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SPEEDY TRIAL IN ILLINOIS: THE STATUTORY RIGHT

David S. Rudstein*

Professor Rudstein's analysis of Illinois' speedy trial statute indicates that there has been much confusion and, perhaps, irrationality in the courts' interpretation and application of the legislative intent. This Article provides an indepth study of each of the statute's provisions and the major decisions which have resulted therefrom. Compared with the constitutional provisions insuring a speedy trial, the statutory guarantee, according to Rudstein, provides the criminal defendant in Illinois a more realistic protection insofar as the United States Supreme Court's decision in Barker v. Wingo remains unimplemented to a great degree in the state courts.

INTRODUCTION

The Constitution of the United States and the Constitution of the State of Illinois both guarantee a defendant in a criminal case the right to a speedy trial.¹ To implement this right the Illinois General Assembly has included section 103-5 in the state's Code of Criminal Procedure.² This section requires that every person in

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¹ U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." This provision was held applicable to the states through the due process clause of the fourteenth amendment in Klopfer v. North Carolina, 386 U.S. 213 (1967).

² ILL. CONST. art. I, § 8 states: "In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial . . . ." Substantially the same provision appeared as section 9 of article 2 of the Illinois Constitution of 1870.


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³ Many states have enacted legislation affording criminal defendants a statutory basis for
custody in Illinois for an alleged offense be brought to trial within 120 days of the date he is taken into custody,\(^3\) and that every person who is on bail\(^4\) or recognizance be tried within 160 days from the date he demands trial, unless the delay is occasioned by the defendant, by an examination for competency, a competency hearing or an adjudication of incompetency for trial, or by an interlocutory appeal.\(^5\) Where more than one charge is pending against a person in the same county the statute requires that he must be tried upon at least one charge prior to the expiration of the applicable statutory period for any of the charges;\(^6\) the remaining charges must then be tried within 160 days after judgment is rendered in the first trial, or, if the trial is terminated without judgment and there is no subsequent trial or plea of guilty, within a reasonable time of the termination of the first trial.\(^7\)

Under the statute the trial court also has the discretion of allowing up to 60 additional days within which to try an accused if it finds that the state has exercised due diligence in obtaining speedy trial in addition to the constitutional guarantee. While the intent of such legislation may have been the definition of the constitutional right, the variety of enacted statutes, and the interpretations given to them by the courts of the various jurisdictions, suggest that the constitutional guarantee should have continued vitality in direct judicial interpretation. Clearly the statutory rights are not to be seen as coextensive with the constitutional scheme. See, e.g., People v. Nowak, 45 Ill.2d 158, 258 N.E.2d 313 (1970); see also Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587 (1965). For an exercise in comparative analysis of various speedy trial statutes see, e.g., Cal. Penal Code § 1382 (West 1971); Mass. Gen. Laws Ann. ch. 227, § 72 (1972); Mich. Comp. Laws Ann. § 767.38 (1968); N.Y. Crim. Proc. Law Ann. § 30.30 (McKinney Supp. 1974-75); Tex. Code Crim. Proc. Ann. art. 32.01 (1966).


4. On September 8, 1975, Governor Walker signed into law H.B. 0442, P.A. 79-818 (effective October 1, 1975), amending Ill. Rev. Stat. ch. 38, §§ 110-6, 110-10 (1973). This amendment provides that when a defendant is shown by clear and convincing evidence to have committed a forcible felony while on bail, the court may revoke bail and hold the defendant to trial without bail. If bail is thus revoked, the defendant may demand and shall be entitled to be brought to trial on the offense within 60 days after the date on which his bail was revoked. If the defendant is not brought to trial within the 60 day period . . . he shall not be held longer without bail. In computing the 60 day period, the court shall omit any period of delay resulting from a continuance granted at the request of the defendant.


6. Id. § 103-5(e).

7. Id.
material evidence without success and there are reasonable grounds to believe that such evidence might be forthcoming. If an accused is not tried in accordance with these provisions he must be discharged or released from the obligations of bail or recognizance.

Recently the Illinois courts have been inundated with claims concerning the violation of the statutory and constitutional rights to a speedy trial. This Article will discuss the interpretations of section 103-5 given by the courts and the relationship between this statute and the constitutional right to a speedy trial.

**COMPUTATION OF THE STATUTORY PERIOD**

In the most elementary situations it is not difficult to compute the 120 or 160-day period within which an accused must be brought to trial. Under the Statutory Construction Act, the day that a person is taken into custody or demands trial is excluded from the computation. Assuming that the running of the statutory period is not thereafter tolled, or extended upon application of the state, the trial of an accused must commence prior to the end of the 120th or 160th day, whichever is applicable. In practice, however, the computation of the period is often complex.

**The Effect of the Tolling of the Statute**

The most significant developments in the past year concerning

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8. *Id.* § 103-5(c).
9. *Id.* § 103-5(d).
12. See text accompanying notes 69-144 infra.
13. See text accompanying notes 153-64 infra.
14. In People v. Williams, 59 Ill. 2d 402, 405, 320 N.E.2d 849, 850 (1974), the court held that the statute is satisfied by beginning the process of jury selection prior to the expiration of the statutory period.
15. If the final day of the statutory period falls on a Saturday, Sunday or holiday it is excluded from the computation of the statutory period. The day succeeding a Saturday, Sunday or holiday is also excluded when it too is a Saturday, Sunday or holiday. ILL. REV. STAT. ch. 131, § 1.11 (1973). See, e.g., People v. Hurst, 28 Ill.2d 552, 198 N.E.2d 19 (1963); People v. Hannon, 381 Ill. 206, 208, 44 N.E.2d 923, 924 (1942). In People v. O'Connell, 84 Ill.App.2d 184, 189, 228 N.E.2d 154, 156 (1st Dist. 1967), cert. denied, 391 U.S. 969 (1968), the appellate court held that allowing the state an additional day when the final day of
section 103-5 occurred in the decision by the Supreme Court of Illinois altering the method of computing the statutory period; the court's retreat from this decision after petition for rehearing by the state; and the legislature's response to the court's action. The court had established that if a defendant causes a delay in his trial, or if the running of the statutory period is tolled for any other reason, the statutory period is not merely suspended at that point; rather, it begins to run anew from the date on which the delay is requested or caused, or to which the case is continued as a result of the delay. In the original opinion issued by the court in People v. Lewis, however, this long standing rule was changed.

Lewis did not contend that his statutory right to a speedy trial, as such, had been violated; rather, he argued that he had been denied due process of law in being forced to choose, on the 116th day following his arrest and incarceration, between going to trial just six days after counsel had been appointed to represent him and requesting a continuance in order to allow his attorney to better prepare for trial. Lewis reluctantly chose to go to trial. The Illinois Supreme Court ultimately held that in being forced to make this choice he was not denied due process of law nor the effective assistance of counsel. The court, however, went on to state:

the period fell on a Sunday did not deny equal protection of the law. See also People v. Walker, 34 Ill.2d 23, 27, 213 N.E.2d 552, 554-55 (1966).

17. People v. Lewis, 60 Ill. 2d 152, 158, 330 N.E.2d 857, 861 (1975).

19. See text accompanying notes 69-144 infra.

22. Id., Slip Opinion at 5.
23. See text accompanying notes 84-90 infra.
By its terms Section 103-5 does not require recommencement of another 120 day term whenever a defendant occasions a delay. In view of the realities now existing in many of our trial courts, we believe it would be more consistent with the intent of the legislature to construe that section as simply excluding from the count of the 120 day term any delays occasioned by the defendant for whatever reason. . . . The new rule will not prejudice the State. . . . if the State would have been ready for trial within the original 120 day term when the defendant did not request a continuance, then there would seem to be no reason why the State would not be just as ready on [for example] the 125th day.24

This decision was issued on January 21, 1975; however, the new rule was to apply prospectively only. Specifically it was to cover only “those cases in which arrests occurred on or after June 1, 1975. . . .”25

The change in the interpretation of section 103-5 created a furor among the state’s prosecutors and a petition for rehearing was promptly filed by the Illinois Attorney General and the Cook County State’s Attorney.26 The state argued that congested court dockets and overburdened prosecutors’ offices would result in the discharge of hundreds of criminal defendants if such a rule were applied.27 This argument was accepted by the court. Denying the state’s petition for rehearing, the court, nevertheless, modified its original opinion, deleting the above-quoted statements and restoring the prior interpretation of section 103-5.28 The court then provided an addendum to its modified opinion:

Our opinion, as originally filed, reinterpreted the 120-day rule to exclude from the computations any delays occasioned by defendants. The additional facts and arguments presented in the petition for rehearing and briefs of amici relating to pending legislation, as well as problems in the implementation of the rule originally announced, have persuaded us that we should, at

25. Id. at 6.
27. Id. at 5-6.
least for now, await legislative consideration and action. Accordingly, that portion of our original opinion has been deleted.29

It is difficult to quarrel with the logic of the court's initial opinion in Lewis. Nothing in section 103-5 requires that the statutory period begin anew each time that it is tolled.30 By analogy to the statute of limitations,31 it would seem that the statutory period should merely be temporarily suspended. Before Lewis, the supreme court had never really explained its conclusion that the period must recommence each time that it was tolled. In People v. Hairston32 it had merely rationalized its decision by stating:

[Section 103-5] and its predecessors have been repeatedly and consistently construed to mean that a delay occasioned by an accused is a waiver of the right to be tried within the statutory period, and that the period starts to run anew from the date to which the cause has been continued because of such delay... It is axiomatic that where a statute has been judicially construed and the construction has not evoked an amendment, it will be presumed that the legislature has acquiesced in the court's exposition of the legislative intent.33

While such an explanation might have merit insofar as continued acceptance of an established rule is concerned, it does nothing to justify the court's initial adoption of the rule.34

The real reason for the rule that the statutory period commences anew each time that it is tolled, therefore, is first made clear by the addendum to Lewis; any other interpretation of the statute would simply overtax the criminal justice system. While

29. Id. at 158, 330 N.E.2d at 861.
33. Id. at 353, 263 N.E.2d at 844-45.
34. The Third District of the Illinois Appellate Court has given the following as justification for the rule:

Obviously the courts have recognized that it would be difficult for a prosecutor to determine the exact number of days to be added to the 120-day period. The rule that interruption by act of defendants suspends the period and makes it begin to run anew could prevent dispositions on a purely technical basis... People v. Ellis, 4 Ill.App.3d 585, 589, 281 N.E.2d 405, 407 (3d Dist. 1972). Nevertheless, in most cases it would be relatively simple for a prosecutor or a court to compute the statutory period by excluding from the computation the number of days delayed.
this rationale might be acceptable insofar as a criminal defendant’s statutory right to a speedy trial is concerned, it seems to be constitutionally unsound. The Supreme Court of the United States has stated, “the ultimate responsibility for [overcrowded courts] must rest with the government rather than with the defendant.”35 In effect, the rule confers a benefit on the state, and penalizes a defendant for the state’s failure to provide sufficient resources for the criminal justice system.36

The problem, however, will not exist much longer. In response to the Lewis case the General Assembly has enacted, and Governor Walker has signed, a bill which amends section 103-5 by adding a new subsection providing:

Delay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried [under this section] and on the day of expiration of the delay the said period shall continue at the point at which it was suspended. Where such delay occurs within 21 days of the end of the [statutory] period . . . the court may continue the cause on application of the State for not more than an additional 21 days beyond the [otherwise applicable] period. . . .37

This provision becomes effective on, and applies to persons charged with offenses committed on or after July 1, 1976. It seems, therefore, that the purpose behind the Illinois Supreme Court’s actions in the Lewis case might have been the stimulation of legislative action. If so, the plan paid off well.

Custody

In addition to the problem involved when the statutory period has been tolled, there are other computation problems that can arise. Since a person in custody in Illinois for an alleged offense must be brought to trial within 120 days “from the date he was

35. Barker v. Wingo, 407 U.S. 514, 531 (1972). In Strunk v. United States, 412 U.S. 434, 436 (1973), the Supreme Court, in dictum, indicated that the responsibility for understaffed prosecutors also rests with the government rather than the defendant.

36. For discussion of the constitutional dimensions of such a scheme see text accompanying notes 167-73 infra.

taken into custody," it is necessary to determine when a person is considered in "custody" for purposes of the statute.

It is apparently settled that the 120 day statutory period commences to run only when the accused is in custody in the State of Illinois. In People v. Hayes the defendant had been arrested in Mississippi in late May or early June of 1959; the Supreme Court of Illinois held, under the predecessor of section 103-5, that the statutory period did not begin to run until July 28, 1959, the date on which the defendant was returned to Illinois. This interpretation has also been applied to section 103-5 by the appellate courts on numerous occasions. Nevertheless, the courts have also indicated that a different result might follow if the prosecutor fails to act diligently in securing the defendant's return to Illinois.

Similar problems arise when the accused is being held on charges unrelated to those which are the subject of his speedy trial claim. Interpreting the predecessor to section 103-5, which referred to "confinement" rather than "custody," the supreme court in People v. Jones, held that the statutory period begins to run only when an accused is confined "in connection with the subsequently prosecuted charges." The same interpretation has

39. 23 Ill.2d 527, 179 N.E.2d 660 (1962).
42. See, e.g., People v. Gulick, 7 Ill.App.3d 427, 287 N.E.2d 727 (3d Dist. 1972); People v. Rose, 7 Ill.App.3d 374, 287 N.E.2d 195 (2d Dist. 1972); People v. Archie, 1 Ill.App.3d 981, 274 N.E.2d 922 (1st Dist. 1971); People v. Gilliland, 131 Ill.App.2d 635, 267 N.E.2d 140 (3d Dist. 1971). In Gilliland the court stated, "If the prosecution is to be faulted for failure to exercise appropriate diligence it does not seem to us that such diligence can be exercised or effectively measured when defendant is not in custody in this State." Id. at 636, 267 N.E.2d at 141.
46. Id. at 360, 211 N.E.2d at 263. The statutory period did not commence in Jones on June 3, 1961, the date that the defendant was first arrested in Illinois for offenses unrelated to those involved in the appeal, nor even on June 10, 1961, the date that formal complaints on the charges involved in the appeal were filed, but rather began to run on February 19, 1962, the date that the defendant was indicted on these charges. However, the court was careful to point out that the record was "devoid of any showing as to the issuance of a warrant, a preliminary hearing, issuance of a mitimus [sic] or any action relating to such
been given to section 103-5. The courts have been vigilant, however, to ensure that prosecuting officials do not use this construction to evade a defendant's right to a speedy trial. In People v. Fosdick, for example, the defendant was arrested on March 12, 1964, pursuant to a Champaign County warrant charging him with rape. The next day the original rape complaint against the defendant was dismissed and a new one charging the same conduct was filed. Another arrest warrant was issued, but not served, because the defendant was returned to DeWitt County to face trial on unrelated charges. A detainer was placed against Fosdick which followed him to the penitentiary where he had been incarcerated following conviction in DeWitt County. The accused was


48. 36 Ill.2d 524, 224 N.E.2d 242 (1967).
not returned to Champaign County to face the rape charge until June 22, 1964. On July 14, 124 days after his initial arrest on the rape charge, the defendant filed a motion for discharge under section 103-5; the motion was denied. On appeal the state argued that the defendant was not in the custody of Champaign County on the rape charge until June 22; however, the court rejected this argument holding that the defendant was in custody, for purposes of section 103-5, on March 12, 1964, the date that the original arrest warrant was served on him. In reaching this result the court said:

We do not believe that . . . a voluntary dismissal on motion of the State, and without notice to defendant, can be used to evade the provisions of the 120-day rule. . . . Neither the dismissal and refiling of the same charge . . . nor the voluntary relinquishment of custody to DeWitt County . . . can deny defendant his right to a speedy trial. 49

In People v. Gray50 the court was equally unreceptive to the state’s view of such prosecutorial delays. A detainer warrant charging the defendant with armed robbery was filed by Morgan County officials on October 26, 1965, while the defendant was serving a one to five year sentence in the state penitentiary. On April 21, 1966, the defendant filed a motion for discharge on speedy trial grounds, and the motion was allowed. On appeal from this dismissal the state contended that the defendant had never been arrested or held in custody by virtue of the detainer warrant and that since the indictment was not returned until May 25, 1966, no proceedings were pending against the defendant in Morgan County until that time. In affirming the dismissal the appellate court pointed out that at all times after October 26, 1965, the prosecution knew the defendant’s whereabouts and had available procedural means to bring the defendant into court for trial. The court concluded:

the State’s Attorney was under a duty to prosecute the charge through trial within 120 days from the discovery of the wherea-

49. Id. at 528, 224 N.E.2d at 245. See also People v. Patheal, 27 Ill.2d 269, 189 N.E.2d 309 (1963); People v. Swartz, 21 Ill.2d 277, 171 N.E.2d 784 (1961); People v. Emblen, 362 Ill. 142, 199 N.E.2d 281 (1935).
bouts of the defendant and the concurrent placing of the detainer warrant. We cannot satisfactorily distinguish the failure to serve the warrant in this case from the dismissal of a complaint and the voluntary relinquishment of custody to another agency as in People v. Fosdick.51

Cases such as Fosdick and Gray indicate that the general rule of construction concerning the meaning of "custody" in section 103-5 (a)52 will not be applied to fact situations indicating the state's attempt to evade a defendant's right to a speedy trial.53 Perhaps the only conclusion that can be drawn from an analysis of the cases is that it is often difficult to determine when a person is in "custody." A crucial factor in making such a determination, however, is whether or not the prosecution has attempted to evade a defendant's right to a speedy trial by releasing him to the custody of another county after formal charges have been filed,54 or by failing to make an effort to obtain custody of an accused who is known to be serving a sentence in a state penal institution.55

Demand for Trial

When a person is free on bail or recognizance, subsection (b) of section 103-5 provides that the statutory period does not begin to run until he demands trial.56 Although it is preferable for the demand to be in writing, an oral demand for trial is adequate.57 However, demand for jury trial is not, by itself, sufficient to start the running of the statutory period; such a demand is not equiva-

52. See cases cited in notes 47-49 supra.
53. But see People v. Nettles, 107 Ill.App.2d 143, 246 N.E.2d 29 (3d Dist. 1969), where it was held that knowledge by officials of the defendant's implication in offenses for which he is subsequently prosecuted is not sufficient to start the running of the statutory period even though the defendant was incarcerated on another unrelated charge at the time such knowledge was acquired. However, the court was careful to point out that "No proof was offered by the defendant which would indicate that the delay was an attempted evasion of the 120-day rule." Id. at 149, 246 N.E.2d at 32.
54. See People v. Fosdick, 36 Ill.2d 524, 224 N.E.2d 242 (1967).
56. ILL. REV. STAT. ch. 38, § 103-5(b) (1973).
57. See, e.g., People v. Rockett, 85 Ill.App.2d 24, 28, 228 N.E. 2d 219, 222 (2d Dist. 1967); People v. Hatchett, 82 Ill. App.2d 40, 47, 226 N.E. 2d 97, 100 (5th Dist. 1967).
lent to a demand for immediate trial but is only a demand that the trial be before a jury whenever it is held.58

Few problems have arisen concerning the interpretation of subsection (b); nevertheless, an interesting question was presented in People v. Byrn.59 Here the defendant was taken into custody on a charge of murder. Four days later he appeared in court with his attorney for arraignment and made a demand for a speedy trial. He remained in custody for another 73 days before he was released on bail. After he had been free on bail for 98 days he moved to dismiss the charge on the ground that more than 160 days had elapsed since he had demanded trial. The trial court allowed this motion and dismissed the indictment. The appellate court reversed, holding that the demand for trial made by the defendant four days after his arrest and while in custody was not a continuing demand, and that since no demand for trial was made after he had been released on bond, he was not entitled to discharge under the speedy trial statute.

While Byrn might appear to place an undue burden on the accused, by requiring him to renew an earlier demand for trial, a closer examination of the situation reveals the contrary. The assumption underlying section 103-5 (a) is that a person held in custody generally will desire a speedy trial; however, the assumption underlying section 103-5 (b) is that a person who is free on bond or recognizance generally will not desire a speedy trial. Following these assumptions, it is reasonable to believe that the majority of persons who desire a speedy trial while in custody will not desire one once they are released on bond or recognizance. If this is true, it is not unfair to place this burden on those defendants who apparently comprise the minority, that is, on those

59. 3 Ill.App.3d 362, 274 N.E.2d 186 (5th Dist. 1971). A question similar to that in Byrn was presented in People v. Cornwell, 9 Ill.App.3d 799, 293 N.E.2d 139 (5th Dist. 1973). In this case, however, the defendant who was free on bond had demanded a speedy trial, but subsequently caused a delay in his trial. He was not tried within 160 days after the last delay caused by him, so the trial court allowed his motion for discharge on speedy trial grounds. On appeal the state contended that since the defendant had not renewed his demand for trial after he had agreed to a continuance, the statutory period had not begun to run again. The appellate court, however, rejected this argument and held that the period commenced again after the delay caused by the defendant without any necessity for him to renew the demand.
who would continue to desire a speedy trial after they have been released from custody. Under this analysis, therefore, the rule that a defendant must renew an earlier demand for trial after he is released from custody is not unreasonable.\textsuperscript{60}

\textbf{D. Retrials}

Even when a defendant’s trial has commenced within the applicable statutory period, the question of whether he has been accorded a speedy trial can still arise if retrial on the same charge becomes necessary. It has been held that when the need for a retrial is caused by reversal on appeal of the trial court’s judgment, the full statutory period recommences the day on which the mandate of the appellate court is received by the trial court.\textsuperscript{61} Similarly, it has been held that when retrial is necessitated by a declaration of mistrial, the full statutory period recommences the day on which the mistrial is declared.\textsuperscript{62} In \textit{People v. Gilbert},\textsuperscript{63} the Illinois Supreme Court apparently modified the latter rule. In this case the defendants’ first trial commenced on June 9, 1959, 35 days after their arrest. A mistrial was declared the next day, after the jury was unable to agree upon a verdict. The second trial, which resulted in the conviction of the defendants, commenced on October 9, 1959. The Illinois Supreme Court found that the defendants had been tried within four months of the declaration of the mistrial, and apparently held that their statutory right under the then applicable speedy trial statute\textsuperscript{64} had not been violated. It then went on to consider the defendants’ constitutional right to a speedy trial, and concluded that under the circumstances of the case there had been no violation of the constitutional right; the interval between arrest and com-

\textsuperscript{60} Nevertheless, here too the courts have indicated an unwillingness to allow the state the use of this rule as a means of technically evading the right to speedy trial. See, e.g., People v. Gooding, 21 Ill.App.3d 1064, 316 N.E.2d 549 (4th Dist. 1974), rev’d on other grounds, 61 Ill.2d 298, 335 N.E.2d 769 (1975).


\textsuperscript{62} See, e.g., People v. Jonas, 234 Ill. 56, 84 N.E. 685 (1908).

\textsuperscript{63} 24 Ill.2d 201, 181 N.E.2d 167, cert. denied, 371 U.S. 844 (1962).

\textsuperscript{64} Under Law of June 17, 1959, ch. 38, § 748, [1959] Ill. Laws 358 (repealed 1963) the statutory period within which a defendant in custody had to be tried was four calendar months.
mencement of the second trial was 156 days and the first trial took place 35 days after the defendants' arrests. However, the court cautioned,

[O]ur decision in this case does not mean that in every instance of a mistrial, the full statutory period begins to run anew, regardless of the length of time that has already elapsed. The overriding consideration is the constitutional right to a speedy trial, and where delay is not attributable to the defendant, that right is not measured by aggregating successive periods of four months each.\(^5\)

Gilbert, therefore, has come to stand for the proposition that the state has only a reasonable time after a mistrial to retry a defendant on the same charge; consequently, whether or not there has been unreasonable delay will depend upon the facts of each case.\(^6\)

The flexible approach taken by Gilbert and its progeny seems preferable to the earlier rule that a new statutory period com-

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\(^5\) 24 Ill.2d at 204-05, 181 N.E.2d at 169-70.

\(^6\) In applying the Gilbert test, the courts have generally found that delay less than the applicable statutory period is reasonable, even when the first trial commenced late in the original statutory period. In each of these cases, the delay exceeded 39 days, and the state had offered a legitimate explanation for the delay. See People v. Hudson, 48 Ill.2d 177, 263 N.E.2d 473 (1970), where the first trial commenced on the 116th day of the statutory period and the second trial commenced 55 days after mistrial. Problems arose from the death of co-defendant's attorney and over whether severance should be granted. In People v. Mason, 118 Ill.App.2d 47, 254 N.E.2d 600 (1st Dist. 1969), the first trial commenced on the 78th day of the statutory period. Motion for discharge was granted by the trial court 90 days after mistrial. The delay in retrial was caused by two of the state's witnesses being out of the country.

There are no reported cases in which the delay between trial and mistrial has exceeded the applicable statutory period. In a case in which the delay was 39 days, the total time between the defendant's arrest and the commencement of his retrial exceeded the original running of the statutory period by only eight days. See People v. Henry, 68 Ill.App.2d 48, 214 N.E.2d 550 (3d Dist. 1966).

For cases involving a delay of three weeks or less see People v. Allen, 1 Ill.App.3d 197, 272 N.E.2d 296 (2d Dist. 1971) (first trial commenced on 119th day of statutory period; second trial commenced 3 weeks after mistrial); People v. Ellis, 132 Ill.App.2d 920, 271 N.E.2d 47 (3d Dist. 1971) (first trial commenced on last day of the statutory period; second trial set for 14 days after mistrial); People v. Eickert, 124 Ill.App.2d 394, 260 N.E.2d 465 (1st Dist. 1970) (first trial commenced on 108th day of the statutory period; second trial commenced 20 days after mistrial).

There has been only one reported case, People v. Aughinbaugh, 53 Ill.2d 442, 292 N.E.2d 406 (1973) in which a court has concluded that the delay between mistrial and retrial was unreasonable. In Aughinbaugh the delay was exceedingly long, 120 days, and the defendant had been incarcerated the maximum 180 days without dilatory action on his part prior to the mistrial. In addition, the state offered no explanation for the long delay after the mistrial.
mences upon the declaration of mistrial. A defendant has the right to a speedy trial, but the state also must have time to prepare its case. Under section 103-5 the state is given either 120 to 160 days for this purpose, with the possibility of obtaining an additional 60 days. However, because the state has already brought the defendant to trial once, it must be assumed that it was prepared for trial at that time. The state, therefore, should not need as much time to prepare for the retrial as it would need to prepare a case initially; thus, to always allow the state the full statutory period at this point, even to try to strengthen its case against the defendant after a hung jury, would be unfair. Because no specific time period can be chosen which is fair to both the state and the defendant in all cases, the courts must be given the discretion to determine whether delay in a particular case is reasonable.

In the recent case of People v. Dodd67 the Illinois Supreme Court has indicated its willingness to apply this flexible approach to cases in which retrial is occasioned by reversal of the trial court's judgment. The court noted:

While situations following reversal of a conviction, or mistrial, may in some instances require an examination of the record to determine whether the expiration of a full 120-day term prior to retrial violated an accused's right to a speedy trial... in the absence of exceptional circumstances, retrial within 120 days of the circuit court's receipt of the mandate remanding the cause for trial satisfies the constitutional requirement that an accused be given a speedy trial. We find no such exceptional circumstances to be shown on this record and hold that petitioner was not deprived of his constitutional right to a speedy trial.68

If this approach is used in future cases involving retrials after reversals, the courts should remember that reversal on appeal generally occurs a year or more after the trial court has entered its judgment. Consequently, the burden on the state in preparing for retrial in these cases is much greater than in those in which the retrial will occur shortly after a mistrial has been declared.

68. Id. at 57, 317 N.E.2d at 30.
TOLLING OF THE STATUTE

In General

The requirements imposed upon the state by section 103-5 to try an accused within specified periods of time is modified whenever "delay is occasioned by the defendant, by an examination for competency . . ., by a competency hearing, by an adjudication of incompetency for trial, by a continuance allowed . . . after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal."9 When these events occur the running of the statutory period is tolled, and a new period commences at the end of the delay.70 Aside from the question of when a delay is "occasioned by the defendant," very few problems have arisen in this area. In the cases concerning these provisions, it has been held that not all examinations for competency and not all competency hearings will toll the statute. Only when there is "bona fide doubt" as to the accused's competency is the running of the statutory period tolled.71

Delay Occasioned by the Defendant

The major problem in the application of section 103-5 concerns


The events enumerated in the statute are apparently the only ones that toll the running of the statutory period. Consequently, if an original indictment is dismissed and an accused is then reindicted for the same offense, the statutory period continues to run. See People v. Lee, 44 Ill.2d 161, 166, 254 N.E.2d 469, 472 (1969). Even if the state is permitted to strike the indictment with leave to reinstate, the statutory period continues to run if the defendant has demanded trial. People v. Baskin, 38 Ill.2d 141, 230 N.E.2d 208 (1967); cf. People v. Nelson, 25 Ill.2d 32, 182 N.E.2d 700 (1962). It is unclear, however, whether or not the statutory period continues to run after a defendant free on bond demands trial and is later discharged at a preliminary hearing. See People v. McAdrian, 52 Ill.2d 250, 287 N.E.2d 688 (1972). See also Ill. Sup. Ct. R. 604(a)(4), 61 Ill.2d ix (1975).


71. See, e.g., People v. Gibson, 21 Ill.App.3d 692, 315 N.E.2d 557 (5th Dist. 1974);
the determination of whether a particular event causes a "delay...occasioned by the defendant." In order to facilitate the making of this determination the Illinois Supreme Court has formulated a general rule:

[T]he criterion in each case is whether the defendant’s acts in fact caused or contributed to the delay. In the varied fact situations that involve the 120-day rule, [a court must] carefully examine the facts to prevent a “mockery of justice” either by technical evasion of the right to speedy trial by the State, or by a discharge of a defendant in fact caused by him.72

In applying the rule the courts have agreed that a continuance sought and obtained by a defendant, or agreed to by him, is chargeable to him and tolls the running of the statutory period.73

People v. Murdock, 3 Ill.App.3d 746, 279 N.E.2d 159 (5th Dist. 1972); see also People v. Benson, 19 Ill.2d 50, 166 N.E.2d 80 (1960); ILL. REV. STAT. ch. 38, § 1005-2-1 (1973).

The courts have held, without much discussion, that when a defendant requests and obtains an examination of his competency to stand trial, the statutory period is tolled. People v. Siglar, 49 Ill.2d 491, 496 N.E.2d 65, 68 (1971); People v. Bacon, 2 Ill.App.3d 324, 276 N.E.2d 782 (1st Dist. 1971); People v. Barksdale, 110 Ill. App.2d 163, 249 N.E.2d 165 (1st Dist. 1969). See also People v. Jenkins, 101 Ill. App.2d 414, 243 N.E.2d 259 (1st Dist. 1968). If, however, the defendant merely requests general psychiatric care, the statutory period is not tolled. People v. Hundley, 13 Ill.App.3d 935, 301 N.E.2d 339 (4th Dist. 1973). In People v. Hugley, 1 Ill.App.3d 828, 275 N.E.2d 178 (5th Dist. 1971) the state filed a petition suggesting incompetency on the 119th day of the 120-day statutory period, and after the defendant had returned from the hospital at the state penitentiary as “not in need of mental treatment,” the court found that the state’s petition had not been filed in good faith, but had been made for purposes of delay.


73. See, e.g., People v. Young, 46 Ill.2d 82, 263 N.E.2d 72 (1970); People v. Bagato, 27 Ill.2d 165, 188 N.E.2d 716 (1963); People v. Rankins, 18 Ill.2d 260, 163 N.E.2d 814, cert. denied, 363 U.S. 822 (1960). But see People v. Scott, 13 Ill.App.3d 620, 301 N.E.2d 188 (5th Dist. 1973), where the court found that the public defender’s request that the case be held on call until the following morning, made on the day after arraignment and appointment of counsel, had not impeded the progress of the case.

The supreme court has also held that defense occasioned delays of the preliminary hearing are to be viewed as delaying the trial for section 103-5 purposes. People v. Benjamin, 34 Ill.2d 183, 215 N.E.2d 216 (1966); People v. Petropoulos, 34 Ill.2d 179, 214 N.E.2d 765 (1966); People v. Bagato, 27 Ill.2d 165, 188 N.E.2d 716 (1963). Recently, the Fourth District Appellate Court has held that a delay of a preliminary hearing which does not in fact impede the state’s ability to bring an accused to trial within the statutory period should not be considered a “delay...occasioned by the defendant.” People v. Gooding, 21 Ill.App.3d 1064, 316 N.E.2d 549 (4th Dist. 1974). This position, however, was promptly reversed by the supreme court, on appeal by the state. People v. Gooding, 61 Ill.2d 298, 335 N.E.2d 769 (1975).

When the defendant’s request for a continuance is only a partial cause of the delay, the
This is true regardless of the reason for the continuance, \(^7\) nevertheless, the facts must support the conclusion that the defendant actually asked for or agreed to the delay.

In *People v. House*, \(^7\) for example, the defendant was brought into court for arraignment on September 16, 1955, and asked whether he had a lawyer. He replied that he did, and that the lawyer's name was George Adams. The judge, after inquiring whether the defendant's attorney had been notified, said, "Notify Adams and we'll continue this until Monday." The prosecutor...
then asked, "Motion defendant?" and the judge replied, "Motion defendant, September 19th," and ordered the clerk to enter an order continuing the case on motion of the defendant. The defendant was subsequently convicted of assault with intent to commit rape, but he appealed, claiming that the trial court erred in denying his pretrial motion for discharge under the speedy trial statute. The state contended that the continuance on September 16 was on motion of the defendant and had therefore tolled the running of the statutory period. The Supreme Court of Illinois, however, rejected the state's argument, stating that the record showed that the defendant made no motion on September 16 and that the continuance on that date was for arraignment not trial. It further stated:

The constitutional guarantee of a speedy trial would be a mockery, indeed, if this court were to permit the State's Attorney and trial court, either with intent or through inadvertence, to ascribe to the defendant, when appearing for arraignment and without counsel, a motion for continuance which he did not make, and thereby toll the running of [the] statute.  

The court reversed the conviction and remanded the case to the trial court with directions to discharge the defendant.

A similar fact situation was presented in *People v. Wyatt*. In this case the defendant and a co-defendant were brought into court for arraignment on armed robbery indictments. After advising the defendants of the charges against them, the trial court inquired whether they had a lawyer. At this point the co-defendant's fiancee, who was a spectator in the courtroom, stated that the co-defendant did not have a lawyer, but that he would get one before trial. The defendant's fiancee, who was also present, volunteered the same information with respect to the defendant. The trial judge then stated, "If you think you can employ a lawyer for them I'll continue it right now until you get a lawyer for him," and asked the defendants whether it was "satisfactory" to them if the case was continued for a week. Both men replied only by inquiring whether their bonds could be reduced. The judge refused to discuss the bonds, but said that he was going to

76. Id. at 559, 141 N.E.2d at 14.
77. 24 Ill.2d 151, 180 N.E.2d 478 (1962).
continue the matter for a week to "enable your friends to get a lawyer for you." He again asked whether this was satisfactory to them, but before they could answer the co-defendant's fiancee asked if the court could make the continuance for two weeks. Thereafter, the defendants, upon interrogation by the court, indicated that this proposal was "agreeable" to them, and the court ordered the case continued for nine days "on motion of the defendants."

One defendant was subsequently convicted of armed robbery, and he appealed, partially on the ground that his pretrial motion for discharge under the speedy trial statute had been erroneously denied. The Illinois Supreme Court agreed with the defendant, and stated that the case could not be distinguished from *House*. It then noted:

> The record here is complicated by the presence and statements of the women bystanders, and by the fact that defendant purported to agree to the trial court's action, but we do not see how either circumstance justifies a harsher limitation of defendant's constitutional right. Any fair and honest appraisal of the proceeding [sic] of June 22, 1959, shows that it was the court, and the court alone, which proposed and interjected the matter of a continuance. It is true defendant was willing to take advantage of the court's offer, once the court suggested it, but we are unable to see how this factor converted the offer into a request for delay on motion of defendant.78

Despite the holdings in *House* and *Wyatt*, the courts generally

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78. Id. at 153-54, 180 N.E.2d at 479. See also People v. Nelson, 25 Ill.2d 38, 182 N.E.2d 700 (1962); People v. Scott, 13 Ill.App. 3d 620, 301 N.E.2d 118 (1st Dist. 1973). But see People v. Benjamin, 34 Ill.2d 183, 215 N.E.2d 216 (1966), where the following transpired when the defendant appeared at arraignment without counsel:

> Mr. Duffy [an assistant public defender]: Judge, in this case, he thinks he may have a lawyer, but he's not sure.
> The Court: Who is it?
> The Defendant: Well, it was Scott. I don't know if he's going to be in court.
> The Court: Do you want to wait for a while?
> The Defendant: He don't know?
> Mr. Duffy: He wants about a week's continuance to get in touch with Scott. Is that correct?
> The Defendant: Yes.

The Illinois Supreme Court held that this continuance was chargeable to the defendant because he "said he thought he had an attorney who was not present and agreed with the
have been unreceptive to the argument that a defendant should not be held accountable for continuances requested and obtained, or agreed to, by court-appointed counsel. The argument was raised by the defendant in *People v. Rankins*, but the court rejected it stating that an accused may not fully avail himself of the services of appointed counsel and then, later, disclaim the attorney's services and appointment when it appears to his advantage to do so. "Any other rule," said the court, "... would cause undue delay and greatly embarrass the effective prosecution of crime." In *People v. Carr*, the court applied the accountability rule even though the defendant had objected strenuously to his court-appointed attorney's request for the continuance. The court noted that the defendant had not discharged his appointed attorney, and that the attorney continued to represent the defendant throughout the trial, and even on appeal.

One recent case, however, has held that the defendant was not accountable for the actions of his court-appointed lawyer. *People v. Carrillo* states that "[i]mplicit in the rule charging a defendant with waiver by his attorney . . . is the supposition that the attorney has had an opportunity to confer with the defendant." Since the defendant in the case, a Mexican who could not speak English, was never consulted by anyone prior to the date of the continuance, which was 72 days after his arrest, and since no one was interpreting the court proceedings for him, the request for a

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suggestion of the Public Defender that a continuance be granted." 34 Ill.2d at 185, 215 N.E.2d at 217.


80. *Id.* at 264-65, 163 N.E. 2d at 817. *See also People v. Johnson*, 45 Ill. 2d 38, 257 N.E. 2d 3 (1970); *People v. Young*, 46 Ill. 2d 82, 263 N.E. 2d 72 (1970); *People v. Leonard*, 18 Ill.App. 3d 527, 310 N.E. 2d 15 (4th Dist. 1974). In People v. Pinkston, 10 Ill.App.3d 548, 294 N.E. 2d 738 (1st Dist. 1973), the court rejected an argument based on equal protection grounds. The defendant argued that he should not be charged with a continuance requested by his appointed counsel in order to properly prepare himself for trial, because if he had been able to retain private counsel at the time of arrest, he would not have found it necessary to ask for a continuance since his counsel would have had an opportunity to prepare his defense. The court, however, pointed out that there was nothing in the record to show that a private attorney would not have asked for the continuance, which was made only four days after the defendant's arrest.


82. 27 Ill.App.3d 603, 327 N.E.2d 1 (1st Dist. 1975).

83. *Id.* at 606, 327 N.E.2d at 4. The court noted that the record was not even clear that the public defender had said "Motion defendant." *Id.* at 605, 327 N.E.2d at 3.
continuance by the public defender could not be attributed to the defendant. The Carrillo court, however, limited its decision by stating that it was not holding that the record must affirmatively show that every time an attorney requests or agrees to a continuance he has consulted with the accused and has advised him. Rather, the presumption is that when an attorney requests a continuance it is knowingly consented to by the defendant.

The Illinois courts are also unreceptive to the argument that a defendant whose arraignment and appointment of counsel come late in the statutory period is denied due process of law by being required to choose between the right to effective assistance of counsel and the right to a speedy trial. In People v. Lewis, 84 for example, the defendant was arrested on November 7, 1971, and remained in custody thereafter. He was not indicted until February 24, 1972, which was the 109th day of his incarceration. He was arraigned the next day, at which time counsel was appointed. After a plea of not guilty was entered, the case was set for trial on March 2, the 116th day of the statutory period. On that date the assistant public defender told the court that since he had been appointed only six days earlier he was unprepared for trial. The defendant, however, persisted in answering ready for trial, even after the judge made specific inquiry of him on two occasions. Trial, therefore, commenced the next day, and the defendant was convicted.

On appeal the Illinois Supreme Court rejected Lewis's contention that he had been denied due process of law by being required to choose between obtaining a continuance on his motion and proceeding to trial immediately.

The fact that on occasion the accused might have to jeopardize the legislative benefits of the four-month rule by asserting his right to a continuance does not entail a denial of his right to a speedy trial. . . . The election was defendant's to determine on the basis of what would better insure him a fair trial, and, having chosen to proceed, his present argument is nothing more than technical obfuscation. The Supreme Court of the United States, in considering an analogous question in McGautha v. California (1971), 402 U.S. 183, 213 . . . made the following

84. 60 Ill.2d 152, 330 N.E.2d 857 (1975).
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observation which is also pertinent here: "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." 85

The court then closely examined the record to determine whether the defendant had been denied effective assistance of counsel as a consequence of his election to proceed to trial, and it concluded that he had not.

The approach taken in Lewis had previously been taken in other cases.86 In one of these cases, People v. Williams,87 where defendant was arraigned and counsel appointed on the 119th day of the 120-day statutory period, the court stated:

There appears to be a growing tendency to countenance . . . delay [in the arraignment of the defendant and the appointment of counsel], a practice which causes this court considerable concern, and a practice which harbors the danger of denying the defendant the effective assistance of counsel.88

Nevertheless, the court concluded that Williams had not been denied due process of law, nor the effective assistance of counsel.89

85. Id. at 156-57, 330 N.E.2d 860.
88. Id. at 405-06, 320 N.E.2d at 851.
89. In People v. Carr, 9 Ill.App.3d 382, 292 N.E.2d 492 (1st Dist. 1972), defense counsel, over the objection of the defendant, apparently chose the alternative of accepting a continuance that was charged to the defendant and thus tolled the running of the statute. The court held that despite the defendant's objections this continuance was properly charged to the defendant because he did not discharge his attorney who continued to represent him at trial and on appeal. The court then stated that if the court had acceded to the defendant's demands for trial, and he had been convicted, the question of whether he had been denied the effective assistance of counsel would surely have arisen on appeal. Thus, the alternative of obtaining a continuance to allow counsel to prepare is equally unattractive to a defendant.
The practice of thoroughly searching the record to determine whether a defendant was prejudiced by proceeding to trial immediately provides some protection to the defendant, but it is always difficult for a court to determine “what might have been” if defense counsel had been allowed additional time within which to prepare for trial. One solution to this problem, of course, is to require the state to proceed with more dispatch in obtaining indictments, yet even absent this step, the problem would be solved by merely suspending the statutory period at the point where the continuance is granted upon the defendant’s motion. This solution was initially adopted in *Lewis*, but, as previously discussed, was subsequently rejected and left to the General Assembly to enact.  

In addition to continuances obtained by the defendant, or agreed to by him, various other actions on his part can constitute “delay . . . occasioned by the defendant,” within the meaning of the statute. Thus, a continuance ordered by the court after it has allowed the defendant’s request for a change of counsel is attributable to the accused and tolls the running of the statutory period. In most circumstances this is just, since in order for the new attorney to be adequately prepared for trial, he must confer with his client, investigate the facts, and formulate his strategy for handling the case. Therefore it is obvious that when the court appoints new counsel for an indigent defendant, at the defendant’s request, the accused is unprepared for trial at that time. Ordinarily, when the court allows the defendant to substitute privately retained counsel, the situation will be the same. If, however, the new attorney is fully prepared for trial at the time he is appointed or allowed to file his appearance, any continuance ordered by the court without the agreement of the new attorney and the accused should not be attributed to the defendant.  

It has also been held that when a defendant’s motion for substitution of judges is allowed, the statutory period is tolled.  

90. See text accompanying notes 16-37 *supra*.  
People v. Zuniga the court explained this result as follows:

[When the motion for substitution of judges was granted] the cases lost whatever seniority status they had acquired on [the original] judge's calendar and had to be returned to the presiding judge for reassignment to another trial judge. The defendant's cases then assumed their position on that judge's calendar, presumably at the bottom of the list of pending cases. Without knowing the exact condition of each judge's calendar and length of time required to dispose of each case thereon it is impossible to state whether the motion for a substitution of judges actually delayed bringing the defendant's cases to trial or advanced them. . . . We do know that the motion and reassignment started anew the administrative procedure of bringing the defendant's cases to trial.

In People v. Macklin, however, the court held that the defendant's successful motion for substitution of judges did not toll the running of the statutory period. In this case the defendant was arrested and incarcerated on April 8, 1971, indicted on June 23, and arraigned on June 29. On August 5, 1971, the case was assigned to a judge for trial, but because that judge was unable to try the case, it was reassigned to another judge on the morning of August 6, 1971, the 120th day of the defendant's incarceration. The defendant then made a timely motion for a substitution of judges pursuant to section 114-5(a) of the Code of Criminal Proce-
Under this section a defendant has the absolute right to a substitution of judges within ten days after his case has been placed on the trial call of a judge. The defendant's motion was allowed and at approximately 10 a.m. the case was referred to the chief judge for reassignment. Although there were judges available to try the case at the time, no reassignment was made then. The defendant was subsequently discharged on the basis of the speedy trial statute and the appellate court affirmed.

We find no authority for the proposition that a defendant waives the "120-day rule" by exercising his statutory right to substitute a judge when the first opportunity to exercise that statutory right comes on the last day of the 120 because the State or the Administrators of the Judicial System have not seen fit to afford a defendant an earlier opportunity to exercise that statutory right. We are not impressed by the fact that before granting the motion to substitute a judge on the 120th day, which was the day the particular judge was assigned to hear the case, the court informed defendant that making the motion to substitute a judge might cause some delay and that defendant so understood.

In the case before us the trial judge implicitly made a finding that the delay occasioned by the substitution of the judges was not unavoidable. We are disinclined to disturb that finding. The defendant had a statutory right to substitute the trial judge assigned to try the cause. Neither right may be precluded by the

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97. Id. § 114-5 provides:

(a) Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of judge or any 2 judges on the ground that such judge or judges are so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another court or judge not named in the motion.

(b) Within 24 hours after a motion is made for substitution of judge in a cause with multiple defendants each defendant shall have the right to move in accordance with subsection (a) of this Section for a substitution of one judge. The total number of judges named as prejudiced by all defendants shall not exceed the total number of defendants. The first motion for substitution of judge in a cause with multiple defendants shall be made within 10 days after the cause has been placed on the trial call of a judge.

(c) In addition to the provisions of subsections (a) and (b) of this Section any defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such motion the court shall conduct a hearing and determine the merits of the motion.
other nor may a defendant be forced to choose between the two when an exercise of both rights will not cause an unavoidable delay.

. . . The faulty operation of judicial administrative machinery is not chargeable to defendant; both the People and the Courts have the obligation to afford a defendant his statutory rights, as well as give him a speedy trial.88

The Macklin approach, that of analyzing whether the particular motion in question actually caused a delay or whether the delay was in reality caused by some other factor, is preferable to a strict rule that any motion by a defendant for a substitution of judges automatically tolls the running of the statutory period. Not only is it fairer to the defendant, but it also removes any incentive to the state to delay the proceedings against a defendant so that it can gain an advantage over him by placing him in the position of electing his right to substitute judges and abandoning his right to a speedy trial, or vice versa. Furthermore, there might be cases in which a substitution of judges does not in fact cause a delay in the defendant's trial. If this is true, and it can be demonstrated by the defendant, there should be no reason why he should remain mechanistically charged with causing a non-existent delay.

A motion by a defendant for a change of venue to another county for trial99 is also considered to be a "delay . . . occasioned by the defendant," regardless of whether the motion is subsequently allowed and the cause transferred.100 In most cases where a change of venue is ordered there will be a delay, "because it

88. 7 Ill.App.3d 713, 715-16, 288 N.E.2d 503, 505-06 (5th Dist. 1972). However, in People v. Walker, 100 Ill.App.2d 282, 241 N.E.2d 594 (1st Dist. 1968), the court considered the relationship between a defendant's right to a speedy trial under section 103-5 and his right to a substitution of judges under section 114-5. The court found no repugnancy between the two and held that even though the defendant made his motion for a substitution of judges at the earliest opportunity, there was delay attributable to him because of the motion's "adverse effect upon the orderly administrative process necessarily a part of bringing his cause to trial." Id. at 286, 241 N.E.2d at 596. The motion for substitution in this case was made well before the 120th day of the statutory period, so that the conflict between the two rights was not present to the extent it was in Macklin.


involves going to a new county for trial."101 Not only must the defendant be physically moved, if he is in custody, but court files must be transferred and arrangements made for the accommodation of the prosecutorial staff and, in some cases, for the presiding judge. Additionally, there might be some delay in obtaining courtroom space and supporting personnel in the new county.

Even if a defendant's motion for change of venue is denied, the state must ordinarily be given some time to rebut the allegations of prejudice made by the defendant;102 furthermore, a hearing must be held103 and the trial judge must be afforded the time necessary to give the matter "proper judicious consideration."104 Since the delay in these situations is unavoidable, and since it is caused by, and for the benefit of, the defendant, it is not unreasonable to attribute the delay to him.

Similarly, a successful motion by a defendant for the severance of his trial from that of his co-indictees105 has also been held to toll the running of the statutory period.106 This result is also just in view of the practicalities of the situation. Once the motion is granted the trial court cannot try the various defendants simultaneously and must, therefore, change the trial date of either the moving defendant or one of the co-indictees.

Rather than penalize the defendants who had not asked for the severance by giving them a later date for trial thereby keeping them incarcerated for a longer period of time before they could establish their innocence, assuming they were not yet admitted to bail, the trial court could . . . continue the case only as to the defendant who sought and gained the severance, giving only

102. People v. Hotz, 261 Ill. 239, 244, 103 N.E. 1007, 1010 (1913).
104. People v. Hairston, 10 Ill.App.3d 678, 683, 294 N.E.2d 748, 751 (1st Dist. 1973). Hairston indicates that a defendant's argument that an unsuccessful motion for a change of venue causes no delay "might be tenable if his motion had been one which could have been acted upon immediately and which, in actual fact, would have caused no further delay." Id. It pointed out, however, that Hairston's particular motion was 90 pages in length.
that party defendant a later trial date.\textsuperscript{107}

Seemingly the same consideration would apply in situations where a defendant moves to sever counts of an indictment against him.\textsuperscript{108} If this motion is successful, the trial court cannot proceed to try the various offenses simultaneously, and it must, therefore, delay the trial on at least one of the counts. It is unclear, however, whether a mere motion to sever counts should automatically cause a delay attributable to a criminal defendant.\textsuperscript{109}

A defendant moving to dismiss a charge against him\textsuperscript{110} is also generally charged with causing a delay in his trial, apparently on the theory that such a motion necessitates a hearing which will thereby delay the defendant’s trial.\textsuperscript{111} However, such a per se rule should be avoided. As indicated by the court in \textit{People v. Tamborski},\textsuperscript{112} a case in which the state argued that the defendant’s previous motion for discharge under the speedy trial statute delayed his trial and thereby tolled the running of the statute, a motion to dismiss a charge can sometimes be heard and decided instanter.\textsuperscript{113} If in a particular case a motion to dismiss the charge is heard and decided immediately, or if it could have been, the defendant should not be charged with causing a delay in his trial. In the former case no delay results, and in the latter delay is due to the court’s failure to act when it could have.\textsuperscript{114}

Delay can also be occasioned by the defendant when he files a


\textsuperscript{108} See \textit{ILL. REV. STAT.} ch. 38, § 114-8 (1973).

\textsuperscript{109} In \textit{People v. Schoeneck}, 1 Ill.App.3d 395, 274 N.E.2d 483 (2d Dist. 1971), the court held that, under the “unique circumstances” presented, it could not hold that the defendants’ motion to sever counts tolled the statute or was a delay caused by them. The court relied on the fact that the defendants’ attorney called the joinder of offenses to the attention of the prosecutor at an early stage of the proceedings, before he filed his formal written motion. Moreover, the state delayed disposition of the defendants’ written motion by choosing to stand on the face of the indictment, simply stating that the alleged offenses at five locations on different dates were part of a comprehensive transaction.

\textsuperscript{110} See \textit{ILL. REV. STAT.} ch. 38, § 114-1 (1973).


\textsuperscript{112} 415 Ill. 466, 114 N.E.2d 649 (1953).

\textsuperscript{113} \textit{See also} \textit{People v. Moriarity}, 33 Ill.2d 606, 611, 213 N.E.2d 516, 519 (1966).

motion to suppress evidence,"\textsuperscript{115} since the disposition of such a motion requires the holding of an evidentiary hearing which could delay the trial."\textsuperscript{116} A dispute has arisen, however, among districts of the Illinois appellate court as to who has the responsibility for calling up such a motion and whether the failure of both parties to call it up should prevent the statutory period from recommencing. In \textit{People v. Ross}\textsuperscript{117} the Fourth District held that section 114-12(b) of the Code of Criminal Procedure\textsuperscript{118} establishes that the duty of showing that physical evidence should be suppressed is squarely on the defendant and that his failure to call the motion for hearing constitutes a waiver of the right to a speedy trial.\textsuperscript{119} But the Fifth District, in \textit{People v. Terry},\textsuperscript{120} has recently concluded that although the defendant has the primary responsibility of calling up the motion to suppress, the defendant’s failure to do so does not justify complete inaction by the state for 253 days after the filing of the motion, including 163 days after the defendant’s demand for speedy trial.\textsuperscript{121} The court noted that if \textit{Ross} stands for the proposition that after a motion to suppress is filed the running of the statutory period is tolled until the motion is called up by the defendant and decided, it expressly declined to follow that case. It then stated that it did not interpret \textit{Ross} in this manner and that the cases were “completely distinguishable on the facts.”\textsuperscript{122}

No attempt was made in \textit{Terry} to articulate the distinction between it and the \textit{Ross} case. Apparently the distinction was

\textsuperscript{117} 132 Ill.App.2d 1095, 271 N.E.2d 100 (4th Dist. 1971).
\textsuperscript{118} Ill. Rev. Stat. ch. 38, § 114-12(b) (1973).
\textsuperscript{119} See also People v. Stock, 56 Ill.2d 461, 309 N.E.2d 19 (1974), where the supreme court indicates that the burden is on the defendant to request a hearing on his motion to suppress evidence.
\textsuperscript{120} 24 Ill.App.3d 197, 321 N.E.2d 21 (5th Dist. 1974).
\textsuperscript{121} But see People v. Wilson, 19 Ill.App.3d 466, 311 N.E.2d 759 (5th Dist. 1974).
\textsuperscript{122} People v. Terry, 24 Ill.App.3d 197, 198, 321 N.E.2d 21, 22 (5th Dist. 1974).
found in the fact that in *Ross* the defendant was free on bond and thus it was necessary for him to demand trial in order to start the running of the statutory period. Ross's demand, however, was contained only in his motion to suppress, so that the claim that he wanted a speedy trial was directly contradicted by the inaction on the motion to suppress. On the other hand, there was no such contradiction in *Terry*. The defendant was in custody the entire time and 90 days after he filed his motion to suppress he filed a demand for a speedy trial. It could be assumed, therefore, that Terry had abandoned his efforts to suppress the evidence and was primarily concerned with the right to a speedy trial; nevertheless, the state still allowed 163 days to pass without bringing him to trial. Upon this distinction the cases both seem to be correctly decided.\textsuperscript{123}

Waiver of jury trial might constitute the statutory "delay occasioned by the defendant" as well. In *People v. Fosdick*\textsuperscript{124} the statutory period commenced on March 12, 1964. The defendant had been turned over to the prosecuting authorities of another county; however, he was not arraigned until June 22, 1964.\textsuperscript{125} On this date trial was set for July 6, subsequently it was reset for July 9. On July 9, the 119th day of the statutory period, the defendant appeared in court and waived trial by jury. The case was then allotted for bench trial on July 15, a date beyond the statutory period. The defendant subsequently moved to dismiss the indictment under the speedy trial statute, but his motion was denied and he was convicted. The appellate court reversed on speedy trial grounds,\textsuperscript{126} and the state appealed to the supreme court, which reversed the appellate court, affirming the defendant’s conviction. It found that the record indicated that the state and the trial court were prepared to commence a jury trial on July 9, and in the absence of a jury waiver the trial would have commenced at that time. It then stated:

We are convinced that there is ample evidence to permit the

\textsuperscript{123} This explanation would also distinguish *Terry* from the Fifth District’s opinion in *People v. Wilson*, 19 Ill.App.3d 466, 311 N.E.2d 759 (5th Dist. 1974). See text accompanying note 150 infra.

\textsuperscript{124} 36 Ill.2d 524, 224 N.E.2d 242 (1967).

\textsuperscript{125} See text accompanying notes 48-49 supra.

trial court to find that the delay in the trial was occasioned by
the defendant. While ordinarily a waiver of jury would expedite
rather than delay trial, this is not true where the waiver is filed
on the last day [sic] of the 120-day period and the case is
allotted on the jury call. While we will not permit the State to
evade the right to a speedy trial, neither will we permit a defen-
dant to evade prosecution by creating a delay. 127

Some of the more difficult problems concerning the determina-
tion of whether “delay is occasioned by the defendant” involve
the effect of motions for discovery filed by the defendant. 128 In
People v. Nunnery 129 the defendant was arrested on February 9,
1969, for armed robbery, and an indictment was returned on May
27, 1969. He was arraigned on June 4, 1969, the 115th day of the
statutory period, and the public defender was appointed to repre-
sent him. The defendant then entered a plea of not guilty, and
the public defender filed a written motion for discovery contain-
ing 21 paragraphs. The trial court immediately allowed several
paragraphs of the discovery motion, denied others, and reserved
its ruling on the rest in order to give the state an opportunity to
respond to them. The court asked the assistant state’s attorney
how much time he would require, and the prosecutor replied,
“Whatever date you set for the case.” Then, in reply to the court’s
question as to whether there was any speedy trial problem, the
prosecutor erroneously informed the trial judge that six weeks
remained in the statutory period. The court set the case for June
12, on which date the defendant filed a petition for discharge
under the 120-day rule. This petition was ultimately allowed, but
the appellate court reversed on the ground that the defendant’s
filing of his discovery motion tolled the running of the statute. 130

Taylor, 123 Ill. App.2d 430, 258 N.E.2d 823 (2d Dist. 1970) reached the same result where
the jury waiver was filed on the 88th day of the statutory period. The court reasoned that
since the case was on the jury trial calendar and the nonjury calendar did not begin until
a later date, the defendant’s jury waiver caused a delay in his trial. Taylor, however, seems
to be wrongly decided. The court in Fosdick based its decision on the fact that the
defendant’s waiver was filed at the very end of the statutory period; this element was not
present in Taylor.

128. See ILL. REV. STAT. ch. 38, §§ 114-2, 114-9, 114-10 (1973); ILL. REV. STAT. ch. 110A,

129. 54 Ill.2d 372, 297 N.E.2d 129 (1973).

He Supreme Court of Illinois, however, reversed and affirmed the trial court, stating that upon consideration of all of the circumstances the delay was not occasioned by the defendant. The court pointed out that the record contained no explanation of why the defendant's arraignment and the appointment of counsel were delayed until 115 days after his arrest. If the state were ready for trial within the statutory period, the information which the court ordered it to produce could have been given promptly; furthermore, the court could have been advised immediately as to the state's position respecting the paragraphs on which the ruling was reserved.

Similar facts were presented in People v. Spicuzza, where the defendant filed a ten part discovery motion on the 117th day of the statutory period. However in this case it was the defendant, not the state, who was responsible for filing so late in the statutory period. The defendant had been represented by counsel for several months prior to the filing of the motion, yet no motion had been filed. The court held that the filing of the discovery motion caused delay which was attributable to the defendant, and thus tolled the running of the statutory period. It distinguished Nunnery on the ground that the delay in that case was caused not by the defendant's motion for discovery but, rather, by the fact that he was neither arraigned nor indicted until the 115th day of the statutory period. It then stated that "a defendant may [not] wait until the eve of trial to present a motion as easily made months earlier and then claim the benefit of the rule when the delay occasioned by his motion necessitates postponement of his trial."

Read together, Nunnery and Spicuzza make it clear that while some motions for discovery will not cause "delay . . . occasioned by the defendant," others will. The question is determining which discovery motions toll the statute and which do not. Perhaps the

132. See also People v. Markword, 108 Ill.App.2d 468, 247 N.E.2d 914 (4th Dist. 1969). Nunnery also pointed out that it was the state's attorney who erroneously advised the court that six weeks remained in the statutory period, and that nothing in the record indicated that defense counsel, who was appointed on that day, knew when the defendant was arrested or how long he had been in custody.
133. 57 Ill.2d 152, 311 N.E.2d 112 (1974).
134. Id. at 156, 311 N.E.2d at 115.
best discussion of the problem, and the test to be applied, is contained in the case of People v. Scott.¹³⁵

All discovery motions are not intrinsically dilatory, therefore not every such motion automatically extends the period in which the defendant must be tried. . . . Motions for discovery may or may not require time to comply with them. A motion may be simple and easily answered or it may be detailed and difficult to answer. The information requested may be presently known or it may only be obtained after search and inquiry. The requested information may be reasonable and supplied without objection or it may call forth objections which must be heard and resolved. A discovery motion which the State can answer quickly would cause little or no delay; the State should not be permitted to use such a motion as an excuse to toll the statute implementing the constitutional right to a speedy trial. On the other hand, a discovery motion that calls for answers which are not quickly available or requests answers replete in detail would cause a legitimate delay; such a motion is properly attributable to a defendant and tolls the running of the statutory period. Whether a motion falls into the former or the latter category would depend on the facts of each case.¹³⁶

The Scott test has been applied by the appellate court in other cases.¹³⁷ It appears to adequately protect both the defendant’s right to discovery and his right to a speedy trial, without placing an undue burden on the state and without allowing defendants to “manipulate rights intended for their protection in such a way as to provide an avenue to escape legitimate prosecution.”¹³⁸ Nevertheless, it should be refined in at least one respect in order to

¹³⁶. Id. at 630, 301 N.E.2d at 125.
¹³⁷. See, e.g., People v. Vanderbilt, 27 Ill.App.3d 168, 326 N.E.2d 418 (1st Dist. 1975); People v. Thomas, 25 Ill.App.3d 88, 322 N.E.2d 597 (3d Dist. 1975); People v. Sharos, 24 Ill.App.3d 265, 320 N.E.2d 351 (5th Dist. 1974); People v. Ward, 13 Ill.App.3d 745, 301 N.E.2d 139 (1st Dist. 1973). Prior to Nunnery and Scott, several cases had held that discovery motions, if timely made, did not toll the statute. See, e.g., People v. Schoeneck, 1 Ill.App.3d 395, 274 N.E.2d 483 (2d Dist. 1971). People v. Jones, 130 Ill.App.2d 769, 266 N.E.2d 411 (4th Dist. 1971). But see People v. Clark, 104 Ill. App.2d 12, 244 N.E.2d 842 (3d Dist. 1968), where the court held that the defendant’s motion for a bill of particulars constituted delay occasioned by him because he did not call it up for hearing and he later withdrew it after his motion for discharge had been unsuccessful, which indicated that it was dilatory in character.
take into account the supreme court's holding in Spicuzza. If, through no fault of the state, the discovery motion is filed so late in the statutory period that even a brief delay to allow response would result in the expiration of the statutory period, the delay should be charged to the defendant in order to prevent the defendant from using the right to discovery as a technical means to avoid prosecution.

Insofar as discovery by the state is concerned, it has been held that if a defendant requires time in which to answer a request by the state for notice of alibi defense the delay cannot be attributed to him. In People v. Shields the state filed such a motion and the defendant, who had previously answered ready for trial, requested one week to file an answer to the state's request. The court held that the state could not be considered as ready for trial on the date it filed its request, because under the applicable statute the defendant had five days to answer the motion. The court noted that for practical purposes the state's motion amounted to a request for a continuance and could not be charged to the defendant.

Finally, in certain circumstances a delay occasioned by a co-defendant can be attributed to an accused and thereby toll the running of the statutory period in his case. Thus, in People v. Hickman, where a continuance was ordered by the court on the 119th day of the 120-day statutory period, after a co-defendant was allowed to change his previous plea of guilty to one of not guilty, and after the attorney of another co-defendant failed to appear in court, it was held that the actions of the co-defendant and the attorney caused the delay, and that in order for the delay not to be attributable to the defendant it was incumbent upon

139. Ill. Rev. Stat. ch. 38, § 114-14 (1973), allows the state to request notice of the defendant's intention to assert an alibi defense. This statute, however, was declared unconstitutional by the Illinois Supreme Court in People v. Fields, 59 Ill.2d 516, 322 N.E.2d 33 (1975). But see People ex rel. Carey v. Strayhorn, 61 Ill.2d 85, 329 N.E.2d 194 (1975).


141. See People v. Hickman, 56 Ill.2d 175, 306 N.E.2d 32 (1973); People v. Nowak, 45 Ill.2d 158, 258 N.E.2d 313 (1970); People v. Meisenhelter, 381 Ill. 378, 45 N.E.2d 678 (1943); People v. Ware, 11 Ill.App.3d 697, 297 N.E.2d 289 (1st Dist. 1973).

142. 56 Ill.2d 175, 306 N.E.2d 32 (1973).
him or his attorney to object to the continuance ordered by the court. The court explained:

To permit defendant's discharge upon the facts of the record presented might countenance tactical maneuvers originating at or near the expiration of the time limit provided by the statute. Such dilatory actions would permit an advantage to an attorney representing joint defendants or to joint defendants represented by separate counsel by allowing counsel to cause delay as to one defendant. The trial court would then be placed in a position of having to refuse counsel's requests or grant an otherwise undesired severance if the co-defendants or their attorney did not affirmatively acquiesce in such delay. This result is neither necessary nor beneficial to an orderly judicial process.\(^\text{143}\)

If, however, neither the defendant nor his attorney were present at the hearing at which the co-defendant requested the continuance, or otherwise caused delay, so that there was no opportunity for the defendant to object, the delay should not be attributed to the defendant and it cannot toll the running of the statutory period against him.\(^\text{144}\)

**Multiple Charges Against a Defendant**

Subsection (e) of section 103-5\(^\text{145}\) provides that when an accused is simultaneously in custody upon more than one charge pending against him in the same county, or when he simultaneously demands trial upon more than one charge pending against him in the same county, he must be tried, or adjudged guilty after waiver of trial, upon at least one of the charges before the expiration of the applicable statutory period relative to any of them. It

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\(^{143}\) *Id.* at 180, 306 N.E.2d at 35.

\(^{144}\) See People v. Grays, 33 Ill.2d 156, 210 N.E.2d 505 (1965); People v. Williams, 27 Ill.2d 327, 189 N.E.2d 314 (1963).

\(^{145}\) ILL. REV. STAT. ch. 38, § 103-5(e) (1973). One portion of this subsection refers to a judgment "rendered pursuant to Section 118-1 of [the Code of Criminal Procedure]." Section 118-1 was repealed by section 8-5-1 of the Unified Code of Corrections, *id.* § 1008-5-1, and replaced by sections 5-1-18 and 5-4-1 of that Code. *Id.* §§ 1005-1-18, 1005-4-1. Under ILL. REV. STAT. ch. 38, § 1008-2-2 (1973), the reference in section 103-5(e) to section 118-1 "shall be held to refer to" sections 5-1-18 and 5-4-1 of the Code.

Similarly, subsection (e) refers to "an examination for competency ordered pursuant to Section 104-2 of [the Code of Criminal Procedure]" which has been replaced by section 5-2-1 of the Unified Code of Corrections. *Id.* § 1005-2-1 (1973). See also note 69 supra.
also provides that the accused must then be tried upon all the remaining charges within 160 days from the date of judgment on the first charge.\textsuperscript{146} or within 160 days from the date that the trial on the first charge terminated, if terminated without judgment and there was no subsequent trial, or adjudication or guilt after waiver of trial, within a reasonable time.\textsuperscript{147}

This provision was "intended to preserve a defendant's right to a speedy trial and at the same time to mitigate the State's burden of preparing more than one charge for trial against a single defendant."\textsuperscript{148} within the statutory period otherwise applicable under sections 103-5 (a) and (b). In interpreting the provision the courts have stated that this purpose must be kept in mind. Thus, in \textit{People v. Brown}\textsuperscript{149} the court ruled that when a defendant pleads guilty to a charge and, prior to sentencing on that charge, is subsequently taken into custody on another charge, subsection (e) does not apply, because at the time he is taken into custody on the second charge there is no longer any need for the prosecutor to be concerned with preparing for trial on the first charge and with bringing the defendant to trial on that charge.

Another case in which the court relied upon the intended purpose of this particular provision was \textit{People v. Wilson}.\textsuperscript{150} Here the defendant was taken into custody on June 23, 1971, on a charge of burglary, and then released on bond. On February 11, 1972, he was arrested for armed robbery and murder, and was held without bond. He was subsequently convicted of burglary on May 17, 1972, but was not sentenced at that time. On June 20, 1972, he filed a motion for discharge on the murder and armed robbery charges, claiming that the state had failed to try him on those
charges within 120 days of February 11, as required by section 103-5(a). The trial court allowed the motion and the state appealed. On appeal the court stated that the intended purpose of subsection (e) of section 103-5 was to protect the state against being required to prepare more than one charge against a single incarcerated defendant, and that "[t]he fact that the defendant is technically on bond for one of the charges should not defeat the purpose of the statute." It then held that "when a defendant is simultaneously charged with more than one offense and when he is in custody, he is 'simultaneously in custody, upon more than one charge' within the meaning of subsection (e)," and that since the 160 day period had not run when the defendant's motion for discharge was allowed, the trial court erred in discharging him.

Wilson, however, appears to be erroneously decided. It is true that the purpose of subsection (e) is to remove from the state the burden of preparing and bringing to trial, within the otherwise applicable statutory period, more than one charge against a single defendant. Under the facts in Wilson, however, the state never had such a burden. At the time when the defendant was released on bond on the burglary charge only one charge was pending against him, so that subsection (a) of section 103-5 was clearly applicable. Under that section the state had no obligation to bring the defendant to trial within a specified period because the defendant was free on bond and had not demanded trial. Thus, when the defendant was subsequently taken into custody on the murder and armed robbery charges the only case that the state had to prepare for trial within a specified period was the one for armed robbery and murder. Consequently, as long as the defendant had not demanded trial on the burglary charge, the burden intended to be mitigated by subsection (e) was not present. If the defendant had demanded trial on the burglary charge while he was in custody on the armed robbery and murder charges only then would the Wilson court's rationale have been valid and subsection (e) properly applicable.

Looking to the purpose of subsection (e), then, it would seem that it should only be applicable in the following situations: (1) where the defendant is in custody on each of at least two charges

151. Id. at 468, 311 N.E.2d at 761.
152. Id.
pending in the same county; or (2) when he is free on bond or recognition on each of at least two charges pending in the same county and demands trial on each of them; or (3) when he is in custody on at least one pending charge and when he has demanded trial on at least one other charge pending in the same county for which he is free on bond or recognizance.

EXTENSION OF THE STATUTORY PERIOD

Subsection (c) of section 103-5 provides:

If the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days.¹⁵³

Under this provision neither a formal written motion¹⁵⁴ nor a supporting affidavit is required.¹⁵⁵ An oral request by the prosecutor for an extension of time within which to try the defendant is sufficient.¹⁵⁶ After a request for additional time has been made by the state, the decision whether to allow the request is within the discretion of the trial court, and the appellate courts have held that the decision will not be disturbed unless the trial court has clearly abused its discretion.¹⁵⁷ In addition, the appellate courts

¹⁵³. ILL. REV. STAT. ch. 38, § 103-5(c) (1973). Subsection (e) of section 103-5 contains an identical provision for situations in which the defendant has more than one charge pending against him. See ILL. REV. STAT. ch. 38, § 103-5(e) (1973).


¹⁵⁶. See People v. Moriarity, 33 Ill.2d 606, 213 N.E.2d 516 (1966); People v. Bey, 12 Ill.App.3d 256, 298 N.E.2d 184 (1st Dist. 1973). The state's request for additional time must normally be made prior to the expiration of the applicable statutory period, but if the final day of the statutory period falls on a Saturday, Sunday or holiday, the state can request the extension on the next business day. People v. Hill, 15 Ill.App.3d 349, 304 N.E.2d 490 (3d Dist. 1973). See also ILL. REV. STAT. ch. 131, § 1.11 (1973). If the request by the state is made prior to the expiration of the applicable statutory period, the defendant's rights under the statute are not violated if the request is not allowed by the court until after the expiration of the initial statutory period. People v. Aughinbaugh, 53 Ill.2d 442, 292 N.E.2d 406 (1973).

¹⁵⁷. See People v. Arndt, 50 Ill.2d 390, 280 N.E.2d 230 (1972); People v. Soukup, 41 Ill.2d 94, 242 N.E.2d 158 (1968); People v. Poland, 22 Ill.2d 171, 174 N.E.2d 804 (1961); People v. Wollenberg, 37 Ill.2d 480, 229 N.E.2d 490 (1967); People v. Hill, 15 Ill.App.3d
seem to assume, in the absence of any showing to the contrary, that the trial court, in allowing the extension "was satisfied that due exertion had been made to secure the evidence and that there were reasonable grounds for believing that it could be procured at a later date." 158

This position has recently been validly criticized by a division of the First District Appellate Court in People v. Bey. 159 The court noted that the assumption seems to place upon the defendant the burden of going forward in the trial court on the issue of whether the state has exercised due diligence in attempting to procure the material evidence that is the basis for its motion. The court stated first, that this is unfair to the defendant because he is not in possession of the facts necessary to make a prima facie showing of lack of diligence, and second, that it conflicts with the language of sections 103-5 (c) and 114-4 (e) of the Code of Criminal Procedure; 160 both of which indicate that the moving party is to make a showing of diligence in order to obtain a continuance. Bey then concluded, however, that

[t]he State as the moving party [is required] to make a showing of diligence which would enable the court to determine that the State has exercised diligence; that allegations of fact in support of such a motion by the State will prima facie satisfy the State's burden to make such a showing in the absence of any denial of those allegations by defendant which would serve to put those allegations at issue; and that, should defendant by denial put those allegations of fact at issue, then the State must present evidence in support of those allegations. 161

The effect of this decision, if it is accepted by other courts, will require the state to allege facts in support of its claim that it

158. People v. Poland, 22 Ill.2d 171, 178, 174 N.E.2d 804, 806 (1961). See also cases cited in note 157 supra. It has been held that if the state obtains an additional period of time within which to try the defendant and then nolle prosses the indictment and tries the defendant upon a new indictment charging the same offense, or a lesser included offense, the extension of time is still effective. People v. Arndt, 50 Ill.2d 390, 280 N.E.2d 230 (1972).
160. ILL. REV. STAT. ch. 38, § 114-4(e) (1973), provides: "All motions for continuance are addressed to the discretion of the trial court and shall be considered in the light of the diligence shown on the part of the movant."
161. 12 Ill.App.3d at 261, 298 N.E.2d at 188.
exercised due diligence in trying to obtain material evidence; it will also encourage defendants to contest these allegations so that the state will then be forced to introduce evidence to support its allegations. A trial court would then be in a better position to protect the defendant against the use of a motion for additional time as a subterfuge for an oppressive and illegal delay. Furthermore, an appellate court will be better equipped to judge whether the trial court abused its discretion in allowing the extension.

Nevertheless, regardless of whether Bey is accepted by other courts, the appellate courts will still be faced with determining whether a trial court has abused its discretion in allowing an extension of time. In making this determination "the situation must be viewed as it was presented to the trial judge at the time, not as it might appear in retrospect in the light of subsequent events." Thus, it is not grounds for reversal that the evidence sought by the state at the time it moved for an extension is not introduced at the ultimate trial, or that it turns out to be unimportant or immaterial.

SECTION 103-5 AND THE FEDERAL CONSTITUTION

While section 103-5 is designed to implement the constitutional right to a speedy trial, the two are not coextensive. Thus, the

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166. See People v. Dodd, 58 Ill.2d 53, 57, 317 N.E.2d 28, 30 (1974); People v. Young, 46 Ill.2d 82, 85, 263 N.E.2d 72, 73-74 (1970); People v. Nowak, 45 Ill.2d 158, 161, 258 N.E.2d 313, 315 (1970); People v. DeStefano, 35 Ill.2d 261, 263, 220 N.E.2d 220, 221 (1966); People v. Stuckey, 34 Ill.2d 521, 523, 216 N.E.2d 785, 786 (1966). In Barker v. Wingo, 407 U.S. 514; 523 (1972), the Supreme Court explored the meaning of the sixth amendment right to a speedy trial, and stated:

We find no constitutional basis for holding that the speedy trial right can be
fact that a defendant’s rights under the statute have not been violated does not necessarily mean that he has not been denied the constitutional right to a speedy trial. This was made clear by the Supreme Court of the United States in *Barker v. Wingo*, the major case interpreting the sixth amendment right to a speedy trial. There the Court, in rejecting the so-called demand-waiver rule, stated:

Since under the demand-waiver rule no time runs until the demand is made, the government will have whatever time is otherwise reasonable to bring the defendant to trial after a demand has been made. Thus, if the first demand is made three months after arrest in a jurisdiction which prescribes a six-month rule, the prosecution will have a total of nine months—which may be wholly unreasonable under the circumstances.

The statement is directly applicable to situations in Illinois where a defendant is free on bond and must therefore demand trial to start the running of the statutory period; likewise, its rationale is applicable in Illinois where the statutory period has been tolled and the state is given an entirely new statutory period within which to try a defendant. As a consequence of the Supreme Court’s decision in *Barker*, it is clear that whenever a defendant in Illinois alleges a violation of his statutory and constitutional rights to a speedy trial, or even when he concedes that his statutory right was not violated but claims that his constitutional right was, the court must consider the constitutional claim even though it finds no violation of the speedy trial statute.

quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.

170. Prior to *Barker* the Illinois Supreme Court had stated that "[a]s a practical matter the statute operates to prevent the constitutional issue from arising except in cases involving prolonged delay, or novel issues . . . ." *People v. Stuckey*, 34 Ill. 2d 521, 523, 216 N.E.2d 785, 786 (1966). In another case it was said, "[I]f an accused is tried within
Barker held that in determining whether an accused's sixth amendment right to a speedy trial has been violated, a balancing test should be applied in which four factors should be weighed: the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. In cases decided since Barker the Illinois courts have gone on to consider a defendant's constitutional claim in addition to his claim that his statutory right had been violated, but they have tended to devote little discussion to the constitutional issue, and in some cases have seemed to analyze only some of the factors mentioned in Barker as elements of the balancing process. It therefore appears that despite Barker, section 103-5 is still the principal safeguard of a criminal defendant's right to a speedy trial in the Illinois courts.

CONCLUSION

Section 103-5 of the Code of Criminal Procedure is an attempt by the legislature to give a more precise meaning to the broad provisions of both the state and federal constitutions guaranteeing a criminal defendant the right to a speedy trial. Although in theory the statute's quantification of the right should have "the 120 days after being taken into custody, or [within 160 days of] demand of trial while on bond, there will have been ordinarily no arbitrary or oppressive delay which the constitution prohibits." People v. Love, 39 Ill.2d 436, 441, 235 N.E.2d 819, 822-23 (1968).


The Illinois Supreme Court had indicated prior to the decision in Barker that the determination of whether an accused had been denied his constitutional right to a speedy trial depended on an analysis of four factors, three of which were the same as those enumerated in Barker. The Illinois court, however, adopted the demand-waiver rule, which was rejected in Barker. See People v. Tetter, 42 Ill.2d 569, 250 N.E.2d 433 (1969).


173. It will be interesting to see how the federal judiciary responds to the newly enacted Speedy Trial Act of 1974, 18 U.S.C.S. §§ 3161 et seq. (Supp. 1975). In time this statute may also overshadow the constitutional guarantee.
virtue of clarifying when the right is infringed and of simplifying courts' application of it,"\textsuperscript{174} it has not worked that way in practice. The courts have been faced with many difficult problems concerning the interpretation and application of the statute. In resolving these problems the courts have, in most situations, adopted a flexible approach that properly takes into account the statutory purpose of protecting a defendant's right to a speedy trial while at the same time allowing the state a reasonable period of time within which to prepare its case against an accused. They have thus concluded, for example, that in determining whether a particular event caused a "delay . . . occasioned by the defendant," or whether a defendant was in "custody" within the meaning of the statute, they will conduct a realistic appraisal of the facts in order to insure that the state does not evade the defendant's right to a speedy trial, and the defendant does not use the statute as a technical means of avoiding prosecution.

In one major area, however, the courts have failed to give sufficient consideration to the defendant's right to a speedy trial. They have held that in computing the statutory period a new period commences each time that the statute is tolled. These holdings allow the state to take advantage of any minor and insignificant delays that are caused by the defendant. While theoretically the constitutional right to a speedy trial is present to prevent and remedy any oppressive delays caused by this, or any other interpretation of the statute, the Illinois courts have not paid sufficient attention to this constitutional right. To its credit the General Assembly has amended section 103-5, effective July 1, 1976, to eliminate this particular problem. In providing that the statutory period is merely suspended during the period of delay caused by a defendant and that it does not commence anew at the end of such a delay, the legislature has more fully implemented the constitutional right to a speedy trial in Illinois.

\textsuperscript{174} Barker v. Wingo, 407 U.S. 514, 523 (1972).

(a) Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant, by an examination for competency ordered pursuant to Section 104-2 of this Act, by a competency hearing, by an adjudication of incompetency for trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal.

(b) Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant, by an examination for competency ordered pursuant to Section 104-2 of this Act, by a competency hearing, by an adjudication of incompetency for trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal.

(c) If the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days.

(d) Every person not tried in accordance with subsections (a), (b) and (c) of this Section shall be discharged from custody or released from the obligations of his bail or recognizance.

(e) If a person is simultaneously in custody upon more than one charge pending against him in the same county, or simultaneously demands trial upon more than one charge pending against him in the same county, he shall be tried, or adjudged guilty after waiver of trial, upon at least one such charge before expiration relative to any of such pending charges of the period prescribed by sub-paragraphs (a) and (b) of this Section. Such person shall be tried upon all of the remaining charges thus pending within 160 days from the date on which judgment relative to the first
charge thus prosecuted is rendered pursuant to Section 118-1 of this Act or, if such trial upon such first charge is terminated without judgment and there is no subsequent trial of, or adjudication of guilt after waiver of trial of, such first charge within a reasonable time, the person shall be tried upon all of the remaining charges thus pending within 160 days from the date on which such trial is terminated; if either such period of 160 days expires without the commencement of trial of or adjudication of guilt after waiver of trial of, any of such remaining charges thus pending, such charge or charges shall be dismissed and barred for want of prosecution unless delay is occasioned by the defendant, by an examination for competency ordered pursuant to Section 104-2 of this Act, by a competency hearing, by an adjudication of incompetency for trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal; provided, however, that if the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days.

(f) Delay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried as by subparagraphs (a), (b), or (e) of this Section and on the day of expiration of the delay the said period shall continue at the point at which it was suspended. Where such delay occurs within 21 days of the end of the period within which a person shall be tried as prescribed by subparagraphs (a), (b), or (e) of this Section, the court may continue the cause on application of the State for not more than an additional 21 days beyond the period prescribed by subparagraphs (a), (b), or (e).

This subparagraph shall become effective on, and apply to persons charged with alleged offenses committed on or after, July 1, 1976.