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THE SPEEDY TRIAL GUARANTEE: CRITERIA AND CONFUSION IN INTERPRETING ITS VIOLATION

INTRODUCTION

The criminal law procedural guarantee of a speedy trial is found in five sources today: (1) The sixth amendment of the United States Constitution, 1 (2) state statutes implementing this constitutional right, 2 (3) rules of courts, 3 (4) by the common law, 4 and (5) to a lesser extent by the due process clause of the fifth amendment of the United States Constitution. 5 This guarantee of a speedy trial is considered to have four objectives: "(1) To prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation . . . (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself . . ." 6 and (4) to protect the interests of society in the orderly and effective administration of justice. 7

Although the right to a speedy trial is "one of the most basic rights preserved by our Constitution," 8 a guarantee "as fundamental as any of the rights secured by the Sixth Amendment," 9 the Supreme Court has given very few decisions interpreting and enforcing this right. 10 Conse-

1. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI.
2. See notes 73 and 156 infra.
5. See notes 81-83 and 134-35 and accompanying texts infra.
9. Id. at 223.
quently, its scope for all but the last few years has been almost entirely
defined by lower federal and state courts.

HISTORY AND EFFECT

The right to a speedy trial was first noted in the common law of England by the Magna Carta: "to no one will we sell, to no one will we deny or delay right or justice." This right was implemented in England by special writs designed to protect citizens from perpetual imprisonment where bail was not allowed. One such writ was the Habeus Corpus Act of 1679, which is seen historically as the antecedent of our sixth amendment right. Eventually the maxim "[j]ustice delayed is justice denied" became ingrained in the English criminal law and was carried over to its colony—America.

When the Bill of Rights was being drawn for the Constitution some of its writers thought that the right of speedy trial was so clearly a part of our "liberty" under the common law that no amendment to the Constitution was needed to preserve it. However, the people wanted this right secured, and listed the right to a speedy trial first in the procedural rights guaranteed in the sixth amendment. It is significant that the due process clause of the fifth amendment guarantees a fair trial. Thus the reiteration of the need for speed in the sixth amendment may be viewed as

13. Magna Carta (1215); see 2 E. Coke, Institutes of the Laws of England 45 (1642).
14. 2 E. Coke, supra note 13, at 42.
15. 31 Charles II, ch. 2 (1679). This act required bail upon request for all but those indicted for treason or a felony, however, people in these two categories would be released on bail if they were not indicted at the next term of court unless the King's witnesses could not be produced. The act also provided for complete discharge for those not indicted and tried by the second term. See also L. Kutner, World Habeas Corpus 84-85 (1962).
17. This maxim appears to be derived from its Latin form and translated first in 2 E. Coke, supra note 13, at 55.
18. The Virginia Declaration of Rights of 1776, § 8, provided "a man hath a right . . . to a speedy trial. . . ."  
a means of emphasizing this right.\textsuperscript{21}

However, this right has been separated from the other criminal procedural rights of the Bill of Rights and enforced differently because it has been viewed as not only a right guaranteed a citizen but also one for the protection of society.\textsuperscript{22} As such its determination has been left to an examination of each case rather than the setting of a fixed time limit. This has led to much uncertainty as to how this right should be applied,\textsuperscript{23} and the view that "the essential ingredient is orderly expedition and not mere speed."\textsuperscript{24}

Delay in bringing a defendant to trial may affect his ability to defend himself in that: (1) witnesses may die, leave the jurisdiction or become impeachable during the delay; (2) memories will fade;\textsuperscript{25} and (3) there is an enhanced possibility of loss or damage to documentary and other evidence. These factors will also affect the prosecution and coupled with the time delay itself may erode the motivation of the prosecution to try the case. Thus the effective disposition of the case often succumbs to a guilty plea for a lesser offense. Furthermore, this is only one of the costs to society that occur where the right to speedy trial is not enforced.

\textsuperscript{21} It should also be noted that the fourth and fifth amendments protect all citizens from "unfair" criminal prosecution, while the sixth and eighth amendments are intended to protect those who stand "accused" of a criminal act. These added rights are to protect one upon whom the prosecutorial forces of the state has turned and whose liberty has been or is in the greatest jeopardy of loss.

\textsuperscript{22} "In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from and at times in opposition to, the interests of the accused." Barker v. Wingo, 407 U.S. 514, 519 (1972). However, the Bill of Rights was intended to secure rights to protect the citizen from the federal government, not citizens from other citizens. The reading of societal interests into a speedy trial right may be intellectually proper as to weighing an individual's rights as against that of society as a whole. Nevertheless, it has no place when one is speaking of secured fundamental rights of an accused as granted by the Constitution. The cost to society should be a catalyst to implement speedy trials, not an excuse for deterring them.

\textsuperscript{23} "A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." United States v. Ewell, 383 U.S. 116, 120 (1966). \textit{See Note, The Right To A Speedy Criminal Trial, 57 COLUM. L. REV. 846 (1957), for a discussion of the speedy trial right.}

\textsuperscript{24} Smith v. United States, 360 U.S. 1, 10 (1959).

\textsuperscript{25} The underlying idea of the trial process is to reconstruct past events from present memories. The law of evidence was developed to get accuracy from an essentially unreliable faculty—the memory. It is well noted that "[t]he more recent the experience, the better the memory of it." Gardner, \textit{The Perception and Memory of Witnesses}, 18 CORNELL L.Q. 391, 392-93 (1933). Therefore, the longer the delay the more unreliable the witness becomes and so too any conviction based on such testimony.
When a defendant is released on bail and his trial is delayed there is always the possibility that during the longer delay he may choose not to appear at trial and forego his bail. Thus, a criminal may be at large to commit crimes again. The delay also causes the postponement of any rehabilitative process and may be detrimental to rehabilitation itself. Where a defendant must remain in jail he may lose his wages resulting in society being liable for the care of any family that relies on him. It costs the state money to keep him in jail, and his presence often causes overcrowding, which in turn may cause rioting. Moreover, a speedy trial would eliminate the need for "preventive detention" and would complement bail reform. It also would enhance the deterrent power of punishment, for society seeks deterrence from the day the crime is known. If the system reacts with unreasonable delays, then deterioration if not destruction of respect for and faith in the law occurs.

However, at present many arrested defendants are not accorded a

26. Also during extended delay the defendant may be able to intimidate witnesses. See generally ABA Project on Minimum Standards for Criminal Justice, Speedy Trial 10-11 (Approved Draft 1968) [hereinafter referred to as ABA Standards].

27. It has been estimated that it costs the state three to nine dollars a day to house, feed and guard a jailed person. See The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice 131 (1967).

28. Much of the blame for the New York City jail riots in 1970 was placed on the fact that 40 percent of the inmates had been waiting over a year for trial. See N.Y. Times, Mar. 8, 1971, at 69, col. 1. A study in 1971 showed that 52 percent of those in city jails were being held for reasons other than criminal convictions. See Wilson, Delay and Congestion in the Criminal Courts, 46 Fla. B.J. 88 (1972).

29. A study by the National Bureau of Standards of the Department of Commerce indicated that during the first 60 days of release, the likelihood of rearrest was very low, but after five to eight months of release pending trial the statistical likelihood of a defendant committing another crime was quite high. This study was reported in Hearings on Preventive Detention Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 33 (1970). Therefore, if a speedy trial was given to an accused the underlying reasons for preventive detention—the elimination of crimes committed by those released on bail—would be substantially erased.

Furthermore, the preventive detention system in Washington, D.C. has been utilized infrequently (only seven persons were detained between February and July of 1971) because of the lack of availability of a speedy trial. Although the 1970 act allows the district to hold an accused up to 60 days prior to trial and requires the case to be listed on an expedited calendar, the courts find it "virtually impossible to bring a defendant to trial within 60 days." Therefore, those not brought to trial within 60 days are treated like any other defendant and subject to release making the act futile in its ultimate attempt to protect society for an extended period of time. See Katz, Analysis of Pretrial Delay in Felony Cases—A Summary Report 9 (1972) [hereinafter referred to as Katz].
speedy trial in the state or federal courts. When these defendants are not released on bail they must remain incarcerated for lengthy periods of time often because of inadequacies in the criminal justice system, and have a higher possibility of receiving a prison sentence than those released on bail. However, this extended incarceration is clearly incompatible with the presumption of innocence in our criminal law.

These delays have many sources, but the most frequently mentioned are increased caseload, lack of resources, pre-trial procedural devices, scheduling difficulties, delay caused by the defense and prosecution, and financing. The financing and lack of resources causes of delay could be erased by giving the courts the manpower and the "tools" to try criminal cases within 60 days after indictment. If the state legislatures and Congress are unwilling to do so it may be possible for courts to order the payment of such sums under the theory that the legislature may not hinder the workings of a co-equal branch of government which "must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated

30. In Cleveland, Ohio, less than one-third of all cases involving jailed defendants, and only 10 percent of those bailed, were disposed of within a recommended period of three months, the average time span being 245 days. See Katz, supra note 29, at 2. This study also showed how overworked prosecutors and judges may let a guilty person plea bargain because of post indictment delay, while an innocent defendant in jail may plead guilty in order to be released. Id. at 6.

31. As of June 30, 1970, more than 6000 federal district court criminal cases (30 percent of all pending cases) had been awaiting trial for one year or more. (It should be noted that about one-half of these backlogged cases involved defendants who were termed "fugitive.") Judicial Conference of the United States, Director of the Administrative Office of the United States Courts, Annual Report 1970, at 155-57 (1971).

32. Statistics from Cleveland, Ohio, indicated that a jailed defendant was twice as likely as a bailed defendant to be sentenced to the penitentiary or reformatory. Katz, supra note 29, at 8.


34. Judge William J. Campbell of the Northern District of Illinois believes that the extended delay today has been caused by the United States Supreme Court, in that the Court has made eight trials out of one (four before trial, one the trial itself, another during, and two after trial) because of its changes in procedural law. See Address by the Hon. William J. Campbell, Conference of Metropolitan Chief District Judges of the Federal Judicial Center, printed in full in 55 F.R.D. 229, 231-34 (1972).


responsibilities, and its powers and duties to administer Justice. . . . 37

The sixth amendment right to a speedy trial has been determined by the Supreme Court to be applicable to state proceedings by the fourteenth amendment, 38 and this decision has been interpreted as having retroactive effect. 39 The remedy for the violation of this right is the dismissal of the charge with prejudice, and reindictment will not be allowed. 40 This remedy has apparently never been questioned in the federal courts, 41 although some states have not agreed with it in relation to state implementary statutes. 42

CRITERIA FOR DETERMINING THE SPEEDY TRIAL RIGHT

There are two major issues to be discussed in interpreting the sixth amendment guarantee of a speedy trial. First, one must determine the criteria by which to judge the constitutionality of delays in regard to whether they violate the right. Second, at what point in time during the criminal process does the right attach.

THE CRITERIA OF CONSTITUTIONALITY

In determining whether a defendant has been deprived of his right to a speedy trial there are four factors which a court will assess: (1) Length of delay; (2) reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. 43 A court is to balance these

37. Carroll v. Tate, 442 Pa. 45, 52, 274 A.2d 193, 197, cert. denied, 402 U.S. 974 (1971). In this case the Pennsylvania trial court instituted a mandamus proceeding to compel the mayor and city council of Philadelphia to appropriate additional funds for the administration of the court. The Pennsylvania Supreme Court ruled that the mandamus proceeding was permissible. Therefore, there is a possibility that courts unable to fulfill their constitutional duty to provide a speedy trial because of monetary shortages may be able to mandamus the appropriation of such sums.


39. Dickey v. Florida, 398 U.S. 30 (1970), held by implication that Klopfer and Smith v. Hooey, 393 U.S. 374 (1969), were to be retroactive in their application.


41. Note, The Lagging Right to a Speedy Trial, 51 VA. L. REV. 1587, 1611 (1965) [hereinafter referred to as Note, Lagging Right].

42. Id. at 1611 n.128. See generally Annot., 50 A.L.R.2d 943 (1956).

factors in order to determine whether the constitutional right has been abridged.\footnote{44}

1. **Length of the Delay**

"The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances."\footnote{45} These two sentences have been seen as approval of inaction by the judiciary for over sixty years\footnote{46} and as such have hindered the development of the speedy trial right. Generally, no violation of this right will be proven solely by reference to periods of time;\footnote{47} nor will a delay be held reasonable merely because it is of short duration.\footnote{48} Rather the length of delay is "to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."\footnote{49}

There have been many proposals to set a time limit between arrest (or indictment) and trial beyond which the speedy trial right would be deemed violated and the charges would be dismissed. Two such proposed time limits for those in jail have been set at 60 days by the American Bar Association\footnote{50} and the proposed Speedy Trial Act of 1971,\footnote{51} and 4 months by a presidential commission.\footnote{52} A longer period is suggested for

\footnotesize
48. See Powell v. United States, 352 F.2d 705, 708 (D.C. Cir. 1965) and Jackson v. United States, 351 F.2d 821, 822 (D.C. Cir. 1965). Both these cases involved five month delays and were measured by due process standards. In Barker v. Wingo, 407 U.S. 514, 531 (1972) the Supreme Court stated that: "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Thus the Court was making further distinction in relation to the brevity of delay, in that the delay must be measured by the type of crime involved.
50. ABA Standards, supra note 26.
51. Speedy Trial Act of 1971, supra note 40 at § 3161(b)(1). The intent of this proposed bill was shown by its stated purpose: "To give effect to the sixth amendment right to a speedy trial for persons charged with offenses against the United States and to reduce the danger of recidivism by strengthening the supervision over persons released on bail, probation, or parole, and for other purposes." See also Katz, supra note 29, where he recommends a 60 day period from arrest for those detained in jail and 120 days for defendants released on bail.
52. The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 155 (1967). This commission recommended the period between trial and appeal be set at five months so
those released on bail in the congressional and A. B. A. proposals. All of these proposals have factual occurrences which are considered necessary delay, which would be excluded in computing the time period for trial.53

The Second Circuit adopted a set of rules of court in 1971 as to speedy trial limits54 which are similar to the A. B. A. standards and in some respects simply reiterated them in a mandatory form.55 Similarly, the Florida Supreme Court has, as a rule of court, established time limits within which a speedy trial must be given—180 days for felonies, 90 days for misdemeanors, and upon formal request the state will be given 60 days to bring a defendant to trial.56

However, the Supreme Court in Barker v. Wingo57 stated that it was "impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long. ..."58 Consequently

53. The ABA recommends five periods to be excluded: (1) where a competency hearing, hearings on pre-trial motions, interlocutory appeals, and trial of other charges; (2) delay caused by the congestion of the trial docket "when the congestion is attributable to exceptional circumstances;" (3) where a continuance is granted at the request of or with the consent of the defendant or his counsel; (4) where the prosecutor requests delay because of: (a) the unavailability of material evidence where there is due diligence and there are reasonable grounds to believe that such evidence will be available at the later date; or (b) additional time is justified because of exceptional circumstances in the case; and (5) the absence or unavailability of the defendant. ABA STANDARDS, supra note 26, at § 2.3. The periods in the Proposed Speedy Trial Act of 1971 are similar to these, except that the second exception—congestion of the trial docket—is excluded. Proposed Speedy Trial Act of 1971, supra note 40, at § 3161. An amendment to the bill by Senator Thurmond would have added this second period and allowed delay to last up to 120 days. Id.

54. The Second Circuit Rules are set forth in 8A J. MOORE, FEDERAL PRACTICE ¶ 48.03 [1], n.1 (2d ed. Supp. 1971). For a discussion of these rules see Comment, Speedy Trials and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, 71 COLUM. L. REV. 1059, 1065-76 (1971). The Supreme Court in Barker v. Wingo, 407 U.S. 514, 530 n.29 (1972), expressly noted that its decision against a fixed time cut-off date was not to be interpreted as disapproving a presumptive rule adopted pursuant to a supervisory court's power.


56. 98 TIME, Nov. 8, 1971, at 80. The immediate effect of this rule, as would be the effect of any time limit rule, was the release of over one hundred defendants in Dade County alone between March and November, 1971 and has caused what is termed a "sea of confusion" in backlogged cases. Id.


58. Id. at 521.
the Court rejected the view that it should set a rule for a specific length of time as proposed by the A. B. A. stating that it "goes further than the Constitution requires . . . ."60 and left such rulemaking activity to the legislature.60 However, some courts view a certain time period as a "lengthy" delay, creating a presumption of prejudice which may shift the burden of proof to the government61 or may even be dispositive of the issue.62 The District of Columbia has adopted a rule that any delay which exceeds one year between arrest and trial raises a speedy trial claim of prima facie merit,63 but most circuits view the mere passage of time as not constituting a per se violation of the sixth amendment.64 Generally time is not the most important factor in determining whether a speedy trial has been denied.65 When speaking of the presumption of a violation due to the length of delay the courts are speaking of a presumption of prejudice, for delay alone without prejudice to a defendant's ability to defend, is insufficient to constitute the constitutional violation.66

59. Id. at 529.

60. The Court noted that: "such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be 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." Id. at 523. For a recent study of the speedy trial schemes of states, see Note, Speedy Trial Schemes and Criminal Justice Delay, 57 CORNELL L. REV. 794, 803-12 (1972).

61. See Hedgepeth v. United States, 364 F.2d 684, 687 (D.C. Cir. 1966). The burden is then on the government to show an absence of prejudice.


63. See United States v. Hines, 455 F.2d 1317, 1332 (D.C. Cir. 1972) and United States v. Holt, 448 F.2d 1108, 1109 (D.C. Cir. 1971). These cases balanced the four factors to determine whether a speedy trial had been abridged. However, as to length of delay the longer the delay the heavier the burden was on the government to show that the right to speedy trial had not been violated. The court in People v. Gray, 7 Ill. App.3d 526, 531, 288 N.E.2d 26, 29 (1972) refused to recognize a three year delay as creating a presumption but noted: "The extended period of purposeless delay would appear to approach the limit of delay beyond which prejudice would be presumed as a matter of law."

64. See, e.g., Short v. Cardwell, 444 F.2d 1368, 1369 (6th Cir. 1971).


2. Reason for the Delay

In determining the reason for a delay the courts are actually seeking to discover who caused the delay, which is determined by finding: (1) the source of the delay, and (2) the motive or reason for the delay.67

(a) Source Of The Delay

It is evident that "[a] defendant cannot complain of delays attributable to himself,"68 such as delays caused by his pre-trial motions or dilatory pleadings.69 Also he may not complain of delays caused by his incompetency to stand trial,70 from his express or implied consent to delays caused by the government,71 or from his fleeing from justice.72 The presence of such factual circumstances would show that the defendant waived his constitutional right to a speedy trial.73

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67. Note, Speedy Trial, supra note 65, at 478 n.15.
69. See, e.g., Osborne v. United States, 371 F.2d 913, 925-26 (9th Cir.), cert. denied, 387 U.S. 946 (1967); Sawyer v. Barczak, 229 F.2d 805, 812 (7th Cir.), cert. denied, 351 U.S. 966 (1956); Note, Speedy Trial, supra note 65, at 480. For a discussion of the legality of assuming a waiver of a speedy trial where one asserts his right to a valid indictment where the first indictment is invalid, see Province, The Defendant's Dilemma: Valid Charge or Speedy Trial, 6 CRIM. L. BULL. 421 (1970).
70. See, e.g., United States v. Davis, 365 F.2d 251, 255 (6th Cir. 1966); Howard v. United States, 261 F.2d 729, 730 (5th Cir. 1958); Note, Speedy Trial, supra note 65, at 480.
72. See Morland v. United States, 193 F.2d 297, 298 (10th Cir. 1951).
73. In addition to the constitutional right to a speedy trial many states have statutes which implement this right, but are not coextensive with constitutional safeguards. People v. Nowak, 45 III.2d 158, 258 N.E.2d 313 (1970). See Note, Lagging Right, supra note 41, at 1590-91, for a list of such state statutes. In Illinois the time limits of 120 days while in custody and 160 days for those released on bail or personal recognizance has been strictly interpreted against the state, placing an affirmative duty upon the state to comply with them. People v. Siglar, 127 Ill. App.2d 256, 261 N.E.2d 27 (1970). However, certain circumstances toll the running of the time period and are deemed to be a waiver of the defendant's statutory right. Examples of such circumstances are: a plea of guilty, People v. Hickman, 3 Ill. App.3d 919, 280 N.E.2d 787 (1971); delay caused by the defendant, People v. Ellis, 4 Ill. App.3d 585, 281 N.E.2d 405 (1972); a defendant's motion for a severance, People v. Bombacino, 51 Ill.2d 17, 280 N.E.2d 697 (1972); and where a defendant requests or agrees to a continuance, People v. Dawson, 3 Ill. App.3d 668, 279 N.E.2d 483 (1972). See Banfield and Anderson, Continuances in the Cook County Criminal Courts, 35 U. CHI. L. REV.
There is dictum to the effect that congestion in a court’s docket and the lack of judicial manpower may excuse a delay. Some courts have accepted this delay as reasonable and have held it does not violate the right to a speedy trial, while others have held it is no excuse. Dictum in the Barker decision asserts that such delay is a “neutral reason” and it should be weighed less against the government than deliberate delay. Yet it is still a barrier to the attainment of a constitutional right and should not be countenanced as a source or a reason for a delay.

(b) Motive Or Reason For The Delay

This factor generally only comes into question where there is governmental delay, which must then be inspected to see if an objectionable motive or reason existed. A deliberate attempt by the prosecution to injure the defendant’s case has been termed “purposeful or oppressive,” and is clearly unjustifiable. Such a delay should be weighed heavily against the government. However, a bad faith intent by the government to harm the defendant is not necessary; it is enough that the government has made a “deliberate choice for a supposed advantage.” Therefore, delays resulting from unreasonably prolonging an investigation, from filing charges in a district of doubtful venue, and from dis-

259 (1968), for the relation between the strategy of continuances and how it effects a speedy trial.


75. See, e.g., King v. United States, 265 F.2d 567 (D.C. Cir.), cert. denied, 359 U.S. 998 (1959); McDonald v. Hudspeth, 113 F.2d 984, 986 (10th Cir.), cert. denied, 311 U.S. 683 (1940); United States v. Verville, 281 F. Supp. 591, 593 (E.D. Wis. 1968); Note, Speedy Trial, supra note 65, at 480.

76. See United States v. Strunk, 467 F.2d 969, 972 (7th Cir. 1972), rev'd on other grounds, 41 U.S.L.W. 4794 (U.S. June 11, 1973) (understaffed office argument rejected as the reason for an eight month delay from indictment to arraignment); Leon v. Baker, 238 So.2d 281 (Fla. 1970) (Florida Supreme Court held that delays emanating from crowded dockets do not toll the speedy trial statute). See also Comment, Criminal Law: Crowded Dockets No Longer Justify Denial Of Speedy Trial, 23 U. Fla. L. Rev. 603 (1971).


81. The Circuit Court of the District of Columbia has created as a rule of court that pre-prosecution delay caused by an undercover investigation will be questioned if it exceeds four months and the defendant is able to show (1) “plausible” prejudice, and (2) that the evidence against the defendant consists solely of the undercover agent’s uncorroborated testimony refreshed from a notebook. Woody
missing one charge and reindicting a defendant on a related charge have been held to violate the speedy trial and due process guarantees.

3. The Defendant's Assertion of His Right

A defendant can always waive his right to a speedy trial and, as noted previously, many actions are considered to waive this right. However, around the speedy trial guarantee there also grew what has been referred to as the "demand-waiver doctrine" under which an accused must demand a speedy trial in order to avail himself of his sixth amendment right. Failure to demand a speedy trial was considered to be an implied waiver of the right. At one time this doctrine was unanimously followed by the federal courts and most state courts. However, in the past few years there has been an eroding of demand-waiver unanimity, with some federal circuit courts placing a positive duty on the prosecution to secure a speedy trial, and not for the defendant to demand it. This has come about because of the high value that courts now place on

v. United States, 370 F.2d 214, 217 (D.C. Cir. 1966); Ross v. United States, 349 F.2d 210, 213 (D.C. Cir. 1965).


84. See notes 68-74 and accompanying text supra.

85. A defendant's failure to make a demand was seen to indicate that he was responsible for the delay and, therefore, was merged with the reason or cause for the delay. Also a failure to make a demand was viewed as indicating that he was in some way profiting from his delay, and thus no prejudice to the defendant could occur. Therefore, waiver had no independent significance but rather was seen as negating the other factors used to determine the sixth amendment violation. See Note, Speedy Trial, supra note 65, at 479-80.

There were three generally recognized exceptions to the demand doctrine: (1) Inability to assert the speedy trial right because of imprisonment, ignorance, or lack of legal advice; See, e.g., United States v. Lustman, 258 F.2d 475, 478 (2d Cir.), cert. denied, 358 U.S. 880 (1958); United States v. Chase, 135 F. Supp. 230 (N.D. Ill. 1955); (2) Ignorance of the pending charge; See, e.g., United States v. Lustman, supra at 478; Taylor v. United States, 238 F.2d 259, 261 (D.C. Cir. 1956); (3) Trial in a district of improper venue; See, e.g., United States v. Gladding, 265 F. Supp. 850, 855 (S.D. N.Y. 1966); United States v. Provoo, 17 F.R.D. 183 (D. Md.), aff'd, 350 U.S. 857 (1955).

86. Note, Lagging Right, supra note 41, at 1602.

87. Note, Lagging Right, supra note 41, at 1604. However, eight states rejected the demand-waiver doctrine. Id. See also Barker v. Wingo, 407 U.S. 514, 524 (1972).

the voluntary waiver of constitutional rights.\textsuperscript{89}

In \textit{Barker v. Wingo} the Supreme Court rejected the demand-waiver doctrine\textsuperscript{80} stating that: "[a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. . . ."\textsuperscript{91} The Court held that presuming waiver of a fundamental right from inaction was inconsistent with its previous pronouncements on waiver of constitutional rights because it is not based on "'an intentional relinquishment or abandonment of a known right or privilege.'"\textsuperscript{92} Furthermore, the Court related that the nature of the speedy trial guarantee makes it "impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants."\textsuperscript{93}

Because of the particular interests of society in this guarantee the Court saw that the duty of swift prosecutions is on society's representatives.\textsuperscript{94} However, the Court noted that in previous fundamental right cases it had placed the entire burden on the prosecution to show a knowing and voluntary waiver, but because of the uniqueness of the speedy trial right it could not be certain when and under what circumstances a defendant must assert his right or it will be waived.\textsuperscript{95} Therefore the Court refused to state that a defendant has no responsibility to assert his right\textsuperscript{96} emphasizing that "[f]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."\textsuperscript{97}

This latter language of the Court appears confusing in light of the fact that the Court had previously stated that a "'[d]efendant has no duty to bring himself to trial . . .'"\textsuperscript{98} but rather the prosecution has such a duty.\textsuperscript{99} The facts of \textit{Barker} show that a large part of the delay was caused by

\begin{itemize}
\item \textsuperscript{89} See ABA Standards, \textit{supra} note 26, at § 2.2 which suggests that the demand rule be explicitly eliminated in any speedy trial rule or statute.
\item \textsuperscript{90} 407 U.S. 514, 528 (1972).
\item \textsuperscript{91} \textit{Id.} at 527. Cf. United States v. Chase, 135 F. Supp. 230, 233 (N.D. Ill. 1955) where the court stated that "'[t]o require a man to beg for a trial on such a charge, with its enormous penalty, requires too much of human nature.'"
\item \textsuperscript{92} Barker v. Wingo, 407 U.S. 514, 525 (1972).
\item \textsuperscript{93} \textit{Id.} at 527.
\item \textsuperscript{94} \textit{Id.}
\item \textsuperscript{95} \textit{Id.} at 529.
\item \textsuperscript{96} \textit{Id.} at 528.
\item \textsuperscript{97} \textit{Id.} at 532.
\item \textsuperscript{98} \textit{Id.} at 527. \textit{See also} the text accompanying note 91 \textit{supra}.
\item \textsuperscript{99} \textit{Id.} at 527. \textit{See also} the text accompanying note 94 \textit{supra}.
\end{itemize}
the Commonwealth's attempt to convict an alleged co-defendant (Manning) so that he could testify at Barker's trial. The Court then balanced the four factors in light of the facts and determined that the prejudice was "minimal" because no witnesses were missing and only two "very minor" lapses of memory occurred, one on the part of the prosecution. Moreover, the Court found that: "[m]ore important than the absence of serious prejudice, is the fact that Barker did not want a speedy trial." The Court stated that it thought Barker was "gambling" on the acquittal of Manning and thus did not want a speedy trial because the state's case would be weak without Manning's testimony. Therefore, the Court refused to rule that his constitutional right was denied because the record disclosed that the defendant did not want a speedy trial.

We are left with a decision in Barker which speaks of a defendant having no duty to bring himself to trial and rejecting the demand doctrine as not consistent with the waiver of constitutional rights. Yet the entire case turns on the defendant not demanding a trial which he has no duty to bring himself to, his failure to do so being viewed as a tactical measure which was impermissible (to strengthen his case) and thus is treated as showing a waiver of his right. The delay by the prosecution was also a tactical measure to strengthen its case. But the Court did not even speak of this reason for the delay when it purportedly balanced the factors, although it was one of the criteria the Court itself had set for determining whether the speedy trial right had been abridged.

4. Prejudice to the Defendant

The fourth factor used in determining if an accused has been denied his constitutional right to a speedy trial is prejudice. There are three

100. In Barker v. Wingo, 407 U.S. 514 (1972), the petitioner was not brought to trial for murder until more than five years after he had been arrested, during which time the prosecution obtained 16 continuances. The first 14 of these were in order to postpone the state's case until the second suspect Manning was convicted and thus any self-incrimination aspects of his testifying against Barker could be removed. Barker did not object to the first 11 continuances over a three year period but objected to the twelfth one and filed a motion to dismiss the indictment which was denied. From February 1959, to February 1963, the state received 14 continuances in order to convict Manning, which it finally did after six trials.

101. Id. at 534.
102. Id.
103. Id. at 534-36.
104. Id. at 536.
divisions of issues to be inspected in order to determine prejudice: (a) what the different types of prejudice are, (b) whether a showing of prejudice is necessary, and (c) if so, who has the burden of proof.

(a) Types Of Prejudice

Prejudice should always be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. Three such interests are: (1) to prevent undue and oppressive pre-trial incarceration; (2) to minimize anxiety and concern accompanying public accusation; and (3) to limit the possible impairment of the ability of an accused to defend himself. The first two types of prejudice can be referred to collectively as prejudice to the person of the accused, and appear to be relatively unimportant in most speedy trial determinations. The third factor, referred to as prejudice to the defense, is the most serious one because the inability of a defendant to adequately prepare his case shows the unfairness of the entire system upon which he is prosecuted. A delay which causes the loss of potential witnesses, memories to fade, and documents or physical evidence to be lost is clearly prejudicial to a defendant's case. As a general rule the extent to which a delay has resulted in actual prejudice is an essential factor in determining whether there has been a violation of the speedy trial guarantee. Some courts


107. See Note, Speedy Trial, supra note 65, at 495; where the author notes that the threat of undue incarceration is often discounted by bail (although it should be recognized that this is not always the case). Even so, the absence of anxiety will not defeat a speedy trial claim. State v. Couture, 156 Me. 231, 163 A.2d 646 (1960).


require that both prejudice and improper cause be shown. Other courts, however, require only that prejudice or improper cause be shown.

(b) Whether A Showing Of Prejudice Is Necessary

The fact that some degree of prejudice needs to be shown appears on its face to be inconsistent with the fact that there is no need to prove any prejudice to show a violation of other sixth amendment rights. Cases which have defined other sixth amendment rights turn on the fact that to determine the degree of prejudice is unnecessary where a fundamental right is involved. As noted in Mr. Justice Brennan's concurring opinion in Dickey, when the fundamental sixth amendment right to a speedy trial is at stake "it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution." Moreover, the plain text of the sixth amendment accords identical stature to each of the rights enumerated therein. The amendment is but a single sentence, a listing of separate rights, each of which is guaranteed to an accused in all criminal prosecutions. As the text is one of guarantee to an accused, there should not be any requirement forcing a defendant to show prejudice in order to receive what the Constitutional language grants to all accused citizens. The amendment does not speak of prejudice, but rather, of protection of rights which must inherently "prejudice" an accused in detracting from his liberty.

Furthermore, in the Bill of Rights there are eleven procedural guarantees that promote the reliability of the criminal guilt-determination process. Of these all but the due process and speedy trial guarantees need

111. See, e.g., United States v. Jackson, 369 F.2d 936, 939 (4th Cir. 1966); United States v. Simmons, 338 F.2d 804, 807 (2d Cir. 1964).

112. See, e.g., United States v. Kaufman, 393 F.2d 172 (7th Cir. 1968), cert. denied, 393 U.S. 1098 (1969); Fleming v. United States, 378 F.2d 502, 504 (1st Cir. 1967); Reece v. United States, 337 F.2d 852 (5th Cir. 1964). Note that Barker v. Wingo, 407 U.S. 514 (1972), has set up a balancing test in which cause of delay and prejudice are two of four factors to be considered in determining a violation of the speedy trial right.


114. See, e.g., Glasser v. United States, 315 U.S. 60, 75-76 (1942).


116. These eleven are (1) the fifth amendment privilege against self-incrimination, and (2) due process, (3) the eighth amendment prohibition against excessive bail, (4) the sixth amendment rights to a speedy trial, (5) public trial, (6) with an impartial jury, (7) to be informed of the nature and cause of the accusation, (8) to be tried in the district in which the crime was committed,
not have actual prejudice shown in order for a court to hold that they have been violated.\textsuperscript{117} However, prejudice need not always be shown in due process cases, for "at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."\textsuperscript{118} Thus the speedy trial guarantee is viewed alone among the criminal procedural guarantees of the Bill of Rights as always requiring the showing of actual prejudice rather than inferring it from the procedure involved.\textsuperscript{119}

(c) Who Has The Burden Of Proving Prejudice

Therefore, since the deprivation of the sixth amendment right to speedy trial does not per se prejudice an accused's ability to defend himself\textsuperscript{120} one must then determine upon whom the burden of proof to show prejudice, or the lack of it, should lie. The Supreme Court has not yet ruled on who has this burden and the lower court cases appear to be divided into three categories as to the burden of proof: (1) The accused must make a showing of prejudice which is dispositive of the issue of prejudice;\textsuperscript{121}

\\n
\footnotesize{(9) to confront the prosecution's witnesses, (10) to have compulsory process for obtaining witnesses, and (11) to have the assistance of counsel. See Note, Speedy Trial, supra note 65, at 494-95 n.131, for cases relating to and explaining these rights.}

\footnotesize{117. Note, Speedy Trial, supra note 65, at 494 n.131.}


\footnotesize{119. One court has held that an unreasonable delay in itself was sufficient for dismissal without a showing of prejudice. United States v. Lustman, 258 F.2d 475 (2d Cir.), cert. denied, 358 U.S. 880 (1958).}

\footnotesize{The eighth amendment right to bail, like the speedy trial right, is designed to minimize incarceration prior to trial and assure that an accused will not be hampered in his ability to prepare his defense. Stack v. Boyle, 342 U.S. 1, 4 (1951). But in determining whether a right to bail has been violated a court will merely look to see if it is excessive and not as to prejudice. 342 U.S. at 4-5. To determine whether the trial was given with all reasonable speed, without regard to an inspection of whether prejudice to the defendant has actually occurred, such a test should be adopted for the speedy trial right. It should be noted however, that in aiming for a "speedy" trial one must not eliminate or by-pass fundamental procedural rights of an accused.}

\footnotesize{120. Barker v. Wingo, 407 U.S. 514, 521 (1972).}

\footnotesize{121. See, e.g., United States v. Ewell, 383 U.S. 116, 120 (1966); Jackson v. United States, 351 F.2d 821, 823 (D.C. Cir. 1965) (a defendant has peculiar knowledge of the facts which would constitute prejudice and therefore he should have the burden of showing them; however, his burden is only to show a "plausible claim" short of a preponderance); Von Cseh v. Fay, 313 F.2d 620, 624 (2d Cir. 1963).}

\footnotesize{However, it would be almost impossible for a defendant to prove actual prejudice if he cannot remember his activities. Also it is difficult to show the materiality of unavailable evidence and the fact that it was available at one time, and next to}
(2) prejudice is presumed from long delay and such presumption is dispositive of the issue of prejudice; and (3) prejudice must be either shown by the accused or presumed from long delay, but in either case the government may overcome such proof or presumption by showing either that the delay was the result of a valid police purpose or that the accused suffered no serious prejudice other than that resulting from ordinary and inevitable delay.

One author believes that the criteria of length of delay should determine who has the burden. He suggested that if a delay is short the defendant should have the burden of establishing prejudice and unnecessary delay, as a check on frivolous claims. However, where a "substantial" delay occurs the burden should be on the state to justify the delay as necessary and proper. If the state is unable to do this then it is logical and fair to require it to show that the defendant has not been prejudiced by the delay.


Most modern state prompt trial statutes implicitly create a presumption of prejudice when a delay exceeds the statutory time limit as extended by specific exclusions. Note, Speedy Trial Schemes and Criminal Justice Delay, 57 CORNELL L. REV. 794, 814 (1972).

123. See, e.g., United States v. Deloney, 389 F.2d 324, 325 (7th Cir.), cert. denied, 391 U.S. 904 (1968) (dictum) (the government has the burden of showing that delay, if it prejudiced the defendant, was the result of a valid police purpose); Hanrahan v. United States, 348 F.2d 363 (D.C. Cir. 1965) (the government has the burden of showing that prejudice to a defendant was not greater than that resulting from ordinary and inevitable delay); Commonwealth v. Clark, 443 Pa. 318, 279 A.2d 41 (1971) (once a defendant makes a prima facie showing of prejudice, the burden is then on the state to show the absence of prejudice).

124. Note, Lagging Right, supra note 41, at 1620.

125. Id. But see Note, Speedy Trial, supra note 65, at 497, where the author asserts that neither the defendant nor the government should have to prove actual prejudice or its absence, but rather prejudice should not be a factor in the speedy trial right.
5. Balancing

In balancing the four factors given by the Barker decision neither of them are regarded "as either a necessary or sufficient condition"\(^\text{126}\) to a finding of a violation of the sixth amendment speedy trial right. Therefore, one factor alone may not be dispositive of the issue, but also the finding of all four factors to be favorable to the accused or the government is not necessary. The factors given by the Court have "no talismanic qualities"\(^\text{127}\) and courts must weigh both the conduct of the defendant and the prosecution in a sensitive balancing process, while always mindful that they are dealing with a fundamental right given an accused in the Constitution.\(^\text{128}\)

TIME OF ATTACHMENT

There has been much discussion in recent years as to exactly when the right to a speedy trial attaches. Generally courts have considered four points in the criminal process at which the guarantee might begin: (1) when the alleged crime is committed; (2) when the government decides to prosecute and has enough evidence to proceed against an individual; (3) when a defendant is arrested; and (4) when he is formally charged with a crime, either by indictment or information. The first two time periods are termed the pre-prosecution period and will be considered together.

1. The Pre-prosecution Period

The United States Supreme Court in United States v. Marion held that the right to a speedy trial does attach to pre-prosecution delay.\(^\text{129}\) The Court noted that no federal court of appeals had ever reversed a conviction or dismissed an indictment solely on the constitutional grounds of the sixth amendment’s speedy trial provision where only pre-indictment delay had been involved.\(^\text{130}\) The view that this right only applied when a prosecution had been formally initiated by an arrest or indictment, and

\(^{127}\) Id.
\(^{128}\) Id.
\(^{130}\) Id. at 315. The Court in stating this fact gives an extensive list of cases in its support. Id. at 315-17 n.8. In all these cases the defendant had alleged that he was prejudiced by the delay. However, in Marion "[n]o specific prejudice was claimed or demonstrated. . . ." Id. at 310; rather, the 38 month delay between the crime and the indictment was claimed to be inherently prejudicial. Id. at 313.
thus there was an "accused" as by the sixth amendment’s terminology, was almost unanimously ingrained in precedent.131

Prior to Marion this conventional rule was criticized by some judges and authors132 and at least three federal district court decisions applied the speedy trial right to pre-prosecution delay.133 Also six circuits had ruled that pre-indictment delay would be grounds for dismissal. However, these cases were treated basically as due process violations requiring a showing of actual prejudice, with an occasional mention of the sixth amendment speedy trial right.134 One circuit and two federal district courts in their decisions have spoken of due process but primarily based their dismissals of indictments on violation of the speedy trial right,135 and the District of Columbia Circuit has applied the right to pre-prosecution delays by its supervisory power.136

However, because of Marion it is now clear that the sixth amendment will afford no protection to those not yet "accused," nor does it require the government to "discover, investigate, and accuse any person within

131. Note, Lagging Right, supra note 41, at 1613. Arguably the term "accused" refers solely to the issue of standing. Cf. Hoffa v. United States, 385 U.S. 293, 310 (1966) (no constitutional right to be arrested, a person not yet charged with a crime has no standing to complain of prosecutorial delay nor to compel the government to begin a prosecution against him). Therefore, it may be possible for an individual, once he is arrested or formally charged, to have standing to then challenge delays dating back to the time of the alleged offense.


any particular period of time." \(^{137}\) It appears that the Court's refusal to extend the sixth amendment right might be because of the procedural problems that would occur from its enforcement. There might be a need for lengthy hearings of proof as to the diligence of prosecuting authorities, \(^{138}\) which might arguably lengthen the time of trial rather than shorten it. \(^{139}\)

The Court in *Marion* supported its decision by stating four factors upon which it relied. The first of these was the fact that:

On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution. \(^{140}\)

The sixth amendment's language clearly shows that all its guarantees apply only to an "accused." However, in applying the sixth amendment right to counsel guarantee the Supreme Court itself has extended this right to pre-prosecution delay in *Escobedo v. Illinois* \(^{141}\) and *Miranda v. Arizona*. \(^{142}\)

In *Escobedo* the Court found that the right to counsel attached to an "accused" prior to arrest or indictment. The Court stated that to require an "accused" to be arrested before the right attached "would exalt form over substance . . ." \(^{143}\) and stated that the right attached when "the investigation is no longer a general inquiry into an unsolved crime but has

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137. United States v. Marion, 404 U.S. 307, 313 (1971). Cf. *Hoffa v. United States*, 385 U.S. 293, 310 (1966) where the Supreme Court stated: "[t]here is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long." (footnotes omitted).


139. In regards to a defendant such a delay would be a voluntary waiver to toll the speedy trial right. However, the right has been viewed as also for the protection of society and thus may be an infringement on society's right. *Barker v. Wingo*, 407 U.S. 514 (1972).

140. United States v. Marion, 404 U.S. 307, 313 (1971). With this the Court answered a question posed by Mr. Justice Brennan in *Dickey v. Florida*, 398 U.S. 30 (1970): "Can it be that one becomes an 'accused' only after he is indicted, or that the Sixth Amendment subdivides 'prosecution' into various stages, granting the right to speedy trial in some and withholding it in others?" *Id.* at 44 (Brennan, J., concurring).


begun to focus on a particular suspect. . . ."\textsuperscript{144} Therefore, logically the first right guaranteed to an "accused" by the sixth amendment, that of a speedy trial, should also attach prior to formal arrest or indictment. In assessing the pre-prosecution delay, in regards to the speedy trial right, a court should inspect the nature of the events of delay and their effects on the rights of those involved, finding a denial of the right where years of unexplained and inexcusable pre-indictment delay occur.\textsuperscript{145}

The second factor upon which the Marion Court based its decision was the fact that: "\textit{Our attention is called to nothing} in the circumstances surrounding the adoption of the Amendment indicating that it does not mean what it appears to say . . . ."\textsuperscript{146} There is practically no historical data as to the intent of the writers when they enacted the speedy trial guarantee.\textsuperscript{147} Therefore, it has been noted by the Supreme Court that it is reasonable to construe this intent in light of the common law sources from which the framers received their legal education.\textsuperscript{148}

In neither the Magna Carta nor Coke's commentaries thereon is any distinction drawn as to the stage of the process in which delay or denial of right occurs.\textsuperscript{149} Furthermore, the Habeas Corpus Act of 1679 did not speak of a distinction between attachment before or after prosecution had begun.\textsuperscript{150} In fact the English common law with which the

\textsuperscript{144} Id. at 490-91. In relation to construing the word "charged" as used in Article IV, section 2 of the United States Constitution, the Supreme Court has stated that it applies when "an affidavit is filed, alleging the commission of an offense and a warrant is issued for his arrest, . . ." not when formal arrest itself occurs. In Re Strauss, 197 U.S. 324, 331 (1905). Therefore, in both instances where the Constitution imposes a duty on the government to act on criminal matters only at a specific time, the Supreme Court has construed such duty to attach previous to formal arrest.


\textsuperscript{146} Id. at 313-14 (emphasis added). It is significant that the briefs in this case (Marion's, Crack's, one amicus curiae brief, and the government's brief) refer to the historical development of the adoptive meaning of this amendment only in a few pages. The Court itself noted that the evidence of this history was "meager." Id. at 314 n.6.

\textsuperscript{147} Note, \textit{Speedy Trial}, supra note 65, at 484.


\textsuperscript{149} Id. at 224.

\textsuperscript{150} 31 Charles II, ch. 2 (1679). It may be argued that this Act did not speak of such a distinction because it only affected those already imprisoned. However, it should also be noted that the Act only applied to felonies and did not speak of public trials, while the sixth amendment does not distinguish between crimes and provides for a public trial. Therefore, this Act should not be seen as a shorthand version of the sixth amendment and is only useful to show who an accused was intended to be according to the Act. The Act noted that one could have the
framers were familiar conceived of a criminal prosecution as being commenced prior to indictment.151 The common law "criminal process" was commenced by the filing of a civil lawsuit by a private citizen, who thereafter had to file an application for criminal prosecution calling for an accused to show cause why he should not be imprisoned.152 Therefore, the "criminal prosecution" commenced prior to "indictment" or formal "arrest" and thus the individual was an "accused" prior to being "arrested" or "indicted."153 One of the earliest cases showing that no distinction was made between pre-trial and post-trial delay at common law was Rex v. Robinson154 which was decided prior to our Declaration of Independence and Constitution. In Robinson, Lord Mansfield refused a motion for a criminal information against the defendant on the ground that over two years had lapsed since the alleged offense and the delay was not accounted for.155

The Marion Court listed the third factor upon which it based its decision as

[legislative efforts to implement federal and state speedy trial provisions also plainly reveal the view that these guarantees are applicable only after a person has been accused of a crime.156

However, what the Congress or state legislatures do, or do not do, should

benefit of the right to release where he was not indicted prior to a set time, thus the Act at least extended to pre-indictment if not the pre-arrest period. Kutner, supra note 15.


155. Id. at 542, 96 Eng. Rep. at 313-14. See also Regina v. Robins, 1 Cox Crim. Cas. 114 (Somerset Winter Assizes, 1844) where a two year delay was occasioned by the failure of a private party to file a complaint, and not by police inaction. The court applied a standard of fundamental fairness stating that "[i]t is monstrous to put a man on . . . trial after such a lapse of time . . ." where no satisfactory explanation was given for the delay. See also Nickens v. United States, 323 F.2d 808, 810 n.2 (D.C. Cir. 1963), cert. denied, 379 U.S. 905 (1964).

156. United States v. Marion, 404 U.S. 307, 316-17 (1971). This Court noted that the federal implementary rule, Federal Rule of Criminal Procedure 48(b), only applies to post-arrest situations. Id. at 312. See ABA STANDARDS, supra note 26, at 14-15 for a comprehensive list of state statutes. These statutes generally are triggered from "date of custody." See, e.g., ILL. REV. STAT. ch. 38, § 103-5(a) (1969).
have no bearing upon the meaning of a fundamental constitutional guarantee which has already been held applicable to the states. Inasmuch as the Constitution is the supreme law of the land, the actions of the states in regard to it must be judged by its meaning. The process should not be such that the Constitution is judged by the meaning of state or congressional statutes (except where it is absolutely necessary). Here it is not imperative that the states or Congress be sought for advice, since the historical precedents for the sixth amendment are enough to show the intent of its writers.

In relation to the interval between the commission of the offense and when an arrest or indictment occurs, the Marion Court held that the statute of limitations exclusively delimits the time during which an accused is exposed to prosecution.157 However, the first statute of limitations was adopted by Congress in 1790,158 one year after the sixth amendment was adopted. Therefore, Congress could not possibly have been according non-existent statutes with any capacity to affect, let alone to attain equal status with a section of the Bill of Rights. The sixth amendment was intended by the framers to safeguard the rights of an accused. They could hardly have intended to leave these rights to the legislative power without any reference to the Constitutional prescription enforceable in the courts.159 Therefore, an analysis reveals that statutes of limitations "merely represent the maximum period beyond which a prosecution cannot be brought, and do not preclude judicial inquiry into the constitutionality of delays within that period. . . ."

Furthermore, there is no federal statute of limitations for capital crimes.160 Thus, if the statute of limitations is a bar to pre-arrest delay, arguably the sixth amendment right to a speedy trial should at least apply

157. United States v. Marion, 404 U.S. 307, 322 (1971). The Court noted that a statute of limitations provides "predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." Id. at 322 (footnote omitted). See also Nickens v. United States, 323 F.2d 808 (D.C. Cir. 1963), cert. denied, 379 U.S. 905 (1964); Hoopengarner v. United States, 270 F.2d 465 (6th Cir. 1959).

158. 1 Stat. 112, 119 (1790) (2 year statute of limitations for non-capital cases; 3 years for capital offense).

159. See Note, Lagging Right, supra note 41, at 1614.

160. Note, Speedy Trial, supra note 65, at 492. Moreover, delay and prejudice can be seen to equal laches and may arguably be seen to apply to the time period during the statute of limitations. See Note, Justice Overdue—Speedy Trial for the Potential Defendant, 5 STAN. L. REV. 95, 102-03 (1952). In exceptional cases laches will override a statute of limitation. H. McCLINTOCK, EQUITY 75 (2d ed. 1948). See also Note, Justice Overdue, supra at 104.

to pre-arrest delay in capital offenses. However, the sixth amendment does not distinguish on its face between capital and non-capital crimes\(^{162}\) and if the right can be invoked at any time in capital cases it should also apply to non-capital cases. The existence of a legislative statute can never foreclose a fundamental constitutional right, and thus it can only be seen as an outer bound and not as forestalling standing to complain of an infringement of the constitutional right which occurs during the time period.

The Court in *Marion* noted that “the statute of limitations does not fully define the appellee's rights with respect to the events occurring prior to indictment . . .”\(^{163}\) and that where “actual prejudice” which is caused by an “intentional device” is present the *due process* clause might require dismissal of an indictment.\(^{164}\) However, it should be noted that there is an added difficulty in showing actual prejudice in pre-arrest delay situations.\(^{165}\)

The fourth factor upon which the *Marion* decision was based was the assertion that:

It is apparent . . . that very little support for appellees' position emerges from a consideration of the purposes of the Sixth Amendment's speedy trial provision . . . .\(^{166}\)

\(^{162}\) Note also that an “accused” has a sixth amendment right to counsel in both capital and non-capital cases. See generally Note, Lagging Right, *supra* note 41, at 1614.


\(^{164}\) *Id.* at 324. It is not clear whether both of these factors need be present for a violation of due process to be recognized. The *Marion* Court in citing these two merely recognized that the government in its brief had conceded that where both were present, then a fifth amendment due process violation would appear. Brief for the Government at 26-27, United States v. Marion, 404 U.S. 307 (1971). Therefore, the mere presence of one of these factors may be enough to show a violation of the fifth amendment. *Cf.* United States v. Daley, 454 F.2d 505, 508 (1st Cir. 1972), where the court stated: “[s]ince neither actual prejudice nor purposeful governmental delay has been shown, the pre-indictment time lapse is irrelevant . . . .” (emphasis added). See generally notes 111 and 112 and accompanying text *supra*, for examples of how these two factors are regarded in sixth amendment speedy trial cases.

In both the *Marion* and *Barker* cases the delay was an “intentional (tactical) device” used by the government to strengthen its case and gain an advantage over the defendant, however, in neither case did the defendant prove actual prejudice (*Marion* did not plead actual but merely “possible” prejudice). Thus, if these two factors are to be considered, or one alone, it appears the showing of actual prejudice, with the burden being on he who pleads it, will be the prime requirement to show a fifth amendment due process violation.

\(^{165}\) See note 179 and accompanying text *infra*.

Mr. Justice White in delivering the opinion of the Court in *Marion* stated that "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense."\(^{167}\) In light of *United States v. Ewell*,\(^{168}\) and the cases interpreting its provisions as to the interests the speedy trial right was designed to protect,\(^{169}\) this statement is clearly erroneous. Primarily the sixth amendment right was designed to protect against the possible impairment of the ability of an accused to defend himself.\(^{170}\) However, Justice White focused upon the fact that a citizen prior to arrest "suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer. . . ."\(^{171}\) Furthermore, he discarded the fact that delay may possibly interfere with the accused's ability to defend himself.\(^{172}\)

As noted previously post-arrest delay may have a prejudicial effect on a defendant.\(^{173}\) However, where lengthy delay occurs prior to arrest the prejudicial effect is often greater.\(^{174}\) Where a defendant does not know of an investigation he may allow evidence to be destroyed, while the government with its knowledge of a possible criminal prosecution will preserve its evidence. He has no notice of the pending criminal charges and thus has no inducement to preserve evidence, his own memory, or the memories of his possible witnesses.\(^{175}\) Also during this time he does not generally have the help of an attorney because he has not yet been arrested, therefore, he loses the aid of an expert who could help him in

\(^{167}\) *Id.* at 320.


\(^{169}\) See generally notes 106-10 and accompanying text supra.

\(^{170}\) Notes 108 and 109 and accompanying text supra.

\(^{171}\) *United States v. Marion*, 404 U.S. 307, 321 (1971). Although one not yet arrested suffers no restraints on his liberty he may, where he is known (as in the case of Marion), be subject to public accusation. "Indeed, the protection underlying the right to a speedy trial may be denied when a citizen is damned by clandestine innuendo and never given the chance promptly to defend himself in a court of law." *Id.* at 331 (Douglas, J., concurring).

\(^{172}\) *Id.* at 321-22.

\(^{173}\) See text accompanying note 105 supra.

\(^{174}\) See *United States v. Kaufman*, 393 F.2d 172, 175 (7th Cir. 1968), cert. denied, 393 U.S. 1098 (1969).

\(^{175}\) See *United States v. Kaufman*, 393 F.2d 172, 175 (7th Cir. 1968), cert. denied, 393 U.S. 1098 (1969); *Hardy v. United States*, 343 F.2d 233, 235 (D.C. Cir. 1964) (dissenting opinion), cert. denied, 380 U.S. 984 (1965); Nickens v. United States, 323 F.2d 808, 813 (D.C. Cir. 1963) (concurring opinion), cert. denied, 379 U.S. 905 (1964). Where a prospective defendant does not know of pending charges he would not be required to (nor under present standing principles can he) demand a speedy trial.
searching for useful witnesses and determining which evidence needs to be preserved. 176

Generally a defendant is required to prove actual prejudice when he complains that his fifth amendment due process right 177 or sixth amendment speedy trial right 178 has been violated. But it is almost impossible for a defendant to prove actual prejudice if he cannot remember his activities on the date of the alleged offense. 179 Without notice a prospective defendant cannot devote his powers of recall to solidify his memory of recent events. On the other hand, "the State may proceed methodically to build its case while the prospective defendant proceeds to lose his." 180 Thus in a very real sense, the extent to which a defendant is prejudiced by a governmental delay is evidenced by the difficulty he encounters in establishing with particularity the elements of that actual prejudice. 181 Furthermore, in inspecting the purposes of the sixth amendment, which the Marion Court attempted to do, it is evident that it imposes a duty upon government officials to proceed expeditiously with criminal prosecutions. However, this purpose will have little meaning if these officials are allowed to determine ex parte when that duty is to commence. 182

2. The Prosecution Period

The third and fourth periods in the criminal process in which the speedy trial right may possibly attach are when a person is arrested or where he is formally charged with a crime. Although at one time some courts did not view the right as attaching upon arrest, 183 it is now seen as

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176. He also does not have the aid of criminal discovery because the right to discovery does not commence prior to indictment. See Brady v. Maryland, 373 U.S. 83 (1963). One of the aids of discovery is that it leads to other avenues of factual exploration, but by the time one is arrested the avenues may have ended.

177. Cases cited note 164 supra.

178. Notes 121-23 and accompanying text supra.

179. A crime of violence may be more readily remembered, if in fact the defendant was the one who committed it; but where there is a crime such as business fraud, as was the case in United States v. Marion, 404 U.S. 307 (1971), it will be extremely difficult for a defendant to recall the transactions, even if in fact he committed the crime. Moreover, where one is innocent it would be next to impossible, after lengthy delay, for him to remember what he did on a specific day or persons who could be witnesses for him. See generally Note, The Potential Defendant's Right to a Speedy Trial, 48 N.C. L. Rev. 121, 127 (1969).


183. See, e.g., Bruce v. United States, 351 F.2d 318, 320 (5th Cir. 1965).
attaching at this point.\textsuperscript{184} The common law history of the development of the guarantee suggests that it was intended to attach at least by the time of arrest.\textsuperscript{185} Moreover, one who has been arrested is clearly an "accused" within the literal meaning of that word contained in the sixth amendment.

Similarly the speedy trial right attaches where one is "accused" by indictment or information.\textsuperscript{186} Also once the right has attached, it will generally continue uninterrupted until final conviction of the crime alleged in the indictment or information.\textsuperscript{187} The speedy trial right also applies where one is held imprisoned in one jurisdiction with an indictment or information lodged against him in another.\textsuperscript{188}

Article IV, section 2 of the United States Constitution is the source of the power for one state to place a detainer upon a person imprisoned in a sister state.\textsuperscript{189} Courts in the past generally refused to hold that the speedy trial right applied to these prisoners. The courts reasoned that any delay in bringing a defendant to trial as a result of prior incarceration did not constitute a violation of the defendant's right to a speedy trial.\textsuperscript{180} However, the Supreme Court in \textit{Smith v. Hooey} found that a prisoner has a right to a speedy trial on all pending charges.\textsuperscript{191} Gen-

\textsuperscript{185} See Note, \textit{Speedy Trial}, supra note 65, at 483-85.
\textsuperscript{187} See, e.g., Finton v. Lane, 356 F.2d 850, 852 (7th Cir. 1966); Hanrahan v. United States, 348 F.2d 363, 367 (D.C. Cir. 1965). Therefore, if an accused is granted a new trial, the right continues from the grant of the motion until the beginning of the new trial. \textit{See, e.g.}, United States v. Gunther, 259 F.2d 173, 174 (D.C. Cir. 1958) (per curiam).
\textsuperscript{188} Smith v. Hooey, 393 U.S. 374 (1969).
\textsuperscript{189} Over 30 percent of all federal prisoners have detainers pending against them. \textit{Note, Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions}, 77 Yale L.J. 767 n.1 (1968). It was determined in 1969 that there were about 23,700 detainers on file against 342,900 convicts in all prisons in the United States, and that 70 percent of these are based upon the fact that the convict had an untried charge pending against him. \textit{See Wenzel, Detainers: A National Survey and the Right to Speedy Trial} 2-8, April, 1969 (unpublished thesis, Northwestern University School of Law), part of which is reported in \textit{Comment, The Convict's Right to a Speedy Trial}, 61 J. Crim. L.C. & P.S. 352, 352-53 n.10 (1970).
\textsuperscript{191} 393 U.S. 374 (1969). However, the Court left open the question of when and how that right could be enforced. Because of the lack of jurisdiction of
erally where courts are not willing or able to remove the detainers themselves, they may order prison officials to minimize their punitive effect.\textsuperscript{192} But where one complains his speedy trial right has been violated by the delay in prosecution where a detainer is lodged he must still show that he was prejudiced in some manner as the result of the state’s delay.\textsuperscript{193}

\textbf{RULE 48(b): FEDERAL PROTECTION AGAINST UNNECESSARY DELAY}

Federal Rule of Criminal Procedure 48(b) provides:

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

This rule is founded upon the sixth amendment right to speedy trial but is not a statutory restatement of that right.\textsuperscript{194} The rule has two facets: (1) it provides a means of enforcing the right of an accused to a speedy trial under the sixth amendment; and (2) it codifies the inherent power of the court to dismiss a case on the ground of unnecessary delay.\textsuperscript{195} The power of the court to dismiss an indictment, information, or complaint for unnecessary delay pursuant to Rule 48(b) is broader than its power to dismiss for an unconstitutional denial of the speedy trial right, for this rule permits dismissal even though there has been no constitutional vio-

\textsuperscript{192} See Carnage v. Sanborn, 304 F. Supp. 857 (N.D. Ga. 1969). Having a detainer placed against an imprisoned person generally results in his confinement in maximum security, the loss of prison privileges, the loss of desirable jobs, the loss of the possibility of being sent to an honor farm, an inability to keep track of the charges and to secure evidence in one’s favor, the loss of eligibility for parole, and the loss of the chance of having any new sentence being served concurrently with his present one. See Schindler, \textit{Interjurisdictional Conflict and the Right to a Speedy Trial}, 35 U. CIN. L. REV. 179, 181-83 (1966); Note, \textit{Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions}, 77 YALE L.J. 767, 771 (1968).


\textsuperscript{195} See, \textit{e.g.}, United States v. Mark II Electronics of Louisiana, Inc., 283 F. Supp. 280, 283 (E.D. La. 1968).
luation. However, this rule, like the constitutional guarantee applies only to post-arrest situations. In considering whether to dismiss pursuant to this rule a court will generally consider the same criteria as it would if considering whether to dismiss pursuant to the speedy trial clause.

**CONCLUSION**

The speedy trial guarantee, although a fundamental right, is still given little stature by itself in the federal courts. It is often confused with the fifth amendment due process requirement and thus many conflicting and almost totally confusing interpretations of this right have arisen prior to and after the Supreme Court's decision in *Barker*. The courts require a showing of actual prejudice to prove a violation of the speedy trial and due process rights, while the other criminal procedural guarantees of the Bill of Rights do not require such proof. However, the showing of actual prejudice should not be required where "lengthy" delay is in-

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196. See, e.g., Mann v. United States, 304 F.2d 394, 397-98 (D.C. Cir. 1962).
199. Note 117 and accompanying text supra.
200. The length of delay allowed should depend on the type of crime involved and the source of the delay. Complex crimes which require more work by both the defense and prosecution would thus be allowed more time than simple crimes of violence such as robbery. See Barker v. Wingo, 407 U.S. 514, 530-31 (1972). A delay caused by court docket congestion should not be allowed unless the prosecution can show that the defendant in some way caused the case to be caught in an overloaded docket (i.e. he asked for a continuance which delayed the trial until a time that is now congested; or, he requested a change of venue to a congested docket).

See THE CHALLENGE OF CRIME IN A FREE SOCIETY, REPORT BY THE PRESIDENT'S COMMITTEE ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 156-57 (1967) for recommendations of management assistance for the courts. Courts should also experiment with restoring control of a case to one judge who would handle it throughout the pre-trial and trial phase of the criminal court process. Such an experiment with an individual calendar initiated by the United States District Court for the Southern District of New York allowed case disposition to increase by 42
involved, and if it must be proven the burden should be clearly on the prosecution to disprove prejudice.

The deleterious effects that the denial of this right has on the individual should be sufficient to enforce the sixth amendment guarantee. However, when one views the right of society to protect itself the speedy trial guarantee may be seen as an answer to controlling the increasing rise of crime in America today. Where a potential defendant is assured of a speedy and expeditious resolution of any criminal charge against him, it will enhance the deterrent intent of the criminal law. Moreover, when society views such rapid but constitutionally proper prosecution it may have more faith in the criminal process, thus reporting and appearing in court to testify to criminal acts.

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