Journal of Criminal Law and Criminology

Volume 66 | Issue 3 Article 1

1976

Right to Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974

Marc I, Steinberg

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 66, No. 3

Printed in U.S.A.

CRIMINAL LAW

RIGHT TO SPEEDY TRIAL: THE CONSTITUTIONAL RIGHT AND ITS APPLICABILITY TO THE SPEEDY TRIAL ACT OF 1974

MARC I. STEINBERG*

INTRODUCTION

The right to a speedy trial in a criminal prosecution is one of the most basic rights preserved by the United States Constitution.[1] In *Klopfer v. North Carolina*,[2] the United States Supreme Court emphasized the significance of this guarantee by holding that the right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment."[3] This sixth amendment right to a speedy trial is made applicable to and enforceable against the states by virtue of the due process requirements of the fourteenth amendment.[4]

The speedy trial guarantee fulfills several purposes for the individual defendant. First, the guarantee enhances the integrity of the fact-finding process by making it more likely that evidence and memories of witnesses will remain readily available.[5] Second, the right minimizes the infliction of anxiety upon the defendant caused by long-pending charges and prevents prolonged pre-trial incarceration.[6] Third, the guarantee guards against oppressive conduct on the part of public officials who may intentionally withhold a criminal trial.[7]

The public also is entitled to a speedy trial in a criminal prosecution, as Chief Justice Burger recently observed.[8] He contended that the deterrent goals of the criminal law are inadequately served when the defendant is deprived of this right.[9] Justice Brennan, concurring in *Dickey v. Florida*,[10] noted that delay may hinder the government in proving its case and concluded that the right to a speedy trial protects both the public and the defendant because "the guarantee protects our common interest that government prosecute, not persecute, those whom it accuses of crime."[11]

In order to more effectively implement the interests of both society and the accused, Congress enacted the Speedy Trial Act of 1974.[12] This Act represents affirmative congressional action in a stated attempt to reduce crime and

* A.B., The University of Michigan; J.D., University of California, Los Angeles.

The *Journal* wishes to acknowledge the editorial assistance rendered by James F. Gossett in preparing this article for publication.

[1] U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." The author has dealt with the federal constitutional speedy trial issue in a previous article: Steinberg, *Right to Speedy Trial: Maintaining a Proper Balance Between the Interests of Society and the Rights of the Accused*, 4 U.C.L.A.-ALASKA L. REV. 242 (1974). Certain portions of the following discussion on the constitutional guarantee were published, in an entirely different context, in that review.

[2] 386 U.S. 213 (1967).

[3] *Id.* at 223.

[4] Smith v. Hooey, 393 U.S. 374, 374–75 (1969); Klopfer v. North Carolina, 386 U.S. 213 (1967).

[5] United States v. Ewell, 383 U.S. 116, 120 (1966).

[6] *Id.*

[7] Rutherford v. State, 486 P.2d 946, 956 (Alaska 1971) (Connor & Rabinowitz, J.J., dissenting in part). In Barker v. Wingo, 407 U.S. 514, 532 (1972), the Court stated that the most serious interest of the accused protected by the speedy trial right is the one first mentioned above because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system."

[8] Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 932 (1970).

[9] *Id.* at 931–32. In 1970 Chief Justice Burger strongly supported legislative action which would provide a remedy to try defendants within sixty days after indictment. He predicted that this practice "would sharply reduce the crime rate." Most recently, however, he has voiced the concern of the Judicial Conference of the United States that the Speedy Trial Act of 1974 may pose difficult problems for the federal judiciary. *See* Burger, *The State of the Judiciary—1975*, 61 A.B.A.J. 439, 442–43 (1975); note 74 *infra*.

[10] 398 U.S. 30, 39 (1970) (Brennan, J., concurring).

[11] *Id.* at 42–43 (Brennan, J., concurring).

[12] 18 U.S.C.A. § 3161 (Supp. 1975).

the danger of recidivism in this country and contains provisions strengthening the supervision over persons released pending trial.[13] The Act also seeks more stringently to safeguard the sixth amendment speedy trial guarantee by establishing time limits within which an accused must be brought to trial.[14] In passing the Speedy Trial Act, Congress specifically determined that neither the previous decisions of the Supreme Court nor the implementation of rule 50(b) of the Federal Rules of Criminal Procedure had provided the courts with adequate guidance on the speedy trial question.[15] Under rule 50(b), the district courts have developed plans "for the prompt disposition of criminal cases" within their districts, some based on a model plan prepared by the Administrative Office.[16] When viewed in its entirety, the Speedy Trial Act is a highly commendable piece of legislation. It is submitted, however, that the Act contains one basic flaw. That weakness is that the time period to measure whether the accused has been denied his speedy trial guarantee does not begin to run until he is arrested or served with a summons.[17] It is submitted that this provision deprives both the accused and society of many of the benefits which the Act allegedly confers.

This article shall first examine the minimum constitutional standards which must be maintained in order to secure the defendant his right to a speedy trial. Next, the pertinent provisions of the Speedy Trial Act of 1974 will be discussed and compared with the minimum safeguards required by the Constitution. Last, this article will examine the issue of when the speedy trial time period should attach in order to better promote the interests of both society and the accused.

I. The Federal Constitutional Guarantee

In determining the minimum constitutional safeguards which must be protected in order to assure the defendant his right to a speedy trial, the fact appears that although this right is provided for by the sixth amendment to the Constitution, the Supreme Court has dealt with this guarantee only infrequently.[18] In *Strunk v. United States,*[19] the Court held that the sole constitutional remedy for a denial of the right to speedy trial was dismissal of the charges. Prior to the recent case of *Barker v. Wingo,*[20] however, the Court had never even attempted to establish the standards by which the speedy trial guarantee is to be judged.[21]

In *Barker,* the Supreme Court took the approach that the speedy trial right must be enforced by balancing the actions of the prosecution and the accused against one another on an ad hoc basis.[22] The Court identified four factors that courts should assess in deciding whether the accused has been deprived of his right to a speedy trial: "Length of delay, the reason for the delay, the defendant's assertion

[13] *Id.*

[14] 16 BNA Cr. L. Rep 2309 (January 8, 1975). The limitations on trial delay apparently were considered by Congress partly as a *means* of reducing crime and recidivism. *See* 1974 U.S. Code Cong. & Ad. News 7402, 7408–09.

[15] 1974 U.S. Code Cong. & Ad. News at 7404–05.

[16] 1974 U.S. Code Cong. & Ad. News at 7405–06. The primary drawback Congress found with the plans drawn up under rule 50(b) was that they encouraged the perpetuation of the status quo through their leniency. *Id.*

[17] 18 U.S.C.A. § 3161(b). This section provides in pertinent part that an information or indictment "charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges."

[18] *See, e.g.,* United States v. Ewell, 383 U.S. 116, 120 (1966); Pollard v. United States, 352 U.S. 354, 361 (1957); Beavers v. Haubert, 198 U.S. 77, 87 (1905). The right to a speedy trial has also been secured by the constitutions of the various states. For this reason, as well as because of the Supreme Court's mandate in *Klopfer,* more than thirty-five states have enacted, either by court rule or by statute, provisions to alleviate pretrial delay in criminal cases. 1974 U.S. Code Cong. & Ad. News 7402. Along with the lower federal courts, many of which have promulgated rules designed to provide speedy trials, the states present a contrast to the Supreme Court in the frequency with which they have dealt with speedy trial issues. *See* 1974 U.S. Code Cong. & Ad. News at 7405–06.

[19] 412 U.S. 434 (1973).

[20] 407 U.S. 514 (1972).

[21] *Id.* at 516. Prior to *Barker,* the Supreme Court had rarely dealt with the speedy trial guarantee at any length. The cases largely concerned tangential issues. Yet dicta in these holdings were relied on by courts seeking to restrict the right to a speedy trial. For a detailed analysis see Note, *The Lagging Right to a Speedy Trial,* 51 Va. L. Rev. 1587 (1965).

[22] 407 U.S. at 530. For a good discussion on the balancing test see Comment, *Devitalization of the Right to a Speedy Trial: The "Per Case" Method v. The "Per Se" Theory,* 5 St. Mary's L.J. 106, 111–14 (1973).

of his right, and prejudice to the defendant." [23] The Court emphasized that none of these four factors is sufficient alone to support a finding that the accused was deprived of his constitutional right to a speedy trial. Rather, all of the above factors are interrelated and must be considered together.[24]

Concerning the length of permissible delay, the Supreme Court concluded that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." [25] The Court noted that the right to a speedy trial is less clearly defined than other procedural guarantees, and consequently it is difficult to determine with exactness when the right has been denied.[26] For that reason, whether delay has been prejudicial to the defendant's right to a speedy trial is dependent upon the particular facts and circumstances of each case.[27]

In discussing possible excuses for delay, the Court held that different weights should be allocated to different sources of delay. A deliberate effort to delay the trial in an attempt to injure the defense should be counted heavily against the government.[28] A less blameworthy reason such as negligence or overcrowded calendars should be counted less heavily.[29] Finally, a justifiable reason, such as a missing material witness, should be considered an appropriate basis for a delay and should not, therefore, be weighed against the government.[30]

Concerning the defendant's assertion of his right, the Court rejected the concept that a defendant waives his right to a speedy trial for all periods prior to which such defendant has not demanded a speedy trial.[31] The Court reasoned that the right to a speedy trial, like all fundamental constitutional rights, cannot be presumptively waived.[32] However, the Court did adopt the rule that the defendant's failure to demand his right to a speedy trial is a relevant factor to be considered in determining whether he has been deprived of this right.[33] The Court emphasized that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." [34]

[23] 407 U.S. at 530. *See* Godbold, *Speedy Trial —Major Surgery For A National Ill,* 24 ALA. L. REV. 265, 274–88 (1972). In his article, Judge Godbold thoroughly examines each of these four factors and the importance that should be given to each in determining whether the defendant has been denied his speedy trial guarantee.

[24] 407 U.S. at 533.

[25] *Id.* at 523. This is a separate question from that of whether a defendant's right to speedy trial should be quantified specifically for policy reasons. *See* ABA STANDARDS RELATING TO SPEEDY TRIAL § 2.1, at 14–16, Comment (Approved Draft 1970).

[26] 407 U.S. at 521.

[27] *Id.* at 530–31.

[28] *Id.* at 531. See United States v. Marion, 404 U.S. 307, 325 (1971) (no prejudice alleged—no showing of intentional delay); Pollard v. United States, 352 U.S. 354, 361 (1957) (delay not intentional or oppressive).

[29] 407 U.S. at 531. *See* Strunk v. United States, 412 U.S. 434, 436 (1973). The recent case of United States v. Roemer, 514 F.2d 1377 (2d Cir. 1975), provides an excellent example of negligent delay. In that case, a 56-month post-indictment and pre-trial delay was upheld. The kind of delay sanctioned in *Roemer* has often been allowed in federal and state courts, especially when, as in *Roemer,* the accused has failed to show that prejudice resulted from the delay.

[30] 407 U.S. at 531. The states and lower federal courts have for years recognized that certain reasons for delay are justifiable. If delay is occasioned by the fault of the accused himself, for example, as when he deliberately evades arrest, it has generally been held that he cannot challenge that delay as violating any right he may have to a speedy trial. *See e.g.,* United States v. Morris, 308 F. Supp. 1348 (D.C. Pa. 1970); State v Harrington, 92 Idaho 317, 442 P.2d 453 (1968).

[31] 407 U.S. at 525. Prior to *Barker,* one of the leading federal cases which adopted the "demand-waiver doctrine" was United States v. Lustman, 258 F.2d 475, 478 (2d Cir.), *cert. denied,* 358 U.S. 880 (1958). For a good analysis of the doctrine see Note, *The Right to a Speedy Criminal Trial,* 57 COLUM. L. REV. 846, 852–55 (1957).

[32] 407 U.S. at 525.

[33] *Id.* at 528.

[34] *Id.* at 532. Several appellate decisions in federal and state courts had required the defendant to demand trial in order to commence the time running under various speedy trial statutes despite the fact that most speedy trial acts are silent on the question. Annot., 57 A.L.R.2d 302, 326 (1958); Annot., 129 A.L.R. 572, 587 (1940).

> A strong minority [of appellate cases], however, rejects the "demand doctrine" and requires only a motion to dismiss filed before trial. These courts place the duty of procuring prompt trial upon the state, attributing significance to the fact that only the state is empowered to bring the charge to trial. Forcing defendant to press for speedy trial would, according to this view, enable the state to do nothing until defendant acts, and then, if he acts too late, to claim waiver.

Note, *The Right to a Speedy Criminal Trial,* 57 COLUM. L. REV. 846, 853 (1957). *See also id.* at 852–55.

The American Bar Association, in setting its minimum standards relating to speedy trial, also rejected the demand-waiver requirement as a general rule:

The Court also noted that prejudice to the defendant should be assessed in reference to the interests of the accused which the speedy trial clause is designed to protect.[35] If witnesses die or otherwise become unavailable during a delay, the prejudice is clear. And the same is true if defense witnesses are unable to remember accurately events of the distant past.[36] Prejudice also occurs through prolonged pre-trial incarceration. The Court observed that time spent in jail by a person not yet found guilty impairs the defendant's ability to contact witnesses, accumulate evidence, or otherwise prepare his defense.[37] Finally, even if the defendant is not imprisoned prior to trial, he still suffers great anxiety by being subjected to restraints upon his freedom and to public suspicion.[38]

Under the balancing test, as promulgated in *Barker,* none of the above four factors—length of the delay, cause of the delay, assertion of the right, and prejudice to the defendant—is sufficient alone to find that the accused was deprived of his federal constitutional right to a speedy trial. Rather, these four factors are interrelated and must be considered together in determining whether the federal speedy trial right has been abridged.

II. The Speedy Trial Act of 1974

The Speedy Trial Act of 1974[39] must meet the minimum constitutional standards established by the United States Supreme Court. Provided that these minimum standards are met, the Congress is free to expand this guarantee so as to provide greater protection for the individual defendant.[40]

The Act clearly exceeds the minimum constitutional requirements. First, it provides for a definitive time period within which the defendant must be brought to trial. In establishing this time period, the Act states that an information or indictment charging an accused with the commission of a crime must be filed within thirty days from the time of arrest or from the time that he was served with a summons.[41] The arraignment must then be held within ten days from the time of the information or indictment.[42] Upon a plea of not guilty, the trial must then be held within sixty days after arraignment. Hence, from the date of his arrest, the defendant must be brought to trial within 100 days.[43]

One reason for this position is that there are a number of situations, such as where the defendant is unaware of the charge or where the defendant is without counsel, in which it is unfair to require a demand. . . . Jurisdictions with a demand requirement are faced with the continuing problem of defining exceptions, a process which has not always been carried out with uniformity. . . . More important, the demand requirement is inconsistent with the public interest in prompt disposition of criminal cases. Consistent with the policies expressed in Part I of these standards, the trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge.

ABA, *supra* note 25. The ABA standards do establish special procedures for those cases in which the person charged with a crime is imprisoned for another offense. In those cases, according to the standards, the prosecutor should not proceed to trial unless the prisoner makes a demand since the prisoner should have the option of not making the demand in the hope the charges will be dropped before or at the time he completes his sentence. *Id.* § 2.2, at 17, Comment at 18.

[35] 407 U.S. at 532. *See* text accompanying notes 5–7 *supra.*

[36] 407 U.S. at 532.

[37] *Id.* at 532–33.

[38] *Id.* at 533.

[39] 18 U.S.C.A. § 3161 (Supp. 1975).

[40] *See generally* Smith v. Hooey, 393 U.S. 374, 374–75 (1969); Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967).

[41] 18 U.S.C.A. § 3161(b).

[42] *Id.* § 3161(c).

[43] *Id.* It is interesting to note that some states have already enacted statutes which establish a definitive time limit within which the defendant must be brought to trial. *See e.g.,* Cal. Penal Code § 1382 (West 1970); Ill. Rev. Stat. ch. 38, §§ 103-05(a) (1973); Iowa Code Ann. §§ 795.1, 795.2 (Supp. 1975); Mass Ann. Laws ch. 277, § 72 (Supp. 1975); Pa. Stat. Ann. tit. 19, § 781 (Supp. 1975); Wash. Rev. Code §§ 10.37.020, 10.46.010 (Supp. 1975). The California statute allows fifteen days from the time a felony defendant is held to answer to the filing of the information, and a time period of sixty days from the information to the trial. A shorter period is established for misdemeanors. The Illinois act allows a time period of 120 days between arrest and trial. The Iowa statute provides for a thirty-day limit from the date the accused is held to answer until indictment and a sixty-day limit from indictment to trial. The Massachusetts law contains a six-month limit from time of imprisonment or bail. The Pennsylvania law provides for a six-month period from the date of commitment. The Washington statute sets a limit at thirty days from the date the accused is held to answer till indictment or filing of an information. The model plan now in effect in many federal district courts provides for a twenty-day and thirty-day

To enable the federal courts to fully comply with these time periods, the Act will take effect over a gradual period. During the first year after the Act takes effect, the maximum time limit between arrest and indictment is sixty days. For the second year, it is forty-five days and for the third year, thirty-five days.[44] The maximum time limit between arraignment and trial is 180 days for the first year, 120 days for the second year, and eighty days for the third year.[45] In the event that any federal court is unable to comply with the Act due to the position of its court calendar, the chief judge may under certain conditions apply for a suspension of such time periods,[46] provided that the suspension does not exceed one year.[47] Any additional suspensions cannot be granted without congressional approval.[48] In addition, none of the above time limitations will take effect until "on or after the date of expiration of the twelve-calendar-month period following July 1, 1975." [49] Congress, however, has provided an interim plan to commence ninety days after July 1, 1975, and terminating on the date immediately preceding the expiration of the above twelve-calendar-month period.[50] The interim plan provides that in regard to detained persons who are incarcerated solely because they cannot pay bail[51] and to released persons who are awaiting trial and are considered as being of high risk,[52] the trial of such persons shall be held within ninety days following the commencement of such continuous detention or designation of high risk.[53] Hence, although the ultimate aim of the Act is to require that the accused be brought to trial within 100 days after arrest, it will probably take the federal courts five years to achieve this goal.

In determining whether the accused has been denied his statutory right to a speedy trial, the Act provides for a number of delay periods which are to be excluded in computing the relevant time limit.[54] These delays are thus deemed justifiable within the terms of the Act. They include, but are not limited to, periods of delay resulting from other proceedings regarding the defendant;[55] delays requested by the government and consented to by the accused, with the approval of the court, "for the purpose of allowing the defendant to demonstrate his good conduct";[56] delays caused by the absence or unavailability of the accused or an essential witness;[57] delays resulting from the defendant's mental or physical incompetency to stand trial;[58] and delays resulting from the

period respectively between indictment and arraignment for defendants in custody or released prior to trial. Between arraignment and entry of a guilty plea for defendants in custody is a period of ninety days and for other defendants a period of 180 days. Thereafter the sentencing of a defendant must take place within forty-five days.

[44] 18 U.S.C.A. § 3161(f).

[45] *Id.* § 3161(g).

[46] *Id.* § 3174(a). Before applying for a suspension of these time periods, the chief judge and the planning group must be satisfied that the resources of the district court in question "are being efficiently utilized."

[47] *Id.* § 3174(b). Before granting such a suspension, all relevant parties must conclude that "no remedy for such congestion is reasonably available."

[48] *Id.* § 3174(c).

[49] *Id.* § 3163(a)(1)(b)(1).

[50] *Id.* § 3164(a).

[51] *Id.* § 3164(a)(1).

[52] *Id.* § 3164(a)(2).

[53] *Id.* § 3164(b). In the event that trial is not held within ninety days, § 3164(c) provides that if the delay was not caused by the defendant or his counsel and if such defendant is still incarcerated because he cannot make bail, then he must be released pending trial. If, however, a defendant is released and is designated as being of high risk, an intentional delay on his part will prompt the court to reconsider the conditions of his release in order to insure his appearance at trial.

[54] *Id.* § 3161(h). For an interesting comparison see People v. Stillman, 391 Ill. 227, 62 N.E.2d 698 (1945), holding that when the defendant obtains a continuance, the 120-day Illinois statute of limitations *begins running anew* from the end of the continuance.

[55] *Id.* § 3161(h)(1). Such other proceedings involving the defendant include trials relating to other charges against the accused, interlocutory appeals, hearings on pretrial motions, and examinations and hearings concerning his mental competency or physical incapacity.

[56] *Id.* § 3161(h)(2).

[57] *Id.* § 3161(h)(3)(A). In defining the meaning of absence or unavailability, § 3161(h)(3)(B) states:

> For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

[58] *Id.* § 3161(h)(4).

granting of a continuance when "the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." [59]

If the time limits provided for by the Act, excluding periods permitted by justifiable delays, are not adhered to by the government, the charges against the accused must be dismissed or otherwise dropped either with or without prejudice. In the case of excessive delay between arrest and indictment or information, the charges are dropped automatically.[60] If the excessive delay occurs between arraignment and trial, however, the indictment or information will be dismissed only on motion by the accused. If the defendant fails to make this motion for dismissal before he goes on trial or before he enters a plea of guilty or nolo contendere, he shall be deemed to have waived this right to dismissal.[61] In determining whether a particular case should be dismissed with or without prejudice, the Act provides that the court shall consider, but is not limited to, each of the following factors: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice."[62]

[59] *Id.* § 3161(h)(8)(A). In determining whether to grant a continuance, § 3161(h)(8)(B) provides that the court must consider, among others, the following factors:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

Only a few states have attempted to enumerate all lawful excuses for delay, *e.g.*, VA. CODE ANN. § 19.1–191 (Supp. 1975). In these states, the most frequently listed excuses are delay "upon the application of the defendant", *e.g.*, ALASKA STAT. § 12.20.050(a)(3)(1972), and delay because of the need to gather material evidence, *e.g.*, ARK. STAT. ANN. § 43–1711 (1964). The model plan in effect in many federal districts now provides broad discretion in the extension of time limits. 1974 U.S. CODE CONG. & AD. NEWS at 7406. Similarly, the American Bar Association's standards on speedy trial list numerous excluded periods. *See* ABA, *supra* note 25, at 25–26 & 26–32, Comment. The following excludable periods of delay are listed in the ABA standards and have often found support in state and federal court opinions as well as state statutes:

1. Delay resulting from other proceedings concerning the defendant and incompetency to stand trial. *See* ILL. REV. STAT. ch. 38 § 103–5(a) (1973); W. VA. CODE ANN. § 62–3–21 (1966).
2. Delay resulting from congestion of court dockets due to exceptional circumstances. Many states excuse delay even when congestion of the courts is chronic. *See e.g.*, ARK. STAT. ANN. § 43–1710 (1964).
3. Delay requested or consented to by the defendant.
4. Delay requested by the prosecution if material evidence unavoidably will not be available until a later date or if other exceptional circumstances require additional time for the preparation of the state's case. *See* ILL. REV. STAT. ch. 38. § 103–5(c) (1973); ARK. STAT. ANN. § 43–1710 (1964).
5. Delay resulting from the absence or unavailability of the defendant. *See* VA. CODE ANN. § 19.1–191 (Supp. 1975). In numerous cases, courts have held that circumstances did not justify delay when the accused was "unavailable" only because of the negligence of authorities in failing to pursue him, and not because of any deliberate evasion on the part of the accused. *See, e.g.*, United States v. Kojima, 3 Hawaii Dist. 381 (1909); People v. Serio, 13 Misc. 2d 973, 181 N.Y.S.2d 340 (1958).
6. The period from a dismissal upon motion of the prosecuting attorney and the filing of a subsequent charge for the same offense or an offense required to be joined with it. It is felt that if dismissal by the prosecutor were to operate so as to begin the time running anew upon a subsequent charge of the same offense, this would open a way for the complete evasion of the speedy trial guarantee. Brooks v. People, 88 Ill. 327, 330 (1878).
7. Delay resulting from joint trial with a codefendant as to whom the time for trial has not run where there is not good cause for severance. *See* FLA. STAT. ANN. § 918.016 (1974).

[60] 18 U.S.C.A. § 3162(a)(1).

[61] *Id.* § 3162(a)(2).

[62] *Id.* § 3162(a)(1)(2). The consequences of a delay in violation of the right to speedy trial are often inexplicit in state statutes. Some do declare there is always a ban to subsequent prosecution, *e.g.*, FLA. STAT. ANN. § 918.015 (1974). Others make improper delay a ban only in misdemeanor cases, *e.g.*, UTAH CODE ANN. § 77–51–6 (1953). Some, but not all, state courts in states with ambiguous statutes establish a ban. *See, e.g.*, Brummitt v. Higgins, 80 Okla. Crim. 183, 157 P.2d 922 (1945); People v. Faulkner, 28 Cal. App. 3d 384, 104 Cal. Rptr. 625 (1972). This is the approach

When one compares the Speedy Trial Act with the constitutional requirements formulated by the Supreme Court, the following facts emerge. First, under the Constitution, there is no definitive time period within which the defendant must be brought to trial.[63] Under the Speedy Trial Act, the time limit is 100 days between arrest and trial.[64] Second, the Court has concluded that delays caused by negligence or overcrowded court calendars should not be weighed that heavily against the government.[65] Contrary to the Court's holding, the Act provides that "no continuance . . . shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government." [66] Third, under the Constitution, the defendant's failure to demand a speedy trial is an important variable in assessing whether he has been denied this guarantee.[67] The Act, however, states that the time period begins, without demand by the accused, once he is arrested or served with a summons.[68] The defendant can waive this statutory right only by failing to move "for dismissal prior to trial or entry of a plea of guilty or nolo contendere." [69] Fourth, under the Constitution, the factor of prejudice must be evaluated in terms largely dealing with whether the unjustifiable delay hampered the defendant in the presentation of his case.[70] The constitutional standard here deters a court from holding that the defendant was denied his constitutional right to a speedy trial, for by so holding, the state is forever barred from reprosecuting the accused on that charge. The Act however, gives the court discretionary power to dismiss the case either with or without prejudice.[71] Because the defendant's remedy is not so drastic, the court can dismiss without prejudice by the state's mere noncompliance with the Act, whether that noncompliance was with good or bad intentions.[72] When dismissal is with prejudice, however, the Act provides that the court examine the same type of factors which are constitutionally mandated in *Barker*.[73]

From the above discussion, it may fairly be concluded that the Speedy Trial Act of 1974 meets and exceeds the minimum constitutional requirements established by the United States Supreme Court. There remains, however, one major gap in the federal legislation which needs to be corrected. That problem is determining the proper time in which the defendant's right to a speedy trial should attach.[74]

---

taken in the ABA standards also. *See* ABA, *supra* note 25, at 40. In contrast, the model plan provides no sanction for the failure of a district court to provide a speedy trial, with the exception of release from custody for defendants who are incarcerated prior to trial. 1974 U.S. CODE CONG. & AD. NEWS at 7406. The requirement is universally supported by all plans for speedy trial that the defendant must move for dismissal prior to trial or plea of guilty. Otherwise, the right to speedy trial is waived. *See, e.g.* Annot., 57 A.L.R.2d 302, 336, 343 (1958); ABA, *supra* note 25, at 41.

[63] Barker v. Wingo, 407 U.S. 514, 523 (1972). In *Barker*, the Court stated that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specific number of days or months."

[64] 18 U.S.C.A. § 3161(b)(c).

[65] 407 U.S. at 531; *see* Strunk v. United States, 412 U.S. 434, 436 (1973).

[66] 18 U.S.C.A. § 3161(h)(8)(C).

[67] 407 U.S. at 528.

[68] *See* 18 U.S.C.A. § 3161(b).

[69] *Id.* § 3162(a)(2).

[70] 407 U.S. at 532.

[71] 18 U.S.C.A. § 3162(a)(1)(2).

[72] *Id.* The Act provides that if the time limits are not adhered to, and if there are no justifiable delays or a waiver on the defendant's part, the court must dismiss the charges. The only discretionary matter for the judge is to dismiss with or without prejudice.

[73] *See* 407 U.S. at 528–33; 18 U.S.C.A. § 3162(a)(1)(2).

[74] Other criticisms have been leveled at the Speedy Trial Act. Chief Justice Burger and the majority of judges in the Judicial Conference of the United States disapproved the Act because they thought that it was unnecessary to supplant the rule 50(b) plans and because they anticipated a crisis in the courts resulting from the Act unless more federal judges were appointed and more money appropriated for the courts. *See* Burger, *The State of the Judiciary—1975*, 61 A.B.A.J. 439, 442–43 (1975). Convincing testimony by other federal judges was presented to the Congress, however, indicating that because of the phase-in provisions of the Speedy Trial Act there would be no problem for the federal judiciary in meeting the Act's time limits even without additional resources, personnel and facilities. 1974 U.S. CODE CONG. & AD. NEWS at 7407. Regarding the contention that the rule 50(b) plans were effective, the Congress found to the contrary. *See* note 16 *supra*.

Another criticism made of the Speedy Trial Act is that its mandatory dismissal provisions will allow persons posing a danger to the public to be released and will undermine the public's faith in the criminal justice system. 1974 U.S. CODE CONG. & AD. NEWS at 7447. Nevertheless, it has been held in Strunk v. United States, 412 U.S. 434 (1973),

III. The Time Period Attachment Issue

Although the defendant is afforded various safeguards under both the constitutional right to a speedy trial and the Speedy Trial Act of 1974, the question persists as to when the defendant has access to these safeguards.[75] The Speedy Trial Act provides that the time limit shall commence when the defendant is "arrested or served with a summons in connection with such charges." [76] If the accused is neither arrested nor served with a summons prior to the issuance of an information or indictment against him, the time period shall begin upon the filing of such information or indictment.[77]

In *United States v. Marion*,[78] in which three years passed between the commission of the alleged crime and the filing of the indictment, the Supreme Court held that the particular protections guaranteed by the speedy trial clause of the sixth amendment only take effect upon "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge. . . ." [79] In a separate concurring opinion,[80] Justice Douglas, joined by Justices Brennan and Marshall, argued that the time period should attach when the prosecution acquires sufficient evidence to bring charges against the accused.[81]

It is submitted that the argument proposed by Justices Douglas, Brennan, and Marshall in *Marion* deserves serious consideration.[82] Although delays prior to arrest or indictment do not usually subject the prospective defendant to incarceration, anxiety, or public accusation, such delays may impair the ability of the accused to defend himself.[83] When an individual has been formally accused of a specific offense, he is aware of the charges against him and may proceed to prepare his defense.[84] Where the prospective defendant has not been formally charged, however, he may be unaware that criminal charges will subsequently be

---

that the sole remedy for a denial of the constitutional speedy trial right is dismissal. This and a complete discharge from later prosecution are also the only effective remedy.

It is also said that short time limits in the Act will discourage prosecutors from bringing complicated cases. 1974 U.S. Code Cong. & Ad. News at 7447. However, the Government has no reason to doubt the courts' ability to reach just solutions through use of the Act's continuance provisions.

Another criticism of the act is that it will result in a decrease in guilty pleas, which are necessary if the courts are not to be overloaded with work. *Id.* Apart from the questionable desirability of retaining the guilty plea as a part of our system of justice, there is evidence in the experience of the Second Circuit with its speedy trial plan that guilty pleas may even be increased under the Act. 1974 U.S. Code Cong. & Ad. News at 7450.

Finally, the argument is made that the Speedy Trial Act, regardless of when the right to a speedy trial attaches under it, deals with only part of the problem of delay in our criminal justice system. *See* Taylor, *The Long Wait for a Speedy Trial*, 80 Case & Com. 3 (1975), for a fine exposition of the over-all problem. Many of the reforms that will be necessary if the problem is to be solved, however, would be better attacked by some means other than speedy trial legislation. Delay in sentencing, for example, can hardly be assaulted under the right of speedy *trial* of an act implementing it. It can only yield to a due process argument. *See* Erbe v. State, 25 Md. App. 375, 336 A.2d 129 (1975).

[75] The author has stated substantial portions of the following discussion in a previous article. Steinberg, *Right to Speedy Trial: Maintaining a Proper Balance Between the Interests of Society and the Rights of the Accused*, 4 U.C.L.A.-Alaska L. Rev. 242, 254–60 (1974).

[76] 18 U.S.C.A. § 3161(b).

[77] *Id.* § 3161(c). The provisions of the Speedy Trial Act dealing with the attachment of the speedy trial time period follow generally the procedures adopted in the majority of states that have dealt with the question. *See*, State v. Almeida, 54 Hawaii 443, 509 P.2d 549 (1973); Note, *The Right to a Speedy Criminal Trial*, 57 Colum. L. Rev. 846, 847 (1957). The American Bar Association standards for speedy trial also follow the majority rule. *See* ABA, *supra* note 25, at 16–17 & 17–23, Comment. The model plan, in contrast, provides that various speedy trial time limits attach at arraignment and indictment. 1974 U.S. Code Cong. & Ad. News 7406.

[78] 404 U.S. 307 (1971).

[79] *Id.* at 320.

[80] *Id.* at 326, 334–35. In *Marion*, the defendants were charged with conducting a fraudulent business which involved misrepresentations, alterations of contracts, and intentional nonperformance of contracts. Because the crime included vast interstate aspects, the victims were widely dispersed and difficult to locate. Because these extenuating circumstances made it difficult for the government to prosecute, Justice Douglas, joined by Justices Brennan and Marshall, concurred in the result by holding that the three year period did not violate the defendants' right to a speedy trial.

[81] *Id.* at 330–31 (Douglas, J., concurring).

[82] *Id.*

[83] *Id.* at 331 (Douglas, J., concurring); United States v. Wahrer, 319 F. Supp. 585, 587 (D. Alaska 1970).

[84] *Cf.* 319 F. Supp. at 587.

brought against him.[85] Thus, where there is no formal accusation, "the State may proceed methodically to build its case while the prospective defendant proceeds to lose his." [86]

Justice White, writing for the majority in *Marion,* dealt with the above problem by stating:

> Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context.[87]

Under the majority's holding in *Marion,* then, the state may formally bring charges against the accused at any time it wishes, as long as the applicable statute of limitations has not run, and still not infringe upon the sixth amendment right to a speedy trial.[88]

Responding to the majority in *Marion,* Justice Douglas stated that the obligation which the sixth amendment "places on Government officials to proceed expeditiously with criminal prosecutions would have little meaning if those officials could determine when that duty was to commence." [89] It would also seem that to allow the state to delay prosecution until a strategically advantageous time arises undermines the purposes of both the applicable statute of limitations and the right to a speedy trial.

The purpose of the statute of limitations is to protect the individual against the bringing of overly stale criminal charges.[90] Thus, the statute acts as a shield to protect the prospective defendant. It should not be used, in effect, to deprive, or at least to limit the scope of, a defendant's constitutional and statutory rights. It would be more in accord with the policy underlying the statute of limitations to hold that the constitutional and statutory right to a speedy trial attaches from the time that the state has sufficient evidence to prosecute. The problem with this approach is that it would impose difficult problems in determining the point at which the prosecution has sufficient evidence to prosecute. At the least, however, this approach might be used in measuring the speedy trial time period where there is evidence of prosecutorial misconduct. Thus, where the state hesitates in bringing charges for no other reason than to impair the defendant's ability to defend, the courts ought to measure the speedy trial time period from the time that the state could have brought charges. This, in effect, may be a due process guarantee, but it amounts to the same thing. Certainly, if there is both prosecutorial misconduct and prejudice to the defendant, the state should not be allowed to benefit.

On the other hand, a significant purpose promoted by the speedy trial right is to preserve the integrity of the fact-finding process.[91] In order to uphold the validity of this truth-finding process, the key issue is whether such delays impinge upon the trustworthiness of verdicts and not whether the delays occurred before arrest or indictment. Since delays occurring before arrest or indictment threaten the validity of the fact-finding process just as much as delays occurring after arrest or indictment, the right to a speedy trial should arguably attach as soon as the prosecution has

[85] Note, *The Right to Speedy Trial,* 20 STAN. L. REV. 476, 489 (1968).

[86] 404 U.S. at 331 (Douglas, J., concurring).

[87] *Id.* at 321–22. *See also* United States v. Ewell, 383 U.S. 116, 122 (1966).

[88] Justice White said the remedy for such governmental misconduct is to be found in the due process clause of the fifth amendment. In *Marion,* 404 U.S. at 324, he observed:

> [T]he statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment 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.

[89] 404 U.S. at 331–32 (Douglas, J., concurring).

[90] *Id.* at 322; United States v. Ewell, 383 U.S. 116, 122 (1966). It might be argued that statutes of limitations are sufficient to protect an accused person's right to speedy trial, except that these statutes establish periods of several years in length. Obviously, these statutes serve only to set up the outermost boundaries for prosecutorial inaction, boundaries which cannot be transgressed for any reason. Within these boundaries, there must be more restrictive ones, which can be ignored only for good cause, if the right to speedy trial is to be fully protected.

[91] Rutherford v. State, 486 P.2d 946, 954 (Alaska 1971).

sufficient evidence to bring charges against the defendant.[92]

Again, the implementation of the above approach raises difficult problems. In addition to the relevant factual problem of determining *when* the prosecution has or has had sufficient evidence, there is the prior problem of determining *what* is sufficient evidence. To define "sufficient evidence" as evidence sufficient to prove the defendant's guilt beyond a reasonable doubt, or even evidence sufficient to establish guilt by a preponderance of the evidence, gives the prosecution an unfair advantage. Under either test, the state may always argue that it has not acquired sufficient evidence and that the uncertainty of a jury verdict requires the state to relentlessly pursue the investigation.

In order to combat this problem, sufficient evidence must be defined as that amount of evidence necessary to establish that "there is *probable cause* to believe that an offense has been committed and that the defendant has committed it . . . ." [93] Since probable cause is sufficient evidence for the state to arrest the prospective defendant,[94] there is no adequate reason why the state should not be compelled to arrest and charge the defendant at that time. Defining sufficient evidence as evidence sufficient to show probable cause compels the state to prosecute at a more readily ascertainable time. At the same time, such a construction enables the defendant to adequately prepare his defense.

Another difficult problem is determining who should bear the burden of proving when the prosecution has sufficient evidence. To expect the prosecution to maintain a day-by-day account describing the precise time it acquired sufficient evidence to prosecute places an intolerable burden upon the efficiency of the criminal justice system.[95] For this reason, the defendant should bear the burden of proving by a preponderance of the evidence that the state had sufficient evidence to prosecute prior to the date on which charges were formally brought. This rule will allow the defendant a remedy in cases of clear prosecutorial misconduct, and at the same time, it will not burden the prosecutorial efforts of the state.

There are certain situations, however, in which the prosecution justifiably delays in bringing formal charges against an accused. Such situations occur when the delay is absolutely necessary to promote the ordinary processes of justice. A clear example is an undercover investigation involving several potential defendants in which the arrest of one suspect before a certain strategic time would destroy the entire investigation. Under such circumstances, the state's interest in protecting society from crime would justify the delay.[96] Where the delay is not absolutely necessary, however, the prosecution may justify the delay only if it can prove that the delay was reasonably necessary to promote the ordinary processes of justice and that the delay did not prejudice the accused in the presentation of his defense.

In order to protect the individual defendant from prejudicial delay occurring before formal charges are filed, while, at the same time, preserving society's interest in holding the guilty accountable for their crimes, it is proposed that the following three-step test should be employed to determine when the constitutional and statutory right to a speedy trial should attach:

(1) The right to a speedy trial attaches, without demand by the accused, from the time the defendant is arrested, initially arraigned, or charged, whichever is first;

(2) In order to avoid prosecutorial misconduct, the defendant may prove by a preponderance of the evidence that the state had sufficient evidence to prosecute him prior to the date on which charges were formally brought. If the defendant successfully proves the above, then the time period attaches from such time that the prosecution had sufficient evidence to prosecute;

(3) If the defendant satisfies the conditions of step two, the state can rebut that attachment if

[92] *See* United States v. Wahrer, 319 F. Supp. 585, 587 (D. Alaska 1970); Penney v. Superior Court, 28 Cal. App. 3d 941, 105 Cal. Rptr. 162 (1972).

[93] FED. R. CRIM. P. 4 (emphasis added). The author has previously argued this standard. Steinberg. *supra* note 75, at 257.

[94] *Id.*

[95] *See* 404 U.S. at 321–22 n.13; Note, *Justice Overdue—Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95, 101–02 n.34 (1952).

[96] *See* Nickens v. United States, 323 F.2d 808, 814 (D.C. Cir. 1963) *cert. denied*, 379 U.S. 905 (1964) (Skelly Wright, J., concurring).

it proves by a preponderance of the evidence (i) that the delay was *absolutely* necessary to promote the ordinary processes of justice or (ii) that the delay was reasonably necessary and that it did not prejudice the accused in the presentation of his defense.[97] If the state is successful in this rebuttal, the time period attaches from the time the defendant was arrested, initially arraigned, or charged, whichever was first.

It is submitted that this three-step test is an equitable solution to the right to speedy trial attachment problem. The test enables the Speedy Trial Act to better achieve its goal of "reducing crime and the danger of recidivism" in this country.[98] The test also recognizes the speedy trial right, in practice as well as in theory, as a fundamental right provided for by the United States Constitution.

Conclusion

The Speedy Trial Act of 1974 was enacted in order to insure both the defendant's and society's interests in having speedy trials. By providing that the time period does not attach until the accused is arrested or served with a summons, however, the Act permits the Government to take such action at any convenient time within the applicable statute of limitations. Although the defendant can prove a denial of due process by showing that the state's delay was intentional and greatly prejudiced him in the presentation of his defense,[99] the fact is that the above allegations are extremely difficult to substantiate. In practical effect, then, the Act gives the Government its option to arrest the accused at the correct time or to delay in order that it may methodically "build its case." [100]

It is submitted that the proper solution to this problem will be implemented by the enactment of the following proposed statute:

> The time for trial shall attach, without demand by the accused, from the time the defendant is arrested, from the time of his initial arraignment, or from the time the charge is placed against the accused, whichever is first. If, however, the defendant should prove by a preponderance of the evidence that the state had sufficient evidence (*i.e.* probable cause) to prosecute him prior to the date on which charges were formally brought, then the time period shall attach when the prosecution had sufficient evidence (*i.e.* probable cause) to prosecute *unless* the state should prove by a preponderance of the evidence that (1) the delay was absolutely necessary to promote the ordinary processes of justice *or* that (2) the delay was reasonably necessary *and* that it did not prejudice the accused in the presentation of his defense.[101]

The above proposal adequately protects the individual defendant from prejudicial delays which may occur prior to the filing of formal charges. At the same time, it also preserves society's interest in bringing potentially guilty defendants promptly to trial. Thus, the proposed statute provides a proper balance between the interests of society and the rights of the accused. It should therefore be legislatively adopted.[102]

[97] *See generally* Nickens v. United States, 323 F.2d 808, 814 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 905 (1964) (Skelly Wright, J., concurring); Williams v. United States, 250 F.2d 19, 21 (D.C. Cir. 1957); Wilson v. State, 8 Md. App. 299, 311–12, 259 A.2d 553, 560 (1969). Where a delay is absolutely necessary to further the ordinary processes of justice, society's interest in holding the guilty accountable for their crimes must be given preference over any possible prejudice to an accused. It must be emphasized that in such a situation, the government's standard for justifying the delay is extremely high. The state must prove that the delay was not only reasonably necessary, but absolutely necessary. If the government can only show that the delay was reasonably justified, then it must also prove that the delay did not prejudice the defendant in the presentation of his case.

[98] 18 U.S.C.A. § 3161.

[99] 404 U.S. at 324.

[100] *Id.* at 331 (Douglas, J., concurring).

[101] *See* Steinberg, *supra* note 75, at 259, 260.

[102] *Id.*