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# CRIMINAL LAW

## DISMISSAL WITH OR WITHOUT PREJUDICE UNDER THE SPEEDY TRIAL ACT: A PROPOSED INTERPRETATION

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### I. INTRODUCTION

Since the Federal Speedy Trial Act[1] became effective on July 1, 1975, there has been much commentary criticizing the Act by both law review writers[2] and the courts.[3] While many of these criticisms have great merit, their value is merely academic, and the important inquiry confronting the courts is *how* certain provisions of the Act should be construed. This article shall propose a suggested interpretation of section 3162(a)(1)(2), which has been acknowledged by commentators to be the most controversial section of the Act.[4] This provision provides the court with discretionary authority to dismiss a case either with or without prejudice when the Act's time periods are violated.[5]

In order better to comprehend this provision within the framework of the Act, one must be aware of the relevant sections. First, the Act requires that an accused be brought to trial within definite time periods: filing of the indictment or information must occur within thirty days after arrest,[6] arraignment must be held within ten days thereafter,[7] and, upon a plea of not guilty, trial must be held within the following sixty days.[8] Hence, from the date of arrest, the accused must be tried within 100 days.[9] To enable the courts to adhere to this schedule, the above time limits will not become effective until July 1, 1979.[10] Until that time, three sets of time periods, imposed in yearly succession (the first began on July 1, 1976), will implement the Act.[11]

Second, the Act provides for a number of justifiable delay periods which are to be excluded in computing the statutory time limits.

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[1] 18 U.S.C. §§ 3161-74 (1970).

[2] *See, e.g.*, Hansen & Reed, *The Speedy Trial Act of 1974 in Constitutional Perspective*, 47 MISS. L.J. 365, 415-17 (1976) [hereinafter cited as Hansen & Reed]; Kozinski, *That Can of Worms: The Speedy Trial Act*, 62 A.B.A.J. 862, 862-64 (1976) [hereinafter cited as Kozinski]; Russ & Mandelkern, *The Speedy Trial Act of 1974: A Trap for the Unwary Practitioner*, 2 J. CRIM. DEF. 1, 27-29 (1976) [hereinafter cited as Russ & Mandelkern]; Steinberg, *Right to Speedy Trial: The Constitutional Right and its Applicability to the Speedy Trial Act of 1974*, 66 J. CRIM. L. & C. 229, 235-39 (1975) [hereinafter cited as Steinberg].

[3] *See, e.g.*, United States v. Tirasso, 532 F.2d 1298 (9th Cir. 1976), where the court stated: "It is discouraging that our highly refined and complex system of criminal justice is suddenly faced with implementing a statute that is so inartfully drawn as this one." *Id.* at 1301. For commentary on the *Tirasso* case, see 44 U.S.L.W. 1161 (April 20, 1976); Kozinski, *supra* note 2, at 864.

[4] *See* Hansen & Reed, *supra* note 2, at 415; Russ & Mandelkern, *supra* note 2, at 24.

[5] 18 U.S.C. § 3162(a)(1)(2).

[6] *Id.* § 3161(b). The thirty day time period also commences when the defendant is "served with a summons in connection with such charges." *Id.*

[7] *Id.* § 3161(c).

[8] *Id.*

[9] Some states have as well enacted statutes which require that an accused be brought to trial within definite time periods. *See, e.g.*, CAL. PEN. CODE § 1382 (West 1970); ILL. REV. STAT. ch. 38, §§ 103-05(a) (1973); IOWA CODE ANN. §§ 795.1, 795.2 (Supp. 1976); MASS. ANN. LAWS ch. 277, § 72 (Supp. 1976); PA. STAT. ANN. tit. 19, § 781 (Supp. 1976); WASH. REV. CODE §§ 10.37.020, 10.46.010 (Supp. 1976).

[10] *See* 18 U.S.C. § 3161(f)(g).

[11] *Id.* During the first year, the time period between arrest and indictment was sixty days, between indictment and arraignment ten days, and between arraignment and trial 180 days. For the second year, this time limit is forty-five days between arrest and indictment, ten days between indictment and arraignment, and 120 days between arraignment and trial. During the third year, there is allotted thirty-five days between arrest and indictment, ten days between indictment and arraignment, and eighty days between arraignment and trial. These transitional time limits carry no sanctions for noncompliance. Presumably, though, courts still retain their authority to dismiss for unnecessary delay under Rule 48(b) of the Federal Rules of Criminal Procedure. *See* Hansen & Reed, *supra* note 2, at 416.

Examples are delays attributable to the unavailability of the defendant or of an essential witness,[12] delays caused by other proceedings involving the accused,[13] and delays resulting from the 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."[14]

Third, section 3162(a)(1)(2) establishes sanctions for noncompliance with the statutory time limits. This provision, which will not become effective until July 1, 1979,[15] provides that if the applicable time limits (excluding periods allowed for justifiable delays) are not adhered to, the charges against the defendant must be dismissed either with or without prejudice. Where there is excessive delay between arrest and indictment, the charges are to be dropped automatically.[16] If the delay occurs between arraignment and trial, however, the defendant is expressly required to move for dismissal.[17] Failure to so move prior to trial or entry of a plea of guilty or nolo contendere constitutes a waiver of the right to dismissal.[18] In determining whether to dismiss a case either with or without prejudice, the section requires that the court shall consider, among others, 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."[19]

Law review commentators have severely criticized section 3162(a)(1)(2) for failing to require dismissal with prejudice,[20] observing that if the charges are dismissed without prejudice, the accused is subject to immediate rearrest and reindictment.[21] Further, if a formal accusation is dismissed on the defendant's motion, the Act's time periods commence anew and thus fail to provide the prosecution with any incentive to increase efficiency and attention to delayed cases.[22] In addition, dismissal without prejudice may inflict greater harm upon the accused than a trial delay, since reindictment could necessitate the hiring of new counsel and the duplication of legal and investigative procedures, all at severe monetary and psychological harm to the accused.[23] One commentator has concluded that "by merely imposing uniform time limits for the disposition of criminal cases without providing an effective sanction, [Congress] has made an empty shell out of the Speedy Trial Act."[24]

However meritorious these criticisms may be, Congress nevertheless has spoken, and the crucial issue is what questions should be considered by the courts in determining whether a dismissal should be with or without prejudice. This article shall attempt to confront this issue by raising and proposing solutions to the following inquiries: (1) Is the district court's determination to dismiss with or without prejudice a question of fact or law? (2) May the court dismiss with prejudice even though there has been no speedy trial constitutional violation? (3) Are the factors which the Act requires the court to consider in determining whether to dismiss with or without prejudice the sole relevant factors?

Before turning to these questions, it is appropriate to examine the purposes underlying the Speedy Trial Act. As stated in the legislative history, the Act was designed "to assist in reducing crime and the danger of recidivism in requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes. . . ."[25] Congress's approach reflects the view that the swift disposition of criminal charges plays an important role in deterrence and rehabilitation.[26] Some commentators question the validity of this ap-

[12] 18 U.S.C. § 3161(h)(3)(A).

[13] *Id.* § 3161(h)(1).

[14] *Id.* § 3161(h)(8)(A).

[15] 18 U.S.C. § 3163(c).

[16] *Id.* § 3162(a)(1).

[17] *Id.* § 3162(a)(2).

[18] *Id.*

[19] *Id.* § 3162(a)(1)(2). In addition, the Act grants the court discretionary authority to impose fines and suspensions upon attorneys who engage in deliberate misconduct. *See* § 3162(b). For a more detailed analysis of the provisions of the Act, *see* Steinberg, *supra* note 2, at 232–35.

[20] *See* Hansen & Reed, *supra* note 2, at 415–17; Russ & Mandelkern, *supra* note 2, at 1–2, 27–29.

[21] *See* Note, *Federal System Adopts Specific Parameters for the Constitutional Right to a Speedy Trial—Speedy Trial Act of 1974*, 10 U. RICH. L. REV. 449, 456 (1976).

[22] 18 U.S.C. § 3161(d); Russ & Mandelkern, *supra* note 2, at 12, 27.

[23] Hansen & Reed, *supra* note 2, at 416; Russ & Mandelkern, *supra* note 2, at 27–28.

[24] Russ & Mandelkern, *supra* note 2, at 28.

[25] 1974 U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess., at 7401.

[26] *Cf.* Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 932 (1970) [hereinafter cited as Burger]. More recently, The Chief Justice stated that "[t]he swift disposition of criminal charges is a major

proach, asserting that severe punishment suppresses undesirable behavior more effectively than mere certainty of swift punishment.[27] It is apparent that society's purpose in bringing defendants promptly to trial[28] is effectively served only by a high apprehension rate soon after the commission of the alleged offense,[29] while the reality is that arrest may not occur until months or even years after the crime. As a result, the assertion that speedy trials serve as effective deterrent and rehabilitative tools is a questionable one.

Other purposes promoted by the Act are less debatable. One is to provide greater safeguards for the individual defendant.[30] Excessive delay before trial may not only cause an accused to incur psychological harm, but may also directly affect his ability to adequately prepare and defend his case.[31] In addition, society has a retribution interest in having punishment imposed upon convicted defendants as speedily as practicable.[32]

A proper construction of the sanctions provision is essential to obtain these objectives, since prosecutorial authorities would otherwise have little incentive to comply with the statutory time limits. It is therefore imperative that courts vigilantly construe this provision in order to ensure that the Act's purposes are fulfilled.

## II. Dismissal With or Without Prejudice—Question of Fact or Law?

If the trial court's decision to dismiss with or without prejudice is a determination of fact, the decision can be set aside by the appellate court only if it is clearly erroneous[33] and not merely because the appellate court might have reached a different result.[34] A finding is deemed clearly erroneous when, although there exists evidence to support it, "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[35] No such deference, however, is accorded to the district court when a question of law is involved. In this situation, the appellate court is not bound to any extent by the lower court's judgment but is free to draw its own conclusions.[36]

In determining whether a dismissal should be with or without prejudice under the Speedy Trial Act, the court must consider, among others, the following four factors: (1) the seriousness of the offense, (2) the facts and circumstances which led to the dismissal, (3) the impact of a reprosecution on the administration of the Act, and (4) the impact of a reprosecution on the administration of justice.[37] Does the trial court's assessment of each of these factors involve a question of fact or law? Beginning the analysis with factors (3) and (4), it is clear that both of these variables should be labeled as questions of law. The lower court's function in

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deterrent that has not had sufficient attention in the administration of justice." Address by Mr. Chief Justice Burger, American Bar Association Mid-Winter Meeting, Feb. 23, 1975.

[27] *See, e.g.*, Singer, *Psychological Studies of Punishment*, 58 Cal. L. Rev. 405, 417 (1970).

[28] 1974 U.S. Code Cong. & Ad. News, 93d Cong., 2d Sess., at 7409.

[29] Singer, *Psychological Studies of Punishment*, 58 Cal. L. Rev. at 417–18.

[30] 1974 U.S. Code Cong. & Ad. News, 93d Cong., 2d Sess., at 7402.

[31] *See* Barker v. Wingo, 407 U.S. 514, 532–33 (1972).

[32] As noted by the dissenters in Furman v. Georgia, 408 U.S. 238 (1972), "There is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements, and the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes." *Id.* at 394 (Burger, C.J., dissenting).

[33] *See* Campbell v. United States, 373 U.S. 487, 493 (1963); United States v. Connor, 478 F.2d 1320, 1323 (7th Cir. 1973); United States v. Jones, 475 F.2d 723, 728 (5th Cir. 1973); 9 Wright & Miller, Federal Practice And Procedure § 2573, at 689 (1971 ed.). As Professors Wright and Miller have observed, the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure has been approvingly applied to factual findings of a trial judge in criminal matters. In pertinent part, Rule 52(a) provides that findings of fact in cases tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

[34] *See* United States v. Gypsum Co., 333 U.S. 364, 394–95 (1948).

[35] *Id.* at 395. Or, as stated by Judge Learned Hand.

> It is idle to try to define the meaning of the phrase 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded. United States v. Aluminum Co., 148 F.2d 416, 433 (2d Cir. 1945).

[36] Moore's Federal Practice 5A 52.03[2], at 2662–63 (2d. ed. 5). *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 314 F.2d 149 (9th Cir. 1963): "'[W]e are in as good a position as the trial judge to determine [the ultimate question].'" *Id.* at 152, *quoting*, Miles Shoes, Inc. v. R.H. Macy & Co., 199 F.2d 602, 602–03 (2d Cir. 1952).

[37] 18 U.S.C. § 3162(a)(1)(2).

this assessment is not to resolve disputed facts or judge the credibility of witnesses, but to draw conclusions about the potential impact a reprosecution of the accused would have. As phrased by one court, "When a finding is essentially one dealing with the *effect* of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside unless clearly erroneous, but is free to draw its own conclusions."[38] Thus, with regard to factors (3) and (4) a question of law, rather than fact, is presented.

Turning next to factor (1), the seriousness of the offense, any doubts as to whether this consideration is a question of fact or law may be resolved by answering the following inquiry: In determining the seriousness of the offense with which the defendant is charged, does the appellate court have before it the same information, having the same reliability, as the district court had? In his analysis, the trial judge neither resolves conflicting facts nor assesses the credibility of witnesses. Rather, he examines the charges pending against the accused, and then arrives at his determination. Similarly, the reviewing court scrutinizes the offenses charged and then makes an assessment regarding their seriousness. Clearly, the reviewing court is in as good a position as the trial court to assess the seriousness of the offense, and the lower court's determination is therefore a matter of law.

The last variable to be considered is factor (2): the facts and circumstances which led to the dismissal. In determining the facts and circumstances which require that he dismiss with or without prejudice, the trial judge must resolve disputed facts and judge the credibility of witnesses. For instance, the prosecution may claim that the excessive delay was caused by case overload, while the accused may argue that the prosecution's conduct was grossly negligent. The resolution of this question is one of fact, reversible on appeal only if clearly erroneous: "A finding of fact to which the clearly erroneous rule applies, is a finding based on the 'fact-finding tribunal's experience with the mainsprings of human conduct.' "[39] A totally different question is raised, however, when one inquires as to what inference should reasonably be drawn from the findings of fact by the district court. Utilizing the prior example, the trial court's finding that the government was grossly negligent in not complying with the Act's time periods is a finding of fact. But the effect or impact of this noncompliance is a question of law. Thus, the determination whether the government's grossly negligent behavior warrants dismissal with prejudice involves a legal question. At this point, there is no dispute as to facts or the credibility of witnesses, but there is an issue as to what effect should be given to the prosecution's negligent conduct. The determination of this issue is a finding of law. The existence of factual elements, specifically in factor (2), does not transmute this legal question into a factual one. Rather, the crucial inquiries are whether the appellate court is situated in as good a position as the lower court to resolve the issues raised and whether the trial court's findings concern the effect or impact of certain events rather than disputed facts and witness credibility. Since both of these questions must be answered in the affirmative, the appellate court is "free from the restraining influence of the 'clearly erroneous' rule," and may therefore draw its own conclusions.[40]

[38] United States v. Hart, No. 76–1196 (9th Cir. Oct. 28, 1976) (en banc) (Hufstedler, J., concurring and dissenting) (emphasis added), *quoting*, Stevenot v. Norberg, 210 F.2d 615, 619 (9th Cir. 1954). That statement was also quoted with approval by the Ninth Circuit in Fleischmann Distilling Corp. v. Maier Brewing Co., 314 F.2d 149, 152 n.2 (9th Cir. 1963). Judge Hufstedler recognized that her supporting authorities were civil rather than criminal decisions. With respect to this issue, she observed:

> These are civil cases, but no reason exists to apply a more restrictive standard of appellate review to criminal cases. On the contrary, a respectable argument can be made that deeper, rather than shallower, appellate scrutiny should be given to criminal cases because the societal and personal stakes in criminal cases are often larger than in civil cases.

No. 76–1196 n.1 (Hufstedler, J., concurring and dissenting).

[39] United States v. Hart, No. 76–1196 (9th Cir. Oct. 28, 1976) (en banc), *quoting*, Lundgren v. Freeman, 307 F.2d 104, 115 (9th Cir. 1962), *quoting*, Commissioner v. Duberstein, 363 U.S. 278, 289 (1960). The issue before the Ninth Circuit in *Hart* was whether the district judge's determination that the government utilized reasonable efforts to secure the informant's presence at the defendant's trial was a question of fact or law.

[40] Kiwi Coders Corp. v. Acro Tool & Die Works, 250 F.2d 562, 568 (7th Cir. 1957). It should be noted that the Act itself does not provide for an interlocu-

## III. Dismissal With Prejudice—Whether There Must Be a Constitutional Violation

The sixth amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."[41] In *Klopfer v. North Carolina*,[42] the Supreme Court deemed this right as fundamental, enforceable against the states by application of the due process clause of the fourteenth amendment,[43] and in *Strunk v. United States*,[44] the Court held that the sole remedy for a deprivation of the right is dismissal with prejudice.[45] Then in *Barker v. Wingo*,[46] the Court promulgated a four step test to determine whether a constitutional violation of the right to a speedy trial had taken place. The four factors which courts must assess in this determination are: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[47] The Court stressed that no one factor alone is adequate for finding a speedy trial abridgement. Rather, all four factors are interrelated and must be examined together.[48]

With regard to the length of permissible delay, the Court held that there exists "no *constitutional* basis for holding that the speedy trial right can be quantified into a specified number of days or months."[49] Concerning possible reasons for the delay, the Court concluded that deliberate delays in an effort to hinder the defendant's case must be weighed heavily against the government; that negligence or overcrowded dockets must be weighed, but less heavily than intentional delays; and that a justifiable excuse, such as a missing essential witness, is not to be counted against the government.[50] With respect to the defendant's failure to demand a speedy trial, the Court held that although the fundamental guarantee cannot be presumptively waived,[51] "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[52] Regarding the factor of prejudice, the Court concluded that if material witnesses become unavailable during the unwarranted delay, or cannot accurately recollect events which are at issue, the prejudice is clear. Prejudice also occurs when the accused has been subjected to prolonged pre-trial incarceration, and even if he is not incarcerated prior to trial, he nevertheless suffers severe anxiety by having restraints imposed upon his freedom and being subjected to public suspicion.[53]

Another principle of constitutional right was

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tory appeal from the denial of a motion to dismiss under Section 3162 or from an order authorizing dismissal without prejudice. It is arguable that since the denial of a motion to dismiss an indictment or a dismissal without prejudice may not be viewed as an appealable order, the defendant must stand trial and raise this issue on appeal after he is convicted.

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), should be persuasive that the denial of a motion to dismiss or an order dismissing without prejudice should be appealable, because if appellate review is delayed until final disposition, the asserted right will be irreparably lost. Employing *Cohen* on an analogous question, appellate courts have ruled that an order denying a motion to dismiss on grounds of double jeopardy is an appealable interlocutory order. *See* United States v. Disilvio, 520 F.2d 247 (3d Cir. 1975), *cert. denied*, 423 U.S. 1015 (1975); United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975); United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972). The same rationale should apply here. Alternatively, relief by writ of mandamus or prohibition could be sought. *See* Hilbert v. Dooling, 476 F.2d 255 (2d Cir.) (en banc), *cert. denied*, 414 U.S. 878 (1973), where this remedy was utilized. For additional discussion on this subject, *see* Russ & Mandelkern, *supra*, note 2, at 28–29.

[41] U.S. Const. amend. VI.

[42] 386 U.S. 213 (1967).

[43] *Id.*; Smith v. Hooey, 393 U.S. 374, 374–75 (1969).

[44] 412 U.S. 434 (1973).

[45] *Id.* at 437–40. For articles which discuss the sixth amendment right at greater length, see Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 Stan. L. Rev. 525, 539–41 (1975); Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 Ala. L. Rev. 265, 274–88 (1972); Steinberg at 230–32.

[46] 407 U.S. 514 (1972).

[47] *Id.* at 530.

[48] *Id.* at 533.

[49] *Id.* at 523 (emphasis added). Thus, whether the length of delay is prejudicial to the accused's sixth amendment guarantee must be determined by the facts and circumstances of each case. *Id.* at 530–31.

[50] *Id.* at 531; *see* Strunk v. United States, 412 U.S. 434, 436 (1973); United States v. Marion, 404 U.S. 307, 325 (1971); Pollard v. United States, 352 U.S. 354, 361 (1957).

[51] 407 U.S. at 525. The demand-waiver rule, followed in some jurisdictions, stated that the accused waived the right for all periods prior to which he failed to demand a speedy trial. The *Barker* Court rejected this doctrine on the basis that to presume waiver of a fundamental right through inaction was contrary to the principle of waiver of fundamental constitutional guarantees. For a commentary criticizing the demand-waiver rule, see ABA Standards Relating To Speedy Trial § 2.2, at 17, Comment at 18 (Approved Draft 1970).

[52] 407 U.S. at 532.

[53] *Id.* at 532–33.

enunciated in *United States v. Marion*,[54] where the Supreme Court held that the Speedy Trial Clause only takes effect when the defendant has been subjected to a formal indictment, information or upon arrest.[55] Thus, the speedy trial right provides no protection against prosecutorial misconduct during the pre-arrest or pre-indictment stage.[56]

One of the significant questions that will confront the courts when the sanctions provision of the Act becomes effective is whether dismissal with prejudice can occur only when there has been a sixth amendment violation.[57] In cases recently decided, the government has argued that dismissal with prejudice under Federal Rule of Criminal Procedure 48(b) is warranted only if there has been a constitutional deprivation.[58] The same rationale could be extended to encompass dismissal with prejudice under the Speedy Trial Act.

However, in authorizing dismissal with prejudice under the Act, it appears that Congress intended that such a dismissal may be declared by the court in the absence of a constitutional violation. Support for this contention is to be found in the Act's legislative history. When the Act passed the Senate, it mandated dismissal with prejudice for noncompliance with the statutory time limits but permitted reprosecution if the court determined that the delay was caused "by exceptional circumstances which the Government and the Court could not have foreseen or avoided."[59] The House version of the Act, approved by the House Judiciary Committee, provided for an even harsher remedy: noncompliance would require dismissal with prejudice, and reprosecution was absolutely barred.[60] Understandably, the Justice Department vehemently opposed both the Senate and House versions. In a letter to Congressman Rodino, Chairman of the Judiciary Committee, Attorney General Saxbe complained:

> Mandatory dismissal of criminal cases not tried within 60 days can only serve to injure the public by releasing persons charged with crime [*sic*] without an adjudication. This injures the public not only because the person may pose a danger to the public welfare, but also because it undermines the public's confidence in the criminal justice system to see persons charged with crimes released without trial.[61]

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[54] 404 U.S. 307 (1971).

[55] *Id.* at 320. Concurring in the result, Mr. Justice Douglas, joined by Mr. Justices Brennan and Marshall, argued that the Speedy Trial Clause should extend as well to pre-indictment delay: 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." *Id.* at 331–32 (Douglas, J., concurring in the result).

For an analysis, see two works by the author proposing that, in the absence of good cause for delay, the time period should begin to run when the prosecutor has probable cause to prosecute. Steinberg, *supra* note 2, at 239; Comment, *Right to Speedy Trial: Maintaining a Proper Balance Between the Interests of Society and the Rights of the Accused*, 4 UCLA-ALASKA L. REV. 242, 259–60 (1974).

[56] Writing for the *Marion* Court, Mr. Justice White asserted that the remedy for prosecutorial misconduct at this time is the due process clause of the fifth amendment:

> [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.

404 U.S. at 324. Even under this formulation, however, the defendant has no protection against negligent delay by the government during the pre-indictment period.

[57] The author has considered this question in another work, concluding that: "When dismissal is with prejudice . . . the Act provides that the court examine the same type of factors which are constitutionally mandated in *Barker [v. Wingo]*." Steinberg, *supra* note 2, at 235. Upon reexamination, the author believes that the above assertion is incorrect, for reasons which are stated in the following discussion.

[58] *See* United States v. Simmons, 536 F.2d 827, 832–36 (9th Cir. 1976); United States v. Correia, 531 F.2d 1095, 1097–98 (1st Cir. 1976); United States v. Garner, 529 F.2d 962, 968 (6th Cir. 1976); United States v. Clendening, 526 F.2d 842, 844 n.2 (5th Cir. 1976); United States v. Stoker, 522 F.2d 576, 580 (10th Cir. 1975); United States v. Clay, 481 F.2d 133, 135 (7th Cir. 1973); Almeda v. Blaubaum, 400 F. Supp. 177, 184 (D. Ariz. 1975); United States v. Crow Dog, 399 F. Supp. 228, 239 (D. Iowa 1975).

[59] S. 754, 93d Cong., 2d Sess. § 101, ch. 208, § 3162(b)(1974).

[60] H.R. REP. No. 93-1508, 93d Cong., 2d Sess., at 37 (1974).

[61] 1974 U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess., at 7447. A similar view was expressed by the minority in the House Report:

> If the purpose of the speedy trial act is to protect society as a whole by enabling the courts to promptly dispose of criminal defendants, then we fear that this bill will frustrate that end by

This strong opposition by the Justice Department prevented the Act from obtaining final passage. Finally, in order to secure the necessary votes for approval, an amendment was introduced which stated that dismissal could be either with or without prejudice at the court's discretion.[62] On the last day of the 93rd Congress, with the amended language substituted for the sanctions which earlier had been provided, the Senate and House passed the Act.[63]

This histoy implies that in finally accepting a compromise solution permitting dismissal with or without prejudice at the court's discretion, Congress manifested its intent that dismissal barring reprosecution be authorized even where constitutional rights had not been abridged. This assertion already has been advanced by the Ninth Circuit. Referring to the Speedy Trial Act in dictum, that appellate court concluded that the sanctions provision "clearly provides that a dismissal with prejudice may occur even though there has been no constitutional violation."[64]

An analogy can be drawn between the sanctions provision of the Act and Rule 48(b) of the Federal Rules of Criminal Procedure. In pertinent part, that rule provides: "[I]f there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint." As the government has recognized, the rule provides the court with inherent authority, derived from common law, to dismiss a prosecution independent of constitutional considerations.[65] The government has argued, however, that unless there has been a constitutional deprivation, dismissal must be without prejudice.[66] Early cases supported this contention.[67] More recent holdings, however, authorize dismissal barring reprosecution without requiring a sixth amendment violation.[68] A leading case on this question is the Second Circuit's decision in *United States v. Furey*.[69] In upholding the dismissal with prejudice provision contained in Rule 4 of the Eastern District of New York and Second Circuit Plans for the Prompt Disposition of Criminal Cases,[70]

allowing defendants to be set free. We can imagine no greater defect in the bill than the release of defendants without full determination of their guilt or innocence. . . .

*Id.* at 7455.

[62] 120 CONG. REC. 12,570 (daily ed. Dec. 20, 1974) (remarks of Congressman Cohen).

[63] *Id.* at 12,573, 22,489. For additional material on the legislative history, see Hansen & Reed, *supra* note 2, at 415; Russ & Mandelkern, *supra* note 2, at 25–26.

[64] United States v. Graham, 538 F.2d 261, 266 (9th Cir. 1976), *quoting*, United States v. Simmons, 536 F.2d 827, 836 (9th Cir. 1976).

[65] *See* United States v. Correia, 531 F.2d 1095, 1098 (1st Cir. 1976); United States v. Stoker, 522 F.2d 576, 580 (10th Cir. 1975); United States v. Furey, 514 F.2d 1098, 1102–03 (2d Cir. 1975).

[66] *See* United States v. Simmons, 536 F.2d 827, 832 (9th Cir. 1976); United States v. Clendening, 526 F.2d 842, 843 (5th Cir. 1976); United States v. Furey, 514 F.2d 1098, 1103 (2d Cir. 1975).

[67] *See* Cohen v. United States, 366 F.2d 363, 367 (9th Cir. 1966), *cert. denied*, 385 U.S. 1035 (1967); United States v. Apex Distributing Co., 270 F.2d 747, 750 (9th Cir. 1959); United States v. Mark II Electronics of Louisiana, Inc., 283 F. Supp. 280, 284 (E.D. La. 1968). A discussion of these cases appears in United States v. Simmons, 536 F.2d at 832–33, 833 nn.24 &25, and United States v. Furey, 514 F.2d at 1103–04.

[68] *See United States v. Simmons*, 536 F.2d at 836; United States v. Stoker, 522 F.2d at 580; United States v. Furey, 514 F.2d at 1104.

[69] 514 F.2d 1098 (2d Cir. 1975).

[70] Rule 4 provides:

> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried, whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5 [Rule 5 tolls the six-month period in various circumstances], the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

Writing for an en banc panel of the Second Circuit, Judge Mansfield observed:

> The purpose of Rule 4 is to insure that regardless whether a defendant has been prejudiced in a given case or his constitutional rights have been infringed, the trial of the charge against him will go forward promptly instead of being frustrated by creeping, paralytic procedural delays of the type that have spawned a backlog of thousands of cases, with the public losing confidence in the courts and gaining the impression that federal criminal laws cannot be enforced.

Hilbert v. Dooling, 476 F.2d 355, 357–58 (2d Cir.) (en banc), *cert. denied*, 414 U.S. 878 (1973). For a discus-

adopted pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure,[71] the *Furey* court reaffirmed its decision rendered two years earlier in *Hilbert v. Dooling*[72] that "it is within the court's inherent power to dismiss a prosecution with prejudice for prosecutorial delay not rising to constitutional dimensions. . . ."[73] Perhaps the most thorough analysis rendered on this subject is the Ninth Circuit's recent opinion in *United States v. Simmons*,[74] which held that dismissal with prejudice, not arising from a sixth amendment abridgment, is permissible providing that this sanction is exercised with caution after prosecutors have been forewarned of the consequences.[75] In reaching this conclusion, the Ninth Circuit found the Speedy Trial Act to be highly relevant. The court stated:

> Although the time limits imposed by the Speedy Trial Act of 1974 were not applicable to this proceeding, we believe that the Act is relevant to show that dismissal with prejudice not arising from a constitutional violation should be exercised with caution and only after a forewarning of the consequences. . . . Thus, the Speedy Trial Act clearly provides that a dismissal with prejudice may occur even though there has been no constitutional violation. But in so providing, the Act requires that courts exercise caution in utilizing this procedure. Such caution is manifested by the consideration of various factors enumerated by the Act, plus other relevant factors which courts may independently employ in reaching the ultimate decision. More importantly, the Act clearly forewarns the United States Attorney that he must comply with the applicable time limits or face the possibility that the indictment or information will be dismissed with prejudice.[76]

## IV. Factors to Be Considered in the Court's Determination Whether to Dismiss With or Without Prejudice

In determining whether to dismiss with or without prejudice, section 3162(a)(1)(2) requires that the court consider, among others, the following factors: "the seriousness of the offense; the facts and circumstances which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." In enumerating these factors, Congress declined to assess greater significance to one factor over another. It thus appears that Congress promulgated a balancing test in which all relevant factors are to be considered together.

Implementation of this approach requires a case by case determination, and the delicate balancing process involved frequently results in a subjective determination by the court.[77] Some general principles may be advanced, however, which may lend guidance to courts making this decision. In formulating these principles, the purposes underlying the Act must be given primary attention. As stated earlier in this article, the Act was designed to protect both the defendant's and society's interests. By providing for a maximum of 100 days between arrest and trial, the Act spares the accused much of the anxiety and prejudice which he otherwise would have incurred. This time period provides greater assurance to society that the accused will not commit additional crimes while he is awaiting trial, better promotes the retributive purpose of the criminal law, arguably deters the accused and other members of society from engaging in illegal conduct, and also arguably eases the rehabilitation process.[78] Keeping these purposes in mind, the following discussion will consider the relevancy to the court's determination whether to dismiss with or without prejudice of each of the four factors men-

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sion comparing the provisions of the Second Circuit Plan with the Speedy Trial Act, see Comment, *Speedy Trials: Recent Developments Concerning a Vital Right*, 4 Ford. Urb. L.J. 351 (1976).

[71] In pertinent part, Rule 50(b) states:

> To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare a plan for the prompt disposition of criminal cases which shall include rules relating to time limits within which procedures prior to trial, the trial itself, and sentencing must take place, means of reporting the status of cases, and such other matters as are necessary or proper to minimize delay and facilitate the prompt disposition of such cases. . . .

Fed. R. Crim. P. 50(b).

[72] 476 F.2d 355 (2d Cir.) (en banc), *cert. denied*, 414 U.S. 878 (1973).

[73] 514 F.2d at 1104; *see* 476 F.2d at 358–61.

[74] 536 F.2d 827 (9th Cir. 1976).

[75] *Id.* at 836.

[76] *Id.* at 835–36. For articles which discuss the relationship between the sixth amendment right to a speedy trial and the Speedy Trial Act, see Hansen & Reed, *supra* note 2; Steinberg; Note, *The Speedy Trial Act of 1974: Defining the Sixth Amendment Right*, 25 Cath. U. L. Rev. 130 (1975).

[77] The adoption of the balancing test by the Court in *Barker* entails the same problems.

[78] *See* text & accompanying notes 25–33 *supra*.

tioned in section 3162(a)(1)(2). Afterwards, other relevant factors will be discussed. Finally, this section will inquire into those factors which should not enter into the court's determination.

### *A. Seriousness of the Offense*

If the Speedy Trial Act was enacted for the sole reason of providing greater safeguards for the accused, the seriousness of the offense charged would be wholly irrelevant. But since a major purpose of the Act is better to protect society's interests, this factor becomes highly material. The more serious the offense with which the accused is charged, the greater interest society has in permitting the government to reprosecute. The problem is to determine what makes an offense of the serious variety. It is certainly plausible to classify any crime as serious which involves the threat or use of violence (e.g., armed robbery). But non-violent crimes, particularly those which have massive social implications, also may be considered serious in nature. For example, it is arguable that indicting a corporate executive for criminally polluting public waters involves an offense which is as reprehensible as many violent offenses. The seriousness of the offense cannot be defined by the range of sentences imposed by the legislature, because inconsistency on the legislature's part between length of the sentence and severity of the crime has been aptly demonstrated.[79] Thus, the determination of the seriousness of the offense charged against the accused cannot be fixed solely by objective standards, but must necessarily involve a partly subjective analysis. In making this determination, however, courts must remember that this factor is one of at least four which must be scrutinized and interrelated.

### *B. Facts and Circumstances Which Led to the Dismissal*

The principle underlying this factor is that there exists an affirmative duty upon courts and prosecutors to comply with the statutory time limits. When this obligation has not been met, dismissal is required even though the excessive delay may have been due to court congestion or prosecutorial work overload.[80] In determining whether to dismiss with or without prejudice, however, the court must consider whether dismissal barring reprosecution would provide an incentive for the courts and prosecutors to adhere to these time limits in the future. When noncompliance is caused by circumstances beyond the control of either the court or prosecutor, no such incentive would be provided by dismissing with prejudice. For example, in enacting the Act, Congress declined to create any new judgeships to enable the courts to operate more efficiently under their already overburdened workload.[81] Authorizing dismissal barring reprosecution under such court congestion, when the judiciary is attempting in good faith to comply with the time limits, would normally serve no useful purpose.

An entirely different situation appears, however, when the impermissible delay occurs because of the court's or prosecutor's deliberate or negligent misconduct. Permitting reprosecution under these circumstances would render the Act without an effective remedy. Prosecutorial authorities, realizing that they could engage in misconduct and yet have another opportu-

[79] *See, e.g.*, In re Lynch, 8 Cal. 3d 410, 505 P.2d 921, 105 Cal. Rptr. 217 (1972), where the California Supreme Court held that an indeterminate sentence ranging from one year to life for the defendant's second conviction of indecent exposure violated the California constitutional prohibition against cruel and unusual punishment. In so ruling, the court compared this sentence to others provided by the legislature for far more serious crimes:

> [I]s it rational to believe that second-offense indecent exposure is a more dangerous crime than the unlawful *killing* of a human being without malice but in the heat of passion? Yet the punishment for manslaughter is far less. . . . The same is true for such other violent crimes against the person as assault with intent to commit murder, kidnapping, mayhem, assault with intent to commit mayhem or robbery, assault with caustic chemicals with intent to injure or disfigure, and assault on a peace officer or fireman engaged in the performance of his duties.

8 Cal. 3d at 431, 503 P.2d at 935, 105 Cal. Rptr. at 231, (emphasis in original) (citations omitted).

[80] *See* 18 U.S.C. § 3161(h)(8)(C).

[81] Congress' failure to supply additional federal judges has been criticized by the Chief Justice. In reminding Congress that the Act was passed over the unamimous dissent of the United States Judicial Conference, he stated: "I agree that even the internal working rules of courts should not be left exclusively to judges, but at least there should be the closest kind of cooperation between the legislative and judicial branches and respect for the views of experienced judges who must make the law work." Address by Mr. Chief Justice Burger, American Law Institute Conference, May 18, 1976.

nity to try the accused, would have little incentive to comply with the Act's time limits.[82]

### *C. The Impact of a Reprosecution on the Administration of the Act and on the Administration of Justice*

The third and fourth factors that the court must consider under the sanctions provision is the impact that dismissal with or without prejudice would have on the administration of the Act and on the administration of justice. Although these factors are relevant, Congress failed to provide any insight into what it meant by the phraseology, "administration of the Act"[83] and "administration of justice."[84] Thus, the consideration of these two factors involves a balancing test. On the one side, there is society's interest in making all potentially guilty defendants stand trial. On the other side, the defendant has a strong interest in not being reprosecuted, and society has an interest, when the delay is caused by judicial or prosecutorial misconduct, to deter such misbehavior in the future. Query what considerations should be relevant to the court in this balancing decision. First, the court should assess the degree of prejudice which reprosecution would impose upon the accused. Second, the facts and circumstances which led to the dismissal should be scrutinized. Third, the court should examine the seriousness of the offenses pending and the severity of the defendant's past criminal record. Thus, it appears that these two factors merely restate the other factors which enter into the court's determination whether to dismiss with or without prejudice.

### *D. Other Factors That Should Be Considered*

This subsection of the article will discuss three additional factors which courts should consider in determining whether to dismiss with or without prejudice. These factors are the defendant's prior criminal record, the prejudice inflicted upon the accused by subjecting him to possible reprosecution, and the effect that dismissal with or without prejudice has on prosecutorial incentive to comply with the statutory time periods.

#### *1. Defendant's Prior Criminal Record*

The Act recognizes that the defendant while he is awaiting trial may present a danger to the community in which he lives. Commenting on the fact that approximately three-quarters of all defendants are released pending trial, the House Judiciary Committee noted: "This means that persons who are likely to commit additional crimes could without adequate supervision and assistance continue to reap the profits of criminal activity at the expense of the public."[85] In order to render better protection against the occurrence of this hazard, Congress enacted legislation which required defendants to be tried within 100 days after arrest and established pre-trial service agencies.[86]

This legislative history indicates that Congress was concerned with devising policies which aid in promoting the general prevention of crime. It is evident that a substantial percentage of crimes are committed by prior offenders.[87] Society's primary concern regarding these recidivists is to isolate them from the community in order to ensure that they will not commit additional offenses. In determining whether to dismiss with or without prejudice under the sanctions provision of the Act, courts should recognize that a defendant with a past criminal conviction record is more likely to commit additional crimes upon his return to the community than is the arrestee who, if convicted, would be a first-time offender. Although not indicative

[82] Further, this concept encompasses both deliberate and negligent misconduct. As stated recently by the Ninth Circuit in dictum, "With the implementation of the Speedy Trial Act's time periods in the fairly near future, the government should be aware that negligent conduct in bringing an accused to trial will not be tolerated." United States v. Graham, 538 F.2d 261, 266 (9th Cir. 1976).

[83] This concept may signify that the court should consider the impact that dismissal permitting or barring reprosecution would have upon the efficient operation of the Act. Or the term may mean that the court should consider whether dismissal with or without prejudice would further or retard the achievement of the purposes advanced by the Act. Upon reflection, both of these interpretations merge into one definitional concept. This result occurs because the Act can only be efficient if it fulfills the purposes for which it was enacted.

[84] The objective of administering justice in deciding a given case enjoys a high stature within the American legal system. The difficult question is the assessment of what is just in any specific situation. See R. WASSERSTROM, THE JUDICIAL DECISION, 84–85 (1961).

[85] 1974 U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess., at 7409.

[86] For the sections relating to pre-trial service agencies, see 18 U.S.C. §§ 3152–55.

[87] *See* 1974 U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess., at 7409.

of the defendant's guilt on the pending charges, his prior criminal record is relevant with respect to society's concern in not releasing that individual outright without requiring him to stand trial.[88]

The next inquiry is what portions of a defendant's criminal record should be considered by the court. First, only convictions, not mere arrests or acquittals, should be material. Subjecting an accused to harsher treatment when the state failed to prove its case is contrary to fundamental principles of justice. Second, all convictions for the commission of serious offenses should be considered relevant,[89] and particularly, any convictions for similar types of offenses. Third, the more severe the prior crimes, the less recent the convictions need be. To place a number of years in this assessment necessarily involves an arbitrary determination. Under most circumstances, as is the case under the Federal Rules of Evidence, convictions for non-homicide offenses should be relevant for a period not exceeding ten years.[90]

*2. Prejudice Suffered by the Accused*

Under the sanctions provision, courts should consider the extent of prejudice inflicted upon the accused. In many cases, permitting the state to reprosecute inflicts greater harm than does the granting of a continuance. Reindictment could require the employment of new counsel and the further depletion of the defendant's financial resources.[91] By dismissing without prejudice, the court subjects the defendant to the whims of the prosecutor, who thereby gains the privilege to reprosecute at any time within the applicable statute of limitations. Further, allowing reprosecution enables the state to build its case while the defendant loses his. The government, having the resources to engage in additional investigational work, can devote its efforts toward strengthening its case, and when it believes that a conviction will be obtained, can then reindict. The defendant, perhaps unaware that the state is pursuing his case and unlikely in any event to have sufficient financial resources, may no longer be able to prepare an adequate defense. Thus, reprosecution subjects the accused to substantial prejudice, a result which should be a significant factor in the court's decision whether to dismiss with or without prejudice.

*3. Prosecutorial Incentive to Comply with the Act's Time Limits*

This consideration, discussed earlier, is mentioned here again to emphasize that unless the prosecution is provided with an incentive to comply with the statutory time limits, the Act will be without an effective remedy and thus

[88] *See* Spencer v. Texas, 385 U.S. 554 (1967), where Chief Justice Warren stated:

> Recidivist statutes have never been thought to allow the State to show probability of guilt because of prior convictions. Their justification is only that a defendant's prior crimes should lead to enhanced punishment for any subsequent offenses. Recidivist statutes embody four traditional rationales for imposing penal sanctions. A man's prior crimes are thought to aggravate his guilt for subsequent crimes, and thus greater than usual retribution is warranted. Similarly, the policies of insulating society from persons whose past conduct indicates their propensity to criminal behavior, of providing deterrence from future crime, and of rehabilitating criminals are all theoretically served by enhanced punishment according to recidivist statutes. None of these four traditional justifications for recidivist statutes is related in any way to the burden of proof to which the State is put to prove that a crime has currently been committed by the alleged recidivist. The fact of prior convictions is not intended by recidivist statutes to make it any easier for the State to prove the commission of a subsequent crime. The State does not argue in these cases that its statutes are, or constitutionally could be, intended to allow the prosecutor to introduce prior convictions to show the accused's criminal disposition. . . .

*Id.* at 571 (Warren, C.J., concurring and dissenting).

[89] For a discussion of what offenses should be considered of a serious nature, see text & accompanying note 79 *supra*.

[90] Rule 609(b) of the Federal Rules of Evidence provides for the admissibility of certain offenses for the purpose of impeaching the credibility of the witness. That rule states:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

[91] Hansen & Reed, *supra* note 2, at 416; Russ & Mandelkern, *supra* note 2, at 27–28.

rendered a dead letter. The argument may be phrased as follows: When the court dismisses without prejudice, the state must once again reindict the accused and redo some of the accompanying motions. This repetitive procedure, however, is a small cost for the government to incur for its noncompliance. It in no way deters prosecutorial authorities from violating the Act's time periods. On the other hand, dismissal barring reprosecution provides these officials with a strong incentive to comply. Since noncompliance might very well result in the outright release of the defendant and forever prevent the state from bringing him to trial on the pending charges, prosecutors have a strong interest in exercising every diligent effort to adhere to the time periods. Thus, although society's interests may suffer in the short run by releasing potentially guilty defendants without trial, from the long-range perspective, dismissal barring reprosecution at times is necessary if the Act is to achieve its avowed purposes.[92]

### *E. Factors That Should Not Be Considered*

Three factors which should not enter into the court's determination whether to dismiss with or without prejudice are the defendant's assertion of his statutory right to a speedy trial, the likelihood of inducing a guilty plea by dismissing without prejudice, and the ability of the prosecution to try the accused shortly after the termination of the statutory time periods.

#### *1. Defendant's Assertion of His Statutory Right*

Under a sixth amendment analysis, the defendant's assertion of his constitutional right is an important consideration in determining whether this guarantee has been abridged.[93] Under the Act, however, his demand for a speedy trial is irrelevant. The time periods automatically commence once he has been arrested or served with a summons.[94] There is one exception to this general rule; namely, that the defendant waives his statutory right to a speedy trial by failing to move for dismissal before trial or entry of a guilty plea or a plea of nolo contendere.[95]

Why Congress inserted this one exception into the Act is difficult to comprehend. It may be true that by declining to assert his right the defendant is expressing his desire to proceed to trial rather than face the possibility that his case may be dismissed without prejudice. But most defendants probably will fail to assert the right only because they are unaware of the demand requirement. Under such circumstances, it certainly is plausible to argue that failure by counsel to inform his client of this basic defense violates the defendant's sixth amendment right to adequate assistance of counsel.[96] This inaction by counsel constitutes plain error which the court may raise sua sponte.[97]

#### *2. Likelihood of Inducing a Guilty Plea*

Some critics of the Act have expressed the view that defendants, hoping that the government will not be ready for trial within the 100 day period, will refrain from entering into plea

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[92] Because the government incurs only slight inconvenience by having to reprosecute the defendant, it would seem logical that the court also would have the discretion to grant a nolle prosequi with leave. Perhaps this alternative was rejected because such action directly affects the accused's constitutional speedy trial guarantee. *See* Klopfer v. North Carolina, 386 U.S. 213, 214–23 (1967).

[93] *See* Barker v. Wingo, 407 U.S. 514, 531–32 (1972).

[94] 18 U.S.C. § 3161(b) provides in relevant part:

> Any 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.

[95] *Id.* § 3162(a)(2).

[96] *See generally* Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968). Writing for the *Beasley* court, Judge Celebrezze stated:

> We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations. . . . Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner.

491 F.2d at 696.

[97] FED. R. CRIM. P. 52(b) provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

negotiations with the prosecution.[98] The consequence of this refusal to plea bargain, these commentators contend, will be the creation of an enormous backlog, which will render both courts and prosecutors incapable of complying with the statutory time limits. Thus, countless defendants will be released without ever being brought to trial.

The possibility of this prediction coming to fruition is remote. During the implementation of the Second Circuit Plan which required defendants to be tried within six months, the number of guilty pleas appears actually to have increased.[99] But more relevant to the present inquiry is whether the court should consider any effect that a dismissal permitting reprosecution will have on the plea bargaining process. The answer must be that this factor is immaterial. The goal of the Act is to bring defendants promptly to trial, not to coerce them to plead guilty. Although the term "coercion" may appear somewhat strong in this context, it is appropriate in this setting.

Given the alternatives of pleading guilty to a lesser included offense and receiving a relatively lenient sentence or taking his chances that the court may dismiss with prejudice, the defendant's decision is a difficult one. But when the accused knows that the court will probably dismiss without prejudice in an attempt to enhance the plea negotiation process, he is then confronted with a different kind of choice. Rather than face the anxiety and prejudice attending reprosecution, the invitation of a reduced charge and a light sentence is appealing. The giving of such a plea under these conditions is inherently involuntary. Neither the Speedy Trial Act nor the American judicial process was created for the purpose of inducing defendants to plead guilty. Rather, a guilty plea should be accepted by the court only if it is freely and intelligently tendered.[100]

### *3. Ability of the Prosecution to Try the Defendant After the Expiration of the Act's Time Periods*

In determining whether to dismiss with or without prejudice, the court should not consider that the prosecution would be ready to bring the accused to trial shortly after the termination of the statutory time periods. For example, suppose that the prosecution states that although it was unable to comply with the time limits, it would be ready to try the defendant within the next ten days. This consideration is relevant only to the granting or denying of a continuance under the Act[101] and not to the determination of dismissing with or without prejudice. Analysis under the dismissal with or without prejuice provision is prohibited because in almost every case the government could argue that if the court would dismiss the proceeding without prejudice, it would be able to comply with the statutory time limits the second time around. Under such circumstances, there would be little incentive for the government to comply when it first arrested or

[98] *See* 1974 U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess., at 7447. As stated by then Attorney General Saxbe:

> Our system of criminal justice presently depends on the guilty plea. Under this bill, criminals who would ordinarily plead guilty may insist on jury trial to take advantage of the automatic dismissal after sixty days. The system would be overwhelmed and wholesale dismissals would follow.

[99] Replying to Attorney General Saxbe's criticisms of the Act, Congressman Conyers, Chairman of the Subcommittee on Crime, stated:

> [T]he Attorney General is of the opinion that enactment of this legislation would result in a decrease in the number of guilty pleas, since defendants would request jury trials with greater frequency. . . . As a matter of fact, the experience of the Second Circuit after the imposition of speedy trial limitations coupled with a dismissal sanction was quite to the contrary. During the first fall quarter after the rules became effective, the rate of disposition increased twenty percent, all due to increased guilty pleas.

*Id.* at 7450.

[100] *See* Brady v. United States, 397 U.S. 742 (1970), where Mr. Justice White stated:

> That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. . . .

*Id.* at 748.

[101] 18 U.S.C. § 3161(h)(8)(B).

indicted an accused. Courts should therefore refrain from considering the government's assertion that it will be ready to try the defendant shortly after the expiration of the Act's time limits in determining whether to dismiss with or without prejudice.

## V. Conclusion

The purpose of this article has been to analyze the dismissal with or without prejudice provision of the Speedy Trial Act and to recommend a proposed interpretation in construing that provision. It must be emphasized that this sanctions provision provides the crucial inquiry under the Act. Unless the government is given an adequate incentive to comply with the statutory time periods, the Act will become a nullity. The government, believing that courts will dismiss with prejudice only under the most extreme circumstances, will be under no compulsion to diligently pursue its prosecutions. Rather, only by a vigorous judicial application of the remedy of dismissal with prejudice will the prosecution be deterred from noncompliance with the time limits. The primary consideration for the courts must be that although society may suffer to some extent by the release of defendants under circumstances prohibiting reprosecution, this result sometimes is necessary if the Act is to achieve the goals for which it was enacted.