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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

DANNY CRISCOLA,

Defendant-Appellant.

Case No. 13037

BRIEF OF RESPONDENT

Appeal from a judgment in the Third District Court, Salt Lake County, State of Utah, the Honorable Joseph G. Jeppson, presiding.

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IN THE

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THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

DANNY CRISCOLA,

Defendant-Appellant.

Case No. 13037

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a jury verdict of guilty of the unlawful sale of a narcotic drug.

DISPOSITION IN THE LOWER COURT

The jury found the defendant guilty of the unlawful sale of a narcotic drug. The defendant was sentenced to an indeterminate term in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent requests that the judgment of the trial court be affirmed.

STATEMENT OF FACTS

The statement of facts as set forth in the appellant's brief is essentially correct, however, although the defendant did testify that he was not aware of the charges against him for four or five months after the date of the alleged offense the record shows this statement not to be true. The offense occurred on February 5, 1971. The complaint was filed on May 4, 1971. And on May 7, 1971, the defendant appeared in person before the court with counsel at which time the complaint was read the defendant posted bail. This was just three months after the date of the offense (R. 2).

ARGUMENT

POINT I.

APPELLANT'S FAILURE TO RAISE THE ISSUE OF DELAY IN ARREST EITHER BEFORE OR DURING THE TRIAL COURT PROCEEDINGS PROHIBITS HIM FROM RAISING THIS ISSUE ON APPEAL.

It has long been held in criminal cases in Utah that issues not presented for the trial judge to rule upon may not be raised on appeal. In *State* v. *Smith*, 16 Utah 2d 374, 401 P. 2d 445 (1965), the Utah Supreme Court held that only under special circumstances will the Supreme Court rule on issues not properly presented to the trial judge. Appellant has shown no special circumstances which would justify this court's consideration of his con-

tentions on appeal. In *United States* v. *Sanchez,* 361 F. 2d 824 (2d Cir. 1966), a narcotics case similar to the one at bar, the Court ruled that once a defendant has been arrested he is under an obligation to give prompt notice of prejudice claimed as a result of pre-arrest delay; the outside limit for such a claim being at trial if not sooner.

POINT II.

CONSTITUTIONAL PROTECTION AFFORDED ONE RELATIVE TO A SPEEDY TRIAL HAS NO APPLICATION UNTIL AFTER THE PROSECUTION HAS COMMENCED.

The Utah Supreme Court in *State* v. *Renzo,* 21 Utah 2d 205, 443 P. 2d 392 (1968), at Section 12 of Art. I of the Constitution of Utah, Section 77-1-8 Utah Code Ann. (1953), and the Sixth Amendment to the United States Constitution all of which confer upon the defendant the right to a speedy trial, do not confer that right until prosecution has been instituted. In determining when prosecution had begun, this court in the *Renzo* case, *supra,* used the criterion set out in *Foley* v. *United States,* 290 F. 2d 562 (8th Cir.), *cert. denied,* 368 U. S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 88 (1961), holding that prosecution is not instituted until an indictment is returned or an information filed. In the case at bar the claimed delay occurred before the indictment or information was filed therefore withdrawing it from the protection of the Sixth Amendment.

Bruce v. *United States*, 351 F. 2d 318, 320 (5th Cir. 1965), is directly in point. There the defendant claimed that a delay from 1952 when the alleged offenses occurred to 1956 when the indictments were returned constituted a violation of his right to a speedy trial. The Fifth Circuit Court held that a right to a speedy trial did not arise until the indictment was filed as the applicable statute of limitations was controlling as to the time within which an indictment or information must be brought.

POINT III.

APPELLANT FAILED TO ESTABLISH THAT A THREE MONTH DELAY IN HIS ARREST PREJUDICED HIS DEFENSE AND HENCE THERE WAS NO DENIAL OF DUE PROCESS.

Appellant claims that the three month delay in his arrest denied him due process and was prejudicial because first, it hampered his ability to remember and secondly it prevented him from finding appropriate witnesses. This contention is not supported by the law. In *United States* v. *Golden*, 436 F. 2d 941 (8th Cir. 1971), which was a narcotics case where the delay in arrest was nine months, the court held that a mere claim of general inability to reconstruct the events of the period in question was insufficient to establish requisite prejudice from pre-indictment delay for reversal on denial of due process. With regard to defendant's second contention the record shows that the witness whom he contends was unavailable be-

cause of the delay in his arrest, in fact testified in defendant's behalf at the trial (Tr. 21-24).

Appellant cites *Ross* v. *United States*, 349 F. 2d 210 (D. C. 1968), as authority for the proposition that a delay in arrest denies defendant due process of law. *Ross, supra,* however, is not similar to the case at bar. The defendant, *Ross, supra,* was convicted on the sole testimony of a policeman who needed to refer to a daily log continuously throughout the trial to refresh his memory of the alleged offense. In the case at bar, government agent Hare, did not refer to any notes but testified from his own recollection and his testimony was corroborated by government agent Clements. In *Ross, supra,* the delay in arrest was seven months and the court in that case said the delay of four months might deny defendant due process of law. In the case now before this court the delay was only three months. Obviously the facts in the two cases are so different as to make the ruling in the *Ross* case in no way applicable.

In *Woody* v. *United States*, 370 F. 2d 214 (D. C. 1966), the Court held that a mere delay of four months between an alleged purchase of narcotics by an undercover officer and the arrest was not so unreasonable as to warrant reversal in absence of special circumstance. See also *United States* v. *Golden, supra.*

CONCLUSION

We submit that the appellant has failed to support this allegation of prejudice or error and, that under the established law of this state and the courts generally throughout the United States, appellant's conviction should be affirmed.

Respectfully submitted,

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