Why such hesitance? Is *Ross* merely a District of Columbia judiciary check on the metropolitan police under the court's supervisory power, or does it represent a constitutionally supported doctrine which deserves more attention? The purpose of this comment is to explore these questions in an attempt to clarify this presently confused area of criminal procedure.

PRE-ARREST DELAYS PRIOR TO ROSS

The decision in *Ross*, based on due process concepts from the fifth amendment,⁷ emphasized fairness to the accused in defending himself. Prior to this time the only limitation on the permissible lapse of time between an offense and filing of a formal charge was the applicable statute of limitations,⁸ since the sixth amendment guarantee of a speedy

⁵ For the sake of simplicity, this stage in the criminal process is referred to as "pre-arrest." However, the delay in some cases will not necessarily be computed to the time of arrest; indeed, it may only include the period of time until information, indictment, or the issuance of a warrant if these happen to occur first. It may also include the time period between issuance of a warrant and actual arrest if it appears the police have been lethargic in executing the warrant. Most importantly, courts seem to be looking for a positive and diligent effort on the part of the Government to notify the defendant of the charges against him.

⁶ *E.g.*, *Betts v. Brady*, 316 U.S. 455 (1942). *Betts* was the first in a line of Supreme Court decisions which held that the sixth amendment guarantee of right to counsel was applicable in special circumstances to the states. However, these circumstances were so nebulously defined that it became impossible to determine when they were present. *Betts*, like *Ross*, relied on due process; *Betts* involved the fourteenth amendment, *Ross*, the fifth amendment. The ambiguity inherent in the very nature of due process further explains the lack of specificity in the *Ross* opinion. The *Betts* court analyzed it as follows:

The phrase [due process] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein described. 316 U.S. at 462 (footnote omitted).

⁷ U.S. CONST. amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law"

⁸ The federal statute of limitations is five years for other than capital offenses.

trial⁹ generally attached only after one became an "accused"¹⁰ and Rule 48(b) of the *Federal Rules of Criminal Procedure*¹¹ has always been construed literally, applying only to one "who has [already] been held to answer to the district court."¹²

Statute of Limitations

Notwithstanding prior case law holding the statute of limitations to be the sole restriction on delays between offense and formal charges,¹³ *Ross* and subsequent cases profess the sound principle that such a statute merely represents the "outer limit" within which formal charges can be brought.¹⁴ In support of this position it has been cogently argued that if the statute of limitations represented an accused's only safeguard against unreasonable delays between offense and formal charges, due process would be dependent upon a legislative enactment.¹⁵ Indeed, it is unlikely that Congress intended the statute to override a constitutional safeguard. Furthermore, the statute of limitations distinguishes between capital and noncapital cases, a criterion which should be wholly irrelevant to whether an accused is afforded due process of law. The statute leaves the government with discretion to postpone formal charges up to five years after the

18 U.S.C. § 3282 (1964). This statute, prior to 1965, was considered by most federal courts to be the sole safeguard against delays between offense and formal charges. *Harlow v. United States*, 301 F.2d 361, 366 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962); *Venus v. United States*, 287 F.2d 304, 307 (9th Cir. 1960), *rev'd mem. on other grounds*, 368 U.S. 345 (1961); *Hoopengartner v. United States*, 270 F.2d 465, 469 (6th Cir. 1959). The same consideration was professed by some state courts regarding their respective statutes of limitation. *Price v. State*, 235 Md. 295, 300, 201 A.2d 505, 508 (1964); *People v. Ciavarella*, 44 Misc. 2d 792, 793, 255 N.Y.S.2d 108, 110 (Sup. Ct. 1964).

⁹ U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

¹⁰ In construing federal and state speedy trial legislation, an "accused" has been judicially defined as one against whom formal charges have been brought. *Reece v. United States*, 337 F.2d 852, 853 (5th Cir. 1964); *Harlow v. United States*, 301 F.2d 361, 366 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962); *Venus v. United States*, 287 F.2d 304, 307 (9th Cir. 1960), *rev'd mem. on other grounds*, 368 U.S. 345 (1961); *People v. Jordan*, 45 Cal. 2d 697, 708, 290 P.2d 484, 491 (1955); *Price v. State*, 235 Md. 295, 299, 201 A.2d 505, 508 (1964); *State v. LeVien*, 44 N.J. 323, 328, 209 A.2d 97, 99-100 (1965); Note, 57 COLUM. L. REV. 846, 848 (1957) and cases cited therein. Compare definition of "accused" in *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964) (concerning sixth amendment right to counsel). For an argument that the right should be extended into the area involving delays prior to the commencement of formal charges, see Note, *Justice Overdue, Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95 (1952). See also Note, 20 STAN. L. REV. 476, 485-93 (1968). For cases in accord, see note 35 *infra*.

¹¹ FED. R. CRIM. P. 48(b) provides that:

[i]f 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.

¹² *Accord*, *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 261, 266 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962); *Hoopengartner v. United States*, 270 F.2d 465, 469 (6th Cir. 1959); *United States v. Hoffa*, 205 F. Supp. 710, 720-21 (S.D. Fla.), *cert. denied*, 371 U.S. 892 (1962).

¹³ See cases cited in note 8 *supra*.

¹⁴ E.g., *Powell v. United States*, 352 F.2d 705, 707 (D.C. Cir. 1965).

¹⁵ Note, 41 N.Y.U.L. REV. 638, 640 (1966).

offense,¹⁶ and is totally oblivious to the reasonableness of the delay and the subsequent effect on the accused's defense. The purpose of the statute of limitations is only to prevent stale prosecutions and the loss of memory and witnesses,¹⁷ but if the statute is to be the sole weapon in this endeavor, even these desirable goals become dependent upon the whims of governmental discretion, and it is not hard to conceive a contrary result.

The inflexibility of the statute and consequent disregard of a defendant's right to due process can be avoided if the statute is viewed merely as providing a necessary period for investigation leading to probable cause for arrest. Then, once probable cause is established, due process considerations should become controlling and prevent unreasonable and prejudicial delays. In American civil law¹⁸ and in both civil and criminal law in England,¹⁹ the doctrine of laches serves this purpose, and thus has been analogized to due process in criminal law in the United States.²⁰

Speedy Trial

The right to speedy trial is deeply rooted in the foundation of our English legal heritage,²¹ traceable to the Magna Carta.²² It existed at common law,²³ and is present today in the federal constitution and in some form in all but two state constitutions.²⁴ The sixth amendment

¹⁶ At common law there was no time limitation on the institution of prosecutions in criminal cases. *United States v. Fraidin*, 63 F. Supp. 271, 279 (D. Md. 1945) (dictum); *People v. Ross*, 325 Ill. 417, 156 N.E. 303 (1927); *State v. Snyder*, 182 Mo. 462, 82 S.W. 12 (1904). Even absent statutes of limitation, however, the inherent prejudice to an accused's defense under such circumstances did not go totally unnoticed during this period. See *The Queen v. Robbins*, 1 Cox Crim. Cas. 114 (Ch. 1844):

It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial. *Id.*

¹⁷ C. ALEXANDER, *LAW OF ARREST* § 299 (1949); *United States v. Elcopoulos*, 45 F. Supp. 777, 781 (D.N.J. 1942).

¹⁸ For application of the doctrine, necessary elements are delay due to lack of diligence on the part of the plaintiff and a resulting prejudice or disadvantage to the defendant. Relief is in the form of estoppel. See *Rome Garden & Machinery Corp. v. J.D. Adams Mfg. Co.*, 135 F.2d 617, 619 (7th Cir. 1943); *Lamar v. Rivers*, 235 Ala. 130, 132, 178 So. 16, 18 (1937); *Croyle v. Croyle*, 184 Md. 126, 136, 40 A.2d 374, 379-80 (1944). But see *Weeks v. State*, 16 Okla. Crim. 443, 444, 183 P. 932, 933 (1919) (dictum) (criminal charges).

¹⁹ See Note, *Justice Overdue, Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95, 103 (1952).

²⁰ Note, 41 N.Y.U.L. REV. 638, 640 n.13 (1966).

²¹ See *Klopfer v. North Carolina*, 386 U.S. 213, 218-20 (1967).

²² "To no one will We sell, to none will We deny or defer, right or justice." Magna Carta, c. 40 (1215). For an interesting view of its historical background, see T. STEVENS, *MAGNA CARTA—A PAGEANT DRAMA* (1928).

²³ E.g., *In re Begerow*, 133 Cal. 349, 65 P. 828 (1901); *State v. Keefe*, 17 Wyo. 227, 98 P. 122 (1908).

²⁴ Nevada and New York are the only two states without constitutional provisions which may be construed to guarantee the right to a speedy trial; in both these states, however, the right is protected by statute. NEV. REV. STAT. § 523.328 (1968); N.Y. CODE CRIM. PROC. §§ 8, 668 (McKinney 1958). For a constitutional and

speedy trial provision, in federal application, is implemented by rule 48(b), which provides a remedy for abridgment of the right. Some state constitutional speedy trial provisions are supplemented by court rules or statutes requiring a trial within a fixed time after formal charges.²⁵ Whatever criteria are used in considering the validity of speedy trial contentions arising from state prosecutions, the state procedure must have afforded at least as much protection as the federal standard.²⁶

The guarantee of a speedy trial serves a threefold purpose: (1) it protects the accused, if held in jail to await trial, against prolonged imprisonment; (2) it relieves him of the anxiety and public suspicion attendant to an untried accusation of crime; and (3) it prevents him from being exposed to the hazard of a trial conducted after so great a lapse of time that the means of proving his innocence may not be within his reach.²⁷ Also, the right to speedy trial is said to safeguard an innocent accused against prolonged criminal sanctions usually present during the period between formal charges and trial.

Since pre-arrest delay situations do not involve anxiety, loss of liberty or property, or any criminal sanctions, it has been urged that they are distinguishable from post-arrest delays.²⁸ Undoubtedly each *may* give rise to different evils, but in light of the judicial application of speedy trial protection, a distinction based on these criteria is not valid in every situation. Compare one who is charged with an offense but not prosecuted because he is incarcerated in another jurisdiction on another offense²⁹ with one who is not charged for a considerable time after the alleged offense.³⁰ The right to speedy trial arises to protect the former because he has been formally charged, while the latter is denied this protection.³¹

statutory compilation of the right to speedy trial, see Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 RUTGERS L. REV. 828, app. at 869 (1964).

²⁵ E.g., ARIZ. R. CRIM. P. 236 (60 days); IND. ANN. STAT. § 9-1403 (1956) (three terms of court); LA. CRIM. PRO. CODE ANN. art. 578 (West 1967) (three years for a capital offense, two years for a felony offense, one year for a misdemeanor); MINN. STAT. § 611.04 (1967) (next term); TENN. CODE ANN. § 40-2102 (1955) (next regular term); WASH. REV. CODE § 10.46.010 (1956) (60 days).

²⁶ The sixth amendment right to a speedy trial is applicable to the states through the fourteenth amendment. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

²⁷ *People v. Prosser*, 309 N.Y. 353, 356, 130 N.E.2d 891, 893 (1955).

²⁸ Note, 41 N.Y.U.L. REV. 638, 640-41 (1966).

²⁹ E.g., *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956); *United States v. Chase*, 135 F. Supp. 230 (N.D. Ill. 1955); *Pellegrini v. Wolfe*, 225 Ark. 459, 283 S.W.2d 162 (1955). After *Ross*, both due process and speedy trial legislation have been utilized by state courts to dismiss indictments where prosecution of an imprisoned accused has been delayed prior to formal charges. Compare *State v. Johnson*, 275 N.C. 264, 167 S.E.2d 274 (1969) (called a speedy trial infringement), with *People v. Winfrey*, 20 N.Y.2d 138, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967) (called a due process infringement).

³⁰ E.g., *Earl v. United States*, 344 F.2d 538 (D.C. Cir. 1965); *United States v. Simmons*, 338 F.2d 804 (2d Cir. 1964), cert. denied, 380 U.S. 983 (1965).

³¹ Compare *United States v. Chase*, 135 F. Supp. 230 (N.D. Ill. 1955), with *Earl v. United States*, 344 F.2d 538 (D.C. Cir. 1965). This same type of comparison has been made in an argument in favor of extension of the right to speedy trial

Yet neither suffers from anxiety over pending prosecution or pretrial imprisonment, and unnecessary delay subjects both to the possibility of prejudice to the merits of their defense through loss of witnesses and the dulling of memories.

Even granting the distinguishability of pre- and post-arrest delays, any distinction which would deny a potential defendant protection from an unreasonable pre-arrest delay, is arbitrary and unjustified. Notwithstanding the possible exception of one who is imprisoned, prejudice inherent in pre-arrest delay situations always affects the fact-finding process,³² and consequently results in a greater probability of faulty conviction, while post-arrest delays do not necessarily have the same result.³³ Yet the defendant who is indicted is protected by the right to speedy trial, while the potential defendant, prior to *Ross*, was without protection. Indeed, the potential defendant may be in need of even more protection, since during the delay he is without notice of the charges against him and therefore has no reason to recall the time in question and gather witnesses.³⁴

Perhaps in recognition of this dilemma, both before and after *Ross*, a number of courts have ignored any distinction between delays prior to and after arrest (whether the defendant had at the time become an accused), and have spoken in speedy trial language while dealing with pre-arrest delay situations.³⁵ However, since *Ross* now affords the po-

into the area of pre-arrest delays. See Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1613 (1965).

³² Prejudice in pre-arrest delay cases is measured by the impact on the accused's ability to defend himself, i.e., whether he has been afforded a fair trial (due process of law). E.g., *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965); *United States v. Curry*, 284 F. Supp. 458 (N.D. Ill. 1968); *United States v. Godfrey*, 243 F. Supp. 830 (D.D.C. 1965), *aff'd per curiam*, 358 F.2d 850 (D.C. Cir. 1966). One exception is where the potential accused is in prison and prison officials have notice of the potential indictment. The prisoner's parole and concurrent sentencing rights may be prejudiced. E.g., *State v. Johnson*, 275 N.C. 264, 274, 167 S.E.2d 274, 281 (1969).

³³ In many post-arrest delay situations, possible prejudice to the fact-finding process is never reached because the charges are dismissed for other reasons of prejudice. In measuring prejudice to defendants during unreasonable post-arrest delays, courts will often consider whether the accused was confined prior to trial, *King v. United States*, 265 F.2d 567 (D.C. Cir.), *cert. denied*, 359 U.S. 998 (1959); *In re Provoo*, 17 F.R.D. 183 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955), or whether the defendant has gone through any emotional trauma because of the prolonged anxiety of prosecution, *United States v. Burke*, 224 F. Supp. 41 (D.D.C. 1963); *United States ex rel. Giovengo v. Maroney*, 194 F. Supp. 154 (W.D. Pa. 1961), or whether the Government's case is strong, *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956); *United States v. Williams*, 163 F.2d 695 (D.C. Cir. 1947).

³⁴ The formally charged defendant receives notice within the delayed period before trial, while the potential defendant receives no notice until the delayed period terminates at the time formal charges are brought.

³⁵ *United States v. Sanchez*, 361 F.2d 824, 825 (2d Cir. 1966); *United States v. Dickerson*, 347 F.2d 783 (2d Cir. 1965); *United States v. Wilson*, 342 F.2d 782 (2d Cir.), *cert. denied*, 382 U.S. 860 (1965); *Sanchez v. United States*, 341 F.2d 225, 228 n.3 (9th Cir.), *cert. denied*, 382 U.S. 856 (1965) (dictum); *Nickens v. United States*, 323 F.2d 808, 813 n.4 (D.C. Cir. 1963) *cert. denied*, 379 U.S. 905 (1964) (Wright, J., concurring); *Mann v. United States*, 304 F.2d 394, 396-97 n.4 (D.C. Cir.), *cert. denied*, 371 U.S. 896 (1962) (dictum); *Harlow v. United States*, 301 F.2d 361, 375 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962) (Rives, J., concurring);

tential defendant protection from unreasonable pre-arrest delays and since the test applied in weighing a pre-arrest due process claim involves the same criteria ordinarily considered in assessing speedy trial claims, this distinction has become one of name only.³⁶

Speedy Trial Precedents and Ross

The only indication prior to *Ross* that pre-arrest delays could violate due process came from occasional dicta in the circuit courts.³⁷ In *Simmons v. United States*,³⁸ the Second Circuit Court of Appeals stated that a violation of due process could arise in a pre-arrest delay situation if it was "prejudicial," i.e., "'purposeful or oppressive' . . . and 'caused by a deliberate act of the government.'"³⁹ The court went on to set out the relevant factors to be considered: length of delay, reason for delay, prejudice to defendant, and waiver by defendant.⁴⁰ These criteria, standing at face value,⁴¹ are identical to those ordinarily considered in analyzing post-arrest speedy trial contentions.⁴² But this is not at all surprising since the problems present in each situation are somewhat analogous,⁴³ and notwithstanding distinct constitutional foundations, the law concerning pre-arrest delay was derived from case law concerned with post-arrest speedy trial violations.⁴⁴

Prior to *Ross* several courts analyzed speedy trial contentions in special circumstances by computing the delay as beginning from the time of the offense and ending at the time of trial.⁴⁵ Using this approach as a

Taylor v. United States, 238 F.2d 259 (D.C. Cir. 1956); United States v. Miller, 259 F. Supp. 294 (E.D. Pa. 1966); United States v. Parrott, 248 F. Supp. 196, 202 (D.D.C. 1965); United States v. Hunter Pharmacy Inc., 213 F. Supp. 323 (S.D.N.Y. 1963); *In re Provoo*, 17 F.R.D. 183 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955); State v. Johnson, 275 N.C. 264, 167 S.E.2d 274 (1969).

³⁶ See note 41 and accompanying text *infra*.

³⁷ Earl v. United States, 344 F.2d 538, 539 (D.C. Cir. 1965) (Wright, J., dissenting); United States v. Torres, 343 F.2d 750, 751 (2d Cir. 1965) (dictum); Hardy v. United States, 343 F.2d 233, 234 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 984 (1965) (dictum); Sanchez v. United States, 341 F.2d 225, 228 n.3 (9th Cir.), *cert. denied*, 382 U.S. 856 (1965); United States v. Simmons, 338 F.2d 804, 807 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965) (dictum); Wilson v. United States, 335 F.2d 982, 984-86 (D.C. Cir. 1963) (dictum).

³⁸ 338 F.2d 804 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965).

³⁹ *Id.* at 807, citing a case involving a post-indictment delay and resolved with speedy trial language.

⁴⁰ *Id.*, citing United States *ex rel.* Von Cseh v. Fay, 313 F.2d 620, 623 (2d Cir. 1963) (involving application of sixth amendment speedy trial guarantee to states through the fourteenth amendment in a post-arrest setting).

⁴¹ Although they are the same criteria, the time after which waiver will be presumed and the types of prejudice which may stem from delays will differ depending on whether the delay is before or after arrest.

⁴² See Note, 57 COLUM. L. REV. 846, 861-63 (1957); United States *ex rel.* Von Cseh v. Fay, 313 F.2d 620, 623 (2d Cir. 1963).

⁴³ See generally Note, *Justice Overdue, Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95 (1952).

⁴⁴ See cases cited note 45 *infra*. See also notes 37-40 and accompanying text *supra*.

⁴⁵ This line of cases can be loosely classified into two categories. First, where a defendant is incarcerated in one jurisdiction and the government delays prosecution without effort to bring charges until the defendant is released. Second, where

starting point, it took the *Ross* court only one further step to consider pre-arrest delays by themselves. Without the aid of the sixth amendment, the *Ross* court relied on the due process dicta from within the District of Columbia as well as case law which computed delays from time of offense to time of trial. In this way the *Ross* panel avoided a mass of conflicting⁴⁶ sixth amendment speedy trial cases.

MEANING OF ROSS

There is no mathematical formula that can be derived from the *Ross* decision. The court set out certain guidelines to be followed, but the conclusion in each case depends on the probability of faulty conviction by a denial of a fair trial. A determination of the reasonableness of the delay and the presence of prejudice necessarily depend on the totality of circumstances in each case.⁴⁷ The court in *Ross* analogized what was reasonable with what was necessary for effective law enforcement, and after finding that the final three months delay was unnecessary, concluded that the delay was unreasonable.⁴⁸ The court further found prejudice in the fact that the defendant was unable to recall or reconstruct the events of the day of the alleged offense, coupled with the fact that a potential alibi witness did not testify at the trial because she did not think she could remember the period of time involved.

Although these findings alone seem sufficient to support the court's conclusion, the decision was not based solely on the unreasonableness of the delay and its consequent prejudice to the defendant, but further rested on the Government's lack of corroborating evidence against the accused.

We are not convinced that successful police operations against narcotics in this jurisdiction depend upon proceedings of such

an initial indictment is dismissed or dropped but later reinstated and does not fall within the protection against piecemeal prosecution. *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956) (delay caused by Government's failure to bring prosecution while defendant was imprisoned on another offense); *United States v. Burke*, 224 F. Supp. 41 (D.D.C. 1963) (delay caused by Government action in seeking second indictment when trial on first was ready to go forward); *United States v. Barnes*, 175 F. Supp. 60 (S.D. Cal. 1959) (delay caused by Government seeking prosecution in civilian court only after prosecution in military court was dismissed for lack of jurisdiction); *In re Provoo*, 17 F.R.D. 183 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955) (delay caused by Government bringing action in New York when it knew venue in New York was doubtful). *But see Sanchez v. United States*, 341 F.2d 225 (9th Cir.), *cert. denied*, 382 U.S. 856 (1965) (delay found not unreasonable where it was caused by Government in prosecuting for sale of narcotics after prosecution for different sale of narcotics unexpectedly failed). After *Ross* some courts, in following this line of reasoning, have dismissed indictments on due process grounds. *United States v. Haulman*, 288 F. Supp. 775 (E.D. Mich. 1968) (after initial indictments were dismissed on Government motion, Government later reinstated indictments charging same offenses); *People v. Winfrey*, 20 N.Y.2d 138, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967) (no effort by Government to prosecute defendant while imprisoned in another jurisdiction).

⁴⁶ See cases cited note 10 *supra*.

⁴⁷ *Dancy v. United States*, 395 F.2d 636, 638 (D.C. Cir. 1968); *Hood v. United States*, 365 F.2d 949, 951 (D.C. Cir. 1966).

⁴⁸ 349 F.2d at 212-13 nn.1 & 2.

slender dimensions. The Government's case should, at the least, have more substance than the one before us if it is to override the appellant's interest in earlier notification.⁴⁹

Whether the court meant that if the Government had a stronger case against the defendant, the prejudice to the accused and the unreasonableness of the delay would have been overlooked, or whether the court simply would have found no prejudice, is not clear from the opinion. What is clear, however, is that this language has caused the most confusion in the area of pre-arrest delay. From this language an approach to pre-arrest delays in narcotics cases different from that of *Ross* has emerged within the District of Columbia.⁵⁰ This dualism⁵¹ has contributed greatly to the hesitance on the part of most courts to accept *Ross*.⁵²

To compound the potential confusion there is language within *Ross* which could arguably limit the result to the context in which the prosecution arose, or because of the court's allusion to its supervisory power,⁵³ to the jurisdiction in which it arose. In *Ross*, the court noted that it was aware of "the pattern and effect of the undercover narcotics operations"⁵⁴ and the "recurring spectacle of convictions . . . in this very narrow and specialized class of narcotics cases"⁵⁵ Notwithstanding that pre-arrest delays most often arise in situations involving underground narcotics operations, other analogous situations exist in which the *Ross* doctrine should be applicable.⁵⁶ Although the narcotics situation in *Ross* has been used by at least one court⁵⁷ as a means of rejecting a pre-arrest delay argument not concerning narcotics, the fact that the Federal courts have considered *Ross* in examining many situations⁵⁸ outside the realm of nar-

⁴⁹ *Id.* at 215-16.

⁵⁰ This different approach concerns prejudice to the accused caused by the risk of mistaken identification by the undercover agent in narcotics cases. It stems from the lengthy delay between the time of the alleged confrontation and sale and the subsequent identification by the undercover policeman. See, e.g., *Hardy v. United States*, 381 F.2d 941, 945 (D.C. Cir. 1967) (Bazelon, C.J., dissenting); *Woody v. United States*, 370 F.2d 214, 218 (D.C. Cir. 1966); *Powell v. United States*, 352 F.2d 705, 710 (D.C. Cir. 1965) (Wright, J., dissenting). See text accompanying notes 96-97 *infra*.

⁵¹ Compare interpretation of "prejudice" in *United States v. Feinberg*, 383 F.2d 60, 65 (2d Cir. 1966), and *Godfrey v. United States*, 243 F. Supp. 830, 832 (D.D.C. 1965), *aff'd per curiam*, 358 F.2d 850 (D.C. Cir. 1966), with *United States v. Napue*, 401 F.2d 107, 111 (7th Cir. 1968), and *Bey v. United States*, 350 F.2d 467 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 905 (1966).

⁵² Time and again, courts have utilized the absence of one component part of this duality to reject pre-arrest delay arguments based on *Ross*. See cases cited in notes 96 & 97 *infra*.

⁵³ See note 60 and accompanying text *supra*.

⁵⁴ 349 F.2d at 215.

⁵⁵ *Id.*

⁵⁶ Similar situations could conceivably arise out of any circumstances involving an unreasonable delay between the time the Government first has probable cause and the initiation of formal charges. Such delays would no doubt be peculiar to all types of police undercover work and should not necessarily be limited to narcotics operations.

⁵⁷ *Terlikowski v. United States*, 379 F.2d 501, 505 (8th Cir.), *cert. denied*, 389 U.S. 1008 (1967) (dictum).

⁵⁸ *Jones v. United States*, 402 F.2d 639 (D.C. Cir. 1968) (robbery); *United*

cotics, tends to negate the notion that the case should be so narrowly limited in scope. The tenor of the opinion merely exemplifies the amount of prejudice caused to a defendant in the typical trial of one accused of selling narcotics;⁵⁹ it does *not* limit the prejudice to situations concerning narcotics.

The scope of the *Ross* decision became somewhat obscured when the court concluded:

Without attempting to define the precise reach of the Fifth Amendment in this context, a due regard for our supervisory responsibility for criminal proceedings in this jurisdiction requires, in our view, the reversal of this conviction.⁶⁰

While this language has been utilized to deny any constitutional basis for the *Ross* decision by a District of Columbia district court in rejecting an argument for retroactivity of *Ross*,⁶¹ and by other Federal courts, in dicta, in rejecting arguments based on *Ross* as inappropriate outside the District of Columbia,⁶² most of the circuit courts have indicated in some manner that pre-arrest delays may give rise to due process violations.⁶³ The above-quoted language is subject to a number of interpretations due to its vague overtone. The most logical explanation is that it was an available means to avoid grounding the decision on the constitutional basis presumably available under the fifth amendment, while affording additional justification for the unprecedented judicial inquiry into the necessity of a

States v. Feinberg, 383 F.2d 60 (2d Cir. 1967) (interstate transportation of motor vehicles); *Schlinsky v. United States*, 379 F.2d 735 (1st Cir.), *cert. denied*, 389 U.S. 920 (1967) (tax evasion); *United States v. Panczko*, 367 F.2d 737 (7th Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (selling counterfeit federal reserve notes); *United States v. Parrott*, 248 F. Supp. 196 (D.D.C. 1965) (violation of Securities and Exchange Act); *Bond v. United States*, 233 A.2d 506 (D.C. Mun. Ct. 1967) (unlawful entry and petit larceny).

⁵⁹ In the typical trial of an accused narcotics dealer, the issue of guilt rests upon whom the jury believes: the undercover policeman or the accused peddler. The Government's case normally consists of no more than the narcotics and the testimony of the undercover policeman. However, nothing more is actually needed. A verbal rebuttal by the accused will hardly suffice to persuade the jury of his innocence, and because of the usual appearance and mannerisms of any associates who might testify to support an alibi, their testimony is unlikely to be of much help. Realistically, however, the accused has nothing else, and once the means to present an alibi defense are lost because of dimmed memories, the already lopsided contest becomes even more of a sham.

⁶⁰ 349 F.2d at 216.

⁶¹ *Gordan v. United States*, 271 F. Supp. 950, 953-54 (D.D.C. 1967). For an argument in favor of retroactivity of *Ross*, see *Hardy v. United States*, 381 F.2d 941, 950-54 (D.C. Cir. 1967) (Bazelon, C.J., dissenting).

⁶² *Whitted v. United States*, 411 F.2d 107, 108-09 (9th Cir. 1969) (dictum); *United States v. Sanchez*, 361 F.2d 824, 825 (2d Cir. 1966).

⁶³ *Wilson v. United States*, 409 F.2d 184, 186 (9th Cir. 1969), *cert. denied*, 395 U.S. 983 (1969) (dictum); *McConnell v. United States*, 402 F.2d 852, 853 (5th Cir. 1968), *cert. denied*, 394 U.S. 933 (1969) (dictum); *United States v. Deloney*, 389 F.2d 324, 325 (7th Cir.), *cert. denied*, 391 U.S. 924 (1968) (dictum); *Schlinsky v. United States*, 379 F.2d 735, 737 (1st Cir.), *cert. denied*, 389 U.S. 920 (1967) (dictum); *Terlikowski v. United States*, 379 F.2d 501, 505 (8th Cir.), *cert. denied*, 389 U.S. 1008 (1967) (dictum); *United States v. Harbin*, 377 F.2d 78, 79 (4th Cir. 1967) (dictum); *Chapman v. United States*, 376 F.2d 705, 707 (2d Cir.), *cert. denied*, 389 U.S. 881 (1967) (dictum).

delay in furthering effective law enforcement.

Synthesizing the opinions which have dealt with the problem, four component parts emerge which must be satisfied in a pre-arrest delay situation before a court will consider dismissal of the indictment on due process grounds: (1) the delay must be of some length; (2) it must be unreasonable under the circumstances; (3) the accused's defense must be prejudiced by the delay; and (4) the accused must raise the argument of denial of due process no later than at trial. For the sake of clarity each element will be discussed separately.

Length of Delay

The length of the delay, by itself, is meaningless unless of such short duration that it will preclude an inquiry into its reasonableness,⁶⁴ or of such great length that it will raise a presumption of prejudice to the accused.⁶⁵ While computation of the delay normally begins at the time of the offense, because the majority of the cases in this area involve undercover operations where the prosecution's evidence-gathering process begins and ends on the day of the offense, it cannot begin before the Government first has probable cause for arrest.⁶⁶ Computation of the delay will end when the Government first takes positive and diligent steps to notify the accused of the charges against him,⁶⁷ or when the defendant actually learns of the charges⁶⁸ if the efforts at notification are less than diligent.⁶⁹

⁶⁴ The *Ross* court indicated that a delay of four months, caused by undercover narcotics operations, might not be unreasonable. 349 F.2d at 213. Subsequently it has been held that a delay of less than four months between occurrence of the first offense charged and issuance of arrest warrant was an appropriate range of time and precluded an inquiry into the reasonableness of the delay caused by an undercover narcotics operation. *Worthy v. United States*, 352 F.2d 718 (D.C. Cir. 1965), *vacated on other grounds*, 384 U.S. 894 (1966). *But see Woody v. United States*, 370 F.2d 214 (D.C. Cir. 1966) (delay of four months held unreasonable for undercover narcotics operations where the accused was able to show prejudice stemming from the delay); *People v. Hernandez*, 15 Mich. App. 141, 166 N.W.2d 281 (1969) (42-day unexplained delay in narcotics undercover case held unreasonable).

⁶⁵ *Hanrahan v. United States*, 348 F.2d 363 (D.C. Cir. 1965), *cert. denied*, 389 U.S. 845 (1967) (dictum) (speaking in terms of speedy trial); *Bond v. United States*, 233 A.2d 506, 512 (D.C. Mun. Ct. 1967) (dictum). This same principle has been applied in the area of post-arrest speedy trial. *See, e.g., Hedgepeth v. United States*, 364 F.2d 684, 687 n.3 (D.C. Cir. 1966) (dictum); *United States v. Lustman*, 258 F.2d 475, 477-78 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958); *United States v. Chase*, 135 F. Supp. 230, 233 (N.D. Ill. 1955); *In re Provoo*, 17 F.R.D. 183, 203 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955); *People v. Hryciuk*, 36 Ill. 2d 500, 504, 224 N.E.2d 250, 252 (1967).

⁶⁶ Note, *Commingle Civil and Criminal Proceedings: A Peek at Constitutional Limitations and a Poke at the SEC*, 34 GEO. WASH. L. REV. 527, 535 (1966).

⁶⁷ *E.g., United States v. Feinberg*, 83 F.2d 60, 66 (2d Cir. 1967).

⁶⁸ If the claimed prejudice stems from an inability to remember events at the time of the alleged offense, actual notice should suffice to terminate computation of the delay, regardless of whether notice is embodied in formal charges, or comes earlier or later from another source, governmental or otherwise. *United States v. Feinberg*, 383 F.2d 60 (2d Cir. 1967) (investigation of alleged offense one week thereafter held sufficient notice to defendant). However, if the claimed prejudice is death of an alibi witness, or other prejudice which actual notice is incapable of alleviating, the above reasoning should not apply.

⁶⁹ *United States v. Godfrey*, 243 F. Supp. 830 (D.D.C. 1965), *aff'd per curiam*,

Reasonableness of Delay

Whether a delay is reasonable is determined by its length, the necessity of the governmental task during the delay, and whether there was any alternative the Government could have chosen to shorten the delay. A delay will not be held unreasonable if it was not caused by the Government,⁷⁰ or if it stems from the routine, normal delay inherent in judicial procedure.⁷¹ It must arise from a deliberate choice for a proposed Government advantage, but bad faith or chicanery need not be present.⁷²

While the District of Columbia courts have been most critical at times in defining whether a delay on the part of the Government was reasonable,⁷³ for the most part other circuit courts of appeals usually presume reasonableness as long as the delay was caused by some legitimate governmental task.⁷⁴ In the area of undercover narcotics operations, courts within the District of Columbia have demanded not only that the delay be concerned with a legitimate task, but also that it be necessary for the success of this task.⁷⁵ Other courts, however, will usually accept as sufficient a general allegation by the Government that the delay was

358 F.2d 850 (D.C. Cir. 1966) (delay between warrant and arrest held unreasonable because attempt to locate defendant to execute warrant was less than diligent). *See also* Jones v. United States, 402 F.2d 639 (D.C. Cir. 1968) (fact that defendant showed difficulty in remembering time of offense and the evidence did not show diligence on part of police in trying to find defendant and arrest him was cause for remand to inquire into reasonableness of delay). *But see* Hoffa v. United States, 385 U.S. 293, 310 (1966) ("there is no constitutional right to be arrested"); King v. United States, 369 F.2d 213, 214 (D.C. Cir. 1966) (Edgerton, J., dissenting), *cert. denied*, 387 U.S. 910 (1967) (court refused to inquire into diligence of police in executing warrant); People v. Gilmore, 239 Cal. App. 2d 125, 130, 48 Cal. Rptr. 449, 452 (1965), *cert. denied*, 385 U.S. 961 (1966):

[S]ince it cannot be seriously argued that the police work wholly independently of the United States Attorney's office in these matters, it would seem that the acknowledged existence of governmental discretion in deciding whether or not to prosecute a given case tends to rebut appellant's claim of right to immediate arrest.

⁷⁰ Bond v. United States, 233 A.2d 506, 511 (D.C. Mun. Ct. 1967); State v. Midell, 40 Wis. 2d 516, 522, 162 N.W.2d 54, 56-57 (1968).

⁷¹ Cf. United States v. Kennedy, 220 A.2d 322, 324 (D.C. Mun. Ct. 1966).

⁷² E.g., Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965) (by implication); United States v. Curry, 284 F. Supp. 458 (N.D. Ill. 1968) (by implication).

⁷³ E.g., Woody v. United States, 370 F.2d 214 (D.C. Cir. 1966); Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965). *But see* King v. United States, 369 F.2d 213 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 910 (1967); Powell v. United States, 352 F.2d 705 (D.C. Cir. 1965).

⁷⁴ See cases cited note 98 *infra*.

⁷⁵ Ross v. United States, 349 F.2d 210 (1965). Cf. United States v. Godfrey, 243 F. Supp. 830 (D.D.C. 1965), *aff'd per curiam*, 358 F.2d 850 (D.C. Cir. 1966). *But see* King v. United States, 369 F.2d 213 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 910 (1967); Powell v. United States, 352 F.2d 705 (D.C. Cir. 1965). This inconsistency is inherent from the manner in which these cases arise. If a defendant can show he has been prejudiced in his defense at trial by an unexplained, substantial delay on appeal to the circuit court, the cause will be remanded for a hearing as to its reasonableness. If, however, prejudice is not shown to have occurred to the defendant at trial, or if the delay is short, it is unlikely to be remanded for a hearing on the reasonableness of the delay. Both Ross and Godfrey were remanded for explanations of the delays, while Powell and King were not.

caused by a desire to prolong undercover operations,⁷⁶ and will not remand the cause for a more critical inquiry as to its necessity.

Although the courts have placed the burden of proving unreasonableness on the accused,⁷⁷ all the accused must do is make a general allegation of availability for arrest or indictment and then it will be necessary for the Government to come forward and explain the reason for the delay. An unexplained delay will always be held unreasonable.⁷⁸

Prejudice

Unless prejudice is presumed from a lengthy delay, even though a delay is found to be unreasonable, a due process contention will still fall unless the defendant can show that he has been prejudiced thereby.⁷⁹ While other courts have not been so lenient,⁸⁰ in *Ross* an allegation of loss of memory coupled with the refusal of a potential alibi witness to testify because of an alleged inability to recall was held sufficient to constitute prejudice.⁸¹ Prejudice has also been found in the loss of a potential alibi witness and an eyewitness,⁸² and by the Government's inability to locate an informant who would have testified to an issue concerning entrap-

⁷⁶ *Wilson v. United States*, 409 F.2d 184, 186 (9th Cir.), *cert. denied*, 395 U.S. 983 (1969); *United States v. Napue*, 401 F.2d 107, 115 (7th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); *People v. Wilson*, 239 Cal. App. 2d 358, 365, 48 Cal. Rptr. 638, 642 (1966); *People v. Gilmore*, 239 Cal. App. 2d 125, 128, 48 Cal. Rptr. 449, 451 (1965), *cert. denied*, 385 U.S. 961 (1966). *But see* *People v. Hernandez*, 15 Mich. App. 141, 147, 166 N.W.2d 281, 284 (1969) (presumption that delay is unreasonable until prosecution explains otherwise in undercover narcotics cases).

⁷⁷ *Powell v. United States*, 352 F.2d 705, 708 (D.C. Cir. 1965). *But see* *United States v. Deloney*, 389 F.2d 324, 325 (7th Cir.), *cert. denied*, 391 U.S. 924 (1968); *People v. Hernandez*, 15 Mich. App. 141, 147, 166 N.W.2d 281, 284 (1969).

⁷⁸ *E.g.*, *United States v. Parrott*, 248 F. Supp. 196 (D.D.C. 1965) (speedy trial language); *United States v. Godfrey*, 243 F. Supp. 830 (D.D.C. 1965), *aff'd per curiam*, 358 F.2d 850 (D.C. Cir. 1966); *People v. Hernandez*, 15 Mich. App. 141, 166 N.W.2d 281 (1969).

⁷⁹ *United States v. Deloney*, 389 F.2d 324 (7th Cir.), *cert. denied*, 391 U.S. 924 (1968) (six-month delay before indictment); *Schinsky v. United States*, 379 F.2d 735 (1st Cir.), *cert. denied*, 389 U.S. 920 (1967) (three and one-half-year delay before indictment); *United States v. Kane*, 243 F. Supp. 746 (S.D.N.Y. 1965) (almost five-year delay before indictment); *State v. Saiz*, 103 Ariz. 567, 447 P.2d 541 (1968) (almost five years between dismissal of one complaint and refiling of subsequent complaint). *But see* *Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968); *Woody v. United States*, 370 F.2d 214 (D.C. Cir. 1966). In the latter cases there was no unreasonable delay but due to special prejudicial circumstances the defendants were denied fair trials. One court has stated, in dictum, that bad faith on the part of the Government may be a substitute for prejudice. *United States v. Kane*, *supra*, at 754.

⁸⁰ *United States v. Miller*, 259 F. Supp. 294 (E.D. Pa. 1966) (general claim of dimmed memories and lost witnesses insufficient, must show concrete harm); *People v. Love*, 39 Ill. 2d 436, 235 N.E.2d 819 (1968) (general assertion of inability to remember and locate possible witnesses held insufficient to show prejudice). It has been said that the most compelling evidence of prejudice is loss of key witnesses. *Bond v. United States*, 233 A.2d 506, 512 (D.C. Mun. Ct. 1967) (dictum).

⁸¹ 349 F.2d at 214-15. *See also* *Jackson v. United States*, 351 F.2d 821, 823 (D.C. Cir. 1965) (dictum): "Since the delay was the clear responsibility of the Government and was arranged solely for its advantage, the accused should not be forced to labor under an exacting burden of proof [in showing prejudice], but he must still show a plausible claim."

⁸² *Woody v. United States*, 370 F.2d 214 (D.C. Cir. 1966).

ment.⁸³ Although never professed in a majority opinion, there are some judges on the District of Columbia Circuit Court of Appeals who feel that prejudice may also stem from the unreliability of the identification process in narcotics undercover situations.⁸⁴

The above examples, however, are all predicated on their respective surrounding circumstances, and are useful only as specific illustrations. Whether any particular set of occurrences will be held to be prejudicial depends upon their impact on the accused's ability to defend himself—*i.e.*, whether they have the effect of denying him a fair deliberation of the charges against him. Ordinarily the burden of showing prejudice is on the accused.⁸⁵ There is no indication that the prejudice must be an intended result of the unreasonable delay, as long as it is a logical consequence.⁸⁶

Waiver

There is unanimous agreement as to when a due process objection will be deemed waived. The courts all agree that a claim of a due process violation from a pre-arrest delay must be clearly⁸⁷ raised, at the very latest, at trial.⁸⁸ Indeed, even a post-trial motion to set aside the conviction is too late if the due process contention was not brought out previously.⁸⁹ It has also been considered waived upon a plea of guilty, even

⁸³ *United States v. Curry*, 284 F. Supp. 458 (N.D. Ill. 1968).

⁸⁴ See note 50 *supra*.

⁸⁵ *Powell v. United States*, 352 F.2d 705, 708 (D.C. Cir. 1965). An exception to this rule exists where the delay is substantial. See cases cited in note 65 *supra*. However, one court has placed the burden of showing that there was no prejudice on the prosecution, irrespective of the length of the delay (which was only 42 days), where the delay is attributable to government undercover operations. *People v. Hernandez*, 15 Mich. App. 141, 147, 166 N.W.2d 281, 284 (1969).

⁸⁶ All that need be shown is that the prejudice would not have resulted, except for the unreasonable delay. See, *e.g.*, *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965); *United States v. Godfrey*, 243 F. Supp. 830 (D.D.C. 1965), *aff'd per curiam*, 358 F.2d 850 (D.C. Cir. 1966); *Bond v. United States*, 233 A.2d 506, 512 (D.C. Mun. Ct. 1967) (dictum). One decision has been criticized for disregarding any nexus between delay and prejudice. See *Woody v. United States*, 370 F.2d 214, 220 (D.C. Cir. 1966) (Burger, J., dissenting). Other courts have demanded not only that the delay cause the prejudice, but that there be some intent on the part of the Government in initiating the delay to cause prejudice to the accused. *People v. Alvarado*, 258 Cal. App. 2d 756, 759, 66 Cal. Rptr. 41, 42 (1968) (due process contention failed because there was no proof that defendant's arrest was delayed by police in order that the informer might disappear). Cf. *Tynan v. United States*, 376 F.2d 761, 763 (D.C. Cir.), *cert. denied*, 389 U.S. 845 (1967) (speedy trial contention failed because prejudice to defendants arising out of destruction of their records by floodwaters prior to delayed trial was not chargeable to Government).

⁸⁷ *United States v. Sanchez*, 361 F.2d 824, 825 (2d Cir. 1966) (due process contention not clearly brought out at trial in limited cross examination because defendant's counsel did not make clear to trial judge the purpose of inquiry into pre-arrest delay); *United States v. Hammond*, 360 F.2d 688, 689 (D.C. Cir.), *cert. denied*, 385 U.S. 918 (1966) (due process question was not raised clearly at trial because Government was prevented from offering any explanation of delay by defense counsel's successful objection to such explanatory testimony).

⁸⁸ *Benson v. United States*, 402 F.2d 576, 580 (9th Cir. 1968); *Chapman v. United States*, 376 F.2d 705, 707 (2d Cir.), *cert. denied*, 389 U.S. 881 (1967); *Hood v. United States*, 365 F.2d 949, 950 n.1 (D.C. Cir. 1966); *United States v. Smalls*, 363 F.2d 417, 419 (2d Cir. 1966), *cert. denied*, 385 U.S. 1027 (1967).

⁸⁹ *D'Ercole v. United States*, 361 F.2d 211, 212 (2d Cir.), *cert. denied*, 385 U.S. 995 (1966).

though on advice of counsel.⁹⁰ Moreover, the claim cannot be raised on collateral attack.⁹¹

ACCEPTANCE OF ROSS: JUDICIAL RELUCTANCE

As of this writing only the District of Columbia Circuit among circuit courts has dismissed indictments solely on due process infringements arising out of pre-arrest delays,⁹² and then only on two occasions.⁹³ Generally, both state and Federal courts have been reluctant to accept *Ross*.⁹⁴ The reluctance of courts to accept *Ross* has been caused by two factors. The first stems from the sensitivity surrounding the area of narcotics, the context in which the question of pre-arrest delay most often arises. Every judge is aware of the tremendous narcotics problem in this country,⁹⁵ and can hardly help but feel restrained from initiating a precedent which might inhibit police efforts to curtail this problem. The second factor is the confusion created by the *Ross* opinion itself. Many courts agree that due process may be violated by a pre-arrest delay, but they are bewildered as to what circumstances must be present in order to invoke due process to dismiss an indictment.

The ambiguity of the *Ross* opinion has facilitated the efforts of other

⁹⁰ *Copping v. Allgood*, 249 F. Supp. 237, 239 (E.D. La. 1965).

⁹¹ *Hardy v. United States*, 381 F.2d 941, 943 (D.C. Cir. 1967). Cf. *Gordan v. United States*, 271 F. Supp. 950, 954-55 (D.D.C. 1967).

⁹² *Woody v. United States*, 370 F.2d 214 (D.C. Cir. 1966); *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965).

⁹³ That few circuit court decisions dismiss indictments in this area of law can be partially explained by the manner in which they arise. Usually the due process contention is not dealt with at the initial trial, although there the question must first be raised. If on appeal the defendant can show he has been prejudiced in his defense by the pre-arrest delay and that the delay has not been justified by the prosecution, the cause will be remanded for a hearing as to the reasonableness of the delay, and the due process issue will be considered. The District of Columbia Circuit has remanded a number of cases for such hearings. E.g., *Jones v. United States*, 402 F.2d 639 (D.C. Cir. 1968); *Lee v. United States*, 368 F.2d 834, 835 n.2 (D.C. Cir. 1966). But see *United States v. Haulman*, 288 F. Supp. 775 (E.D. Mich. 1968) (due process contention dealt with at trial). On remand, if the issue of due process is erroneously dealt with adversely to the defendant, and he appeals, the circuit court of appeal will have occasion to dismiss an indictment.

⁹⁴ Some District of Columbia district courts have interpreted *Ross* liberally, e.g., *United States v. Godfrey*, 243 F. Supp. 830 (D.D.C. 1965), *aff'd per curiam*, 358 F.2d 850 (D.C. Cir. 1966); cf. *United States v. Parrott*, 248 F. Supp. 196 (D.D.C. 1965) (speedy trial language). District courts outside the District of Columbia have interpreted *Ross* restrictively, e.g., *United States v. Miller*, 259 F. Supp. 294 (E.D. Pa. 1966); *Copping v. Allgood*, 249 F. Supp. 237 (E.D. La. 1965). But see *United States v. Haulman*, 288 F. Supp. 775 (E.D. Mich. 1968); *United States v. Curry*, 284 F. Supp. 458 (N.D. Ill. 1968). State courts, with few exceptions, have shown reluctance to accept *Ross*. See, e.g., *State v. Saiz*, 103 Ariz. 567, 447 P.2d 541 (1968); *People v. Wilson*, 239 Cal. App. 2d 358, 48 Cal. Rptr. 638 (1966); *Scott v. State*, 444 P.2d 902 (Nev. 1968); *People v. Winfrey*, 20 N.Y.2d 138, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967). But see *People v. Hryciuk*, 36 Ill. 2d 500, 224 N.E.2d 250 (1967); *People v. Hernandez*, 15 Mich. App. 141, 166 N.W.2d 281 (1969); cf. *State v. Johnson*, 275 N.C. 264, 167 S.E.2d 274 (1969) (speedy trial language).

⁹⁵ See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 1-20 (1967) [hereinafter cited as TASK FORCE REPORT].

courts, unwilling to confront due process arguments based on pre-arrest delays, to distinguish *Ross* from their respective cases. In *Ross*, prejudice was found in the accused's inability to remember the time and circumstances surrounding the alleged offense. Subsequently, in cases where defendants have shown any indication that they remember the alleged time of the offense, or have attempted to present any alibi defense, courts have utilized either of these factors to distinguish *Ross*.⁹⁶ In addition, the *Ross* court took into account the weakness of the Government's identification of the accused in its decision to dismiss the indictment. Consequently, where courts have found a more reliable identification, *Ross* has again been distinguished.⁹⁷ Finally, in *Ross*, after finding that the Government's delay was unnecessary for effective law enforcement, the court held the delay to be unreasonable, despite its connection with a legitimate Government task. Most courts after *Ross* have refused to inquire into the actual necessity of the delay, but have held it reasonable so long as it was a result of a legitimate Government operation.⁹⁸

PREJUDICE: INABILITY TO DEFEND V. PROCESS OF
IDENTIFICATION—WOODY V. UNITED STATES

As indicated earlier, the major source of confusion arising from *Ross* has stemmed from language illustrating concern over the lack of corroborating evidence against the accused. This language has led to an extension of *Ross* within the District of Columbia Circuit.⁹⁹ In the five years since the decision first enunciated notions of due process violations in the context of pre-arrest delay, the Circuit Court of Appeals for the District of Columbia has divided as to what underlying rationale was determinative in *Ross*. While several cases have emphasized the prejudice to an accused caused by a delayed notification of the charges,¹⁰⁰ other cases

⁹⁶ *United States v. Feinberg*, 383 F.2d 60, 66 (2d Cir. 1967) (despite delay of 4 years, 11 months in arresting defendant, defendant received notice of the charges one week after offense); *Powell v. United States*, 352 F.2d 705, 709 (D.C. Cir. 1965) (defendant had an alibi witness); *Cannady v. United States*, 351 F.2d 817, 818 (D.C. Cir. 1965) (defendant took stand and testified as to circumstances surrounding offense); *United States v. Godfrey*, 243 F. Supp. 830, 831-32 (D.D.C. 1965), *aff'd per curiam*, 358 F.2d 850 (D.C. Cir. 1966) (defendant took stand and testified as to his whereabouts on day of alleged offense).

⁹⁷ *Whitted v. United States*, 411 F.2d 107, 109 (9th Cir. 1969); *Dancy v. United States*, 395 F.2d 636, 638 (D.C. Cir. 1968); *Morrison v. United States*, 365 F.2d 521, 523 (D.C. Cir. 1966); *Bey v. United States*, 350 F.2d 467 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 905 (1966).

⁹⁸ *Wilson v. United States*, 409 F.2d 184, 186 (9th Cir.), *cert. denied*, 395 U.S. 983 (1969); *United States v. Napue*, 401 F.2d 107, 115 (7th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); *King v. United States*, 369 F.2d 213, 214 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 910 (1967); *United States v. Panczko*, 367 F.2d 737, 738-39 (7th Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *People v. Wilson*, 239 Cal. App. 2d 358, 365, 48 Cal. Rptr. 638, 642 (1966); *People v. Gilmore*, 239 Cal. App. 2d 125, 128, 48 Cal. Rptr. 449, 451 (1965), *cert. denied*, 385 U.S. 961 (1966); *Jones v. State*, 3 Md. App. 616, 618, 240 A.2d 790, 791 (1968); *Brown v. State*, 1 Md. App. 571, 573, 232 A.2d 261, 262 (1967).

⁹⁹ See notes 49-52 and accompanying text *supra*.

¹⁰⁰ *E.g.*, *Woody v. United States*, 370 F.2d 214, 220 (D.C. Cir. 1966) (Burger,

have found the determining factor to be the prejudice to the accused caused by the unreliability of the process by which he is identified.¹⁰¹ Both, of course, are aggravated by the length of delay, and both were present in *Ross*.¹⁰²

This division was exemplified in *Woody v. United States*,¹⁰³ where a violation of due process was found in a pre-arrest delay, but where each of the three judges sitting on the panel expressed different views. The delay in *Woody* involved a period of four months which, like *Ross*, stemmed from an undercover narcotics operation. Woody's defense was allegedly prejudiced by the death of the woman with whom he had been living during the period of the alleged commission of the offense. Furthermore, a witness to the alleged transaction, who once offered to testify for Woody, refused to testify on advice of counsel after he, himself, was arrested just prior to Woody's trial. Woody did not take the stand at the trial,¹⁰⁴ but his counsel asserted that he was unable to recall the events of the day of the offense. The Government's case consisted solely of the undercover agent's identification of Woody and the narcotics. The agent testified that on the night of the alleged transaction he made some brief notes of the physical makeup of the seller, but could not explain why these notes failed to mention a facial scar on Woody. Moreover, after the undercover operation was terminated the agent's identification did not take place at a face-to-face confrontation.

Chief Judge Bazelon, voting for dismissal, expressed himself almost wholly in terms of the nebulous identification.¹⁰⁵ He felt that even though the four-month delay was reasonable, the fact that the questionable identification might lead to conviction of an innocent person constituted special circumstances warranting dismissal of the indictment. Judge McGowan, also voting for dismissal, emphasized prejudice in terms of the death of a potential alibi witness and the refusal of an eyewitness to testify.¹⁰⁶ Because the prejudice occurred during the latter part of a deliberate delay on the part of the Government, Judge McGowan felt due process was violated. Judge Burger, dissenting from the dismissal, agreed with the approach of Judge McGowan, but felt there was no nexus between the delay and the resulting prejudice and the due process contention should

J., dissenting); *Powell v. United States*, 352 F.2d 705, 709 (D.C. Cir. 1965); *Ross v. United States*, 349 F.2d 210, 213-15 (D.C. Cir. 1965).

¹⁰¹ E.g., *Dancy v. United States*, 395 F.2d 636, 638 (D.C. Cir. 1968); *Morrison v. United States*, 365 F.2d 521, 523 (D.C. Cir. 1966); *Bey v. United States*, 350 F.2d 467 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 905 (1966).

¹⁰² Both are also peculiar to situations arising out of undercover narcotics operations.

¹⁰³ 370 F.2d 214 (D.C. Cir. 1966).

¹⁰⁴ On advice of counsel Woody refused to take the stand since he would have been subject to examination concerning identification from police files and his former convictions would have been revealed to the jury. *Id.* at 216.

¹⁰⁵ *Id.* at 215.

¹⁰⁶ *Id.* at 218.

therefore fail.¹⁰⁷

Both opinions favoring dismissal in *Woody*, while purportedly based on *Ross*, in reality went beyond the *Ross* guidelines, each in a different respect. Chief Judge Bazelon's opinion, rather than finding prejudice from the inability of the accused to defend, found prejudice in the unreliability of the prosecution's case. While the *Ross* court viewed the unsoundness of the Government's case as an additional justification for dismissal, Chief Judge Bazelon found this factor prejudicial in itself. He contended that the reliability of the verdict becomes solely dependent upon the quality of the police investigation and method of identification. Because the police could have been more efficient, he argued, *Woody* had been prejudiced.

However, the identification procedure is unrelated to the reasonableness of the delay, the Government's reasons for the delay, or the prejudice to the accused's ability to present a defense. The *Ross* court held that prejudice to the accused's ability to defend resulting from an unreasonable delay was a prerequisite for a successful due process contention. Instead, Chief Judge Bazelon's approach fails to consider these essential factors and represents an attempt to second-guess the jury's decision giving credibility to the identifying officer. While this reasoning may have some merit in another context,¹⁰⁸ it is hardly what the *Ross* court intended.¹⁰⁹

Without inquiring into the necessity of the delay, Judge McGowan felt that because the defendant's ability to present a defense was in fact impaired, the indictment should fall in view of the surrounding circumstances. However, the *Ross* decision did not purport to go this far but constituted a compromise between the necessity for some delay in narcotics undercover operations and the fairness to an accused in early notification of the charges against him.¹¹⁰ Nevertheless, Judge McGowan, by failing to inquire into the necessity for the delay, disregarded the societal interest in effective law enforcement, which the *Ross* court had deemed important.¹¹¹

¹⁰⁷ *Id.* at 220.

¹⁰⁸ In *Ross*, the court measured the strength of the prosecution's evidence in deciding to dismiss the indictment, but it did so only after a finding of prejudice to the accused's ability to defend because of an unnecessary delay. Such an evidentiary inquiry is part of a *Ross*-type examination, but it is not the sole factor to be considered. See text accompanying notes 49-52 *supra*.

¹⁰⁹ See *State v. Rountree*, 106 N.J. Super. 135, 151, 254 A.2d 337, 345 (1969). See generally Note, 80 HARV. L. REV. 1361 (1967).

¹¹⁰ Compare *Woody v. United States*, 370 F.2d 214 (D.C. Cir. 1966), with *United States v. Ward*, 240 F. Supp. 659 (W.D. Wis. 1965).

¹¹¹ The *Ross* court suggested that a four-month delay before arrest stemming from an undercover narcotics operation might be reasonable. 349 F.2d at 213. The court recognized the need for such programs, but felt that because the delay was purposeful, it should result only from arrangements which reflect a conscious effort to accommodate both *fairness* and *efficiency*. *Id.* n.2. The intended result was not to abolish police undercover operations, but only to jeopardize those which were

The holding in *Woody*, which in effect makes the reasonableness of each delay dependent on the possible occurrence of an event before arrest which affects the accused's defense, has impaired the usefulness of the *Ross* rule. This is not to say that a *Woody*-type decision can never be justified. For example, the reasonableness of a delay, in itself, has no bearing on whether an accused has been prejudiced but rather is wholly dependent on whether the Government can justify the delay. Thus, in an unusual situation, prejudice to a defendant may occur where the delay is reasonable and a decision disregarding such prejudice because of this reasonableness may be unjustified. In a situation like this, disregard of the reasonableness may be permissible.¹¹²

However, this procedure is not consonant with *Ross*, which represented a balance of the interests of both the accused and the prosecution—not solely the interest of the accused.¹¹³ Where there is a strong societal interest in a particular area of law enforcement,¹¹⁴ a balance must be struck. To assure consideration of both interests involved, findings of reasonableness or unreasonableness and prejudice or no prejudice must be separately made. Impairment of an accused's interest is represented by the amount of prejudice to the defense, while impairment of the Government's interest is represented by the reasonableness of the delay. To weigh the prejudice to the accused against the reasonableness of the Government's delay rather than making separate findings of each is to make each interest dependent on the disproportion of the other. In effect, the greater the prejudice to the accused, the less unreasonable a delay must be to require dismissal of the indictment. Inevitably, one interest will lose protection to accommodate the infringement of the other interest. There would be no balance. This, in effect, was the result in *Woody*. A split decision representing the personal interpretations of two judges, the merit of *Woody* as a precedent should be weighed accordingly.¹¹⁵

unnecessary for effective law enforcement. *Woody*, however, represents a complete withdrawal from this compromise.

¹¹² Where the alleged offense was armed robbery, and the accused became amnesic just prior to arrest, the conviction was reversed notwithstanding the fact that there was no delay in arrest on the part of the Government. *Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968). Perhaps in anticipation of such circumstances some state legislatures have enacted statutes allowing the courts discretion to dismiss complaints in the *furtherance of justice*. E.g., CAL. PENAL CODE § 1385 (West 1965); IDAHO CODE ANN. § 19-3504 (1947); IOWA CODE § 795.5 (1966); N.D. CENT. CODE § 29-18-04 (1960).

¹¹³ Mr. Justice Jackson has expressed a similar construction of due process. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224-25 (1953) (Jackson, J., dissenting):

Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration. (citations omitted).

¹¹⁴ See TASK FORCE REPORT, *supra* note 95.

¹¹⁵ *Hannah v. Larche*, 363 U.S. 420, 505 (1960) (Douglas, J., dissenting): Due process under the prevailing doctrine is what the judges say it is; and it differs from judge to judge, from court to court. This notion of due

ROSS IN ITS PROPER PERSPECTIVE

Analysis of *Ross v. United States* reveals a sound constitutional doctrine from which sufficient guidelines can be abstracted to construct a logical and viable test to protect an accused from prejudice to his defense arising out of unreasonable Government delays prior to arrest. It is a test of probabilities which demands a series of inquiries before a conclusion can be reached. The principle behind *Ross* was fairness to the accused: the accused is entitled to a fair deliberation of the accusations against him, and if by an unnecessary delay on the part of the Government the defendant is denied this, the indictment should fail. The *Ross* court was not necessarily concerned with a delay which was purposeful or deliberate, but one which was unnecessary for effective law enforcement. If the delay proves unnecessary, the accused should not be subjected to a possible faulty conviction because of a defense which is prejudiced by lapse of time. Whether the accused has been prejudiced depends on whether he has been denied the means for presenting a defense. However, not every detriment to the accused's defense caused by an unnecessary delay requires dismissal. In many cases it may appear from other available evidence that the asserted detriment would not have affected the verdict even had it not occurred.¹¹⁶ But where it appears that the verdict *has* been affected, the presumption of innocence¹¹⁷ should prevail to require dismissal.

The judicial system presupposes that a defendant will be afforded all possible means in presenting his defense. But *Ross* does not purport to guarantee this ideal under all circumstances; only when the circumstances are avoidable by the Government. *Ross* represents a sound doctrine, and a successful argument based on that doctrine calls for the finding of three separate factors. First, the delay must have been unreasonable, *i.e.*, unnecessary for effective law enforcement. Second, the accused's defense must be impaired by some event which would not have existed but for the delay. Third, there must be some probability that the accused's defense has been so impaired as to deny him a fair deliberation of guilt or innocence. This three-step approach is hardly a complex inquiry, and if employed, would not undermine efficient police procedures.

RAISING DUE PROCESS CONTENTIONS BY PRE-TRIAL MOTION

Although a due process objection based on *Ross* must initially be asserted at trial, it is rarely disposed of at this stage and is usually dealt

process makes it a tool of the activists who respond to their own visceral reactions in deciding what is fair, decent, or reasonable.

¹¹⁶ FED. R. CRIM. P. 52(a), the "harmless error" rule, provides that "[a]ny defect, irregularity or variance which does not affect substantial rights shall be disregarded."

¹¹⁷ See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152-72 (1960).

with on appeal. Normally, if on appeal prejudice can be shown to have occurred during the trial because of an unexplained delay, the case will be remanded for a hearing on the reasonableness of the delay, and the due process contention will finally be confronted.¹¹⁸ This procedure is obviously both time-consuming and expensive for the defendant and the Government. In addition, if the defendant, as the burden of proof requires, is going to make a trial record to prove prejudice, it is often necessary for him to take the stand and relate his inability to recall the time of the offense. Consequently, the existing procedure may force the defendant to relinquish his right against compulsory self-incrimination.¹¹⁹

These pitfalls could be avoided in many situations if the contention could be raised prior to trial and the issue resolved prior to or immediately after trial. Since the majority of cases in this area involve undercover narcotics operations, the issues would be comparatively simple, *i.e.*, normally the Government's evidence consists merely of the narcotics and the agent's testimony regarding the identity of the defendant. If, for example, the accused could show that his defense was impaired by a lengthy pre-arrest delay attributable to the Government, and the Government could not offer sufficient justification, other relevant circumstances could be taken into account at a hearing on the motion.

Most often it would be desirable to hold the hearing after trial in order first to observe the impact of the prejudice on the litigation. However, it is conceivable that the degree of prejudice may be so great that the accused is left with no means to present a defense, and under such circumstances to first proceed with a trial would amount to a sham. In such a situation, a hearing prior to trial would be in order.

Rule 12(b) of the *Federal Rules of Criminal Procedure* affords such a procedure.¹²⁰ Furthermore, a 12(b) motion gives the court discretion to proceed with trial to determine the merits of the motion.¹²¹ All these attributes afforded by rule 12(b) make it a most appropriate remedy for eliminating much of the lengthy procedure now utilized to confront a due process argument stemming from a pre-arrest delay.

CONCLUSION

The *Ross* court did not offer any definitive solution for the Government to avoid future dismissals. The court left the solution to the police,

¹¹⁸ See cases cited note 93 *supra*.

¹¹⁹ *Jackson v. United States*, 351 F.2d 821, 823 (D.C. Cir. 1965). It appears that, in response to this problem, one judge in the District of Columbia already permits a private hearing. *Id.* at 824.

¹²⁰ FED. R. CRIM. P. 12(b)(1): "Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion."

¹²¹ FED. R. CRIM. P. 12(b)(4): "A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue."

giving notice that future delays must show consideration for the accused's interest in early notification of charges.¹²² The court suggested that a four-month delay might be sufficient to accommodate this interest in situations arising out of effective undercover narcotics operations,¹²³ but the decision in *Woody* has cast some doubt on the validity of this notion. Notwithstanding the possibility of future misinterpretations such as the *Woody* decision, the police in the District of Columbia may reasonably rely on delays of up to four months for effective narcotics operations and still satisfy *Ross* requirements. Generally, police outside the District of Columbia can probably rely on a more lengthy delay to satisfy judicial requisites because of their respective courts' attitudes toward the *Ross* doctrine. Experience in one area has shown that this prophylactic device to control police procedures does not necessarily impair effective undercover narcotics operations.¹²⁴

The emergence of judicial law concerned with pre-arrest delays has been characterized by diversity, varying according to the different weight and interpretation given the *Ross* decision. Many courts have utilized the multi-factual circumstances present in *Ross* to distinguish their respective cases.¹²⁵ The bewildering rationale of the *Woody* majority plus the hypersensitive attitude which accompanies narcotics control supplements the vague expression of the *Ross* decision itself as explicating, but hardly justifying, this judicial reluctance to apply the *Ross* ruling. The *Ross* test represents a logical and constitutionally supported safeguard against potential miscarriages of justice. While our imperfect system of law cannot expect to prevent an occasional injustice, it should, at the very least, avoid this possibility when the cause is rooted in unreasonable action by the Government itself.

¹²² *Ross v. United States*, 349 F.2d 210, 213 n.2 (1965):

Whatever the outer limits of such a period may be, the point is that, being purposeful, the delay should result only from arrangements which reflect a conscious effort to accommodate fairness and efficiency.

¹²³ *Id.* at 213.

¹²⁴ Undercover narcotics operations resulting in delays of less than four months have been successful in New York City. Note, 41 N.Y.U.L. REV. 638, 644 (1966).

¹²⁵ See cases cited notes 96-98 *supra*.