be employed as alternative means of correctly resolving the issue of priority between the seller and the trustee.[123] To a large extent, the conflict among the circuits in dealing with the relationship of a section 2-702 seller and the trustee in bankruptcy is one of Code methodology. Some courts are reluctant to acknowledge that the U.C.C. in places is not just a codification of the common law but is new law. If common law is used as a basis to interpret the Code, a confusing and unpredictable result is achieved. The Code must, at times, be the source of its own interpretation, both in examining the practical effects of the rights created thereunder in relation to section 67c of the Bankruptcy Act, and in defining the relationship between the unsecured seller and the trustee in bankruptcy. The consequence of using the Code as a source of law, although invalidating the rights of a seller under section 2-702 as against the trustee in bankruptcy, will be to promote uniformity in interpretation of the seller's rights under both the Code and the Bankruptcy Act.

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123. One must plead these theories in the alternative, since *pro forma* one cannot argue that, for the purposes of § 67c(1)(A) of the Bankruptcy Act, § 2-702(2) constitutes a statutory lien, and that § 2-702(2) gives the seller the status of an unsecured creditor against the trustee's hypothetical lien creditor status.

PREINDICTMENT DELAY IN THE EIGHTH CIRCUIT

I. INTRODUCTION

The scope of the due process clause in the fifth amendment[1] has been interpreted to include protection of citizens from unfair trials as a result of preindictment delays in prosecution, regardless of the fact the indictment is within the statute of limitations.[2] In 1971, the Supreme Court in *United States v. Marion*[3] recognized that there would be delays of the most necessary type which might cause prejudice to the defendant, but rejected the suggestion that "every delay-caused detriment to a defendant's case would abort a criminal prosecution."[4] The Court set forth the elements a defendant must establish to support a motion to dismiss an indictment for delay:

> [T]he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the preindictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.[5]

Recognition of the need for preindictment delays came early in the decisions of the Eighth Circuit. As early as 1963, in *Crow v. United States*,[6] the Eighth Circuit endorsed the need to give the prosecution a reasonable time to investigate,[7] and extended some sympathy to the government because of its "heavy workload."[8] The question of what was a

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1. The fifth amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.
2. United States v. Marion, 404 U.S. 307, 320 (1971).
3. 404 U.S. 307 (1971).
4. United States v. Marion, 404 U.S. 307, 324-25 (1971) (footnote omitted).
5. *Id.* at 324 (footnote omitted). Prior to *Marion*, the Supreme Court had not provided any criteria directly applicable to determination of preindictment delay charges. Although the Court briefly discussed the issue of preindictment delay in United States v. Ewell, 383 U.S. 116 (1966), it was only considered in the posture of a sixth amendment right to a speedy trial claim. United States v. Ewell, 383 U.S. 116, 122-23 (1966). In *Marion*, the Court initially held that the sixth amendment right to a speedy trial and Federal Rule of Criminal Procedure 48(b) were applicable only to post-arrest situations and that their purpose was not to be extended to cover a claim of prejudice from preindictment delay. Rule 48(b) provides:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecesary delay in bringing a defendant to trial, the court may dismiss the indictment, information complaint.

FED. R. CRIM. P. 48(b).
6. 323 F.2d 888 (8th Cir. 1963).
7. Crow v. United States, 323 F.2d 888, 890 (8th Cir. 1963).
8. *Id.* at 891.

reasonable time would depend on the circumstances of the immediate case.[9] However, the court at that time had not articulated any specific formula for determining when a delay was unreasonable. The more recent preindictment delay cases decided by the Eighth Circuit[10] indicate that the court has implicitly chosen to reject the *Marion* conjunctive test[11] of

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9. *Id.*

10. United States v. Constanza, 549 F.2d 1126 (8th Cir. 1977); United States v. Bresley, 548 F.2d 223 (8th Cir. 1977); United States v. Quinn, 540 F.2d 357 (8th Cir. 1976); United States v. Naftalin, 534 F.2d 770 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976); United States v. Lovasco, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977); United States v. Barket, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

11. There has been some confusion as to whether Justice White meant to present the test in a conjunctive or disjunctive fashion. *See* United States v. Barket, 530 F.2d 189, 194-95 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976). Although the language itself is obviously conjunctive, the facts in *Marion* required no application of the test, as the Court found neither substantial prejudice nor tactical delay. Additionally, the opinion of Justice White included several qualifying statements, perhaps leaving the lower courts good reason to question whether the two stated requirements for showing a violation of due process were disjunctive or conjunctive.

In his opinion Justice White initially discussed the statute of limitations and held that it was designed to "guard against the mere possibility that preaccusation delays will prejudice the defense in a criminal case. . . ." United States v. Marion, 404 U.S. 307, 323 (1971). He adds that the statute of limitations was designed to balance the need for investigations and at the same time limit the "possibility of prejudice inherent in any extended delay that memories will dim, witnesses become inaccessible and evidence be lost." *Id.* at 323, n.14.

Justice White concludes his discussion of the purpose of the statute of limitations by stating "[n]evertheless, . . . since appellees may claim *actual* prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to the indictment." *Id.* at 324. It is at this point in his opinion that Justice White delineates the "*Marion* test," and thus it would appear from its placing, that the construction of the test was meant to be conjunctive. Both substantial prejudice and a tactical delay by the government would be required to demonstrate a violation of due process beyond what the statute of limitations was designed to protect. In such a case, the statute of limitations period would not serve to carry the legislative presumption of due process of law.

However, Justice White creates confusion within the relevant section of his opinion by adding: "To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case." *Id.* at 325. It is at this point that opinions diverge as to the discretion the "delicate judgment" requirement places upon the lower courts. Yet the less constrained interpretation of White's opinion seems to be that the statute of limitations was designed as the primary safeguard against prejudice resulting from preindictment delay. Only when the government has engaged in an intentional delay to gain a tactical advantage over the defendant should the due process remedy of dismissal be granted to the defendant. The "delicate judgment" Justice White refers to concerns a determination of whether or not there was actual and substantial prejudice to the defendant resulting from the tactical delay by the government. If either of the two elements is missing, then it is the statute of limitations which controls the amount of time the government has in which to file the indictment. *Id.* at 323-26.

The Court indicates a conjunctive interpretation of *Marion* in its reversal of the Eighth Circuit's *Lovasco* decision, but still stops short of making a definitive statement. The Court insists it wishes to leave to the lower court the "task of applying the settled principles of due process . . . to the particular circumstances of individual cases." United States v. Lovasco, 97

substantial prejudice *and* intentional delay. Instead, the Eighth Circuit makes use of a hybrid "delicate judgment"-balance test involving the two factors of delay and prejudice.

The Eighth Circuit has generally used the balance test when there is an affirmative showing of prejudice resulting from the delay sufficient to interfere with the defendant's ability to defend himself.[12] In the process of determining prejudice, the court will consider, among other factors, the applicability of the statute of limitations, the distribution of the burden of proof, the strength of the government's case, and the objective circumstances of the defendant's position. Once a showing of prejudice is made, the court then proceeds to balance the degree of prejudice against the reasonableness of the delay. Among the reasons frequently offered to justify a delay are mistake, presence of a continuing investigation, and protection of undercover narcotics agents.

The Eighth Circuit recently decided in two preindictment delay cases that due process was violated, and for the first time ordered dismissal of the indictments on that basis.[13] Thus it seems appropriate to examine the development and present status of the Eighth Circuit's approach to preindictment delay cases. The ultimate purpose of this Note is to isolate the Eighth Circuit's current standard on preindictment delay-due process claims.[14]

A. *Pre-Marion: United States v. Golden*[15]

Prior to *Marion*, the Eighth Circuit had considered the question of preindictment delay and had made substantial progress in defining the standards by which it would examine such questions. A review of the court's decision in *United States v. Golden*[16] provides an indication of the Eighth Circuit's early directions.

S. Ct. 2044, 2053 (1977). The Court's holding, however, was that the lower court simply erred in applying the balance test,—thus the effect of the reversal is very close to an application of the *Marion* conjunctive test. The Court found that the delay, necessitated by further investigation, was in good faith, and was thus "fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" *Id.* at 2051.

12. The Eighth Circuit has recognized that prejudice can be presumed in a case of outrageous delay. *See* United States v. Naftalin, 534 F.2d 770, 773-74 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976), and United States v. Jackson, 504 F.2d 337, 339 n.2 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

13. The court found violations of due process in United States v. Lovasco, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977), and United States v. Barket, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

14. The major transgression to cases from other circuits will be Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965). *Ross* is a leading and noteworthy case as it was the first major departure from a consistent denial of due process-preindictment delay claims by circuit courts.

15. 436 F.2d 941 (8th Cir. 1971).

16. 436 F.2d 941 (8th Cir. 1971).

Golden was charged with two illegal sales of heroin allegedly made on January 15 and 16, 1969.[17] The indictment was not issued until October 16, 1969, nine months later, and the defendant was not arrested until November 24, 1969.[18] As a result of the preindictment delay, Golden claimed a denial of due process guaranteed by the fifth amendment.[19]

The court's examination focused on whether the alleged prejudice was specific and whether it reached a level which so impaired the defendant's ability to defend himself that due process was denied.[20] The court found no such prejudice to exist.[21] The absence of prejudice from the delay, however, did not terminate the court's inquiry. In the course of its opinion, the Eighth Circuit examined the reasons given by the government for the delay[22] and concluded that "often for reasons of personal safety as well as a complete investigation, delay is of great necessity."[23] *Golden*'s allusion to the "necessity" of some preindictment delays implies that once the first step of establishing prejudice is reached, a balancing of the necessity for the delay and the level of prejudice which accrues by reason of the delay may be necessary.[24]

B. *Post-Marion: United States v. Jackson*[25]

After *Marion*, the Eighth Circuit took advantage of three 1974 cases[26]

17. United States v. Golden, 436 F.2d 941, 942 (8th Cir. 1971).

18. *Id.* at 943.

19. U.S. CONST. amend. V. *See* note 1 *supra*.

20. United States v. Golden, 436 F.2d 941, 945 (8th Cir. 1971).

21. The test enunciated in *Golden* was "[has] the delay . . . impaired the defendant's ability to defend himself." *Id.* at 943. The court made it clear that "mere conjecture," "mere claim of general inability to reconstruct the events," or "[an] insubstantial, speculative, or premature [claim]" would not be a sufficient allegation of prejudice. *Id.* Furthermore, the court required a specific showing of impairment involving "peculiar circumstances of the delay." *Id.* Also, "the defendant must point to specific evidence which has actually disappeared or been lost or witnesses known to have disappeared." *Id.* Thus the court first found the defendant's general allegation of loss of memory to be insufficient to establish sufficient prejudice. Secondly, the court found that the only evidence of intentional and tactical delay by the government was the omission of an informant's name on a bill of particulars requested by the defendant, which the government corrected 14 days later. The court found this to be an "honest mistake" by the government, and furthermore, that the defendant's defense was not weakened by the 14-day delay, or by his general inability to recall the events of the day in question. The court thus held that the defendant had shown no specific impairment to his defense. *Id.* at 944-45.

22. The government claimed the delay was necessary for the completion of a "continuing investigation of illegal drug traffic in the Minneapolis area." *Id.* at 945.

23. United States v. Golden, 436 F.2d 941, 945 (8th Cir. 1971).

24. The court stated: "the courts are concerned not only with the delay but also the needs of society." *Id.*

25. 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

26. United States v. Jackson, 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975); United States v. Norton, 504 F.2d 342 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); United States v. Washington, 504 F.2d 346 (8th Cir. 1974).

to articulate its interpretation of Justice White's opinion in *Marion*.[27] Of the three, it was *United States v. Jackson*[28] in which the court specifically focused on the language in *Marion*.

Jackson, convicted on two counts of selling heroin, alleged on appeal that the eleven-month delay between the offenses and the filing of the indictment was unnecessary and prejudicial.[29] The only "specific" allegation of prejudice Jackson offered was that he was unable to "reconstruct his activities on the dates in question or locate witnesses who could assist him in such reconstruction."[30]

The court implicitly rejected *Marion's* required showing of intentional tactical delay and substantial prejudice as necessary elements of the due process claim[31] by stating, "we view the Fifth Amendment claim as one involving a process of balancing the reasonableness of the delay against any resultant prejudice to the defendant. . . ."[32] Although the court in *Jackson* found neither tactical delay nor prejudice,[33] the court's opinion demonstrated the procedure of balancing to be used if prejudice to the defendant is sufficiently proven.[34]

United States v. Jackson indicates that the Eighth Circuit considers as very important the government's need to protect the safety of its informants, and the need to use them effectively.[35] At the same time the court acknowledged that "even the legitimate excuse of a continuing undercover investigation may be stretched to the breaking point; at some point, the accused's right to due process of law must prevail."[36]

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27. United States v. Marion, 404 U.S. 307 (1971).

28. 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

29. United States v. Jackson, 504 F.2d 337, 338 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

30. *Id.*

31. *Id.* at 339 n.2.

32. *Id.* at 339. It is within a footnote in the *Jackson* decision where the court directs its attention to the precise application it wishes to give *Marion*. The court acknowledges that there could be some circumstances where prejudice is presumed in an "outrageous case of unjustified delay." Consequently, an affirmative and specific showing of prejudice will not necessarily be a prerequisite to a due process claim. Later, in United States v. Naftalin, the court interprets its use of the phrase "outrageous case of unjustified delay" to mean tactical delay. United States v. Naftalin, 534 F.2d 770 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976). However, in circumstances "where the government is not engaging in intentional delay in order to gain a tactical advantage over the accused, the defendant must actively demonstrate prejudice," and the court will balance the prejudice against the reasonableness of the delay. United States v. Jackson, 504 F.2d 337, 339 n.2 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

33. United States v. Jackson, 504 F.2d 337, 339 n.2 & 340 (8th Cir. 1974). A lack of either of these elements would have supported an affirmance of the conviction under the *Marion* requirements.

34. The indictment was unquestionably within the statute of limitations as it was brought within one year of the offenses. *Id.* at 338.

35. *Id.* at 340.

36. *Id.* The D.C. Circuit found just such a breaking point in United States v. Ross, 349 F.2d 210 (D.C. Cir. 1965).

The Eighth Circuit's balancing test as suggested in *Jackson* is further differentiated from *Marion's* conjunctive requirement of tactical delay and substantial prejudice because in cases of tactical delay, prejudice may be presumed.[37] Although not in direct conflict with the *Marion* language, this liberal presumption certainly takes away from *Marion* any delimiting effect it might have had.[38] If prejudice can be presumed when tactical delay is shown, it becomes mechanical to require both. The effect of such a presumption is to require in most instances only tactical delay.

Consequently, when the Eighth Circuit was confronted with the *Barket*[39]*-Lovasco*[40]*-Naftalin*[41] trilogy in 1976, the court had articulated the general composite of its balance test, but had not yet been confronted with facts which demonstrated "that level of prejudice required for reversal on the ground of denial of due process."[42] Indeed, the court had yet to make a decision that a defendant had ever been prejudiced by a delay, at least beyond the general inability to remember.[43]

C. *Eighth Circuit Today: Barket*[44]*-Lovasco*[45]*-Naftalin*[46]

Three of the most recent preindictment delay cases emerging from the Eighth Circuit[47] have helped in some ways to provide a better guide

37. United States v. Jackson, 504 F.2d 337, 339 n.2 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975). *See* note 32 *supra*.

38. Of the other two cases handed down at approximately the same time, only United States v. Norton added to the court's balance test. United States v. Norton, 504 F.2d 342 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). In *Norton*, the court also examined the strength of the government's case in deciding the likelihood of whether the defendant had been prejudiced by the loss of testimony of an allegedly exculpatory witness. The court noted that three police officers testified they knew the defendant before the sale of narcotics, they witnessed the sale in broad daylight and personally recognized the defendant, and that an automobile registered to the defendant was involved. The court concluded that any prejudice resulting from a lost witness could be reviewed only in consideration of those factors. *Id.* at 344. *See also* United States v. Jackson, 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

The other decision handed down by the court the same day was United States v. Washington, 504 F.2d 346 (8th Cir. 1974). *Washington* fails to add much to the court's discussion of the preindictment delay-due process issue, as the decision focused on the defendant's right to a speedy trial.

39. United States v. Barket, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

40. United States v. Lovasco, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977).

41. United States v. Naftalin, 534 F.2d 770 (8th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976).

42. United States v. Golden, 436 F.2d 941, 945 (8th Cir. 1971).

43. The distinction between an inability to remember and the resultant prejudice to one's defense is important. While the defendant may be unable to remember what he was doing on the day in question, this alone does not establish a viable claim. He must also demonstrate how his lack of ability to remember would cause prejudice to his defense.

44. United States v. Barket, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

45. United States v. Lovasco, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977).

46. United States v. Naftalin, 534 F.2d 770 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976).

47. *Id.*; United States v. Lovasco, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977); United States v. Barket, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

as to the types of prejudice the court will consider sufficient to have impaired the defendant's ability to defend himself. They also indicate the wide range of factors the court is willing to take into consideration in its application of the balance test. In two of the three cases,[48] the court found that the prejudice to the defendant reached the "level of prejudice required for reversal on the ground of denial of due process."[49] Although the court failed to provide any definitive general guidelines by which one can ascertain that level, the facts and general holdings of the three cases help to provide the framework from which one must consider the problems that arise in the formulation and application of a workable "test" for the preindictment delay-due process claims.

1. *United States v. Barket*[50]

In *United States v. Barket*[51] the indictment in question was filed on June 12, 1974,[52] and was based upon a loan transaction made on July 29, 1970.[53] The indictment charged Barket with violation of a political campaign contribution statute[54] and misapplication of bank funds for approving, in his capacity as a bank officer, a $30,000 loan to a group called the Regular Democrats.[55] Barket filed a motion to dismiss on the ground that his defense had been prejudiced by the lengthy preindictment delay.[56]

The district court found that the $30,000 loan was discovered on January 4, 1971, and subsequently reported to the Regional Administrator of National Banks. On March 15, 1971, the Comptroller of the Currency relayed the information to the Criminal Division of the Department of Justice in Washington, D.C. One year later, in March of 1972, the Department of Justice declined prosecution and closed the case.[57] The information known to the Washington Department of Justice and the action it had taken, however, were not reported to the local United States Attorney for the Western District of Missouri. In late 1973, the local United States Attorney "discovered" the loan transaction in an unrelated investigation and asked for permission to indict Barket. The Justice Department in Washington granted permission, but apparently did not view such permission as re-opening the case inasmuch as it seemingly re-

48. United States v. Lovasco, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977); United States v. Barket, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).
49. United States v. Golden, 436 F.2d 941, 945 (8th Cir. 1971).
50. United States v. Barket, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).
51. *Id.*
52. *Id.* at 190.
53. *Id.* at 191.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 191-92.

tained no record of the information the Department had previously gathered or its reasons for declining prosecution.[58]

At the pretrial hearing on the motion to dismiss, the district court decided Barket had shown "sufficient delay-caused prejudice to his defense," to warrant dismissal.[59] The Eighth Circuit affirmed the dismissal in a two-to-one decision.[60] The circuit court applied the balance test that it had presented in *Jackson*[61] and proceeded to examine the alleged prejudice to Barket and the reasonableness of the delay by the government. Finding a sufficient showing of prejudice, the court took note of the extremely lengthy delay (almost four years);[62] the death of six material witnesses;[63] and the extreme loss of memory in regard to the incident which had been suffered by many other witnesses.[64] The reasonableness of the government's delay was not viewed favorably. The court observed that the government's case was weak;[65] that the statute of limitations covering the alleged crime had since been reduced by two years;[66] that the government had declined prosecution of Barket under one theory;[67] and finally that the government was culpably negligent because of the lack of communication between the offices in the Department of Justice, and that knowledge of the first investigation should be imputed to the local United States Attorney's office.[68]

The court gave little consideration to the government's contention that *Marion* required (1) actual prejudice *and* (2) "intentional delay to gain tactical advantage,"[69] and simply held that because of the government's culpable negligence, the delay was unreasonable.[70] The unreasonableness of the delay in relation to the degree of prejudice shown by the defen-

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58. *Id.* at 192.

59. *Id.*

60. United States v. Barket, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976). Circuit Judge Henley dissented from the majority opinion.

61. United States v. Jackson, 504 F.2d 337, 339 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

62. United States v. Barket, 530 F.2d 189, 192 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

63. *Id.* at 193.

64. *Id.*

65. *Id.* at 194.

66. Although Barket was not directly affected by the reduction of the statute of limitations, the court found the reduction from five years to three years relevant. *Id. See* notes 146-51 *infra* and accompanying text.

67. United States v. Barket, 530 F.2d 189, 195-96 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976). The court said: "[T]he Government's change of theory . . . cannot relieve it of its obligation to bring the charges against Barket promptly enough to permit him to establish his defense." *Id.*

68. *Id.* at 195.

69. United States v. Marion, 404 U.S. 307, 324 (1971).

70. United States v. Barket, 530 F.2d 189, 196-97 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

dant therefore required dismissal of the indictment.[71] Thus the court, in substance, again rejected a literal application of *Marion's* conjunctive test and chose to apply a balance test which considers the reasonableness of the delay in relation to the prejudice alleged.[72]

2. *United States v. Lovasco*[73]

One month after *Barket*, the Eighth Circuit handed down the *Lovasco* decision[74] and, once again, found that the defendant had incurred sufficient prejudice to his defense because of preindictment delay and dismissed three out of four counts charged against him.[75] Lovasco had been indicted March 6, 1975, on three counts of unlawful possession of handguns stolen from the mail and one count of engaging in the business of dealing in firearms without a license.[76]

The charges related to the time period from July 25, 1973, to August 31, 1973.[77] A postal inspector had investigated the incidents and sent a report to the United States Attorney for the Eastern District of Missouri on October 2, 1973.[78] The district court dismissed the indictments, finding the delay to be unreasonable and prejudicial.[79]

The Eighth Circuit, citing *Jackson*,[80] looked at the two basic elements essential to a claim of preindictment delay. The court examined the government's reason for the delay—the hope that "others might be discovered who may have participated in the theft of firearms from the United States mails,"[81] and Lovasco's prejudice—his allegedly exculpatory witness had died during the delay.[82] There was no explicit finding of intentional tactical delay on the part of the government, nor was

71. *Id.*

72. The court denied that it was rejecting the *Marion* conjunctive test, and instead appeared to say it was substituting "culpable negligence" for the element of "tactical delay." *Id.*

73. United States v. Lovasco, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977). The Supreme Court reversed, holding that the Eighth Circuit erred in its application of the balance test. *See* note 11 *supra*. "[C]ompelling respondent to stand trial would not be fundamentally unfair." United States v. Lovasco, 97 S. Ct. 2044, 2052 (1977).

74. United States v. Lovasco, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977).

75. *Id.*

76. *Id.* at 60.

77. *Id.*

78. *Id.* The district court ruled that the government possessed all relevant information by October 2, 1973. *Id.*

79. The court did not comment upon the fact that the postal inspector had taken a statement from Lovasco in the presence of his attorney. Lovasco apparently failed to mention his allegedly exculpatory witness at that time because, as he explained later "[t]his guy was a bad tomato, he was liable to take a shot at me if I told him." *Id.* at 60-61.

80. The only authority the majority opinion cited was United States v. Jackson, 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

81. United States v. Lovasco, 532 F.2d 59, 61 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977). "The prosecuting attorney has indicated that the Government theorized that the guns in question had come from the accused's son, who worked at the post office. . . ." *Id.*

82. *Id.* at 60-61.

there any independent examination of the substantiality of prejudice to the defendant. The court simply engaged in a balancing test, and on the whole of the circumstances decided that the unreasonable delay and prejudice to the defendant constituted a violation of due process[83] which required affirming the dismissal of three counts of the indictment.[84]

3. *United States v. Naftalin*[85]

Another of the recent Eighth Circuit preindictment delay cases, *United States v. Naftalin*,[86] was handed down the month following *Lovasco*. In *Naftalin*, the Eighth Circuit reversed the lower court's dismissal of an indictment against the defendant and ruled that there had been no violation of due process due to the preindictment delay.[87]

Naftalin was charged on April 11, 1974, with eight counts of securities fraud which allegedly occurred during the summer and fall of 1969.[88] Although the Securities Exchange Commission (SEC) had known of all the relevant facts underlying the eight count indictment as early as December, 1969,[89] the matter was not referred to the Justice Department until March 8, 1974.[90] During this time period several civil proceedings relating to Naftalin were initiated, and additionally the SEC was holding administrative hearings concerning the barring of Naftalin from the securities industry.[91] The administrative hearings were concluded on June 19, 1973, and the referral to the Justice Department occurred approximately nine months later, with the indictment following on April 11, 1974.[92]

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83. In its reversal of the *Lovasco* decision, the Supreme Court reaffirmed the effect of *Marion's* two-pronged test, if not the specific language, by discussing the "good faith" of the Government and the need for prosecutorial discretion as opposed to the reasonableness of the delay. Thus, upon finding the delay was not an intentional tactical delay, not outside of the ambit of the prosecutorial discretion to be exercised and not caused by a desire for further investigation, the Court found no violation of due process. Justice Marshall, writing for the majority, stated "we would be most reluctant to adopt a rule which would . . . [require the Government to make charging decisions immediately upon assembling evidence sufficient to establish guilt] absent a clear constitutional command to do so. We can find no such command in the Due Process Clause of the Fifth Amendment." United States v. Lovasco, 97 S. Ct. 2044, 2051 (1977).

84. United States v. Lovasco, 532 F.2d 59, 62 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977). The fourth count charged defendant with dealing in firearms without a license. Because the missing witness was not a part of the transaction relating to the fourth count, his testimony would not be relevant. Thus, the court declined to view the death of defendant's exculpatory witness as prejudicial in regard to the fourth count, and affirmed the district court's ruling denying the dismissal of this count. *Id.* at 61-62.

85. 534 F.2d 770 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976).

86. United States v. Naftalin, 534 F.2d 770 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976).

87. *Id.*

88. *Id.* at 772.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

The district court found that the four and one-half year delay between "full governmental knowledge and the bringing of a criminal indictment was outrageous."[93] Yet the district court failed to identify any demonstrable prejudice to the defendant's defense. Nevertheless, the district court found the delay to be presumptively prejudicial,[94] relying upon the Eighth Circuit's indication in *Jackson* that in a case of outrageous delay, prejudice could be presumed.[95]

Judge Bright, writing for the Eighth Circuit, rejected such a presumption of prejudice except after a showing of "deliberate and ill-motivated attempts by the government to weaken the accused's defense by long delay."[96] Thus, in the absence of intentional and tactical delay, as defined by *Naftalin*, prejudice must be affirmatively alleged and proven. If prejudice is found, it is to be balanced against unreasonable delay. The court clarified this balancing process when it indicated that absent such prejudice, the reasonableness of the delay becomes irrelevant.[97] The court found no prejudice to Naftalin because the securities industry's practice of keeping records in duplicate and triplicate[98] obviated reliance on the memories of the witnesses. Furthermore, the statements of witnesses at the administrative and civil proceedings had begun at an early date, which prompted the recording of statements by witnesses, thus negating the potential of prejudice to Naftalin's defense.[99]

Finding no prejudice to the defendant's ability to defend himself,[100] and no intentional tactical delay by the government[101] from which prejudice could be presumed, the Eighth Circuit ordered the district court to reinstate the indictment.[102]

II. The Balance Test

The Eighth Circuit, despite its protestations,[103] appears to have rejected *Marion's* conjunctive test, and to have adopted a pure balance test. This would make "substantial" prejudice entirely relative and not only

93. *Id.*

94. *Id.*

95. United States v. Jackson, 504 F.2d 337, 339 n.2 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

96. United States v. Naftalin, 534 F.2d 770, 774 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976). *But see* United States v. Constonza, 549 F.2d 1126 (8th Cir. 1977).

97. United States v. Naftalin, 534 F.2d 770, 773 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976).

98. *Id.*

99. *Id.*

100. *Id.* at 774.

101. *Id.*

102. *Id.*

103. United States v. Barket, 530 F.2d 189, 194 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976). The *Barket* court stated "[T]his [court has] not had occasion to determine whether *Marion* is to be read conjunctively or disjunctively. . . ." *Id.*

operative when joined by a deliberate tactical delay, but also when balanced against an unreasonable delay.[104] For example, in the three recent Eighth Circuit cases previously discussed, the prejudice alleged was as follows: (1) *Barket:* six material witnesses had died whom Barket claimed would have materially aided his defense,[105] while other witnesses had faded memories of events "crucial" to Barket's defense;[106] (2) *Lovasco:* one allegedly exculpatory and thus material witness was dead;[107] (3) *Naftalin:* no specific prejudice was shown,[108] although the lower court found the "outrageous delay" (four and one-half years) to be presumptively prejudicial.[109]

The Eighth Circuit, through its balancing process, found a violation of due process in *Barket* and *Lovasco*, but failed to find such a violation in *Naftalin*. In none of these cases did the court find intentional tactical delay by the government; in *Barket* the court found the government to be culpably negligent.[110]

Thus prejudice becomes a consideration to be viewed in light of many factors, and then balanced against the reasonableness of the governmental delay. Although the weight of the various factors varies greatly with the circumstances, a discussion of the problems involved can be facilitated by an issue by issue examination. It is significant that the prejudice to the defendant must be weighed against the reasonableness of the delay before the final determination of whether due process has been violated can be made. Before analyzing the factors bearing on the reasonableness of the delay, however, a closer examination of the elements that weigh in the decision of determining if prejudice exists is necessary.

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104. *See* United States v. Jackson, 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

105. United States v. Barket, 530 F.2d 189, 193 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

106. *Id.*

107. United States v. Lovasco, 532 F.2d 59, 60-61 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977). Lovasco also alleged his brother, who died in April, 1974, would have been a material witness on his behalf. However, this allegation was not discussed by the circuit court. United States v. Lovasco, 97 S. Ct. 2044 (1977).

108. United States v. Naftalin, 534 F.2d 770, 772-73 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976). The district court did find specific prejudice in that Naftalin "has been inhibited in offering mitigating testimony at the administrative proceedings. He has had to live for four and one-half years after admission of wrongdoing under uncertainty as to whether he would be criminally prosecuted." *Id.* at 773. However, the Eighth Circuit ruled that the objection to due process violations at the administrative proceedings should have been raised then. Secondly, "only prejudice to an accused's ability to defend against the delayed indictment" will support a due process attack on pre-accusatory delay. *Id.*

109. *Id.* at 772.

110. United States v. Barket, 530 F.2d 189, 195-96 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

A. *Part One of the Balance Test: Sufficiency of the Prejudice*

The Supreme Court in *Marion* rejected as insufficient for reversal allegations of impaired memory, lost evidence, witness unavailability and other general interference.[111] However, by rejecting *Marion* and choosing to engage in a "delicate judgment" to determine "when and in what circumstances actual prejudice resulting from preaccusation delays requires the dismissal of the prosecution,"[112] the Eighth Circuit leaves open the possibility that any of these claims of prejudice might be sufficient. In practice, however, the court has not been overly receptive to these types of allegations. For example, in *United States v. Emory*,[113] the court simply rejected a "bare claim of faded memory" as insufficient and insubstantial.[114] In *United States v. Golden*,[115] the Eighth Circuit ruled that the defendant must show specifically, and "not by mere conjecture," how his defense has been impaired. In other words, the defendant must show the definitive circumstances of his prejudice, such as specific evidence lost or unavailable witnesses, rather than merely asserting a general claim of inability to remember.[116]

Three years after *Golden*, however, the Eighth Circuit implicitly qualified its holding in that case. In *United States v. Jackson*,[117] the court, although finding that the general claim of prejudice by Jackson was insufficient, was careful to distinguish the instant facts from the facts in *Ross v. United States*,[118] a District of Columbia Circuit case handed down nine years earlier. In *Ross*, in spite of only a general allegation of prejudice of inability to remember by the defendant, the District of Columbia Circuit, in a two-to-one decision, ordered the conviction reversed.[119] The court's decision was greatly influenced by the weakness of the government's case.[120] The Eighth Circuit's acknowledgement of the *Ross*-type problem in *Jackson* and its failure to disagree with or criticize the decision in *Ross*[121] suggests that there may sometime be facts sufficient to support a dismissal upon the claim of a general inability to remember by the defendant.

Nevertheless, even assuming that *Golden* requires the showing of specific prejudice to establish a due process violation, the Eighth Circuit

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111. United States v. Marion, 404 U.S. 307, 321 (1971).
112. *Id.* at 324-25.
113. 468 F.2d 1017 (8th Cir. 1972).
114. United States v. Emory, 468 F.2d 1017, 1020 (8th Cir. 1972).
115. 436 F.2d 941 (8th Cir. 1971).
116. United States v. Golden, 436 F.2d 941, 943 (8th Cir. 1971).
117. 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).
118. 349 F.2d 210 (D.C. Cir. 1965).
119. Ross v. United States, 349 F.2d 210, 215-16 (D.C. Cir. 1965).
120. Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965).
121. United States v. Golden, 436 F.2d 941, 946 (8th Cir. 1971).

has failed to reveal any clues as to when lost evidence or an unavailable witness is of sufficient importance to maintain a claim of impairment to one's defense. For example, not long after *Golden*, in *United States v. Houp*,[122] the court ruled that the defendant had failed to establish substantial prejudice caused by the preindictment delay, without discussing the impact of the defendant's allegation of a missing witness.

In *United States v. Norton*,[123] the Eighth Circuit was again faced with the loss of an allegedly exculpatory witness. The court acknowledged that the government must "bear the burden of demonstrating that the informant did not possess exculpatory evidence."[124] However, by rejecting an offer by the government to make available a written statement of the witness, the defendant had, according to the court, waived the right to assert his due process claim.[125]

More recently, in the *Lovasco* decision, the court found the simple allegation of a lost exculpatory witness to be sufficient prejudice to render the balance test operative, and to subsequently dismiss three of the counts against the defendant.[126] And in *Barket*, the court also found the defendant's allegation that the missing witnesses might have been able to exculpate Barket sufficient to establish prejudice under the circumstances.[127] Yet in *Naftalin*, the Eighth Circuit upheld the lower court's ruling that a dead witness presented no prejudice problems, as the relevance of the witness's testimony could be established from the numerous records kept within the securities industry.[128]

Thus, at this point there seems to be no clear indication of what degree of specificity the Eighth Circuit will require in regard to prejudice resulting from a preindictment delay. The defendant must probably allege something more than a mere inability to remember; there must *usually* be a more particular claim, such as an allegation of the loss of a witness. But to what degree the defendant must show that such witness would have helped in his defense, and to what degree the government must show that the witness would have been of no assistance, remains to be defined.

1. *Statute of Limitations*[129]

One of the major problems that presents itself in the consideration of

122. 462 F.2d 1338 (8th Cir. 1972).

123. 504 F.2d 342 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

124. United States v. Norton, 504 F.2d 342, 345 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

125. *Id.*

126. United States v. Lovasco, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977).

127. United States v. Barket, 530 F.2d 189, 193 (8th Cir.), *cert denied*, 429 U.S. 917 (1976).

128. United States v. Naftalin, 534 F.2d 770, 773 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976).

129. The general limitations provision for federal offenses provides: "Except as other-

prejudice to the defendant is whether the statute of limitations will be an overriding factor even though a delay was unnecessary. The Supreme Court considered the purpose of a statute of limitations in *Toussie v. United States,*[130] and quoted the following language from that decision in *United States v. Marion.*[131]

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.[132]

The court in *Marion* is quite clear in stating that the limiting and protecting purpose of a statute of limitations is to guard against *possible* prejudice such as impaired memories, lost evidence or unavailable witnesses.[133] But the Court's statement appears in the context of its ruling that the sixth amendment speedy trial guarantee should not be extended to protect against such possible prejudices.[134] When the discussion in *Marion* examines the due process claim resulting from a preindictment delay, however, Justice White shifts the focus of his remarks. "Nevertheless, . . . since appellees may claim *actual* prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define appellees' rights with respect to the events occurring prior to indictment."[135] Thus, even though an indictment is within the statute of limitations, due process may be violated when substantial actual prejudice and tactical delay are both found to exist.[136]

The Eighth Circuit first considered the impact of a statute of limitations in *United States v. Gross,*[137] wherein the court stated that the indictment was returned "well within" the statute of limitations[138] and that

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wise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years after such offense shall have been committed." 18 U.S.C. § 328 (1970).

130. 397 U.S. 112 (1970).

131. United States v. Marion, 404 U.S. 307, 323 (1971).

132. Toussie v. United States, 397 U.S. 112, 114-15 (1970). The quotation is found in United States v. Marion, 404 U.S. 307, 323 (1971). *See also* United States v. Ewell, 383 U.S. 116, 122 (1966).

133. United States v. Marion, 404 U.S. 307, 321 (1971).

134. *Id.* at 320-22.

135. *Id.* at 324 (emphasis added).

136. *Id.* But beyond the explicit exception that is recognized when both tactical delay and substantial prejudice coincide, it is not easily discerned from Justice White's opinion whether an exception should be created when actual prejudice results from an unreasonable, albeit not a tactical, delay. *See* United States v. Marion, 404 U.S. 307 (1971).

137. 416 F.2d 1205 (8th Cir. 1969).

138. United States v. Gross, 416 F.2d 1205, 1210 (8th Cir. 1969).

"certainly the statute of limitations has some significance."[139] From this point the Eighth Circuit progressed to its stand in *United States v. Houp*,[140] wherein the court applied the *Marion* language concerning the statute of limitations literally. Dismissing the defendant's claim that an allegedly exculpatory witness was dead and that this prejudiced his ability to defend himself, the court ruled that the "safeguard against unaccessible witnesses is provided by the statute of limitations. . . ."[141] As the indictment was within the statute of limitations in *Houp*, the Eighth Circuit court reasoned that a missing witness would not establish a due process claim.

The Eighth Circuit has obviously retreated from this rigid stand, beginning with *United States v. Jackson*.[142] In the *Jackson* decision, the court cited *Marion* for the statement of Justice White that "the statute of limitations does not fully define the rights of criminal suspects to be speedily accused."[143] In recent preindictment delay cases wherein the indictment was within the statute of limitations, the theory that dismissal is precluded because the statute of limitations provides the sole protection against prejudice to the defendant has hardly been considered by the Eighth Circuit. For example, in *United States v. Lovasco*,[144] the court found that preindictment delay required dismissal of three counts of the indictment, despite the fact that the indictment was within the statute of limitations.[145] In that case, the delay resulted in the loss to the defendant of an allegedly exculpatory witness. *Lovasco* therefore implicitly overrules the Eighth Circuit holding in *Houp*, wherein the court designated the statute of limitations as the sole safeguard against the prejudice resulting from missing witnesses.

In *United States v. Barket*,[146] the court gave some discussion to the statute of limitations, but the court's treatment of the issue there did little to support the court's ultimate result. At the time Barket was indicted, the applicable statute of limitations of the Federal Election Campaign Act was five years.[147] Since the time of the indictment, Congress had amended the statute of limitations to three years.[148] The court ap-

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139. *Id.*

140. 462 F.2d 1338 (8th Cir. 1972).

141. United States v. Houp, 462 F.2d 1338, 1340 (8th Cir. 1972). The court gave great deference to the fact that the government presented "uncontroverted evidence" that the defendant sold stolen grain to a dealer. *Id. See* notes 161-62 *supra* and accompanying text.

142. 504 F.2d 337 (8th Cir. 1974).

143. United States v. Jackson, 504 F.2d 337, 339 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975). *See* United States v. Marion, 404 U.S. 307, 324 (1971).

144. 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977).

145. United States v. Lovasco, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977).

146. 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

147. United States v. Barket, 530 F.2d 189, 192-93 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

148. *Id.* at 192 n.6.

pears to consider the reduction of time as an indication that Congress had found the five-year period failed to " protect . . . defendants from the extreme difficulties of recreating the circumstances of political activity out of the distant past."[149] Because the forty-seven month preindictment delay in *Barket* would have surpassed the three-year statute of limitations had the amendment been effective at that time, the court considered this relevant in holding the forty-seven month delay to be unreasonable.[150] But with application of the Eighth Circuit's own analysis, at the time Barket was indicted Congress had yet to decide that five years was an unreasonable time for the indictment to be filed. Thus a forty-seven month delay, in the opinion of Congress at that time, was within a time period designed to protect defendants from an inability to remember.[151]

However, with the major variant being *Barket*,[152] the statute of limitations has not been a significant factor in the recent preindictment delay-due process cases. The Eighth Circuit systematically employs the balance test in all cases where prejudice has been alleged in an attempt to determine if the prejudice is at a level that defeats the reasonableness of the delay. The only general rule one could risk summarizing is that usually a general allegation of an inability to remember, without more, is not enough to defeat the statute of limitations as the controlling factor in regard to reasonableness. But it is also clear the Eighth Circuit has made the decision to go beyond the major exception to the statute of limitations designated in *Marion*—substantial prejudice coupled with tactical delay.[153] With the resultant "delicate judgment" balance test the court has devised, the predictability simply cannot be as great as that which an inflexible but exclusively controlling statute of limitations would provide.

2. *Strength of the Government's Case*

One of the most important considerations the Eighth Circuit will review in the determination of prejudice is the strength of the government's case. *Ross v. United States*[154] from the District of Columbia Circuit is the leading example of how the strength or lack thereof of the government's case can be a determinative factor in a preindictment delay-due process claim. The court in *Ross* soundly criticized the "slender dimensions" of the government's case.[155] The *Ross* court, in a two-to-one decision, found "(1) a purposeful delay of seven months between offense and arrest [to maintain an undercover narcotics investigation]; (2) a plausible

149. *Id.* at 194.
150. *Id.*
151. The only exception would be if the government had engaged in a tactical delay. *Id.*
152. United States v. Barket, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S 917 (1976).
153. United States v. Marion, 404 U.S. 307, 324 (1971).
154. 349 F.2d 210 (D.C. Cir. 1965).
155. United States v. Ross, 349 F.2d 210, 216 (D.C. Cir. 1965).

claim of inability to recall or reconstruct the events of the day of the offense and (3) a trial in which the case against appellant consists of the recollection of one witness refreshed by a notebook."[156] The *Ross* court, in holding that there was a violation of due process due to the delay,[157] also ruled that "[t]he Government's case should, at the least, have more substance . . . if it is to override the appellant's interest in earlier notification,"[158] and held that there was a violation of due process.

The dissent by Circuit Judge Danaher in *Ross* criticized the majority for weighing the evidence and "substitut[ing] their determination . . . for that of . . . . [the] jurors who had . . . found . . . that the Government had proved guilt beyond a reasonable doubt."[159] Judge Danaher accurately perceived the problem of drawing a line between the delay-created prejudice that creates an inability for the defendant to defend himself and the simple fact that the government had a better case than did the defendant.[160]

The Eighth Circuit has consistently considered the strength of the government's case as a factor in its examination of delay-caused prejudice to the defendant. For example, in *United States v. Houp*,[161] the court considered relevant the government's "uncontroverted evidence," and in strong reliance thereon, found the defendant was not denied due process by the inaccessibility of an allegedly exculpatory witness.[162] In *United States v. Golden*,[163] the court distinguished the Eighth Circuit case from *Ross*, but implicitly accepted the reasoning of the D.C. Circuit by holding that "the identification of defendant Golden by agent Yarn [does not] . . . possess the prerequisite infirmities necessary to the invocation of the *Ross* result."[164] In *United States v. Norton*[165] the court added "[t]he likelihood that the loss was prejudicial is eased by the reliability of the evidence presented by the government,"[166] and additionally that "[p]ossible prejudice arising from the loss of [a witness] must be assessed in that light."[167] Finally, in *United States v. Jackson*,[168] the court reviewed the

156. *Id.* at 215.
157. *Id.* at 216.
158. *Id.* at 215.
159. *Id.* (Danaher, J., dissenting).
160. *Ross* has been distinguished as an "identification case." Yet if the identification problem combined with the delay creates an impairment to the defendant's ability to defend himself, the result is a due process violation. *See* United States v. Golden, 436 F.2d 941, 945-46 (8th Cir. 1971).
161. 462 F.2d 1338 (8th Cir. 1972).
162. United States v. Houp, 462 F.2d 1338, 1340 (8th Cir. 1972).
163. 436 F.2d 941 (8th Cir. 1971).
164. United States v. Golden, 436 F.2d 941, 946 (8th Cir. 1971).
165. 504 F.2d 342 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).
166. United States v. Norton, 504 F.2d 342, 344 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).
167. *Id.*
168. 504 F.2d 337 (8th Cir. 1974).

record to determine if "the delay increased the likelihood of erroneous conviction of an innocent man,"[169] but ultimately held that the weaknesses found in *Ross* were not present in the *Jackson* facts.[170]

In three of the more recent preindictment delay decisions from the Eighth Circuit, all appeals were on motions to dismiss made prior to trial.[171] Consequently, as the hearing generally occurs prior to the introduction of the government's case, the posture of the cases would seemingly help prevent the court from going beyond examination of prejudice and into a weighing of the evidence.[172] However, in *United States v. Barket*,[173] the court did give thorough discussion to the "weakness of the government's case."[174] In so doing, the court went beyond an examination to determine solely if the delay caused prejudice to the defendant such that his ability to defend against the indictment was impaired. As opposed to making a determination of whether the government's case was *weak* and thus, coupled with the delay-caused prejudice to the defendant, would "increase the likelihood of conviction of an innocent man," the court expressed an opinion upon the likelihood of the defendant's innocence.[175] The court went so far as to "deem it significant that the United States Attorney's own staff expressed reservation as to the merits of the Government's accusation."[176] The court added, "it is also significant that the instant loan was in fact ultimately repaid in full by Barket . . . and others . . . long prior to their indictment. . . . This factor alone would appear to rebut the theory that the loan was a sham."[177] While the weakness of the government's case in *Ross* might have been remedied by an earlier indictment, the Eighth Circuit does not suggest how an earlier indictment could have corrected the infirmities in the

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169. United States v. Jackson, 504 F.2d 337, 341 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

170. *Id.*

171. United States v. Naftalin, 534 F.2d 770, 771 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976); United States v. Lovasco, 532 F.2d 59, 60 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977); United States v. Barket, 530 F.2d 189, 190 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

172. Judge Henley, in his dissent in *Lovasco*, suggests that the court should reserve ruling on the motion to dismiss until after the trial, at which time the question could be "presented in clearer focus." United States v. Lovasco, 532 F.2d 59, 62 (8th Cir. 1976) (Henley, J., dissenting), *rev'd*, 97 S. Ct. 2044 (1977). However, it also appears that it would be more difficult for the reviewing court to stop short of the point of weighing the evidence. By reviewing such motions prior to trial, the focus of the hearing will be more easily containable.

173. 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

174. United States v. Barket, 530 F.2d 189, 194 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

175. United States v. Jackson, 504 F.2d 337, 341 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

176. United States v. Barket, 530 F.2d 189, 194 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

177. *Id.* at 194 & n.7.

Barket case. Indeed, if the circuit court was correct in its observation that "there is no evidence of any kind that the bank intended to charge off the loan and thus make a political contribution,"[178] then a delay in the indictment would have no effect upon the defendant's ability to present a defense, and the charge would presumably be disposed of at trial by a verdict of not guilty. If not, the proper moment for the circuit court to review the sufficiency of the evidence would be upon an appeal by the defendant after the trial.

In spite of the obvious problems the court encounters when reviewing the strength of the government's case, it is clear that it is an important step in assessing the degree of prejudice which the defendant has incurred by reason of the delay, and is necessary in an application of the balance test.

3. *Defendant's Circumstances*

Another factor sometimes relevant to the court's determination of prejudice is an objective evaluation of the defendant's circumstances, and their ultimate effect upon the defendant's ability to recall facts relevant to his defense. This was an important consideration in the District of Columbia Circuit's decision in *Ross v. United States.*[179] In *Ross,* the defendant's alleged prejudice consisted of only a general inability to recall his activities on the day in question.[180] Finding that the defendant was a man who had a limited education, who kept no diary or received little mail, and who had no regular employment,[181] the court considered defendant's claim to be "plausible," and ultimately dismissed the indictment as violative of due process.[182]

The Eighth Circuit has yet to find a general allegation of inability to remember sufficient to sustain a motion to dismiss, regardless of the position of the defendant. In *United States v. Jackson,*[183] the court recognized that "passage of time bears with it the risk that the suspect will not be able to present a complete defense to the charges, particularly when the suspect is out of work and is living in poverty."[184] But in *Jackson,* the court distinguishes the facts from *Ross* on the basis that the government presented a stronger case against Jackson than was presented in *Ross.*[185]

In a more recent case, the surrounding circumstances operated to the defendant's detriment. Defendant Naftalin was in the securities business

178. *Id.* at 194.
179. 349 F.2d 210 (D.C. Cir. 1965).
180. United States v. Ross, 349 F.2d 210, 213-14 (D.C. Cir. 1965).
181. *Id.*
182. *Id.* at 215-16.
183. 504 F.2d 337 (8th Cir. 1974), *cert. denied,* 420 U.S. 964 (1975).
184. United States v. Jackson, 504 F.2d 337, 340 (8th Cir. 1974), *cert. denied,* 420 U.S. 964 (1975).
185. *Id.* at 341.

which the circuit court found to be "characterized by records kept in duplicate and triplicate," thus "the memories of witnesses are not as crucial as in other types of cases."[186] The Eighth Circuit consequently excused a four and one-half year delay largely on that basis.[187] Yet, in the *Barket* decision, which immediately preceded *Naftalin*, the court failed to characterize the banking business as a "record-keeping industry" and found the difficulty many witnesses had remembering to be an impairment to Barket's ability to defend himself.[188] Thus the circumstances surrounding the event are a fairly crucial factor in determining if prejudice to the defendant's ability to defend himself exists, but viewed alone, they cannot be a determining factor. It appears to be especially important when the defendant's primary allegation of prejudice is that of an inability to remember. The life-style of the defendant will be examined by the court to determine if it is such that a reasonable man in his position would or would not be unable to remember. Additionally, even if that examination reveals a "plausible" claim of inability to remember, if there are alternative methods to reconstruct the past, the claim will be much less significant.[189]

4. *Burden of Proof*

If an indictment is within the statute of limitations, a presumption exists as to the reasonableness of any delay prior to indictment.[190] To challenge this presumption, a defendant must affirmatively allege prejudice to establish that "the delay has impaired the defendant's ability to defend himself."[191]

In *United States v. Jackson*,[192] the court holds that the necessary prejudice may sometimes be presumed in an "outrageous case of unjustified delay."[193] Yet in *Naftalin*, the court limits those words to mean only "tactical delays" by the government.[194] Thus, it appears that the sole exception to the general rule that the defendant carries the risk of nonpersuasion when alleging prejudice because of delay is when the govern-

186. United States v. Naftalin, 534 F.2d 770, 773 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976).

187. *Id.* at 774.

188. United States v. Barket, 530 F.2d 189, 193 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

189. *See* United States v. Barket, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

190. *See* United States v. Marion, 404 U.S. 307, 322-23 (1971).

191. United States v. Golden, 436 F.2d 941, 943 (8th Cir. 1971).

192. 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

193. United States v. Jackson, 504 F.2d 337, 339 n.2 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

194. United States v. Naftalin, 534 F.2d 770, 774 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976).

ment has engaged in tactical delay.[195] However, it is clear that in all other cases, no matter how unreasonable or unjustified the delay, the defendant must initially show prejudice.

Yet even if the defendant reaches that point, the due process violation is not proven. The government will then attempt to demonstrate that the prejudice was not of a nature that would impair the defendant's defense. For example, an allegation of a missing exculpatory witness would probably support the defendant's claim.[196] At that point the government must show that the witness would not have exculpated the defendant, or perhaps provide a previously acquired written statement of the witness as an alternative.[197] If the court finds no prejudice, the inquiry is at an end. If the court finds prejudice of a nature which has impaired the defendant's ability to defend himself, there is one final step. The court must then balance the prejudice against the reasonableness of the delay.

Beyond this, the Eighth Circuit has yet to develop a more definitive level at which the defendant has met his burden of proof and when the government has defeated the allegation of prejudice.[198]

B. *Part Two of the Balance Test: Reasonableness of the Delay*[199]

If the court determines from the aforementioned factors that prejudice to the defendant does exist, the court will then proceed to balance

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195. This would appear to suggest a possible conflict with *Marion*, wherein the Supreme Court affirmatively stated that due process can be violated if tactical delay and substantial prejudice are shown, with no mention of a presumption of prejudice. United States v. Marion, 404 U.S. 307, 324 (1971).

196. United States v. Golden, 436 F.2d 941, 943 (8th Cir. 1971).

197. United States v. Barket, 530 F.2d 189, 196 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976); United States v. Norton, 504 F.2d 342, 345 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

198. *See* United States v. Quinn, 540 F.2d 357 (8th Cir. 1976).

199.

> When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive,' is unjustifiable . . . The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided—whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of the reason for the delay, and, on the other, the length of the delay and its potential for prejudice to interests protected by the speedy-trial safeguard. For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interest of realizing an important objective, would be suspect.

Dickey v. Florida, 398 U.S. 30, 52-53 (1970) (Brennan, J., concurring).

such prejudice against the reasonableness of the delay. This balancing is necessary, according to the decisions of the Eighth Circuit, in order to reach the final decision as to whether or not due process has been violated.

1. *Necessary Delay*

One of the more common situations in which preindictment delay claims arise is that of the "continuing investigation of the undercover narcotics agent."[200]

> [T]he [p]olice . . . employed . . . their own members as undercover agents to make purchases of narcotics. It is elemental that the effectiveness of such an agent does not survive the time when it becomes known that he is a policeman. That time is ordinarily the moment when he appears before a magistrate to swear out complaints against those from whom he has made purchases. Thus, it is the practice for such an agent to postpone all swearing out of complaints until he has completed his underground service. At that point, and armed with his notebook of notations, he swears out all the complaints at once.[201]

The Eighth Circuit explicitly recognized the necessity for such undercover operations in its decision in *United States v. Norton*.[202] But the court used strong language to emphasize that the "continuing investigation" contention will not necessarily be sufficient to tip the balance to the government's side.[203] There could be circumstances, the court cautioned, where a missing and allegedly exculpatory witness may "make it impossible to give the defendant a fair trial and . . . when those circumstances occur, the court may be compelled to dismiss the indictment."[204] The court did not articulate what "those circumstances" might be.

More recently the Eighth Circuit apparently identified "certain circumstances"[205] in which the court felt the sole reason of "continuing investigation" would not serve to excuse a seventeen-month delay between the alleged offense and the indictment. The court in *United States v. Lovasco*[206] had viewed with disfavor the government's "hope that others might be implicated by further investigation," and held the delay to be

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200. Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965). The *Ross* decision, albeit an atypical result, provides a most thorough discussion of the problem of balancing effective law enforcement against the rights of a fair trial for the citizen. In *Ross*, the District of Columbia Circuit found that a continuing investigation and desire to protect the identity of the undercover agent was not always "necessitated by the requirements of effective law enforcement. . . . A balance must be struck if the interest of fair procedures for the citizen . . . is not to be sacrificed. . . ." *Id.* at 212-13.

201. *Id.* at 212.

202. 504 F.2d 342 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

203. United States v. Norton, 504 F.2d 342, 345 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

204. *Id.*

205. *Id.*

206. 532 F.2d 59 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977).

"unjustified, unnecessary, and unreasonable."[207] Because the court also found prejudice to the defendant's ability to prepare his defense, the court dismissed three of the counts against Lovasco.[208] However, the Supreme Court reversed, finding that the delay by the government was "in good faith" and thus reasonable.[209]

One month later, the Eighth Circuit considered the reasonableness of a four and one-half year delay in the filing of an indictment for a securities fraud case.[210] The court found the justification by the Government—that the general procedure in securities cases is to allow civil and administrative proceedings to be exhausted before recommendation of criminal prosecution—to be reasonable and in the public interest.[211] The court's holding, however, was specifically based upon the finding that defendant Naftalin had made no showing of prejudice.[212]

Lovasco appears to be the only identifiable limiting case on what the Eighth Circuit might find to be reasonable in regard to alleged "necessary" delays. Yet with that decision reversed by the Supreme Court, "the particular circumstances of individual cases"[213] constitutes the only means of predicting what the court might decide in future cases.

2. *Inadvertent Delays*

Justice Douglas, in his concurring opinion in *Marion*, reluctantly considered the United States Attorney's plea that the office was insufficiently staffed to have proceeded as expeditiously as desirable.[214] Because of the complex nature of the case involved,[215] Justice Douglas acknowledged that a three-year delay was reasonable, but stated that "even in that kind of case [three years] goes to the edge of a permissible delay."[216]

The Eighth Circuit has not been overly sympathetic to inadvertent delays, or delays attributable to the internal structure of the government operations; however, some delays have been excused by the court on the basis of complexity or mistake by the government. In *United States v. Golden*,[217] a twelve-day delay in naming the proper witness in a bill of particulars was called an "honest mistake on the part of the United

207. United States v. Lovasco, 532 F.2d 59, 61 (8th Cir. 1976), *rev'd*, 97 S. Ct. 2044 (1977).

208. *Id.*

209. United States v. Lovasco, 97 S. Ct. 2044 (1977).

210. United States v. Naftalin, 534 F.2d 770 (8th Cir.), *cert. denied*, 419 U.S. 827 (1976).

211. *Id.* at 774.

212. *Id.*

213. United States v. Lovasco, 97 S. Ct. 2044 (1977).

214. United States v. Marion, 404 U.S. 307, 334 (1971) (Douglas, J., concurring).

215. The case in *Marion* involved fraud and misrepresentation, alteration of contracts and deliberate nonperformance of contracts. United States v. Marion, 404 U.S. 307, 308-09 (1971).

216. *Id.* at 335 (Douglas, J., concurring).

217. 436 F.2d 941 (8th Cir. 1971).

States Attorney" by the court.[218] But the court in *United States v. Jackson*[219] refused to consider as a reason for the delay the fact that the local Drug Abuse Law Enforcement office was suffering from a "paralysis" because of a highly publicized raid where officers mistakenly raided a wrong house.[220]

The strongest pronouncement from the Eighth Circuit in regard to inadvertent errors by the government is found in the court's opinion in *United States v. Barket*.[221] In *Barket*, the Criminal Justice Division in Washington, D.C., had chosen not to prosecute Barket for a banking transaction that had occurred in July, 1970, and was discovered in January, 1971; the case was closed in March, 1972.[222] The local United States Attorney, not being informed of the foregoing information, "discovered" the transaction in late 1973 and filed an indictment against Barket in June of 1974.[223] The court found the failure by the Department of Justice to "let the left hand know what the right is doing"[224] inexcusable, and charged the government with culpable negligence.[225] Finding that the knowledge of the Department of Justice should be imputed to the local United States Attorney, the delay was deemed unreasonable.[226] Thus, a finding of unreasonable delay, coupled with the sufficient showing of prejudice, required a dismissal of the indictment.

3. *Tactical Delay*

An additional consideration in determining the nature of the government's delay, is whether the delay was an intentional one for the purpose of gaining a tactical advantage over the accused. The Eighth Circuit has held, in accord with *Marion*, that when the defendant's capacity to prepare his defense is substantially impaired by a deliberate and tactical prosecutorial delay, such a delay would clearly be a violation of due process.[227]

Beyond this interpretation, the court has never broached the subject of whether, if a clearly tactical delay failed to prejudice the defendant, the court would find a denial of due process. The Supreme Court in *Marion* would appear to provide a negative response,[228] in that Justice

218. United States v. Golden, 436 F.2d 941, 945 (8th Cir. 1971).

219. 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

220. United States v. Jackson, 504 F.2d 337, 341 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

221. 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

222. United States v. Barket, 530 F.2d 189, 191-92 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976).

223. *Id.* at 191-92.

224. *Id.* at 195.

225. *Id.*

226. *Id.* at 196-97.

227. United States v. Emory, 468 F.2d 1017, 1019 n.5 (8th Cir. 1972).

228. United States v. Marion, 404 U.S. 307, 324 (1971).

White's opinion expressly calls for both elements before a violation of due process is found. However, the Eighth Circuit has also chosen not to apply the conjunctive interpretation of *Marion*, so it is unclear how it might rule under such circumstances. The court does intimate in *Jackson* that it might presume prejudice in a case of "outrageous" delay,[229] or abiding by its interpretation of outrageous delay in *Naftalin*, a tactical delay.[230] But because the situation has yet to arise, the court has provided little guidance. The Eighth Circuit's committment to go beyond the *Marion* test in protecting the citizen's right to a fair trial necessarily involves a more complex procedure in order to determine if there has been a violation of due process.

III. CONCLUSION

The prejudice to the defendant because of preindictment or preaccusatory delay can presumably be "substantial" when viewed in isolation, and yet still be offset by a determination that the delay was of absolute necessity. At the opposite side of the scale, the prejudice could be minimal, yet result in a violation of due process if weighed against a totally unjustifiable delay. And finally, an intentional tactical delay could create a presumption of prejudice. Thus, one does not examine the prejudice and the reasonableness of the delay in isolation. What may at first appear to be substantial prejudice might be viewed differently when the circumstances of the delay become apparent.

Additionally, the balance test the Eighth Circuit utilizes does not appear to be one of assigning fixed values to the amount of prejudice and the reasonableness of the delay, thereby allowing that which carries the greatest weight to tip the balance. For example, if the reasonableness of the delay becomes apparent, the court is inclined to require a greater degree of specificity in the allegation of prejudice to show a violation of due process. If the delay is not so reasonable, a more general allegation of prejudice to the defendant may suffice for a successful motion to dismiss.

From the preceding Note, one can sense what the Eighth Circuit requires for the operation of its balance test. There must be a threshold claim of prejudice before the balance begins. But how the court looks at the two balance factors beyond that has thus far seemed largely dependent on the individual circumstances of each case. Unless the Eighth Circuit can provide a more predictable standard as to how the balance test will operate, it is best that the *Marion* conjunctive test be affirmatively imposed on the circuit court by the Supreme Court. The Court refused to

229. United States v. Jackson, 504 F.2d 337, 339 n.2 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

230. *See* United States v. Naftalin, 534 F.2d 770 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976).

do this in its reversal of the Eighth Circuit's decision in *Lovasco.* However, by finding that the delay in *Lovasco* was reasonable, and by writing at some length on the importance of prosecutorial discretion in regard to time of filing indictments, the Court's standard comes close to having the same effect as the *Marion* conjunctive test.[231] If the *Marion* conjunctive standard was to be imposed on the circuit courts, the flexibility which the Eighth Circuit now has would be greatly curtailed. Yet at the same time, the statute of limitations would be revitalized as the sole safeguard against prejudice resulting from preindictment delays. The single exception in *Marion* would seem consistent with the intent of the statute of limitations. *Marion* is simply designed to prevent the government from engaging in tactical and intentional delays. The statute of limitations would remain as the preventive factor for other occurrences of prejudice.

Kathleen S. Bean

231. United States v. Lovasco, 97 S. Ct. 2044 (1977).