The Constitutional Guarantee of Speedy Trial

I. Introduction

The Speedy Trial Act of 1974[1] was signed into law by President Ford on January 3, 1975. The Act provides that commencing July 1, 1979, an indictment or information must be filed within thirty days after arrest; an arraignment must be held within ten days after the filing of an indictment or information; and the defendant must be tried within sixty days after he pleads not guilty at his arraignment.[2] If the time limits are exceeded the charges are to be dismissed. Discretion is vested with the court to dismiss with or without prejudice after considering the seriousness of the offense, the circumstances leading to dismissal, and the effect of reprosecution on the administration of the Act and on the administration of justice.[3]

The full impact of the Speedy Trial Act of 1974 cannot yet be measured. Its effect on the entire federal criminal justice system will undoubtedly be profound, far reaching, and perhaps, in some instances, even traumatic. The Act does not, however, displace the constitutional right of speedy trial. The Act excludes many periods of delay from its coverage. Even when the time limits of the Act are exceeded, a defendant may involuntarily waive the violation by failure to move for dismissal prior to trial or entry of a guilty plea,[4] or the charges against a defendant may be dismissed without prejudice, thus allowing reprosecution for the same offense. The Act itself recognizes that "[n]o provision . . . shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution."[5] Nevertheless,

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[1]18 U.S.C. § 3161 *et seq.* (120 Cong. Rec. S22,483 (daily ed. Dec. 20, 1974)).

[2]*Id.* § 3161. Gradually decreasing time limits are provided during the interim period until July 1, 1979. Certain periods of delay are excluded from the computation of the time limitations, such as delay resulting from (1) proceedings concerning the defendant, including hearings on pretrial motions, (2) written agreement with the defendant, (3) the absense or unavailability of the defendant or an essential witness, (4) the mental incompetence of the defendant, (5) the dismissal of charges by the government and the filing of new charges for the same offense, (6) the joint trial of co-defendants, and (7) a continuance granted by the court to serve the ends of justice. *Id.* § 3161(h)(1) to (8) (120 Cong. Rec. S22,483-84).

In addition the Act contains many provisions for the development and implementation of plans in each judicial district for the operation of the Act. Five million dollars is authorized for the development and implementation of such plans in five pilot districts. *Id.* §§ 3165-66 (120 Cong. Rec. S22,485).

[3]*Id.* § 3162 (120 Cong. Rec. S22,484).

[4]*Id.* § 3162(a)(2).

[5]*Id.* § 3173 (120 Cong. Rec. S22,486). The sixth amendment provides, "In all criminal prosecution, the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend VI.

the Act will certainly lessen the need for criminal defendants in federal courts to invoke their constitutional right of speedy trial and may thus herald a new era of speedy justice in the United States.

On the eve of this new era, it seems particularly appropriate to warn against the neglect of the constitutional right of speedy trial. The development of this right must continue in the future because it stands as the ultimate barrier against denial of justice through delay.

This Note will examine the Supreme Court's four factor balancing method, as set forth in *Barker v. Wingo*,[6] for measuring deprivations of the sixth amendment guarantee of speedy trial, and how that test has been applied in well over 100 reported opinions of the lower federal courts since the *Barker* decision. It may thus be possible to determine the present status of the constitutional right of speedy trial and identify particular areas where further development is needed. Such an analysis may also serve as a reminder of the importance of the constitutional right of speedy trial in the hope that it will not stagnate under the Speedy Trial Act of 1974.

II. History

The development of the right of speedy trial as a viable, constitutionally protected right has been extremely slow. A brief examination of the few Supreme Court cases prior to *Barker* in which the right to a speedy trial was considered is necessary for an understanding of the *Barker* decision. The early Supreme Court rulings emphasized intentional or purposive delays by the prosecution as a prerequisite to a deprivation of the right to a speedy trial. In *Beavers v. Haubert*,[7] the Court noted that the

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[6]407. U.S. 514 (1972) The Supreme Court had an opportunity to interpret *Barker* in the case of Moore v. Arizona, 414 U.S. 25 (1973) (discussed at text accompanying notes 21, 96-98 *infra*). The *Barker* decision was considered important as an initial step by the Court to act definitively in a long neglected area of constitutional law and spawned comments in a number of law reviews. *See, e.g.*, Uviller, Barker v. Wingo: *Speedy Trial Gets A Fast Shuffle*, 72 Colum L. Rev. 1376 (1972); 58 Cornell L. Rev. 399 (1973); 86 Harv. L. Rev. 164 (1972).

[7]198 U.S. 77 (1905). The defendant had been charged in the Eastern District of New York. When he appeared to move upon and plead to the indictments, the district attorney refused to proceed further and stated his intention to institute removal proceedings to the District of Columbia under indictments pending there against the defendant. The defendant sought to attack his removal to the District of Columbia on the grounds that it would deny him a speedy trial in New York. The Court found no speedy trial violation.

right to a speedy trial was "relative" and consistent with delays. Later, in *Pollard v. United States*,[8] the Court found no speedy trial violation because the delay was merely "accidental" rather than purposeful or oppressive. In *United States v. Ewell*,[9] the court identified what it believed were the three purposes of the constitutional guarantee of a speedy trial. Those were to prevent prejudice to a defendant due to (1) oppressive pretrial incarceration, (2) the anxiety and concern resulting from being accused of a crime, and (3) the impairment of his ability to defend himself. In *Barker*, the Court adopted these purposes in its prejudice factor.

In 1967, in *Klopfer v. North Carolina*,[10] the Court granted relief to a person because he had been deprived of a speedy trial. More importantly, however, the Court held the sixth amendment guarantee of a speedy trial to be a fundamental right secured to defendants in state courts under the due process clause of the fourteenth amendment. Again, in *Smith v. Hooey*,[11] the Court afforded some relief for deprivation of a speedy trial. The Court held that the defendant had a right to a speedy trial even though he was a prisoner in another jurisdiction. When the defendant made a demand for a speedy trial, the authorities were constitutionally required to make a diligent, good faith effort to obtain custody of the defendant and bring him to trial as soon as pos-

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[8]352 U.S. 354 (1957). The defendant pleaded guilty to a federal offense. After he left the court room, the judge entered a judgment suspending sentence and placed the defendant on probation for three years. Two years later, when the defendant violated probation, the court sentenced him to two years imprisonment and set aside its previous judgment and order. The Supreme Court viewed the sentencing process as part of the trial for speedy trial purposes. However, it noted that the original suspension of sentence was an error because the defendant was not present at the time. The imposition of the two year sentence was thus considered to be a correction of that error. Thus, the delay was found not purposeful or oppressive, but merely accidental.

[9]383 U.S. 116 (1966). The defendants were convicted of selling narcotics, but the indictments under which they were convicted failed to state the name of the purchaser. In a later and unconnected case, such indictments were declared invalid. On the basis of this later case, the defendants successfully attacked their convictions. They were immediately reindicted for the same offense, but the new indictments named the purchaser. The district court granted the defendants' motion to dismiss the new indictments on the ground that they violated the defendants' rights to a speedy trial. The Supreme Court reversed the district court.

[10]386 U.S. 213 (1967). The Supreme Court invalidated a North Carolina procedure which allowed the prosecution to nolle prosequi a charge with leave to reinstate it at a future date.

[11]393 U.S. 374 (1969).

sible. The same issue arose in *Dickey v. Florida,*[12] and the Court reversed a Florida conviction on charges filed eight years earlier while the defendant was a federal prisoner.[13] In *United States v. Marion,*[14] the Court considered the crucial question of the time at which the right of speedy trial attaches in the scheme of events leading to a criminal trial. It was held that the guarantee of a speedy trial attached only after the defendant became "accused." The Court suggested that the requirement of being "accused" could be satisfied by the filing of formal charges or by an arrest and being held to answer criminal charges.[15]

Thus, in 1972, before the *Barker* decision, all that could be said about the constitutional right to a speedy trial was that it protected only persons actually "accused" of a crime; its purpose was to prevent prejudice to an accused; and the right was not suspended because an accused was incarcerated in another jurisdiction.

III. BARKER V. WINGO

In *Barker,* a fact situation arose which prompted the Court to set out criteria by which to measure deprivations of speedy trial. Willie Barker was not tried and convicted of murder until more than five years after his arrest on that charge. Barker was held in jail for the first ten months of this period but was then set free on bond until his conviction. Initially, Barker's trial was delayed by the prosecution so that a conviction of Barker's alleged accomplice could be obtained and so that the testimony of the accomplice could be used at Barker's trial. It took six trials and almost five years, however, to obtain a final conviction of Barker's accomplice. The prosecution sought and was granted a total of sixteen continuances of Barker's trial, which was originally set for October 21, 1958, but did not finally occur until October 9, 1963. The first fourteen of these continuances were requested for the purpose of delaying Barker's trial until his accomplice could be convicted. Barker's only objection to these continuances was a motion to dismiss filed by his attorney in February of 1962, after the prosecution had requested its twelfth continuance. This mo-

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[12] 398 U.S. 30 (1970).

[13] The defendant had made three requests to be brought to trial and it was found that he had suffered substantial impairment of his defense due to the delay.

[14] 404 U.S. 307 (1971).

[15] *Id.* The Court further noted that pre-accusation delays might give rise, in certain circumstances, to due process deprivations. The court, in Favors v. Eyman, 466 F.2d 1325 (9th Cir. 1972), held that when the filing of a complaint under local law does not toll the statute of limitations, it does not engage speedy trial rights.

tion to dismiss was denied. Barker's trial was eventually set for the first term of the court following the sixth and final trial of his accomplice. The prosecution, however, requested and received two more continuances due to the illness of the chief investigating officer in the case. Barker objected to both of these last two continuances. On October 9, 1963, the final date set for trial, Barker moved to dismiss the indictment on the grounds that his speedy trial rights had been violated. This motion was denied. Trial was held, and Barker was convicted and given a life sentence. The Supreme Court granted Barker's petition for certiorari after the denial of Barker's petition for habeas corpus by a federal district court had been affirmed by the Court of Appeals for the Sixth Circuit.[16] The Supreme Court affirmed the Sixth Circuit holding that Barker's speedy trial rights had not been violated.

The four criteria identified and applied in *Barker* to determine whether there had been a denial of constitutional speedy trial rights were (1) the length of delay, (2) the reason for delay, (3) the accused's assertion of his right, and (4) the prejudice to the accused.[17] The Court expressly rejected any fixed time standard[18] or requirement that there be a demand for a speedy trial.[19] Applying the four factors to the facts in *Barker,* the Court noted that while some delay might have been justified in order to obtain a conviction of the accomplice, the extraordinary delay of over four years could not be justified. The Court further said that the illness of the chief investigating officer provided a strong excuse for the final delay of seven months. It was felt, however, that although the length of delay and the reason for the delay weighed in Barker's favor, the other two factors compelled the conclusion that Barker's speedy trial rights had not been violated. The Court noted that the prejudice suffered by Barker was minimal because Barker suffered no significant impairment of his defense as a result of the delay. Of course, it was recognized that Barker did suffer some prejudice as a result of both his initial ten month incarceration and having lived under a cloud of suspicion and anxiety for over five years. Also, the Court considered it most important that, even though near the end Barker had de-

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[16]Barker v. Wingo, 442 F.2d 1141 (6th Cir. 1971), *aff'd,* 407 U.S. 514 (1972).

[17]407 U.S. at 530. The Court also noted that these were essentially the same factors as those identified by Justice Brennan in his concurring opinion in Dickey v. Florida, 398 U.S. 30, 39 (1970).

[18]Although the Court refused to measure the constitutional right of speedy trial in specific time limits, it expressly approved the fixing of specific time limits by statute and court rules.

[19]This approach was referred to as the demand-waiver doctrine. 407 U.S. at 525.

manded a speedy trial, he apparently did not actually want a speedy trial but instead preferred the delay in the hope that his accomplice would be acquitted and he himself would never be tried. As will be seen, the way in which the Court applied the four factors to the facts in *Barker* has probably had a profound affect on the lower federal courts' applications of *Barker*.

Since its decision in *Barker*, the Supreme Court has considered the right to speedy trial in *Strunk v. United States*[20] and *Moore v. Arizona*.[21] In *Strunk*, the Court was faced solely with the issue of how to remedy an admitted violation of speedy trial rights. The Court held that when the sixth amendment right of speedy trial had been abridged, the Constitution required dismissal of the criminal charges with prejudice. In *Moore*, the Court explained that under its holding in *Barker* a defendant was not required to prove impairment of his defense as a prerequisite to obtaining relief for denial of his right to a speedy trial.

IV. Barker as Applied in the Lower Federal Courts

A. *Length of Delay*

In discussing the length of delay in *Barker*, the Court said:

> 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. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.[22]

Not surprisingly, the lower federal courts have apparently had some trouble understanding the Court's meaning. Although the above statement might lead one to believe otherwise, it is apparent from the Court's analysis in *Barker* that length of delay was not intended to act solely as a triggering mechanism. Rather, after triggering a complete analysis, the length of delay is to be used again as one of the factors in the balancing process. Thus, it might be said that length of delay serves a dual role. Each of these roles will subsequently be analyzed separately. There is a threshold question, however, which has apparently given some courts a problem. That is the question of how to measure the

[20] 412 U.S. 434 (1973).
[21] 414 U.S. 25 (1973).
[22] 407 U.S. at 530-31 (footnote omitted).

delay. In *United States v. Marion,*[23] the Supreme Court held that the sixth amendment right of speedy trial is engaged when one has been "accused" of a crime.[24] Thus, it would seem that the period of delay starts with accusation and ends with trial. As noted before, accusation apparently occurs either when formal charges are filed or when the defendant is arrested, whichever occurs first. However, the Court in *Barker* did not specifically state when the period of delay began to run, perhaps because the delay was so long they felt this point to be insignificant. While most courts which have considered the question since *Barker* have measured the period of delay from accusation to trial, a few have used different periods. For example, in *United States ex rel. Cole v. LaVallee,*[25] the defendant was arrested for sodomy on March 19, 1971, indicted on May 20, 1971, and tried on August 1, 1972. The court characterized the delay as fourteen months and, thus, apparently did not include the period between the arrest and the issuing of an indictment.[26]

The Fifth Circuit has developed a line of authority for the proposition that *Barker* applies only to post-indictment delays and so it would measure length of delay beginning with the date of indictment. In *United States v. Smith,*[27] the crime of which the defendant was accused occurred on May 24, 1968, and the defendant was arrested on June 24, 1968, but was not indicted until November 9, 1971. The Fifth Circuit Court of Appeals held that *Barker* did not apply even though the sixth amendment right of speedy trial was involved. Rather the court stated that the statute of limitations provided the necessary check on pre-indictment delays. The court held that the only criterion for measuring speedy trial deprivations resulting from pre-indictment delays was actual impairment of the accused's defense.[28] It is suggested that

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[23]404 U.S. 307 (1971).

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> [I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

Id. at 320.

[25]376 F. Supp. 6 (S.D.N.Y. 1974).

[26]In United States v. Lincoln, 494 F.2d 833 (9th Cir. 1974), the court did not consider any part of the delay except the fifteen days between the date originally set for trial and the date trial was held. In United States v. Morse, 491 F.2d 149 (1st Cir. 1974), the defendant complained only of a two month delay between the impaneling of the jury and his trial. The court considered only this time in deciding whether the defendant had been denied a speedy trial.

[27]487 F.2d 175 (5th Cir. 1973).

[28]*See also* United States v. Joyner, 494 F.2d 501 (5th Cir. 1974); United

this approach by the Fifth Circuit is clearly incorrect. The Constitution stands above the laws of the legislatures. There is no reason not to apply *Barker* to both pre-indictment and post-indictment delays.[29]

A further problem in computing delay involves the question of how to treat defense-caused delays. One approach, and the one most often used, is to count defense-caused delays in the period of delay and then to weigh the factor of reason for delay against the defendant.[30] Another possible approach, which apparently has not been tried, would be to measure the length of delay from the end of the last defense-caused delay. Finally, some courts have applied *Barker* only to the total of all non-defense-caused delays. Thus, in *United States v. Joyner*,[31] the defendant's trial was delayed twice by the government and, when the third trial date was reached, he was too ill to be tried. The court considered only the delay until the third trial date. This approach has the advantage of removing defense-caused delays from the balance, thus presumably making the balancing process easier. It is suggested, however, that defense-caused delays should be included in the balancing process. In *Joyner*, the court did not take account of the fact that had the two government-caused delays not occurred, the defendant would have been tried long before his illness. While the government had no control over the defendant's illness, the government delays were causally connected to the delay caused by the defendant's illness. The suggested approach would have allowed the court to take this into consideration.

With regard to the length of delay acting as a triggering mechanism, the Court in *Barker* was unclear as to what it meant by a "presumptively prejudicial" delay. The lower federal courts have not effectively defined the term either. A few courts have refused to consider very short delays. For example, in *United States v. Black*,[32] the court refused to consider a claim involving a delay of only three weeks, and in *United States v. Askins*,[33] a delay of eight months was considered insufficient to trigger an

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States v. Zane, 489 F.2d 269 (5th Cir. 1973), *cert. denied*, 94 S. Ct. 1975 (1974); United States v. Davis, 487 F.2d 112 (5th Cir. 1973), *cert. denied*, 94 S. Ct. 1573 (1974); United States v. Schools, 486 F.2d 557 (5th Cir. 1973).

[29]Of course the sixth amendment, and thus *Barker*, does not apply to pre-indictment delays when the defendant was not arrested before his indictment. See note 24 *supra*.

[30]*See* United States *ex rel.* Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974); United States v. Drummond, 488 F.2d 972 (5th Cir. 1974); Sander v. Ohio, 365 F. Supp. 1251 (S.D. Ohio 1973).

[31]494 F.2d 501 (5th Cir. 1974).

[32]480 F.2d 504 (6th Cir. 1973).

[33]351 F. Supp. 408 (D. Md. 1972).

analysis of the *Barker* factors. Most courts merely begin their analysis of all of the factors with a bald assertion that the delay involved is sufficient to trigger such an analysis.[34] Only a few courts have made use of the distinction drawn in *Barker* between street crimes and conspiracies.[35] No court has shown any inclination to identify other such distinctions. Thus it seems apparent that the lower federal courts are not making any serious attempt to define the term "presumptively prejudicial delay" nor to identify the factors to be considered in finding a delay presumptively prejudicial. A statistical analysis of the cases would probably show that a period of approximately one year is the minimum delay which most courts will consider presumptively prejudicial. However, delays of as little as six months have triggered an analysis of all the *Barker* factors.[36]

Once a presumptively prejudicial delay is found, there remains the further question of how length of delay is weighed into the balance with the other factors. The term "presumptively prejudicial" suggests that some burden may be shifted as a result of a presumption.[37] In general, however, the courts have not used the length of delay to shift any burden of proof to the prosecution. In *United States v. Hanna,*[38] the court employed the concept of a "presumptively excessive" delay which was determined by comparing the reason for the delay with the length of delay. The defendant was still required to show prejudice. In *Endres v.*

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[34]*See* United States v. Cabral, 475 F.2d 715 (1st Cir. 1973); United States v. Jones, 475 F.2d 322 (D.C. Cir. 1972); United States v. Parish, 468 F.2d 1129 (D.C. Cir. 1972); Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972); United States v. DeTienne, 468 F.2d 151 (7th Cir. 1972), *cert. denied,* 410 U.S. 911 (1973); United States *ex rel.* Stukes v. Shovlin, 464 F.2d 1211 (3d Cir. 1972); United States v. Dornau, 356 F. Supp. 1091 (S.D.N.Y. 1973); Delph v. Slayton, 355 F. Supp. 888 (W.D. Va. 1973); United States v. Brown, 354 F. Supp. 1000 (E.D. Pa. 1973); Endres v. Swenson, 352 F. Supp. 738 (E.D. Mo. 1972).

[35]*See, e.g.,* United States v. Perez, 489 F.2d 51 (5th Cir. 1973) (discussed at text accompanying note 45 *infra*); United States v. Perry, 353 F. Supp. 1235 (D.D.C. 1973). For an argument that greater delays ought to be tolerated for street crimes than for conspiracies, see Uviller, *supra* note 6, at 1384.

[36]United States v. Card, 470 F.2d 144 (5th Cir. 1972), *cert. denied,* 411 U.S. 917 (1973). *See also* Plumley v. Coiner, 661 F. Supp. 1117 (S.D. W. Va. 1973). For other examples where delays of less than one year have triggered an analysis of the other criteria, see United States v. Parish, 468 F.2d 1129 (D.C. Cir. 1972), and United States v. Strunk, 467 F.2d 969 (7th Cir. 1972), *rev'd on other grounds,* 412 U.S. 434 (1973).

[37]See Uviller, *supra* note 6, at 1384-85, in which it is suggested that such a result was clearly not intended by the Court in *Barker.*

[38]347 F. Supp. 1010 (D. Del. 1972).

Swenson,[39] the defendant had been in jail in California and a detainer had been placed on him by Missouri for a burglary charge. The defendant demanded four times that he be brought to trial in Missouri. He was not brought to trial until twenty-two months after his first demand, and after he had been released on parole by California. No reason for the delay was given by the prosecution. The court held that the delay was sufficiently long to trigger an examination of all the *Barker* factors but concluded that, because the defendant had failed to allege or prove prejudice, his speedy trial rights had not been violated.[40]

A few courts, however, have shifted the burden of proof to the prosecution after finding a presumptively prejudicial delay. In *United States v. Rucker*,[41] for example, the court placed on the prosecution the necessity to provide justification for the delay, "the burden of which increases with the length of the delay."[42] Another approach, taken in *United States v. Macino*,[43] is to weigh the factor of reason for delay against the prosecution when no reason for delay is given. It appears, however, that most lower federal courts have read *Barker* to mean that the concept of "presumptively prejudicial delay" is used only when the delay is used as a triggering mechanism and, when the delay is weighed in with the other factors, there is no presumption of prejudice. Thus the concept of presumptively prejudicial delay is employed by most courts only to dispose summarily of frivolous claims. It is suggested that this is probably what the Supreme Court had in mind when it used the term, and so these courts are correct in their analyses.

It may be considered obvious that the greater the length of delay, the greater weight it should be accorded in the defendant's favor. Almost certainly this is an unstated proposition in every court's application of the *Barker* factors. It is regrettable, however, that the length of delay was so great in *Barker*. Many long delays, when compared with the almost five year delay in *Barker*, appear less excessive by comparison. It is possible that several courts have used such a comparison as an excuse to accord the length of delay less than the weight to which it should be entitled.[44] The comparison of one case with another is not to be condemned so long as it is remembered that the different circum-

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[39]352 F. Supp. 738 (E.D. Mo. 1972).

[40]It is possible that the court was influenced by the fact that the defendant had escaped from custody after he was first arrested in Missouri.

[41]464 F.2d 823 (D.C. Cir. 1972), *cited in* United States v. Perry, 353 F. Supp. 1235 (D.D.C. 1973).

[42]464 F.2d at 825.

[43]486 F.2d 750 (7th Cir. 1973).

[44]*See, e.g.*, United States *ex rel.* Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974); United States v. Reynolds, 489 F.2d 4 (6th Cir. 1973).

stances of each case must be taken into account before any meaningful comparison of factors can be made. In *United States v. Perez,*[45] however, the court carried such a comparison to an extreme. The defendant had been convicted of conspiracy and mail fraud after a three year delay between his indictment and his trial. The court held that the case was controlled by another conspiracy case[46] which involved a less lengthy delay, and for this reason, the court refused even to consider whether the three year delay was sufficient to trigger an analysis of the *Barker* factors.[47]

One final problem area with the length of delay factor involves the question of how to handle a situation in which the delay is not long enough to be presumptively prejudicial, but the defendant can prove actual prejudice. In *United States v. Askins,*[48] it was implied that in such a situation a court should consider all the *Barker* factors. In *Askins,* the court held that an eight month delay between the defendant's arrest and indictment, if not accompanied by an allegation of actual prejudice, would not satisfy "the defendant's initial burden."[49] Since the purpose of the guarantee of speedy trial is to prevent prejudice to an accused,[50] it would seem that an allegation and proof of prejudice could serve as a triggering mechanism regardless of the length of delay. Of course, if the prejudice does not result from the delay, the issue is more one of due process than of speedy trial.

B. Reason for Delay

This factor was discussed in *Barker* as follows:

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a

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[45]489 F.2d 51 (5th Cir. 1973).

[46]United States v. Lane, 465 F.2d 408 (5th Cir. 1972).

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> Because we hold that this case is controlled on its specific facts by *Lane,* we expressly decline to decide whether a three year and twenty-three day delay in a complex conspiracy case is sufficient to pull the trigger.

489 F.2d at 72 n.39.

[48]351 F. Supp. 408 (D. Md. 1972).

[49]*Id.* at 416.

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

> valid reason, such as a missing witness, should serve to justify appropriate delay.[51]

Implicit in this discussion is, of course, the idea that the defendant may only complain of delays which he has not caused, and the cases since *Barker* have uniformly held this to be so.[52] As noted above, there may be some question as to whether to exclude defense-caused delays from consideration altogether or to include them and weigh their causes against the defendant. Since the latter approach allows more flexibility in its application, it would appear preferable.

The Supreme Court apparently placed all reasons for delay into two broad categories: those which justify some delay, and those which do not justify delays. Beyond this, reasons which do not justify delays may be ranked by how heavily they weigh against the prosecution. As to the valid reasons which justify an appropriate delay, the lower federal courts have recognized the "missing witness" reason suggested by the Supreme Court. In *United States v. Fasanaro*,[53] a delay of over four years was held justified because an important prosecution witness could not be located. In so holding, the court apparently also relied on its impression that the defendant did not want a speedy trial but preferred to wait in the hope that the witness would never be found. Thus it is doubtful whether a delay of four years could be justified solely by the lack of a witness. It is apparently not necessary that a witness be "missing;" it is sufficient that he is unavailable. In *Torres v. Florida*,[54] a delay of seventeen months was held justified because a witness was unable to testify because of gunshot wounds received during the alleged crime. In *United States v. Counts*,[55] a delay was justified until the chief prosecution witness completed a tour of duty in Viet Nam.

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[51] 407 U.S. at 531 (footnote omitted).

[52] *See* United States *ex rel.* Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974); United States v. Nathan, 476 F.2d 456 (2d Cir. 1973); United States v. Counts, 471 F.2d 422 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); United States v. Pollard, 466 F.2d 1 (10th Cir. 1972); Sander v. Ohio, 365 F. Supp. 1251 (S.D. Ohio 1973); United States v. Perry, 353 F. Supp. 1235 (D.D.C. 1973). A related problem was discussed in United States v. Phillips, 482 F.2d 191 (8th Cir. 1973), in which it was said that speedy trial rights may be impaired by a co-defendant's request for a continuance.

[53] 471 F.2d 717 (2d Cir. 1973). *See also* United States v. Douglas, 488 F.2d 1331 (D.C. Cir. 1973); United States v. Anderson, 471 F.2d 201 (5th Cir. 1973); United States v. Saglimbene, 471 F.2d 16 (2d Cir. 1972). *Cf.* United States v. Boatner, 478 F.2d 737 (2d Cir. 1973); United States v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1973).

[54] 477 F.2d 555 (5th Cir. 1973).

[55] 471 F.2d 422 (2d Cir. 1973).

In addition, the lower federal courts have identified a variety of other reasons which may justify an appropriate delay. In *United States ex rel. Little v. Twomey,*[56] the defendant was committed to a hospital for almost three years before he was found competent to stand trial. The delay was held justified.[57] In *United States v. Taylor,*[58] a delay of over one year was held justified because of the nature and complexity of the crime—selling stolen automobiles. It has also been held that when a prosecution witness makes conflicting pretrial statements, a reasonable delay may be justified for the purpose of resolving the inconsistencies and preparing for impeachment of the witness.[59] In *United States v. DeTienne,*[60] the desire of the prosecution to conduct a joint trial of two defendants was held to justify an almost nineteen month delay. If the prosecution must dismiss an indictment because of improper grand jury proceedings, *United States v. Merrick*[61] held that a delay pending impaneling of a new grand jury is justified. In *United States v. Galardi,*[62] the court said that a reasonable delay could be justified by the prosecutor's good faith belief that the defendant wished to use the procedure provided for in the Federal Rules of Criminal Procedure.[63] Certainly other justifications for delay exist, even though they have not been noted by the lower federal courts since *Barker*. It is commendable that the courts have identified so many justifications, but in the future the great danger will be that the line between reasons which justify delays and the "more neutral" reasons which do not justify delays will become blurred. For example, in the *Merrick* case,

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[56]477 F.2d 767 (7th Cir. 1973).

[57]For a Supreme Court discussion of how long a person can be committed in order to ascertain his competency to stand trial, see Jackson v. Indiana, 406 U.S. 715 (1972).

[58]469 F.2d 284 (3d Cir. 1972). *See also* United States v. Lane, 465 F.2d 408 (5th Cir. 1972); United States *ex rel.* Stukes v. Shovlin, 464 F.2d 1211 (5th Cir. 1972).

[59]Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972). Although the court indicated a reasonable delay would have been tolerated, the defendant's conviction was reversed because the delay was nineteen months and the defendant had suffered significant prejudice to his defense.

[60]468 F.2d 151 (7th Cir. 1972). *See also* United States v. Annerino, 495 F.2d 1159 (7th Cir. 1974).

[61]464 F.2d 1087 (10th Cir. 1972).

[62]476 F.2d 1072 (9th Cir. 1973). *See also* United States v. Strunk, 467 F.2d 969 (7th Cir. 1972).

[63]FED. R. CRIM. P. 20 provides a method whereby a person arrested and held in a district other than the one in which the indictment, information, or warrant was issued may state in writing that he wishes to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or warrant was issued, and may thereby consent to a disposition of the case in the district in which he is being held.

it is conceivable that the government should have assumed responsibility for the improper grand jury procedures, and the delay should have been weighed against the prosecution.

It might be suggested that the analysis of the *Barker* factors should stop upon finding that a delay was justified. In general, however, most courts have completed their analyses of all the *Barker* factors. Although this is probably done to avoid being later overruled, two considerations support completing the weighing of all factors even when the delay is held justified. First, even a justifiable delay might be outweighed by another factor such as impairment of defense. Thus, in *United States v. Canty,*[64] the court stated that when a government-caused delay was partially excusable, the defendant might have been discharged had he incurred substantial prejudice.[65] Secondly, the amount of delay which a reason will justify may depend on other factors. For example, while a desire to hold a joint trial of accomplices is recognized to justify some delay, it might not provide any justification for delay after one defendant makes a demand to be tried or suffers some prejudice to his defense.[66]

The cases which have considered the "more neutral" reasons which do not justify delays have tended not to weigh these very heavily against the prosecution.[67] Thus, in *United States v. Cabral,*[68] there was a fifteen month delay between the defendant's arrest for possession of an illegal weapon and his indictment. The court attributed the delay to government neglect and noted that the defendant had asserted his right to a speedy trial in a timely fashion. Nevertheless, relief was denied because the only preju-

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[64]469 F.2d 114 (D.C. Cir. 1972).

[65]Despite this language, the court failed to find any substantial prejudice in the death of an alibi witness, the loss of witnesses' memories, and the impairment of a defense of mental incompetence.

[66]*Cf.* United States v. LaBorde, 496 F.2d 965 (6th Cir. 1974).

[67]The case of United States *ex rel.* Little v. Twomey, 477 F.2d 767 (7th Cir. 1973), is particularly disconcerting in this respect. The court failed to answer conclusively whether or not the defendant had been denied due process at a competency hearing, and whether or not the state should have brought him to trial after that hearing. Thus, the court was apparently unsure whether the sixteen month interval before the next competency hearing constituted a delay in bringing the defendant to trial. But, if it was such a delay, the court dismissed it as being less than the delay in *Barker*. *See also* United States v. Toy, 482 F.2d 741 (D.C. Cir. 1973). On the other hand, at least one recent case granted relief for a two year delay in bringing a defendant to trial which was found to have resulted solely from government inadvertance and negligence. The significance of this factor is difficult to determine, however, since the court also found an impairment of the defense, which impairment was termed "devastating." Wylie v. Wainwright, 361 F. Supp. 914 (S.D. Fla. 1973).

[68]475 F.2d 715 (1st Cir. 1973).

dice alleged was loss of the opportunity to serve his sentence concurrently with a state sentence received as a result of the same arrest. The court thought this was too "speculative" and implied the necessity of showing actual prejudice. Relief was granted to the defendant in only two of the cases surveyed where the reasons for delay were crowded dockets or understaffing of the United States Attorney's office.[69] Those were *United States v. Strunk,*[70] and *United States v. Perry.*[71] In *Strunk* there was an eight month delay between indictment and arraignment. The prosecution could offer no acceptable reason for the delay other than that the United States Attorney's office was understaffed. The court rejected this reason.[72] The only prejudice claimed by the defendant was the delay in starting his sentence. The court attempted to remedy the situation by crediting the length of delay against the defendant's sentence.[73] In *Perry,* a three year delay occurred in the defendant's trial for robbery, which the prosecution attributed to understaffing of his office and overcrowded dockets. The court held that even though the defendant had not requested a speedy trial, he should be discharged because there was presumed to be a "reasonable possibility of significant prejudice" due to a three year delay in the trial of an ordinary street crime. In addition, the defendant had lost his job because of his pretrial incarceration. At least one court has taken the approach that when no reason is offered by the government to explain a delay, that factor will weigh against the government.[74] This approach seems fair, since the government ought to take responsibility for any delay it cannot justify in some manner.

When a delay has been intentionally caused by the government for the purpose of hampering the defense or for other questionable purposes, courts have been quick to grant relief. For

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[69]For examples of instances in which relief was not granted, see United States v. LaBorde, 496 F.2d 965 (6th Cir. 1974); United States v. Reynolds, 489 F.2d 4 (6th Cir. 1973); United States v. Jones, 475 F.2d 322 (D.C. Cir. 1972); United States v. Parish, 468 F.2d 1129 (D.C. Cir. 1972); United States v. Schwartz, 464 F.2d 499 (2d Cir. 1972); United States v. Altro, 358 F. Supp. 1034 (E.D.N.Y. 1973); and Delph v. Slayton, 355 F. Supp. 888 (W.D. Va. 1973).

[70]467 F.2d 969 (7th Cir. 1972).

[71]353 F. Supp. 1235 (D.D.C. 1973).

[72]The language of the court was: "[M]oreover, we summarily reject the additional reason for the delay, the characterization of the United States Attorney's office as understaffed." 467 F.2d at 972.

[73]On appeal to the Supreme Court this was reversed. The Court held the only permissible remedy to be discharge of the defendant. United States v. Strunk, 412 U.S. 434 (1973).

[74]United States v. Macino, 486 F.2d 750 (7th Cir. 1973).

example, in *Arrant v. Wainwright,*[75] the state attorney asserted as his reason for the delay that "he didn't want to see [the defendant] acquitted."[76] The appellate court reversed the conviction. In *United States v. Jackson,*[77] at a pretrial conference held on December 18, 1973, the court ordered discovery closed on March 1, 1974, and ordered all parties to file with the court by April 1, 1974, a stipulation of the issues not in dispute, an agreed statement of the issues in dispute, lists of all witnesses to be called, copies of all exhibits (pre-marked), and trial briefs which included each party's theories of the case. The government made no objection to this order either at the pretrial conference or during the interim period before April 1. On April 1, the government, instead of making the required filings, filed a motion for clarification of the order contending that it did not have to reveal its witnesses or its theories of the case. The court gave the government until April 8 to comply with the order, but the government refused to do so. The court then dismissed the case against one of the defendants because of denial of speedy trial.

Thus, it appears that the lower federal courts have made use of the distinction drawn in *Barker* between the more neutral reasons for delay and the purposeful delays. It is suggested, however, that this distinction is of questionable merit. Although the constitutional right of speedy trial serves some of society's interests, it is primarily an individual right for the protection of accused persons. From the accused's point of view, the distinctions between different reasons for delay are irrelevant so long as the delay is not his fault. It is ultimately the government's burden to provide a speedy trial, and the individual accused should bear no responsibility for procuring a speedy trial other than the responsibility not to obstruct the orderly processes of justice. Thus it would seem that if the government cannot provide enough courts so that the dockets will not be overcrowded, or enough personnel so that prosecutor's offices will not be understaffed, or if a delay occurs because of the negligence or inadvertance of one charged with the administration of justice, then the accused has been denied a speedy trial just as surely as if someone had decided not to try the accused because he should not be allowed back on the streets.

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[75]468 F.2d 677 (5th Cir. 1972). *See also* United States v. Hanna, 347 F. Supp. 1010 (D. Del. 1972). It has been suggested that once a defendant shows what amounts to malice on the part of the prosecution, the analysis of the *Barker* criteria should cease, and the defendant should be discharged. Uviller, *supra* note 6, at 1385.

[76]468 F.2d 677, 681 (5th Cir. 1972).

[77]374 F. Supp. 168 (N.D. Ill. 1974).

If it is felt that the distinction between intentional delays and more neutral delays is necessary, then it is suggested that a shift of emphasis must be made. Intentional delays, so long as the length of delay is not insignificant, should result automatically in a finding that the right of speedy trial has been abridged. Like the exclusionary rule under the fourth amendment, this would have a prophylactic effect. There is no excuse for intentional or purposive delays in bringing an accused to trial and such delays should not be tolerated. All other reasons for delay for which the government bears the responsibility should be weighed heavily against the government.

C. Assertion of the Right

With respect to the defendant's assertion of his right to a speedy trial, the Court in *Barker* said:

> Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, thus is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.[78]

In addition, as noted above, the Court rejected a demand-waiver approach under which a defendant would be considered to have waived his right to a speedy trial unless he asserted it.[79] In spite of this, it appears that if the accused is a prisoner of another jurisdiction, some courts still apply a demand-waiver rule. In so doing, these courts are apparently following the language of the earlier Supreme Court case of *Smith v. Hooey*.[80] For example, in

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[78]407 U.S. at 531-32.

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> We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.

Id. at 528 (footnote omitted).

[80]393 U.S. 374 (1969). The Court said: "Upon the petitioner's demand,

Gerberding v. United States,[81] the defendant failed to demand a speedy trial while he was serving a state sentence on a previous conviction. The court held there was no violation of his speedy trial rights. On the other hand, under similar circumstances, when a defendant does make a request to be brought to trial, and the authorities fail to act on his request, many courts have been quick to grant relief. For example, in *Moulton v. Aaron,*[82] the court ruled that Texas detainers placed on a federal prisoner could not be enforced to limit the prisoner's activities and rights while in prison. The prisoner had made numerous inquiries to Texas authorities, and a show cause order had previously been issued against the authorities by the federal court. Texas authorities had nevertheless taken no action to bring the prisoner to trial on the Texas charges during the twenty months that the detainers had been pending.

It is quite possible that the actual holding in *Barker* seriously undercut the Court's rejection of a demand-waiver approach.[83] It seems, however, that the Court merely recognized the difference between an accused's demand for or assertion of his right to a speedy trial and an accused's actual desire for a speedy trial. This distinction was a prime consideration of the Court in reach-

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Texas had a constitutional duty to make a diligent good faith effort to bring him before the Harris County Court for trial." *Id.* at 383.

[81]471 F.2d 55 (8th Cir. 1973). *Contra,* Clark v. Oliver, 346 F. Supp. 1345 (E.D. Va. 1972). In *Clark,* the defendant was not aware of the nature of the charges against him and the court found that he had suffered significant prejudice to his defense. *Cf.* Jordan v. Beto, 471 F.2d 779 (5th Cir. 1973); United States v. Schwartz, 464 F.2d 499 (2d Cir. 1972); United States v. Dornau, 356 F. Supp. 1091 (S.D.N.Y. 1973).

[82]358 F. Supp. 256 (D. Minn. 1973). Also see Haynie v. Henderson, 357 F. Supp. 1004 (N.D. Ga. 1973), in which a similar action was dismissed for lack of jurisdiction. It was held that the prisoner's remedy when the state failed to act on his demand to be brought to trial was an original action in the state supreme court. *See also* Norris v. Georgia, 357 F. Supp. 1200 (W.D.N.C. 1973); Leonard v. Vance, 349 F. Supp. 859 (S.D. Tex. 1972). In Endres v. Swenson, 352 F. Supp. 738 (E.D. Mo. 1972), the defendant made five demands to be brought to trial, but no action was taken on his demands. No violation of speedy trial rights was found.

[83]In referring to the Court's statement that a defendant who fails to assert his right of speedy trial will find it difficult to prove he was denied a speedy trial, Professor Uviller said:

> Here is a solemn pronouncement to be reckoned with. It is underscored still more emphatically later when the Court deals with the facts before it. This message washes over the Court's earlier dutiful recital of orthodox waiver theory, all but obscuring its shape. Waiver is not to be automatically inferred from silence, perhaps, but woe betide the silent defendant who makes no effort to bring himself to trial. Like Barker, his is an uphill, well-nigh impassible climb.

Uviller, *supra* note 6, at 1388.

ing its decision that Barker had not been denied a speedy trial. The distinction seems to be an appropriate one. There are many circumstances in which an accused might fail to demand a speedy trial and still desire one. In these circumstances the defendant's failure to demand a speedy trial should not weigh against him. For example, an accused not represented by counsel may not even be aware of his right to a speedy trial or the procedure for obtaining one.[84] An accused may not understand the nature of the charges against him and this may contribute to his failure to demand a speedy trial.[85] In *United States v. Hanna,*[86] the defendant was promised that he would not be indicted if he gave a statement implicating another person and cooperated in the prosecution of that person. The government delayed obtaining an indictment in order to induce the defendant to fulfill his bargain. Under these circumstances, the court held that the failure of the defendant to assert his right to a speedy trial should not weigh against him. Similarly, in *United States v. Macino,*[87] the court discounted the fact that the defendant had not requested a speedy trial prior to his indictment. The court felt that it was reasonable for the defendant to hope he would never be indicted and that the defendant should not be forced to seek his own prosecution.

The defendant who knows of his right to a speedy trial and desires to assert it has the additional dilemma of deciding when to make his assertion. There is always the danger that a court will focus its attention only on delay which occurs after a defendant's demand for trial.[88] In order to avoid this, a defendant should assert his right as early as possible. This may also have the effect of making future delays less "neutral." By asserting his right early, however, the defendant runs the risk that he may be forced to seek a continuance or accept a trial before he is ready. If he seeks a continuance, he will be charged with the delay caused and this will weaken any subsequent claim that his

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[84]In United States v. Dyson, 469 F.2d 735 (5th Cir. 1972), the government was ordered to show cause for a two year delay in trying a defendant on draft evasion charges or dismiss the charges. *Cf.* United States v. Burnett, 476 F.2d 726 (5th Cir. 1973). The court failed to grant any relief to a defendant for a thirty month delay in bringing him to trial on draft evasion charges because he had not requested to be tried. The defendant was represented by counsel, and the court distinguished *Dyson* on this basis. *Contra,* United States v. Cabral, 475 F.2d 715 (1st Cir. 1973). The court denied the defendant any relief despite saying that his failure to assert his right was mitigated by a lack of knowledge as to whether he would ultimately be prosecuted and by a lack of counsel.

[85]*See* Clark v. Oliver, 346 F. Supp. 1345 (E.D. Va. 1972).

[86]347 F. Supp. 1010 (D. Del. 1972).

[87]486 F.2d 750 (7th Cir. 1973).

[88]*See, e.g.,* United States v. Parish, 468 F.2d 1129 (D.C. Cir. 1972).

speedy trial rights were violated. In addition, the court may deem his request for a continuance inconsistent with his demand for a speedy trial.[89] Both the defendant and the prosecution need a reasonable time to prepare their cases. In protecting the right of speedy trial, no defendant ought to be tried before he is ready, and at the same time he should not have to endure delays beyond a reasonable time for the prosecution to prepare its case. In *Arrant v. Wainwright*,[90] the court specifically recognized the defendant's dilemma and held that he need not assert his right to a speedy trial until an unreasonable delay occurs.

The distinction drawn in *Barker* between a defendant's assertion of his right and his desire for a speedy trial is a necessary distinction. It appears from the Court's decision in *Barker* that the really crucial factor is the defendant's desire for a speedy trial. The defendant's demand for a speedy trial is evidence of his desire for one, but clearly there may be other indicia which lead to the conclusion that the defendant actually preferred the delay over going to trial. In these circumstances the holding in *Barker* would seem to indicate that the defendant's speedy trial rights have not been violated. The difficulty is, of course, that it may be nearly impossible for a court to determine whether a defendant actually wanted a speedy trial. When the right is asserted, a presumption should arise that the defendant desired a speedy trial, which presumption could be overcome by other evidence, as was the case in *Barker*. On the other hand, the language of the Court in *Barker*, to the effect that it would be very difficult for a defendant to prove he was denied a speedy trial if he failed to assert his right, would seem to raise a presumption when a defendant does not assert his right to a speedy trial that he did not desire one. This presumption also may be overcome by appropriate evidence or other circumstances.[91]

Unfortunately, the lower federal courts have engaged in no such analysis of the *Barker* decision. They have often weighed heavily against the defendant his failure to assert his right to speedy trial.[92] Only a few courts have suggested that they were

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[89]*See, e.g.*, Torres v. Florida, 477 F.2d 555 (5th Cir. 1973).

[90]468 F.2d 677 (5th Cir. 1972).

[91]See text accompanying notes 84-87 *supra*.

[92]*See, e.g.*, United States v. Reynolds, 489 F.2d 4 (6th Cir. 1973); United States v. Phillips, 477 F.2d 913 (5th Cir. 1973); United States v. Cabral, 475 F.2d 715 (1st Cir. 1973); United States v. Jones, 475 F.2d 322 (D.C. Cir. 1972); United States v. Canty, 469 F.2d 114 (D.C. Cir. 1972); United States v. Parish, 468 F.2d 1129 (D.C. Cir. 1972); United States v. Rodriguez, 375 F. Supp. 589 (S.D. Tex.), *aff'd*, 497 F.2d 172 (5th Cir. 1974); Sander v. Ohio, 365 F. Supp. 1251 (S.D. Ohio 1973); United States v. Orbiz, 358 F. Supp. 200 (D.P.R. 1973); United States v. Dornau, 356 F. Supp.

concerned with whether the defendant desired a speedy trial.[93] It thus appears that the lower federal courts have been extremely deficient in their analysis of the assertion of right factor. The decisions have invariably dealt with an analysis of all the *Barker* factors and, thus, it is impossible to isolate the defendant's assertion of his right to a speedy trial and determine exactly how it is being weighed into the balance. However, the summary fashion with which most courts have dealt with this factor, and their failure to mention the distinction between a defendant's assertion of his right and his desire for a speedy trial, indicate that this crucial factor is probably not receiving the weight it deserves. This is due in large part to the failure of the Court in *Barker* to make itself clear and to the lingering effects of the demand-waiver rule which many courts used prior to the *Barker* decision. In order to correct the situation, it will probably be necessary for the Supreme Court to issue a decision in which it explains the meaning of its decision in *Barker*. If the analysis of *Barker* suggested above is correct, then the Court should make clear that the real concern is whether a defendant wanted a speedy trial, not whether he asserted his right to a speedy trial. The assertion of the right is merely evidence of his desire for a speedy trial. The Court should also make clear what presumptions arise through the assertion or non-assertion of the right to a speedy trial.

D. Prejudice to the Defendant

The Supreme Court said in *Barker* that the analysis of prejudice to the defendant should be conducted within the three categories of prejudice which the right of speedy trial is designed to prevent: (1) oppressive pretrial incarceration, (2) the anxiety and concern of being accused of a crime, and (3) impairment of defense.[94] The Court in *Barker* further stated:

> Of these interests the most serious is the last [impairment of defense], because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if the defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is

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1091 (S.D.N.Y. 1973); DeMasi v. United States, 349 F. Supp. 747 (S.D.N.Y. 1972).

[93]United States v. Burnett, 476 F.2d 726 (5th Cir. 1973); United States v. Fasanaro, 471 F.2d 717 (2d Cir. 1973); United States v. Saglimbene, 471 F.2d 16 (2d Cir. 1972).

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

> not always reflected in the record because what has been forgotten can rarely be shown.[95]

The extra emphasis on impairment of defense was perhaps unfortunate. It may have resulted in many courts viewing impairment of defense as a sine qua non of speedy trial deprivations. In November of 1973, in *Moore v. Arizona,*[96] the Supreme Court said that *Barker* "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial."[97] However, most lower federal court decisions since the Supreme Court decision in *Moore* have failed to mention the *Moore* case. Many have placed heavy emphasis on the lack of impairment of defense in denying speedy trial claims.[98] It may be hoped that in the future more courts will become aware of the *Moore* decision and stop overemphasizing impairment of defense.

While the Supreme Court in *Barker* felt that prejudice is obvious when witnesses die or disappear during a delay, this prejudice apparently has not been so obvious to the lower federal courts. Many have placed a heavy burden on the defendant to show the actual prejudice which resulted. Thus, in *United States v. Davis,*[99] the court held that although one of the defense witnesses was missing because of the delay, the testimony of that witness would merely have been cumulative. In *United States v. Jones,*[100] the court doubted whether an alleged alibi witness ever really existed and said that "the overwhelming evidence against appellant belies any thought that the witness . . . could possibly have swayed the jury's verdict."[101] In *United States v. Schwartz,*[102] the court circumvented the death of a defense witness who had been ill by holding that the defendant, knowing that the witness might possibly die, should have obtained a deposition. In contrast is *United States v. Macino,*[103] in which a co-defendant had

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[95] 407 U.S. at 532.

[96] 414 U.S. 25 (1973).

[97] *Id.* at 26.

[98] United States v. LaBorde, 496 F.2d 965 (6th Cir. 1974); United States v. Annerino, 495 F.2d 1159 (7th Cir. 1974); United States *ex rel.* Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974); United States v. Morse, 491 F.2d 149 (1st Cir. 1974); United States v. Heinlein, 490 F.2d 725 (D.C. Cir. 1973).

[99] 487 F.2d 112 (5th Cir. 1973).

[100] 475 F.2d 322 (D.C. Cir. 1972).

[101] *Id.* at 325. *See also* Gerberding v. United States, 471 F.2d 55 (8th Cir. 1973); United States v. Canty, 469 F.2d 114 (D.C. Cir. 1972); United States v. Lane, 465 F.2d 408 (5th Cir. 1972); United States v. Merrick, 464 F.2d 1087 (10th Cir. 1972); United States v. Brown, 354 F. Supp. 1000 (E.D. Pa. 1973).

[102] 464 F.2d 499 (2d Cir. 1972).

[103] 486 F.2d 750 (7th Cir. 1973).

died during the delay. Although there was no evidence that his testimony would have been helpful to the defendant, the court felt that the death of such a witness, with firsthand knowledge of the events at issue, created a strong possibility of prejudice. Of course, when the loss or death of a witness occurs before the government becomes chargeable with any delay, the defendant cannot claim prejudice to his speedy trial rights.[104]

The Supreme Court in *Barker* also recognized that lost or dimmed memories seldom reveal themselves in transcripts. Nevertheless, many lower federal courts have required affirmative evidence of impairment of witnesses' memories and, in the absense of such affirmative evidence, have held the possibility of prejudice to be too "speculative."[105] In addition, many courts have required the defendant to show that the dimming of witnesses' memories was prejudicial rather than helpful. Thus, in *United States v. Heinlein,*[106] the court found that the dimmed memories prejudiced the prosecution as much or more than they prejudiced the defense.[107]

While stressing the need for impairment of defense in order to successfully claim denial of the right to a speedy trial, the lower federal courts have tended to ignore the prejudice resulting from pretrial incarceration and the anxiety and concern of being accused of a crime.[108] Generally, the courts have not mentioned the prejudice resulting from pretrial incarceration except to say that there was none in cases in which the defendant was

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[104]United States v. Anderson, 471 F.2d 201 (5th Cir. 1973). The defendant was arrested on May 11, 1971, and his trial was originally set for September 27, 1971. Trial was delayed by government continuances until March 8, 1972. The co-defendant was killed on June 15, 1971. The defendant raised a speedy trial claim, saying that his defense had been prejudiced by the death of his co-defendant. The court held that since there was only a one month delay before the co-defendant's death, the defendant could not properly assign this as prejudice resulting from denial of his speedy trial rights.

[105]*See, e.g.*, United States v. Churchill, 483 F.2d 268 (1st Cir. 1973); United States v. Toy, 482 F.2d 741 (D.C. Cir. 1973); United States v. Galardi, 476 F.2d 1072 (9th Cir. 1973); United States v. Canty, 469 F.2d 114 (D.C. Cir. 1972); Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972); United States v. DeTienne, 468 F.2d 151 (7th Cir. 1972); United States v. Taylor, 465 F.2d 1199 (10th Cir. 1972); United States v. Lane, 465 F.2d 408 (5th Cir. 1972). It has been observed that proof of loss of memory is so difficult that the party with the burden of proof on this point will find it impossible to bear. 86 Harv. L. Rev. 164 (1972).

[106]490 F.2d 725 (D.C. Cir. 1973).

[107]*See also* United States v. Merrick, 464 F.2d 1087 (10th Cir. 1972).

[108]The down-grading of these two types of prejudice in *Barker* has received criticism. 86 Harv. L. Rev. 164 (1972).

not incarcerated. Furthermore, in *Wylie v. Wainwright*,[109] the court stated that since the defendant was in jail on a previous conviction, there was no prejudice resulting from pretrial incarceration. The court further suggested that the prejudice resulting from the anxiety and concern over being accused of a crime was minimized by the defendant's extensive background in penal institutions.

The contrast between two cases decided by the Seventh Circuit Court of Appeals is illustrative of the failure of the lower federal courts to accord proper weight to the anxiety and concern of being accused of a crime. In *United States v. Annerino*,[110] the court found no deprivation of speedy trial. With regard to the anxiety and stigma of being accused of a crime, the court said that "conclusory allegations of general anxiety and depression, travel restrictions and an inability to secure employment constitute a showing of only minimal prejudice of a kind normally attending criminal indictment."[111] In contrast is *United States v. Macino*,[112] in which the court found that the defendant had been denied a speedy trial. With regard to the anxiety and stigma which attach to being accused of a crime, the court said, "we must recognize that they exist despite the fact that a trial transcript or court record will seldom reveal them. Nor can this form of prejudice be treated lightly."[113] In neither *Macino* nor *Annerino* was the defendant incarcerated during the delay. The delay in *Macino* was twenty-eight months, while the delay in *Annerino* was about sixteen months. In *Annerino* the delay was caused by the government's desire to have a joint trial of co-defendants. In *Macino* no reason was offered by the government for the delay. Also, in *Macino* the court found a strong possibility of impairment of defense.[114] All of these differences may well justify the difference in the outcome of the two cases. However, the striking difference in the way the court treated the prejudice resulting from the anxiety and concern of being accused of a crime would hardly seem justified on the facts.

There are a few cases in which the burden on the defendant to prove actual prejudice has been eased. In *Hoskins v. Wainwright*,[115] there was a delay of eight and one-half years in bringing the defendant to trial for attempted robbery. The Fifth Cir-

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[109]361 F. Supp. 914 (S.D. Fla. 1973).

[110]495 F.2d 1159 (7th Cir. 1974).

[111]*Id.* at 1163-64.

[112]486 F.2d 750 (7th Cir. 1973).

[113]*Id.* at 753.

[114]See text accompanying note 103 *supra*.

[115]485 F.2d 1186 (5th Cir. 1973).

cuit Court of Appeals had previously remanded for a hearing on the question of whether the defendant had suffered any prejudice because of the delay.[116] On remand, the state court found that the defendant had not been prejudiced by the delay, and the district court accepted this finding. The court of appeals, however, finally realized that prejudice was not the sine qua non for judicial relief for a deprivation of speedy trial and reversed the defendant's conviction.[117] As noted above, in *United States v. Macino*,[118] the court granted relief to the defendant after finding a reasonable possibility of prejudice.[119]

If the sixth amendment guarantee of speedy trial is to be adequately protected, the lower federal courts must begin to heed the following language of the Supreme Court: "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense."[120] The lower federal courts must give up their misplaced emphasis on impairment of defense, which after all may be more a due process question, and begin to give proper emphasis to the prejudice resulting from pretrial incarceration and the anxiety and concern of being accused of a crime.

V. Remedies

The dismissal of charges against a defendant because he has been deprived of a speedy trial is a very severe remedy.[121] It may mean that a guilty person will be set free before trial or even after having been convicted. According to the Supreme Court, however, dismissal of charges is the only remedy allowed by the Constitution. The severity of this remedy probably provides an

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[116] Hoskins v. Wainwright, 440 F.2d 69 (5th Cir. 1971).

[117] "[T]here must be some point of coalescence of the other three factors in a movant's favor, at which prejudice—either actual or presumed—becomes totally irrelevant. And we so hold." 485 F.2d at 1192.

[118] 486 F.2d 750 (7th Cir. 1973).

[119] See text accompanying note 103 *supra*. In United States v. Perry, 353 F. Supp. 1235 (D.D.C. 1973), the court found that a reasonable possibility of significant prejudice existed as a result of a three year delay in the trial for a street crime, and the court dismissed the charges.

[120] United States v. Marion, 404 U.S. 307, 320 (1971).

[121]

> But such severe remedies are not unique in the application of constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain as *Barker* noted, "the only possible remedy."

Strunk v. United States, 412 U.S. 434, 439-40 (1973).

atmosphere which pressures many courts to go to almost any length to avoid finding deprivations of speedy trial. There is no way of knowing how many of the decisions surveyed may have been in some way motivated by this consideration. There are at least two possible solutions to this problem. The first is to define more rigidly the constitutional right to speedy trial and thus to deprive the courts of some of the discretion they now enjoy. This solution would be unfortunate. The variables involved in speedy trial questions are highly complex, and the courts need wide discretion in order to deal properly with the vast number of possibilities. The second solution is to enact, by statute or court rules, safeguards which are more stringent than the Constitution requires for the protection of speedy trial. This possibility will be discussed in the next section.

Another interesting possibility in the area of remedies for speedy trial deprivations is the class action suit. In *Wallace v. Kern,*[122] the inmates of the Brooklyn House of Detention for Men brought a class action seeking an injunction to enforce their rights to speedy trial. The court noted that the delays of justice for inmates of that institution were "notorious" and "chronic." The court further noted that the prejudice caused by incarceration may be mitigated by releasing the defendant without dismissing the charges. The court issued a preliminary injunction which in effect provided that no one should be held in the institution pending trial for more than six months.

VI. Conclusion

The sixth amendment guarantee of speedy trial is still not a viable, well defined constitutional right. The Supreme Court's decision in *Barker* was a small and confusing step in the right direction. Unfortunately, the lower federal courts have not moved forward from that decision. They have not made any significant attempt to define the concept of "presumptively prejudicial delay." There is a great need for a reconsideration of the reason-for-delay factor of the *Barker* test. Unfortunately, the lower federal courts have not attempted to grapple with this problem but instead have consistently given little weight to reasons for which the government should bear the burden. The *Barker* decision set the tone for this approach, and it will probably require a re-evaluation by the Supreme Court before any progress can be made in this area.

The *Barker* decision was extremely ambivalent with regard to the defendant's assertion of his right to a speedy trial. This

[122] 371 F. Supp. 1384 (E.D.N.Y. 1974).

has been reflected in the lower courts' subsequent decisions. There has been no clear distinction drawn between the demand for speedy trial and the desire for a speedy trial. The Court in *Barker* made this distinction vaguely, but it is difficult to tell how strongly the Court relied on it.

Perhaps the single area in which the lower federal courts are most deficient in their analyses of speedy trial questions is their misplaced emphasis on impairment of defense. Since *Barker*, the Supreme Court made clear in *Moore v. Arizona*[123] that impairment of defense was not a prerequisite to a deprivation of speedy trial. Furthermore, the Court long ago made clear that the right of speedy trial is primarily designed to protect against those forms of prejudice which do not result from impairment of defense.[124]

If the cases discussed in this Note demonstrate anything, it is that in general the lower federal courts will only follow the Supreme Court's lead in the development of the constitutional guarantee of speedy trial. Thus, in order for the right to develop further, the Supreme Court must set the pace and issue future decisions which cast light on its decision in *Barker*.

Robert L. Hartley, Jr.

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[123]414 U.S. 25 (1973).

[124]See text accompanying note 120 *supra*.