

January 1966

## **Criminal Procedure - Deliberate and Purposeful Delay between the Date of the Commission of a Crime and the First Filing of Charges as Violation of Defendant's Fifth Amendment Due Process Right to a Fair Trial - Ross v. United States**

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### **Recommended Citation**

Grant, Edward L. (1966) "Criminal Procedure - Deliberate and Purposeful Delay between the Date of the Commission of a Crime and the First Filing of Charges as Violation of Defendant's Fifth Amendment Due Process Right to a Fair Trial - Ross v. United States," *Land & Water Law Review*: Vol. 1 : Iss. 1 , pp. 317 - 321.

Available at: [https://scholarship.law.uwyo.edu/land\\_water/vol1/iss1/12](https://scholarship.law.uwyo.edu/land_water/vol1/iss1/12)

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unconscionable contracts. Attorneys with a buyer client, who feels he has been wronged by an allegedly unconscionable contract, will do well to cite the *Williams* case in support of their cause. And finally, merchants who make a practice of using standardized contract forms, which are unreasonably favorable towards themselves, may be well inclined to change this practice in the event a substantial number of buyer's are found to have entered unconscionable contracts by courts which follow the rationale of the *Williams* case.

DENNIS R. FRANCISH

**CRIMINAL PROCEDURE—Deliberate and Purposeful Delay Between The Date of the Commission of a Crime and the First Filing of Charges as Violation of Defendant's Fifth Amendment Due Process Right To a Fair Trial. *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965).**

The defendant was arrested and charged with violation of federal narcotics laws seven months after the date of the alleged offense. Immediately after the commission of the offense, law enforcement officers had probable cause to believe that the defendant was the person who had committed it. He was continuously available during this period of time, but the arrest was purposely delayed in order to prevent disclosure of the identity of the undercover agent who was conducting a continuing investigation of narcotics violations in the area and who was the only witness against the defendant. At the trial the defendant claimed that he was unable to recall his whereabouts and activities on the date of the alleged offense. The government's only evidence, aside from the drugs allegedly sold to the agent by the defendant, was the agent's testimony which he could not give without refreshing his memory from a notebook. The defendant was convicted and he appealed, contending that deliberate and purposeful delay between offense and complaint violated his rights to speedy trial and due process guaranteed by the fifth and sixth amendments to the United States Constitution. Expressly declining to base its decision on the sixth amendment, the Court of Appeals for the District of Columbia *held* that deliberate and purposeful delay between the date of the alleged crime and the date of initiation of criminal proceedings, when

the defendant is unable to recall his whereabouts and activities of the date of the crime, denied the defendant due process in violation of the fifth amendment.<sup>1</sup> Conviction reversed.

The principle set forth in this case must be distinguished from the law relating to a defendants' right to speedy trial under the sixth amendment and the statutes implementing that amendment. The sixth amendment law can be summarized in some general propositions.

When violation of right to speedy trial is asserted in reliance upon the sixth amendment provision, the rule is usually stated that the accused has a right to a trial which is free of "vexations, capricious, and oppressive delays manufactured by the ministers of justice."<sup>2</sup> The amount of delay which will be allowed under this generalization depends upon all of the circumstances of the particular case, but delay for a reasonable purpose is generally condoned.<sup>3</sup> As stated in *Beavers v. Haubert*,<sup>4</sup> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."

In cases where the right is asserted in reliance upon statutes implementing the sixth amendment, it is generally held that expiration of the time limit in the statute without the defendants' being tried, per se violates the right.<sup>5</sup> Whether claimed on the basis of a constitutional provision or a statute, the right accrues to those against whom an information or indictment has been filed, although he has not been arrested.<sup>6</sup> It may also be invoked by those who have been arrested but delay is imposed between arrest and trial, whether or not the defendant is confined or free on bail during the interim. This is because the protection serves purposes other than that of preventing long imprisonment prior to trial.<sup>7</sup>

1. *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965).

2. BLACK, *CONSTITUTIONAL LAW* 584 (2d ed. 1897). See also *Chinn v. United States*, 228 F.2d 151, 153 (4th Cir. 1955).

3. *Leggett v. Kirby*, 231 Ark. 576, 331 S.W.2d 267, cert. denied, 362 U.S. 981 (1960).

4. 198 U.S. 77, 87 (1905).

5. *Zehrlaut v. State*, 230 Ind. 175, 102 N.E.2d 203 (1951).

6. *United States v. Kojima*, 3 Hawaii Dist. 381 (1909). On constitutional assertion of the right see *People v. Taylor*, 52 Cal. 2d 91, 338 P.2d 377 (1959). Claim based on statute. For an annotation on delay between indictment and arrest in general, see Annot. 85 A.L.R.2d 980 (1962).

7. *People v. Prosser*, 399 N.Y. 353, 130 N.E.2d 891, 57 A.L.R.2d 295 (1955).

The most important feature of the sixth amendment law for purposes of this note is that the right arises only at the time the defendant is officially charged, whether by indictment, information or arrest. This is because the statutes require trial within some specified time after the accused is "committed" or "held"<sup>8</sup> and constitutional language refers to the "accused."<sup>9</sup>

Because of this interpretation placed on the constitutional and statutory language prior to the *Ross* case, the right to speedy trial had not been held to apply to one who had not been charged and whose arrest was being delayed, even though the authorities had knowledge of the offense. Thus one commentator declared in 1957, "In no event, however, will the right to speedy trial arise before there is some charge or arrest, even though the prosecuting authorities had knowledge of the offense long before this."<sup>10</sup> However, the holding of the principal case was presaged by three cases which followed the usual speedy trial rules but took into consideration the delay between the offense and the filing of charges in determining the reasonableness of the delay after the filing of charges but before trial.

In *Petition of Provoo*,<sup>11</sup> the court said that a certain period of detention at an earlier time was irrelevant to the issue of speedy trial. However, the court added that, "[T]he effect of that imprisonment is a circumstance to be considered in deciding whether, under all of the facts of this case, trial in 1955 on the charges formally made against Provoo in 1949 for acts alleged to have been committed in 1942-45, could be a 'fair trial,' as that term is used in recent cases."<sup>12</sup>

8. WYO. STAT. § 7-234 (1957); MICH. STAT. ANN. § 28.966 (1954).

9. "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial . . ." CAL. CONST. art. I, § 13. In *People v. Aguirre*, 181 Cal. App. 2d, 5 Cal. Rptr. 477 (1960), the court held that the speedy trial provisions of the state constitution apply only to "a party accused," and the defendant was not a party accused until the indictment was returned. *Ibid.*

Under the federal statute there is no protection for the person claiming delay between the offense and the formal charge, as that is covered by the applicable statute of limitations. *Harlow v. United States*, 301 F.2d 361, 366 (5th Cir. 1962), cert. denied 371 U.S. 814 (1962).

For a discussion of inapplicability of statutory and constitutional language see Note, *Justice Overdue, Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95 (1952).

10. Note, *The Right to Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 848 (1957).

11. 17 F.R.D. 183 (D. Md. 1955), aff'd, 350 U.S. 857 (1955).

12. *Id.* at 202.

In *Taylor v. United States*,<sup>13</sup> there was delay between the date of the offense and the indictment and further delay between indictment and trial. The court said that the combination of these delays with the fact that the defendant was held in confinement and the “[R]esulting handicap to the procurement of witnesses who might have supported appellants’ alibi, or any other defense, must seriously have handicapped the preparation of a defense.”<sup>14</sup> The court continued, declaring that it did not rely on the lapse of time between the offense and the charge considered by itself, but that, “It is the combination of the factors set forth above which motivates our decision.”<sup>15</sup>

Seven years later, the same court of appeals in *Nickens v. United States*,<sup>16</sup> although affirming the conviction, stated that “Although it has never been directly decided, due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused . . . .”<sup>17</sup>

Although each of the three cases discussed involved situations in which the defendant had been arrested and jailed, each case is successively more explicit in saying, by way of dicta, that delay between the offense and the charge could be a contributing factor in determining that there was unreasonable delay at some later stage of the proceedings.

The principal case, *Ross v. United States*, went a step further and held expressly that delays prior to any charge could, under some circumstances, by themselves constitute a violation of the due process clause. In reaching its decision the court considered several factors of special significance, *i.e.*, the seven month delay was deliberate, the record substantiated the defendant’s claim that he could not reconstruct the events of the day in question, and the case against the defendant was weak, being based solely on the uncorroborated testimony of the investigator refreshed by a notebook.<sup>18</sup>

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13. 238 F.2d 259 (D.C. Cir. 1956).

14. *Id.* at 262.

15. *Ibid.*

16. 323 F.2d 808 (D.C. Cir. 1963).

17. *Id.* at 810 n. 2. The court cited 1 Cox’s C.C. 114 (Somerset Winter Assizes 1844) as an example of an English court applying a standard of fundamental fairness when charges were not preferred for more than two years.

18. *Ross v. United States*, *supra* note 1, at 215.

The *Ross* case represents a departure from prior law in several important respects.<sup>19</sup> But in another sense and more fundamentally, it is a logical and necessary extension of existing law. This conclusion is compelled when one considers the fact that the underlying reasons for the sixth amendment protection are also the reasons underlying the decision in the principal case. Without going into all of the purposes of the sixth amendment, it may be said with certainty that a critical one is to afford the defendant an opportunity to properly prepare a defense.<sup>20</sup> He cannot do this at a time so far removed from the date of the offense that witnesses are unavailable and the accused cannot remember what happened at the critical time. This factor is obviously present in cases in which the delay was between offense and charge as well as those in which delay was between charge and trial. In fact, it may be an even more salient feature in such cases. The person who is not charged may never know that there will ever be a trial. He is not put on notice and therefore has no reason to fix in his mind the occurrences of the day in question or otherwise preserve evidence. The importance of the delay is magnified in cases like *Ross* in which the prosecution's case is very weak. In the language of the *Ross* case, "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."<sup>21</sup>

To deny redress from the very evils intended to be remedied by the sixth amendment on the grounds that the defendant is not *formally* charged seems unjust. Yet, that is the result obtained by the application of traditional speedy trial doctrines. The decision in the *Ross* case, supplementing these doctrines with the due process clause, eliminates the anomaly while leaving intact the limitations of the sixth amendment which the courts and legislatures have deemed it wise to impose.

EDWARD L. GRANT

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19. For a brief discussion of the extent to which the type of deliberate delay used by police in the *Ross* case is employed by police in general, see *La Faye. ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 220 (The Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States, 1965).

20. See *People v. Prosser*, *supra* note 7; *Petition of Provoov*, *supra* note 11; *Taylor v. United States*, *supra* note 13.

21. *Ross v. United States*, *supra* note 1, at 216.