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## COMMENT

### THE STATUTE OF LIMITATIONS IN A CRIMINAL CASE: CAN IT BE WAIVED?

Statutes of limitation for crimes insulate defendants from prosecution after the passage of an express period of time following commission of an offense.<sup>1</sup> Such statutes are designed to prevent prejudice by precluding prosecutors from bringing stale charges when the defense would be handicapped by the inevitable loss of evidence.<sup>2</sup> Congress has enacted statutes of limitation for all noncapital federal crimes.<sup>3</sup> In so doing, it has determined that there is a point after which society's interest in the administration of justice is subordinate to a defendant's right to a fair trial.<sup>4</sup>

Many courts have reasoned that the Government's failure to prosecute before expiration of a statutory time limit is a jurisdictional bar to prosecuting a defendant.<sup>5</sup> This rationale has justified allowing

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1. *United States v. Marion*, 404 U.S. 307, 322-23 (1971); *Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *United States v. Ewell*, 383 U.S. 116, 122 (1966); *Benes v. United States*, 276 F.2d 99, 108-09 (6th Cir. 1960).

2. *See United States v. Marion*, 404 U.S. 307, 322-23 (1971); *Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *United States v. Handel*, 464 F.2d 679, 681 (2d Cir.), *cert. denied*, 409 U.S. 984 (1972).

Statutes of limitation are the "primary guarantee against bringing overly stale criminal charges," *United States v. Ewell*, 383 U.S. 116, 122 (1966), and are the primary form of protection against prejudice resulting from preindictment delay. *United States v. Dallago*, 311 F. Supp. 227, 235 (E.D.N.Y. 1970).

If preaccusation delay impairs a defendant's ability to defend himself, he may have a due process claim which will preclude his prosecution. *McLawhorn v. North Carolina*, 484 F.2d 1, 3 n.7 (4th Cir. 1973); *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965).

3. For those noncapital crimes for which there is no specific statute of limitations, the following applies: "Except as otherwise 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 next after such offense shall have been committed." 18 U.S.C. § 3282 (1970).

4. "Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice . . . . These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *United States v. Marion*, 404 U.S. at 322 (footnotes & citations omitted).

5. *Waters v. United States*, 328 F.2d 739 (10th Cir. 1964); *Chaifetz v. United States*, 288 F.2d 133 (D.C. Cir. 1960), *cert. denied*, 366 U.S. 209 (1961); *Benes v. United States*, 276 F.2d 99 (6th Cir. 1960); *State v. Steensland*, 33 Idaho 529, 195 P. 1080 (1921). *See United States v. Harris*, 133 F. Supp. 796 (W.D. Mo. 1955), *aff'd on other grounds*, 237 F.2d 274 (8th Cir. 1956); *Savage v. Hawkins*, 239 Ark. 658, 391 S.W.2d 18 (1965); *People v. McGee*, 1 Cal. 2d 611, 36 P.2d 378 (1934); *Herman v. People*, 124 Colo. 46, 233 P.2d 873 (1951); *State v. King*, 282 So.2d 162 (Fla. 1973); *Ex Rel. B.H.*, 112 N.J. Super. 1, 270 A.2d 72 (Juv. & Dom. Rel.

a defendant to raise a statute of limitations defense at any stage of a proceeding or on appeal, despite his failure to assert it at trial.<sup>6</sup> A statute of limitations also may be the basis for a collateral attack,<sup>7</sup> in that a verdict rendered without jurisdiction in the court is void.<sup>8</sup>

In a case of first impression, *United States v. Wild*,<sup>9</sup> the Court of Appeals for the District of Columbia declined to adopt this jurisdictional approach.<sup>10</sup> Wild, a former vice-president of Gulf Oil Corporation, was charged with consenting to illegal campaign contributions in violation of title 18, section 610 of the United States Code.<sup>11</sup> In 1973, as a result of negotiations between Gulf's counsel and the Watergate Special Prosecution Force (WSPF), Wild pleaded guilty

Ct. 1970); *City of Cleveland v. Hirsch*, 26 Ohio App.2d 6, 268 N.E.2d 600 (1971).

6. *Waters v. United States*, 328 F.2d 739, 743 (10th Cir. 1964) (statute of limitations is jurisdictional and may be noted on appeal); *Askins v. United States*, 251 F.2d 909, 911 (D.C. Cir. 1958) (defendant initially may raise statute of limitations on motion to set aside his conviction under 28 U.S.C. § 2255 (1970) (habeas corpus)); *City of Cleveland v. Hirsch*, 26 Ohio App.2d 6, —, 268 N.E.2d 600, 601 (1971) (criminal statutes of limitation may be raised before or after conviction).

7. In *United States v. Harris*, 133 F. Supp. 796 (W.D. Mo. 1955), *aff'd on other grounds*, 237 F.2d 274 (8th Cir. 1956), the defendant pleaded guilty at trial and did not raise the statute. He nevertheless was permitted to assert the defense on a habeas corpus motion pursuant to 28 U.S.C. § 2255 (1970) because a guilty plea does not waive jurisdictional defects.

28 U.S.C. § 2255 (1970) permits questioning the validity of a sentence at any time. The statute provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

*Id.* (emphasis supplied).

8. See *United States v. Harris*, 133 F. Supp. 796, 799-800 (W.D. Mo. 1955), *aff'd on other grounds*, 237 F.2d 274 (8th Cir. 1956); *Herman v. People*, 124 Colo. 46, 50-51, 233 P.2d 873, 876 (1951); *City of Cleveland v. Hirsch*, 26 Ohio App.2d 6, —, 268 N.E.2d 600, 602 (1971).

9. 551 F.2d 418 (D.C. Cir. 1977), *cert. denied*, 45 U.S.L.W. 3747 (U.S. May 16, 1977).

10. The court began the opinion by noting: "This is a case of first impression." *Id.* at 419.

11. The law provided in pertinent part:

[E]very officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution in violation of this section, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than \$50,000 or imprisoned not more than two years, or both.

Act of June 25, 1948, ch. 645, § 610, 62 Stat. 723 (current version at 2 U.S.C.A. § 441(b) (Supp. III 1976)).

to a misdemeanor violation of section 610. In 1975, the WSPF resumed its investigation of Gulf and notified Wild that it was prepared to seek his indictment for three violations of section 610; the statute of limitations<sup>12</sup> on one of the violations was to expire the day after the return date of the proposed indictment.

The WSPF indicated to Wild that his cooperation in supplying information that would lead to prosecutions of the ultimate recipients of the contributions might result in the termination of further proceedings against him. Anxious to avoid indictment, and after consultation with counsel, Wild signed an express waiver of the statute of limitations.<sup>13</sup> Wild thereafter supplied the WSPF with information and testified before a grand jury concerning the recipients of the illegal political contributions. Despite such cooperation, the WSPF sought and obtained an indictment against Wild, one count of which included the violation on which the statute of limitations had expired. Wild challenged this count of the indictment in the district court<sup>14</sup> on the grounds that it was barred by the statute of limitations and that the statute could not be waived. After determining that the expiration of the statute did not constitute a jurisdictional bar to prosecution,<sup>15</sup> the court of appeals reversed the lower court<sup>16</sup> and held that the statute was waivable.<sup>17</sup>

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12. The statute provided in pertinent part:

"No person shall be prosecuted, tried, or punished for any violation of . . . section . . . 610 . . . of title 18 . . . unless the indictment is found or the information is instituted within 3 years after the date of the violation." Act of Oct. 15, 1974, Pub. L. No. 93-443, tit. III, § 302, 88 Stat. 1289 (current version at 2 U.S.C.A. § 455(a) (Cum. Supp. 1976)).

13. Wild signed the following statement:

I have been advised by your office [WSPF] that a federal grand jury is presently investigating my alleged involvement in the making of unlawful corporate campaign contributions by Gulf Oil Corporation and particularly my alleged involvement with respect to corporate contributions made in connection with the 1972 election campaign of Sam Nunn, a candidate for United States Senator from Georgia.

In consideration of your office's delaying any final decision with respect to charging me with any criminal violations in connection with the alleged contribution to Sam Nunn's campaign, a delay requested by me for my benefit, I hereby waive all defenses grounded upon the applicable statute of limitations with respect to the Nunn transaction. I have discussed this matter with my attorney, Edward Bennett Williams, Esq., and I fully understand the consequences of this waiver.

551 F.2d at 420 n.3.

14. *United States v. Wild*, No. 76-110 (D.D.C. June 24, 1976).

15. 551 F.2d at 423.

16. *Id.* at 425.

17. *Id.* at 423. "We decide that where, as here, the defendant followed the advice of competent counsel and executed an express written waiver prior to the expiration of the

*Wild* raises two questions: First, is a statute of limitations a bar to prosecuting a defendant or is it an affirmative defense; and second, is such a statute waivable?<sup>18</sup> Most courts have treated the waivability issue as dependent on whether the statute is treated as jurisdictional or as an affirmative defense.<sup>19</sup> If the court adopts the jurisdictional approach, the statute cannot be waived: the running of the statute extinguishes the court's power to try the case,<sup>20</sup> and no action or agreement of the parties can supply the requisite jurisdiction.<sup>21</sup> In jurisdictions in which the statute of limitations is deemed to be an affirmative defense, however, most courts treat the statute as waivable.<sup>22</sup> This Comment will appraise the validity of this distinction and attempt to determine whether the statute of limitations should be a waivable defense.

#### STATUTES OF LIMITATIONS: AFFIRMATIVE DEFENSE OR BAR TO PROSECUTION?

##### *The Affirmative Defense Approach*

Primary authority for *Wild* is an 1872 Supreme Court decision,

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statute of limitations, the district court was not without jurisdiction to try him upon his subsequent indictment." *Id.* at 419.

18. "The first step in our analysis . . . is to determine whether the statute constitutes a jurisdictional bar to prosecution or whether it is equivalent to an affirmative defense." *Id.* at 421. "Our next task then, having decided that the statute does not constitute a jurisdictional bar, is to determine whether *Wild* could validly waive his potential defense . . . by a written agreement . . . prior to its expiration." *Id.* at 423.

19. See generally 8 MOORE'S FEDERAL PRACTICE ¶ 12.03 [1] (2d ed. 1976); 1 WHARTON'S CRIMINAL LAW & PROCEDURE §§ 179, 185 (1957); 1 WRIGHT'S FEDERAL PRACTICE & PROCEDURE § 193, at 410-11 (1969).

20. See *State v. Fogel*, 16 Ariz. App. 246, \_\_\_, 492 P.2d 742, 744 (1972); *People v. Rehman*, 62 Cal. 2d 135, \_\_\_, 396 P.2d 913, 915, 41 Cal. Rptr. 457, 459 (1965); *Moore v. State*, 43 N.J.L. 203, 209 (1881); *People v. Warden*, 242 App. Div. 282, 284, 275 N.Y.S. 59, 62 (1934). See generally notes 5, 6, 8 *supra*.

21. See *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *United States v. Isaacs*, 493 F.2d 1124, 1140 (7th Cir.), cert. denied sub nom. *Kerner v. United States*, 417 U.S. 976 (1974); *McCusker v. Cupp*, 506 F.2d 459, 459-60 (9th Cir. 1974); *Pon v. United States*, 168 F.2d 373, 374 (1st Cir. 1948); *Colson v. Smith*, 315 F. Supp. 179, 182 (N.D. Ga. 1970), aff'd on other grounds, 438 F.2d 1075 (5th Cir. 1971).

22. In the following cases the statute of limitations was said to be a defense which must be asserted at or before trial: *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917); *United States v. Kenner*, 354 F.2d 780, 785 (2d Cir. 1965), cert. denied, 383 U.S. 958 (1966); *United States v. Taylor*, 207 F.2d 437, 438 (2d Cir. 1953); *United States v. Franklin*, 188 F.2d 182, 186 (7th Cir. 1951); *Forthoffer v. Swope*, 103 F.2d 707, 709 (9th Cir. 1939); *Pruett v. United States*, 3 F.2d 353, 354 (9th Cir. 1925). In *People v. Brady*, 257 App. Div. 1000, 13 N.Y.S. 789 (1939), the court expressly stated that by failing to assert the statute, the defendant waived its benefit.

*United States v. Cook*,<sup>23</sup> in which the Court held that the statute of limitations could not be pleaded by demurrer<sup>24</sup> because such a plea would deprive the prosecution of the opportunity to prove that the case fell within an exception to the statute.<sup>25</sup> The failure of the indictment to show on its face that it was returned within the statutory period should not bar the prosecution from proving, for example, that the defendant was a fugitive, and thus within an exception to the statute. Even absent such an exception, the Court held, the prosecution should be allowed to challenge the sufficiency of the defense, inasmuch as "time is not of the essence of the offense."<sup>26</sup> The correct method of asserting the statute of limitations, therefore, was by special plea or by evidence under the general issue.<sup>27</sup>

Related to the question of the requisite form of the pleadings is that of their necessary components. *Cook* explained which elements of a crime the prosecution must allege for a sound indictment. If the statute defining the offense contains an exception in its enacting clause and the exception is so incorporated into the definition of the crime that "the offense cannot be accurately and clearly described if [it] is omitted," then the indictment must show that the defendant is not within the exception.<sup>28</sup> If the exception is "entirely separable" from the definition of the crime, however, then it is not a part of the offense which must be pleaded and proved by the prosecution but is, rather, a matter of defense.<sup>29</sup>

The holding in *Cook* resulted from the requirements of the common law forms of pleading. Despite the admittedly archaic language used by the Court in *Cook*,<sup>30</sup> the court in *Wild* nonetheless concluded that in *Cook* the statute was considered to be a defense which must be raised by the defendant.<sup>31</sup> Although the court of appeals noted that the defendant was required to raise the defense by a special plea or by evidence under the general issue so that the

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23. 84 U.S. (17 Wall.) 168 (1872).

24. *Id.* at 179.

25. *Id.* at 179-80.

26. *Id.* at 180.

27. *Id.* at 179-80.

28. *Id.* at 173-74.

29. *Id.*

30. See *United States v. Wild*, 551 F.2d at 421.

31. "Although the parties [in *Cook*] did not raise the issue, and the Court made no mention of the effect of the statute's expiration on a court's subject matter jurisdiction, it is clear that the Court considered the statute to be in the nature of a defense which must be raised by the defendant." *Id.* at 422 (footnote omitted).

prosecution might answer the pleading,<sup>32</sup> it apparently ignored the immateriality of this rationale under modern procedural rules.<sup>33</sup> Similarly, the mode for determining whether an exception to a criminal statute must be pleaded by the prosecutor or defendant does not answer the question in *Wild*—whether the statute of limitations is jurisdictional or a matter of defense. That the statute in the nineteenth century could not be the subject of a demurrer to an allegation of a particular statutory offense is not grounds for equating it with an affirmative defense under modern pleading practice.<sup>34</sup>

As further support for determining that the statute of limitations is not jurisdictional, *Wild* relied on *Askins v. United States*.<sup>35</sup> In *Askins*, the defendant was tried for first degree murder, a capital crime having no statute of limitations,<sup>36</sup> but was convicted of second degree murder, which had a limitation of three years.<sup>37</sup> His conviction was returned more than three years after the commission of the offense and was affirmed on appeal.<sup>38</sup> The defendant then filed a motion to set aside his sentence on the grounds that the expiration of the statute of limitations had deprived the court of jurisdiction to impose sentence.<sup>39</sup> Although *Askins* had not raised the issue at trial or on appeal, he was allowed to attack his conviction collaterally because he had been indicted for first degree murder and consequently had been unable to raise the statutory defense until the verdict was rendered for the lesser offense.<sup>40</sup> The court held: "A sentence imposed for second degree murder upon an indictment timely for first degree murder, but found more than three years after the offense, is a sentence which is not authorized by law."<sup>41</sup> Without

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32. *Id.* at 421-22.

33. "Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty, and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished . . ." FED. R. CRIM. P. 12(a).

34. There are no absolute statements in *Cook* that the statute is jurisdictional or an affirmative defense; rather, the Court resolved the issue by ruling so that both parties may submit pleadings on the question. Nevertheless, the circuit court in *Wild* analogized between the special plea and the contemporary affirmative defense. 551 F.2d at 421.

35. 251 F.2d 909 (D.C. Cir. 1958). See 551 F.2d at 422.

36. "An indictment for any offense punishable by death may be found at any time without limitation . . ." 18 U.S.C. § 3281 (1970).

37. The applicable statute of limitations is now five years. See note 3 *supra*.

38. *Askins v. United States*, 231 F.2d 741 (D.C. Cir.), cert. denied, 351 U.S. 989 (1956).

39. 251 F.2d at 910. *Askins* also claimed a violation of his constitutional right to a speedy trial. *Id.* The court did not meet the constitutional issue because the statute was determinative.

40. *Id.* at 912.

41. *Id.*

more, *Askins* would support the proposition that the statute of limitations is jurisdictional; the court, however, qualified its decision. In its qualified holding, the court in *Askins* distinguished the situation in which a statute of limitations is applicable to the offense charged in an indictment: "In that event the defense of the statute must be raised at the trial or before trial on motion. If this is not done and a verdict of guilty is rendered, sentence may be lawfully imposed."<sup>42</sup> The court in *Wild* considered this statement to be consistent with its interpretation of *Cook*, that the statute of limitations is equivalent to an affirmative defense.<sup>43</sup> Neither *Cook* nor *Askins*, however, mandate a decision unfavorable to the defendant in *Wild*. On the contrary, *Cook* is of questionable value in determining modern procedural questions, and the actual holding in *Askins* does not support *Wild*.

The other cases cited in *Wild* as supportive of the affirmative defense rationale are *Biddinger v. Commissioner of Police*<sup>44</sup> and *United States v. Kenner*.<sup>45</sup> *Biddinger*<sup>46</sup> and *Kenner*<sup>47</sup> merely assert that the statute of limitations is an affirmative defense that must be raised by a defendant at trial. In neither case, however, is the jurisdictional question considered; no rationale is provided beyond citations to *Cook* and *Askins*.<sup>48</sup> Other decisions not cited in *Wild* have treated the statute as waived if not asserted in the trial court, making the defense unavailable in a collateral attack situation<sup>49</sup> or on appeal.<sup>50</sup> These refusals to consider the statute of limitations issue unless it is raised at trial are, by implication, determinations that the defense is nonjurisdictional. Although they treat the statute of limitations as though it were an affirmative defense, these

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42. *Id.* at 913 (footnotes omitted).

43. 551 F.2d at 422.

44. 245 U.S. 128 (1917). *See* 551 F.2d at 422 n.7.

45. 354 F.2d 780 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 (1966). *See* 551 F.2d at 422 n.7.

46. 245 U.S. at 135.

47. 354 F.2d at 785.

48. *Biddinger* was an extradition proceeding to which the statute of limitations issue was only peripheral. In *Kenner*, the defendant first raised the defense of the statute in a collateral attack on his sentence. Citing *Askins's* dicta, the court stated the defendant could not attack his sentence after having failed to raise the issue at trial. 354 F.2d at 785. De facto, the defendant's failure to assert the statute before or during trial constituted a waiver.

49. *Forthoffer v. Swope*, 103 F.2d 707 (9th Cir. 1939). *But see* *United States v. Mathues*, 27 F.2d 137 (E.D. Pa. 1928).

50. *United States v. Taylor*, 207 F.2d 437 (2d Cir. 1953); *United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951); *Pruett v. United States*, 3 F.2d 353 (9th Cir. 1925). In both *Pruett* and *Taylor*, it was not actually established that the statute had run; this may have affected the result.



cases do not conclusively establish that the statute is in fact an affirmative defense, waivable by the defendant.

### *The Jurisdictional Approach*

Many decisions have treated the running of the statute as an expurgation of the crime which deprives the court of jurisdiction to prosecute the defendant.<sup>51</sup> Other courts have reasoned that, because the state has determined that it will limit its right to prosecute criminals after an established period of time, the burden of proof is on the Government to show that the offense was committed within the statutory period.<sup>52</sup> Under either rationale, the satisfaction of the statute of limitations has been treated as a prerequisite to the court's jurisdiction.<sup>53</sup>

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51. *People v. McGee*, 1 Cal. 2d 611, \_\_\_, 36 P.2d 378, 379 (1934) ("[T]he statute is jurisdictional, and . . . an indictment or information which shows on its face that the prosecution is barred by limitations fails to state a public offense."); *Herman v. People*, 124 Colo. 46, 50, 233 P.2d 873, 876 (1951)

(Had a verdict of guilt been returned under this information, any judgment or sentence thereon would have been void because of the running of the statute on such a crime would have been to the effect that there was no crime, as such, existing at the time of the trial. Therefore, the court was without jurisdiction to proceed further than to dismiss the case . . . );

*In re Pillo*, 11 N.J. 8, 18, 93 A.2d 176, 181 (1952) ("In practical effect the lapse of time works an expurgation of the crime."); *Moore v. State*, 43 N.J.L. 203, 209 (1881) ("[W]hen the specified period shall have arrived, the right of the state to prosecute shall be gone, and the liability of the offender to be punished, — to be deprived of his liberty, — shall cease.").

52. *Az Din v. United States*, 232 F.2d 283, 287 (9th Cir. 1956) ("The Government has the burden of proving that the [crime] was within [the statutory] period."); *United States v. Schneiderman*, 106 F. Supp. 892, 897 (S.D. Cal. 1952) ("[T]o convict the accused, the proof must establish that the [offense] was committed, within the . . . period of the statute of limitations"); *Lowe v. State*, 154 Fla. 780, \_\_\_, 19 So.2d 106, 107-08 (1944) ("The law places the burden of proof on the prosecution, upon the trial of a criminal case, to show that the commission of the offense as charged was committed within the two year period prescribed by statute.").

The dissent in *United States v. Waldin*, 253 F.2d 551 (3d Cir. 1958) stated: "The burden of proving affirmatively that the crime was committed within a period not proscribed by the applicable statute of limitations is on the United States." *Id.* at 559 (dissenting opinion).

53. "The time within which an offense is committed is a jurisdictional fact in all cases subject to limitation." *Mitchell v. State*, 157 Fla. 121, \_\_\_, 25 So.2d 73, 74 (1946). *See State v. Steensland*, 33 Idaho 529, \_\_\_, 195 P. 1080, 1081 (1921); *City of Cleveland v. Hirsch*, 26 Ohio App.2d 6, \_\_\_, 268 N.E.2d 600, 602 (1971). Legislatures have limited the time within which to prosecute criminals and taken from the courts the power to proceed once a statute has run. *People v. McGee*, 1 Cal. 2d 611, \_\_\_, 36 P.2d 378-79 (1934). The protection provided by a statute of limitations is in the nature of a substantive right. *United States v. Haramic*, 125 F. Supp. 128, 129 (W.D. Pa. 1954). Some decisions adopt the jurisdictional approach by implication. *Chaifetz v. United States*, 288 F.2d 133 (D.C. Cir. 1960), *cert. denied*, 366 U.S. 209 (1961); *Benes v. United States*, 276 F.2d 99 (6th Cir. 1960).

The language of the statute of limitations at issue has been pivotal to the conclusion of many courts that the statute bars prosecution of the defendant.<sup>54</sup> In *United States v. Harris*,<sup>55</sup> for example, the language of the statute, characterized by terms of "extinguishment or prohibition of prosecution" rather than of "repose," was determinative.<sup>56</sup> Although the defendant had pleaded guilty to an information,<sup>57</sup> the court held that the defendant was entitled to challenge the lawfulness of his sentence because the expiration of the statute operated as a jurisdictional bar to his prosecution.<sup>58</sup> In so holding, the court noted that, because the language used in the statute deprived the court of jurisdiction over an offense barred by the statute, no punishable federal offense had been committed.<sup>59</sup> When confronted with similar statutes of limitation, courts have asserted that they must effectuate "the clear expression of Congressional will that in such a case 'no person shall be prosecuted, tried, or punished.'"<sup>60</sup> Adhering to the general rule of statutory construction that if the language of a statute is unambiguous its plain meaning will prevail,<sup>61</sup> courts have been reluctant to make exceptions to unequivocal language and thus have treated the statutes of limitation as jurisdictional.<sup>62</sup> Generally, precedent reflecting this approach deals with a statute<sup>63</sup> containing an express exception.<sup>64</sup> The statute in *Wild*

54. *Waters v. United States*, 328 F.2d 739, 743 (10th Cir. 1964); *United States v. Harris*, 133 F. Supp. 796, 799 (W.D. Mo. 1955), *aff'd on other grounds*, 237 F.2d 274 (8th Cir. 1956); *United States v. Zisblatt Furniture Co.*, 78 F. Supp. 9, 11-13 (S.D.N.Y. 1948), *appeal dismissed*, 336 U.S. 934 (1949); *Savage v. Hawkins*, 239 Ark. 658, —, 391 S.W.2d 18, 20 (1965); *State v. King*, 282 So.2d 162, 167 (Fla. 1973).

55. 133 F. Supp. 796 (W.D. Mo. 1955), *aff'd on other grounds*, 237 F.2d 274 (8th Cir. 1956).

56. *Id.* at 799.

57. A plea of guilty is a waiver of all non-jurisdictional defects. *Salazar v. Rodriguez*, 371 F.2d 726 (10th Cir. 1967); *United States v. Reincke*, 341 F.2d 977 (2d Cir. 1965); *United States v. Gallagher*, 183 F.2d 342 (3d Cir. 1950); *Berg v. United States*, 176 F.2d 122 (9th Cir.), *cert. denied*, 338 U.S. 876 (1949).

58. 133 F. Supp. 796, 799-800 (W.D. Mo. 1955).

59. *Id.* at 799.

60. *Toussie v. United States*, 397 U.S. 112, 124 (1970) (quoting 18 U.S.C. § 3282 (1970)).

61. *See Toussie v. United States*, 397 U.S. 112, 115 (1970); *United States v. Richardson*, 393 F. Supp. 83, 87 (W.D. Pa. 1974), *aff'd*, 512 F.2d 105 (3d Cir. 1975); *United States v. Udell*, 109 F. Supp. 96, 98 (D. Del. 1952); *United States v. Ganapowski*, 72 F. Supp. 982, 985 (M.D. Pa. 1947); *United States v. Nazzaro*, 65 F. Supp. 456, 457 (S.D.N.Y. 1946); *State v. King*, 282 So.2d 162, 167 (Fla. 1973). This principle has been applied in civil cases. *See, e.g., Corona Coal Co. v. United States*, 263 U.S. 537 (1924).

62. *See, e.g., Waters v. United States*, 328 F.2d 739 (10th Cir. 1964); *United States v. Harris*, 133 F. Supp. 796 (W.D. Mo. 1955); *Savage v. Hawkins* 239 Ark. 658, 391 S.W.2d 18 (1965); *State v. King*, 282 So.2d 162 (Fla. 1973).

63. 18 U.S.C. § 3282. *See* notes 3 & 54 *supra*; note 68 *infra*.

64. *See* note 3 *supra* (the statute is applicable except as otherwise provided by law).

contained no such exception; rather, it is couched in absolute terms providing that "[n]o person shall be prosecuted, tried, or punished . . . unless the indictment is found or the information is instituted within 3 years after the date of the violation."<sup>65</sup> Therefore, the plain meaning rule of statutory construction might be applied even more logically to *Wild*.

In view of Congressional policy that statutes of limitations are not to be extended "except as otherwise expressly provided by law,"<sup>66</sup> courts have determined that statutes of limitation are not to be extended unless Congress specifically provides.<sup>67</sup> Exercising judicial restraint, courts thus have applied the maxim that lawmaking is the function of the legislature, not the judiciary; any exceptions to and extensions of statutes of limitation are therefore a legislative responsibility.<sup>68</sup> Moreover, judicial policy views statutes of limitation as statutes of repose that should be interpreted liberally in favor of defendants.<sup>69</sup> If there are ambiguous or conflicting provisions, courts look to legislative intent but generally resolve any doubts in favor of defendants.<sup>70</sup> Congressional policy for over 150 years has been that prosecution for noncapital crimes should be limited and that exceptions to this policy "ought to be manifested in a clear and unequivocal manner."<sup>71</sup>

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65. 2 U.S.C. § 455(a) (Supp. 1976) (amended 1976).

66. 18 U.S.C. § 3282 (1970).

67. *United States v. Richardson*, 393 F. Supp. 83, 87 (W.D. Pa. 1974), *aff'd*, 512 F.2d 105 (3d Cir. 1975). Confronted with the issue of retroactive application of the statute of limitations, the court said, "[i]n the absence of a clear statement from Congress that it intended retroactive application of the extended statute we do not think we should extend it by judicial order. To do so would presume that Congress was in error—that it passed a statute which did not reflect its intent. We think the better course is to presume that Congress was not mistaken. . . .").

68. *Toussie v. United States*, 397 U.S. 112, 121 (1970); *United States v. Richardson*, 393 F. Supp. 83-87 (W.D. Pa. 1974), *aff'd*, 512 F.2d 105 (3d Cir. 1975); *United States v. Udell*, 109 F. Supp. 96, 98 (D. Del. 1952); *United States v. Ganapowski*, 72 F. Supp. 982, 983 (M.D. Pa. 1947); *United States v. Nazzaro*, 65 F. Supp. 456, 457 (S.D.N.Y. 1946); *State v. King*, 282 So.2d 162, 167 (Fla. 1973).

69. The Supreme Court frequently has articulated this policy. *United States v. Habig*, 390 U.S. 222, 227 (1968); *Bridges v. United States*, 346 U.S. 209, 215-16 (1953); *United States v. Scharton*, 285 U.S. 518, 522 (1932). See *United States v. McElvain*, 272 U.S. 633, 639 (1926).

70. See *United States v. Mendoza*, 122 F. Supp. 367, 368 (N.D. Cal. 1954); *United States v. Zisblatt Furniture Co.*, 78 F. Supp. 9, 12-13 (S.D.N.Y. 1948), *appeal dismissed*, 336 U.S. 934 (1949). See also note 61 *supra*; *Reevis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955).

71. For over 150 years it has been the public policy of the United States, as revealed by the enactments of Congress, to limit the time within which to institute criminal proceedings in noncapital cases . . . This court will not lightly

*Wild*, however, did not heed this policy. Although Congress has not provided that a criminal defendant may waive the protection of the statute of limitations, the court in *Wild* was unconcerned with the policies motivating the legislature's silence. On the contrary, instead of resolving any doubts in favor of the accused, the court in *Wild* resolved the issue in favor of the prosecution, thus creating an exception to the statute not provided by Congress. This departure from the general rules of statutory construction and the longstanding policy of judicial restraint may thwart the purpose for which such statutes were enacted.

When confronted with issues similar to those presented in *Wild*, other courts, however, have resolved the issue in favor of the jurisdictional approach and unequivocally have refused to allow prosecution of the defendant after the statute has run. In *Benes v. United States*,<sup>72</sup> for example, the defendant was charged with tax fraud prior to the expiration of the statute of limitations. He initiated a civil action to enjoin the United States attorney from presenting certain evidence to the grand jury; the prosecution agreed not to pursue the criminal charge before resolution of the civil litigation. After resolving the civil issue, an indictment was returned against the defendant. The statute, however, had run as to one of the counts, and Benes contended that the prosecution thus was barred by limitations. Treating the statute of limitations as jurisdictional, the court of appeals held that the indictment was barred by the running of the statute, which was not waived by the voluntary withholding of prosecution.<sup>73</sup> Although *Benes* clearly is more analogous to *Wild* than the decisions on which the court relied,<sup>74</sup> the court in *Wild* failed to follow this decision.

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assume that Congress intended to place this defendant in the category of a defendant in a capital case with respect to the statute of limitations by applying a general rule of construction. Such an intention ought to be manifested in a clear and unequivocal manner, especially where the door is open for reasonable minds to differ upon the construction of the statute.

*United States v. Zisblatt Furniture Co.*, 78 F. Supp. 9, 12 (S.D.N.Y. 1948), *appeal dismissed*, 336 U.S. 934 (1949).

72. 276 F.2d 99 (6th Cir. 1960).

73. And the general rule is further that an indictment, found after the expiration of the time for beginning prosecution, is barred by the statute of limitations and is not waived by the fact that the prosecution was withheld on account of an agreement with the accused, or by the fact that the accused procured continuances of the preliminary hearing from time to time until the period of limitations had expired.

*Id.* at 109 (citations omitted).

74. *United States v. Cook*, 84 U.S. 168 (1872); *United States v. Doyle*, 348 F.2d 715 (2d

In *Chaifetz v. United States*,<sup>75</sup> the defendant asked that an instruction on a lesser included offense be given to the jury. The court refused the instruction, reasoning that because the lesser offense was barred by a statute of limitations it could not support a conviction.<sup>76</sup> This denial effectively prevented Chaifetz from waiving the bar of the statute even though such a waiver would benefit him. In so deciding, the court noted that "a statute of limitations in a criminal case . . . is not merely a statute of repose but creates a bar to the prosecution."<sup>77</sup> Although such language indicates that the court deemed the statute to be jurisdictional, *Wild* rejected this contention; the court stated that when viewed "in light of *Cook*, it is apparent that such is not the case",<sup>78</sup> in that under *Cook* the statute acts as a bar only if the prosecution is unable to demonstrate an exception. Yet the language and the holding of *Chaifetz* indicate that the court treated the expiration of the statute as a jurisdictional bar to prosecution rather than as an affirmative defense. *Chaifetz* was decided by the same court as *Wild*, yet *Wild* implicitly contravenes the posture assumed by that court seventeen years earlier. Not only is the interpretation of *Chaifetz* in *Wild* unsubstantiated, but also the holding in *Wild* directly contradicts those of other circuit courts considering the waivability of statutes of limitation.<sup>79</sup>

Although the majority of courts have adopted the jurisdictional approach, the court in *Wild* rejected such an approach, relying instead on cases such as *Cook* that did not discuss waiver of the statute of limitations and ignoring analogous cases such as *Benes* that expressly considered the waiver question. Even so, despite the court's apparently fallacious reasoning, the holding appears correct.

Both the jurisdictional and the affirmative defense approaches are too arbitrary. Because adopting either one automatically dis-

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Cir.), cert. denied, 382 U.S. 843 (1965); *Askins v. United States*, 251 F.2d 909 (D.C. Cir. 1958); *United States v. Parrino*, 212 F.2d 919 (2d Cir.), cert. denied, 348 U.S. 840 (1954).

75. 288 F.2d 133 (D.C. Cir. 1960), cert. denied, 366 U.S. 209 (1961).

76. "Since Chaifetz could not, at the time of his trial, have been convicted of the misdemeanor of failing to file required information for the year 1953, he was not entitled to have the trial judge tell the jury it could, or should, find him guilty of that offense." *Id.* at 136.

77. *Id.* at 135-36 (citing *Benes*).

78. 551 F.2d at 422. The court conceded there was other case law contrary to its position but insisted that *Cook* justified its opinion. *Id.* at 422-23 n. 9, citing *Waters v. United States*, 328 F.2d 739 (10th Cir. 1964).

79. *Waters v. United States*, 328 F.2d 739, 743 (10th Cir. 1964); *Benes v. United States*, 276 F.2d 99, 109 (6th Cir. 1960). See *Askins v. United States*, 251 F.2d 909, 911-12 (D.C. Cir. 1958).

poses of the waivability issue, the court is unable to use its discretion in determining whether the defense was waived or should have been waived in any particular situation. The unique circumstances of a given case may make it unreasonable for a court adopting the affirmative defense approach to presume the efficacy of a waiver.<sup>80</sup> Similarly, the jurisdictional approach is arbitrary in that it fails to provide for instances in which permitting a waiver would not frustrate public policy. A case by case analysis focusing on waivability of the particular statute, rather than on the unclear jurisdictional-affirmative defense distinction, is the preferable approach.<sup>81</sup>

### WAIVER OF CRIMINAL STATUTES OF LIMITATION

#### *Waiver of Constitutional Rights and Civil Statutes of Limitation*

Consideration of the waivability of constitutional guarantees and civil statutes of limitation provides a framework within which to analyze the desirability of permitting criminal statutes of limitation to be waived. A criminal defendant may waive constitutional protections<sup>82</sup> by failing to assert them, by a plea of guilty, or by an express waiver similar to that in *Wild*. The accused may waive rights such as the right to counsel,<sup>83</sup> protection from double jeopardy,<sup>84</sup> the right to be tried in the district in which the offense was committed,<sup>85</sup> the right against self-incrimination,<sup>86</sup> the right to trial

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80. Although most potential defects in a waiver agreement should be uncovered by counsel, ambiguities as to material terms still may exist. If a prosecutor accepts a waiver in bad faith, it should be ineffective.

81. Although such an approach would not decrease the amount of litigation on the subject, it would clarify the issues if courts focused on the language of the statute instead of looking to precedent involving similar but not identical statutes. The best solution would be the enactment of clarifying legislation.

82. See notes 83-88 *infra*.

83. *Johnson v. Zerbst*, 304 U.S. 458 (1938). A defendant "may waive his constitutional right to assistance of counsel if he knows what he is doing and his choice is made with his eyes open." *Adams v. United States*, 317 U.S. 269, 279 (1942) (citing *Johnson*).

84. "The constitutional immunity from double jeopardy is a personal right which, if not affirmatively pleaded by the defendant at the time of trial, will be regarded as waived." *United States v. Scott*, 464 F.2d 832, 833 (D.C. Cir. 1972). The protection is waived by a plea of guilty. *United States v. Hoyland*, 264 F.2d 346, 351 (7th Cir.), *cert. denied*, 361 U.S. 845 (1959).

85. "The right of an accused to be tried in a particular venue is a personal privilege which may be waived." *Bickford v. Looney*, 219 F.2d 555, 556 (10th Cir. 1955) (footnote omitted). A request for a change of venue is a waiver of the accused's right to trial in the jurisdiction where the offense originally occurred. *Jones v. Gasch*, 404 F.2d 1231, 1235 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

86. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

by jury,<sup>87</sup> and the right to confront one's accusers.<sup>88</sup> Nonetheless, judicial policy is to "indulge every reasonable presumption against waiver of fundamental constitutional rights".<sup>89</sup> Hence, to be valid, a waiver must be an "intentional relinquishment or abandonment of a known right or privilege,"<sup>90</sup> and waivers of constitutional rights are scrutinized very closely.<sup>91</sup> In civil suits, the statute of limitations defense is considered a personal privilege that may be waived by conduct or agreement.<sup>92</sup> Generally, the defense is deemed waived if not asserted at the time of trial.<sup>93</sup> The minority view, however, is that civil statutes may not be waived because such action would defeat their underlying rationale.<sup>94</sup> In view of the ability to waive constitutional rights, the court in *Wild* discerned no reason to proscribe criminal defendants from waiving statutory rights as well.<sup>95</sup> The court did note, however, that civil statutes of limitation affect less critical interests than criminal statutes; such a distinction might justify permitting the former to be waived while prohibiting waiver of the latter. It therefore becomes necessary to determine whether compelling policy reasons exist for treating criminal statutes of limitation as nonwaivable.

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87. *Patton v. United States*, 281 U.S. 276, 312 (1930). A defendant may waive his right to trial by a jury of twelve and consent to a jury of fewer than twelve, or to no jury. *Id.*

88. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

89. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (footnote omitted), *quoting* *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937). The corollary to this is that the Supreme Court does not "presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 307 (1937).

90. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). See *Green v. United States*, 355 U.S. 184 (1957); *Moore v. Michigan*, 355 U.S. 155 (1957).

91. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (will not presume waiver of right against self-incrimination, right to trial by jury, and right to confront one's accusers from a silent record; court must ascertain that plea was intentionally, voluntarily, and knowingly made); *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973) (strict standard of waiver applied to those rights guaranteed to criminal defendant to insure that he is accorded greatest possible opportunity to utilize every facet of constitutional model of fair criminal trial).

92. *Allen v. Smith*, 129 U.S. 465, 470 (1889); *Nightingale v. Sanger*, 122 U.S. 176, 183 (1887); *Parchen v. Chessman*, 49 Mont. 326, \_\_\_, 142 P. 631, 633 (1914); *State v. Hart Motor Express, Inc.*, 270 Minn. 24, \_\_\_, 132 N.W.2d 391, 394 (1964).

93. *Oedekerck v. Muncie Gear Works, Inc.*, 179 F.2d 821, 824 (7th Cir. 1950); *Van Sant v. American Express Co.*, 169 F.2d 355, 372 (3d Cir. 1948).

94. *Forbach v. Steinfeld*, 34 Ariz. 519, \_\_\_, 273 P. 6, 9 (1928) (if made in advance, agreement to waive a statute of limitations is against public policy); *First Nat'l Bank v. Mock*, 70 Colo. 517, \_\_\_, 203 P. 272, 274 (1921) (waiver of statute of limitations for indefinite period of time is void).

95. "It seems to us, too, if a defendant may waive certain constitutional rights, he should certainly be capable in this instance of waiving a statutory right such as the statute of limitations." 551 F.2d at 424.

*The Policy Differences between Civil and Criminal Statutes of Limitation*

The purpose of both civil and criminal statutes of limitation is to protect defendants from having to defend against an old claim or charge at a time when they are incapable of presenting their defenses adequately.<sup>96</sup> The underlying rationale of civil statutes "is to encourage promptness in the bringing of actions [so] that the parties should not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory."<sup>97</sup>

In contrast to civil statutes of limitation which go to the remedy only, criminal statutes of limitation restrict the power of the sovereign to act against the accused; they create a bar to the prosecution of the defendant.<sup>98</sup> The purposes of criminal statutes of limitation are more comprehensive than those of civil statutes; not only the interests of the accused but also those of society and of the criminal justice system are the focus of legislative and judicial concern.<sup>99</sup> Such statutes represent a "legislative assessment of the relative interests of the state and the defendant in administering and receiving justice;"<sup>100</sup> they determine that after the lapse of a designated period of time, society's interest in the prosecution of criminals is secondary to the defendant's right to a fair trial.<sup>101</sup>

Unlike their civil counterparts, criminal statutes of limitation specify a time limit beyond which an irrebuttable presumption arises that the defendant's right to a fair trial would be prejudiced.<sup>102</sup> They are the primary form of protection afforded a criminal defendant against prejudice resulting from pre-indictment delay. Their purpose is more comprehensive than that of civil statutes, inasmuch

96. *United States v. Marion*, 404 U.S. 307, 322-23 (1971) (criminal statutes); *Toussie v. United States*, 397 U.S. 112, 114-15 (1970) (criminal statutes); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314-15 (1945) (civil statutes); *Missouri, Kan. & Tex. Ry. v. Harriman*, 227 U.S. 657, 672 (1913) (civil statutes).

97. *Missouri, Kan. & Tex. Ry. v. Harriman*, 227 U.S. 657, 672 (1913).

98. *Benes v. United States*, 276 F.2d 99, 109 (6th Cir. 1960).

99. See *United States v. Marion*, 404 U.S. 307, 322-23 (1971); *Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *Benes v. United States*, 276 F.2d 99, 108-09 (6th Cir. 1960); *United States v. Bonanno*, 177 F. Supp. 106, 112 (S.D.N.Y. 1959), *rev'd on other grounds sub nom. United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960).

100. *United States v. Marion*, 404 U.S. 307, 322 (1970).

101. *Id.*; *Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *Benes v. United States*, 276 F.2d 99, 108-09, (6th Cir. 1960). See *United States v. Bonanno*, 177 F. Supp. 106, 112 (S.D.N.Y. 1959), *rev'd on other grounds sub nom. United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960); *Askins v. United States*, 251 F.2d 909, 912 (D.C. Cir. 1958).

102. *United States v. Marion*, 404 U.S. 307, 322 (1971).



as criminal statutes of limitation are designed not only to bar prosecutions based on stale evidence but also to end prosecutions for crimes a reasonable time after the commission of the offense "when no further danger to society is contemplated from the criminal act."<sup>103</sup> Moreover, it may be healthier for society if suspected criminals are charged within a certain period of time after the alleged crime was committed or are relieved of the possibility of having to defend themselves after a reasonable period "as punishment is not the only means of healing the wound to society."<sup>104</sup>

Many courts have relied upon these public policy reasons to support the conclusion that the statute is nonwaivable in a criminal case. In *Waters v. United States*,<sup>105</sup> the defendant first asserted the limitations defense on a motion to vacate his sentence under title 28, section 2255 of the United States Code.<sup>106</sup> In deciding whether the statute should be deemed waived, the court stated:

[I]f recognition of a distinction between the statute of repose in civil cases and the substantive bar in criminal cases, is to have any meaning in the administration of criminal justice, the statute of limitations must be held to affect not only the remedy, but to operate as a jurisdictional limitation upon the power to prosecute and punish.<sup>107</sup>

Thus, because *Waters* held that the defense is jurisdictional and nonwaivable, the defendant's failure to plead the statute in the trial court did not constitute a waiver.<sup>108</sup> Similarly, in *City of Cleveland v. Hirsch*,<sup>109</sup> because of the differences in the public policy goals of criminal and civil statutes of limitation, the court held that "jurisdiction cannot be conferred upon the court by any act or omission of the parties, hence, the defense of the statute cannot be waived by failure to assert it."<sup>110</sup>

Perceiving no distinction between the policies underlying civil and criminal statutes of limitation, other courts have held that the defendant's failure to assert the statute constitutes a waiver.<sup>111</sup> The

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103. *United States v. Bonanno*, 177 F. Supp. 106, 112 (S.D.N.Y. 1959), *rev'd on other grounds sub nom.* *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960).

104. *Askins v. United States*, 251 F.2d 909, 912 (D.C. Cir. 1958).

105. 328 F.2d 739 (10th Cir. 1964).

106. *See* note 6 *supra*.

107. 328 F.2d at 743.

108. *Id.*

109. 26 Ohio App.2d 6, 268 N.E.2d 600 (1971).

110. *Id.* at —, 268 N.E.2d at 602.

111. *United States v. Kenner*, 354 F.2d 780 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 (1966);

limitations defense also has been deemed waived by a plea of guilty.<sup>112</sup> For example, the court in *Wild* relied on two circuit court cases that equated guilty pleas with waiver of the statute.<sup>113</sup> In *United States v. Parrino*<sup>114</sup> the court characterized the statute as a defense addressed to the merits which was precluded by a guilty plea. Similarly, in *United States v. Doyle*<sup>115</sup> the court concluded that an unqualified guilty plea bars the assertion of the statute. In *Wild* the court's reliance on the two cases appears unfounded, in that Wild's efforts to prevent indictment hardly can be equated to a guilty plea.

The issue of whether a criminal defendant by express agreement may validly waive the protection of the statute, however, never has been litigated. Nonetheless, the court in *Doyle* did assert that, even if the statute of limitations claim is not waived by a guilty plea, a defendant may agree to waive the statute after consultation with counsel.<sup>116</sup> But cases such as *Doyle* that allow waiver of the statute ignore the paramount public policy reasons for enactment of statutes of limitation. In contrast, the court in *Benes v. United States*<sup>117</sup> held that the defense of the statute is not waived if, by agreement with the accused, the Government does not institute timely prosecution.<sup>118</sup> Those courts adopting this non-waivability stance are concerned with upholding public policy and refuse to allow private agreements to circumvent express legislative intent. Nonetheless, such an approach is patently arbitrary in that it does not provide for situations in which permitting the defendant to waive the statute would not contravene public policy.

Inasmuch as constitutional rights may be waived, allowing a defendant to waive a statutory right such as limitations is not unreasonable. Furthermore, waivers of civil statutes of limitations do not

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*United States v. Taylor*, 207 F.2d 437 (2d Cir. 1953); *United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951); *Pruett v. United States*, 3 F.2d 353 (9th Cir. 1925); *People v. Brady*, 257 App. Div. 1000, 13 N.Y.S. 789 (1939). See *Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917); *United States v. Johnson*, 76 F. Supp. 542 (M.D. Pa.), *aff'd*, 165 F.2d 42 (3d Cir. 1947). See notes 48-50 *supra*.

112. *United States v. Doyle*, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); *United States v. Parrino*, 203 F.2d 284 (2d Cir. 1953). *Contra*, *United States v. Harris*, 133 F. Supp. 796 (W.D. Mo. 1955).

113. 551 F.2d at 423-24.

114. 212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954).

115. 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965).

116. *Id.* at 719.

117. 276 F.2d 99 (6th Cir. 1960).

118. *Id.* at 109.

contravene the statute's purposes; because the policy reasons underlying both civil and criminal statutes are similar, a waiver of criminal statutes of limitations should not be presumed to circumvent their purpose. Thus, the most reasonable approach is to allow the statute of limitations to be waived if certain prerequisites are met: (1) the waiver is knowing, intelligent, and voluntary; (2) it is made for the defendant's benefit and after consultation with counsel; and (3) the defendant's waiver does not handicap his defense or contravene any other public policy reasons motivating the enactment of the statute. If these conditions are met, permitting a defendant to waive the benefit of the statute is neither unjust nor unreasonable.

### CONCLUSION

In *Wild* the court held that, by an express agreement with the prosecution, the defendant had validly waived his statute of limitations defense. The court of appeals' inability to articulate a sound rationale for its holding in *Wild*, however, resulted from the diversity of case law and the ultimate failure of the old jurisdictional-affirmative defense distinction to meet the needs of modern criminal procedure. Nonetheless, despite the erroneous rationales espoused, the result was reasonable in that all the requisites for a valid waiver were met: Wild's waiver was voluntarily and intelligently made; he executed it with the assistance of counsel and for his own benefit; and his defense was not handicapped by the waiver in that Wild knew of his possible indictment before the statute expired. Moreover, because Wild was indicted shortly after the statute ran, his defense was not prejudiced. Furthermore, Wild's prosecution was delayed by his solicitation of an extension from the prosecution, rather than by the Government's failure to institute timely prosecution. Therefore, the court's decision to uphold Wild's waiver and permit prosecution for a time barred offense was the correct one.