

REVISITING THE RIGHT TO A SPEEDY TRIAL: RECONCILING THE SIXTH AMENDMENT WITH THE SPEEDY TRIAL ACT

ELIOT T. TRACZ*

I. INTRODUCTION

Prosecutors enjoy broad discretion to initiate and conduct criminal prosecutions; something the courts recognize in part out of respect for the doctrine of separation of powers,¹ and in part because “the decision to prosecute is particularly ill-suited to judicial review.”² This holds true in both state and federal courts.³ This broad discretion includes the decision to investigate,⁴ permit a plea-bargain,⁵ determine whether to bring

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* Law Clerk to the Honorary Kathy Wallace, Minesota Third Judicial District. J.D., DePaul University College of Law; B.A., Coe College. The author thanks Kellie Tracz for her advice and the staff of the Capital University Law Review for their hard work. All mistakes are the author’s own.

¹ See *United States v. Armstrong*, 517 U.S. 456, 463–64 (1996) (separation of powers concerns and systemic costs of judicial intrusions caution against setting threshold showing for discovery for selective prosecution claims too low); *United States v. Snyder*, 136 F.3d 65, 70 (1st Cir. 1998) (determination of whether to prosecute is “within broad limits, a prerogative of the Executive Branch”); *United States v. Chagra*, 669 F.2d 241, 247 (5th Cir. 1982) (constitutional authority for faithful execution of laws textually committed to executive branch).

² *Wayte v. United States*, 470 U.S. 598, 607 (1985). See also *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (broad discretion appropriate because prosecutor, not courts, must evaluate the strength of the case, allocation of resources, and enforcement priorities); *United States v. Brock*, 782 F.2d 1442, 1444 (7th Cir. 1986) (broad discretion to delay prosecution in order to allow wider investigation; such priority setting ill-suited to judicial review).

³ See *Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition*, ORG. OF AM. STS. (2007), https://www.oas.org/juridico/mla/en/usa/en_usa-int-desc-guide.html [<https://perma.cc/674P-RBYV>] (discussing how the states have broad authority to prosecute crimes within their boundaries, but only federal government has such authority throughout the United States).

⁴ See *United States v. Martinez*, 785 F.2d 663, 670 (9th Cir. 1986) (court review of investigation is limited by prosecutorial discretion).

⁵ See *United States v. Williams*, 47 F.3d 658, 663 (4th Cir. 1995) (no constitutional violation when prosecutor predicated plea offer on assistance to police); *Russel v. Collins*, 998 F.2d 1287, 1294 (5th Cir. 1993) (no constitutional violation when prosecutor enters into plea bargains with some defendants but not others, absent showing of impermissible standard).

charges,⁶ what charges to bring,⁷ where to bring charges,⁸ and when to bring charges.⁹

All prosecutions are, of course, subject to certain restrictions. A number of those can be found within the Sixth Amendment of the United States Constitution.¹⁰ Within this Amendment includes the right to a speedy and public trial,¹¹ the right to an impartial jury of the state and district where the crime is committed,¹² the right to be informed of the nature and cause of the accusation,¹³ the right to confront opposition witnesses,¹⁴ the right to compulsory process for obtaining witnesses in his favor,¹⁵ and the right to the assistance of counsel.¹⁶ Additional Constitutional criminal rights may be found in the Fourth, Fifth, and Eighth Amendments.¹⁷

Taken together, these amendments lay a basic foundation for the criminal law of the United States at both the state and federal levels. They exist, in the words of Professor Amar, to deal with “the agency problem—the danger that government officials might attempt to rule in their own self-interest at the expense of their constituents’ sentiments and liberty.”¹⁸

⁶ See *United States v. Williams*, 504 U.S. 36, 48 (1992) (prosecutor needs no leave of court to seek a grand jury indictment); *Fields v. Soloff*, 920 F.2d 1114, 1118 (2d Cir. 1990) (neither grand jury nor judge can compel prosecutor to act when she decides not to bring charges).

⁷ See *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979) (prosecution proper under any statute violated by defendant, without regard to penalty, as long as prosecution is not discriminatory); *Hunter v. United States*, 73 F.3d 260, 262 (9th Cir. 1996) (per curiam) (when two criminal statutes apply to same conduct, prosecutor may decide under which to proceed).

⁸ See *United States v. Melendez*, 60 F.3d 41, 50 (2d Cir. 1995) (decision to drop state prosecution and re-indict accomplices in federal court, thus enabling prosecution of defendant, did not violate due process when no showing decision based on suspect characteristics of defendant or otherwise in bad faith); *United States v. Satterwhite*, 980 F.2d 317, 320 (5th Cir. 1992) (decision to prosecute in federal rather than state court is not evidence of abuse of prosecutorial discretion even when allegedly made without any objective or reviewable guidelines).

⁹ See *United States v. Lovasco*, 431 U.S. 783, 795–96 (1977) (eighteen month delay between crime and indictment is not a due process violation, even if delay prejudiced defendant, when delay was a result of prosecutor’s good faith investigation).

¹⁰ See generally U.S. CONST. amend. VI.

¹¹ U.S. CONST. amend. VI, cl. 2.

¹² *Id.* at cl. 3.

¹³ *Id.* at cl. 5.

¹⁴ *Id.* at cl. 6.

¹⁵ *Id.* at cl. 7.

¹⁶ *Id.* at cl. 8.

¹⁷ See generally U.S. CONST. amend IV, V & VIII.

¹⁸ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 82 (1998).

These amendments contain crucial rights and have given rise to celebrated cases,¹⁹ yet some of these rights remain less celebrated than others. Among the most important of these rights is the right to a speedy and public trial.

Courts assume that criminal prosecutions are undertaken in good faith unless evidence is presented to the contrary.²⁰ There would be little reason to assume that delays caused by the State were made in bad faith, yet the burden to bring criminal charges rests entirely on the shoulders of the State. For this reason, this article only considers those delays to a speedy trial that are caused or requested by the State.

Section II of this article reviews the history of the right to a speedy trial found within the Sixth Amendment of the United States Constitution.²¹ In doing so, this article delves into old English law and tradition in order to shed light on how the right to a speedy trial became entrenched in the American legal system. Additionally, this Section discusses the factors considered in determining whether or not this right had been violated.

In Section III, this article considers the requirement for a speedy trial under the Speedy Trial Act.²² This includes looking at the statute itself, as well as the case law applying the statute to specific cases. Section IV considers the similarities between the Sixth Amendment right to a speedy trial and the Speedy Trial Act, as well as the differences. In Section V, this article considers how various courts have considered required showings of good faith in cases alleging that a defendant's right to a speedy trial has been violated. Finally, Section VI suggests a burden shifting mechanism once the fact of a prosecution-caused delay has been established.

II. THE SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL

A. *The Right to a Speedy Trial*

The Sixth Amendment of the United States Constitution proudly states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a

¹⁹ See, e.g., *Katz v. United States*, 389 U.S. 347, 353 (1967) (reasonable expectation of privacy); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (counsel must be provided to indigent defendants in all felony cases); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (barring execution of people who were under eighteen at the time their crime was committed).

²⁰ See *United States v. Parham*, 16 F.3d 844, 846 (8th Cir. 1994) (absent “a showing of intentional and purposeful discrimination,” good faith in prosecution presumed).

²¹ U.S. CONST. amend. VI.

²² Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–74 (2012).

speedy and public trial . . .”²³ This right, like all the rights found in the Sixth Amendment, is a fundamental right.²⁴ The Fourteenth Amendment guarantees that the right to a speedy trial can be enforced against the states.²⁵

The right to a speedy trial has a long history in English law dating back to at least the year 1215 and the signing of the Magna Carta; it contained the words “[w]e will sell to no man, we will not deny or defer to any man either justice or right.”²⁶ The learned jurist Sir Edward Coke wrote that in the late thirteenth century, justices provided with commissions of “gaol delivery” and “oyer and terminer” would “have not suffered the prisoner to be long detained, but at their next coming have given the prisoner full and speedy justice, without detaining him long in prison.”²⁷ With lawyers in the Colonies having studied the English system of laws, it is no surprise that the first colonial bill of rights, drafted by George Mason, would reference the right to a speedy trial: “In all capital or criminal prosecutions a man hath a right . . . to a speedy trial.”²⁸

B. Criteria for Determining Whether a Delay Violates the Right to a Speedy Trial

1. Background

Willie Barker was one of two suspects in the murder of an elderly couple in Christian County, Kentucky on July 20, 1958.²⁹ Barker and the other suspect, Silas Manning, were indicted on September 15, 1958, and Barker’s trial was set for October 21, 1958.³⁰ The Commonwealth, believing that it had a stronger case against Manning (and convincing that Manning would need to be convicted before holding a conviction against Barker), moved for a continuance of Barker’s trial.³¹ After a series of events, including six trials for Manning,³² and sixteen continuances of

²³ U.S. CONST. amend. VI, cl. 1–2.

²⁴ *Klopper v. North Carolina*, 386 U.S. 213, 223 (1967).

²⁵ *Id.* at 222–23.

²⁶ MAGNA CARTA, cl. 29 [cl. 40 of KING JOHN’S CHARTER OF 1215] (1225), translated and quoted in COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (Brooke, 5th ed. 1797).

²⁷ COKE, *supra* note 26, at 43.

²⁸ *Klopper*, 386 U.S. at 225 (citing Va. Declaration of Rights, 1776, §8).

²⁹ *Barker v. Wingo*, 407 U.S. 514, 516 (1972).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 516–17 (The first trial ended on a hung jury; the second and third resulted in convictions but both were overturned on appeal; the fourth resulted in another hung jury;

(continued)

Barker's trial, Barker finally stood trial on October 9, 1963.³³ Manning was featured as the Commonwealth's chief witness and Barker was convicted with a life sentence.³⁴

Barker appealed his conviction claiming, in part, that his right to a speedy trial was violated.³⁵ The Kentucky Court of Appeals confirmed his conviction.³⁶ In 1970, Barker petitioned for *habeas corpus* in District Court for the Western District of Kentucky, where his petition was rejected without a hearing.³⁷ The District Court did, however, grant leave to appeal *in forma pauperis*,³⁸ as well as a certificate of probable cause to appeal.³⁹ The Sixth Circuit Court of Appeals affirmed the District Court's ruling, finding that Barker had waived his speedy trial claim for the period before 1963.⁴⁰ Additionally, the Court of Appeals found that after Barker first raised his claim, but before his trial, only eight months had lapsed (the Supreme Court found it to be a period of twenty months).⁴¹

The Supreme Court granted *certiorari* and arguments were heard on April 11, 1972.⁴² In a majority opinion by Justice Powell, the Court noted several differences between the right to a speedy trial and the other Constitutional rights afforded to persons accused of crimes. First, the Court argued that there is a societal interest in providing a speedy trial which is separate from, and sometimes conflicts with, the interests of the accused.⁴³ Among the societal concerns Justice Powell listed were: the backlog of cases in many urban courts which enable defendants to negotiate pleas to lesser offenses; accused persons released on bond for extended lengths of time (thus having opportunities to commit more offenses); the temptation to jump bail; a detrimental effect on offender

the fifth found him guilty of the murder of one victim; and the sixth found him guilty of the murder of the second victim).

³³ *Id.* at 518.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* See also *Barker v. Commonwealth*, 385 S.W.2d 671, 674 (Ky. Ct. App. 1964).

³⁷ *Barker*, 407 U.S. at 518.

³⁸ "In *Forma Pauperis*" is "[s]omeone who is without the funds to pursue the normal costs of a lawsuit or criminal defense. Upon the court's granting of this status the person is entitled to waiver of normal costs and/or appointment of counsel (but seldom in other than a criminal case)." *In Forma Pauperis*, THE LECTRIC L. LIBR., <https://www.lectlaw.com/def/i020.htm> [<https://perma.cc/CH4N-9JVT>].

³⁹ *Barker*, 407 U.S. at 518.

⁴⁰ *Id.*

⁴¹ *Id.* at 519.

⁴² *Id.* at 514.

⁴³ *Id.* at 519.

rehabilitation; the dangers of overcrowding in jails; and, with regards to persons who could not make bail, economic concerns including the cost of holding people for a lengthy time, as well as lost wages for those who may have been arrested.⁴⁴

Second, the Court stated that deprivation of the right to a speedy trial may benefit the accused.⁴⁵ Powell asserted that delay is a common defense tactic and that, as time passes, the memories of witnesses may fade or a witness may become unavailable.⁴⁶ Because the burden of proof lies with the prosecution, Justice Powell felt that delay could weaken the prosecution if it was their witness whose memory was faulty or who was unavailable.⁴⁷

Finally, Justice Powell noted that the right to a speedy trial is, conceptually, more vague than other procedural rights.⁴⁸ He wrote that it is “impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.”⁴⁹ Additionally, he reiterated that “[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice”⁵⁰

Next the Court considered two possible approaches to determine whether there has been a violation of the right to a speedy trial. First, the Court considered the suggestion that the Constitution requires a criminal defendant to be offered a trial within a set time period.⁵¹ Justice Powell noted that this approach would clarify the determination of whether an infringement had occurred.⁵² The Court determined, however, that such a rule would require the Court to take on a legislative role and that there was no Constitutional basis for a specified time period.⁵³

An alternative suggestion would restrict the right to a speedy trial to those accused persons who explicitly demand a speedy trial.⁵⁴ The Court noted two particular approaches to this issue: first, the demand-waiver,

⁴⁴ *Id.* at 519–21.

⁴⁵ *Id.* at 521.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 522 (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).

⁵¹ *Id.* at 523.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 523–24.

which treats the right to a speedy trial in accordance with the concept of a waiver; and the second, which considers a demand to be a factor to consider along with several others.⁵⁵ In discussing the demand-waiver doctrine, the Court held that assuming waiver from a silent record is impermissible.⁵⁶ Instead, the Court would move in a different direction.

Ultimately, the *Barker* Court determined that the optimal approach to determining whether the right to a speedy trial has been violated is through a balancing test.⁵⁷ The Court identified four factors for consideration: “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”⁵⁸ Though these four factors are considered to be *the* relevant factors, the Court was clear that their opinion could “do little more than identify *some* of the factors which courts should assess in determining whether a particular defendant has been deprived of his right.”⁵⁹

2. *Length of Delay*

The first factor the Court considered was the length of the delay in bringing the accused to trial.⁶⁰ The Court viewed this factor as a “triggering mechanism” due to the belief that “[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.”⁶¹ The length of the delay is, of necessity, “dependent upon the peculiar circumstances of the case.”⁶²

3. *Government Justification for Delay*

The second factor considered by the Court is “the reason the government assigns to justify the delay.”⁶³ Different weights are to be assigned to different causes.⁶⁴ Deliberate attempts to delay trial are heavily weighted against the government, while neutral causes, including negligence and overcrowded courts, should be weighed less heavily against

⁵⁵ *Id.* at 524–25.

⁵⁶ *Id.* at 526.

⁵⁷ *Id.* at 530.

⁵⁸ *Id.*

⁵⁹ *Id.* (emphasis added).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 530–31.

⁶³ *Id.* at 531.

⁶⁴ *Id.*

the government.⁶⁵ Valid reasons, such as missing witnesses, should be considered as justifying an appropriate delay.⁶⁶

4. *Responsibility of Defendant to Assert Right to Speedy Trial*

The third factor that the Court discussed is the defendant's responsibility to assert his right to a speedy trial.⁶⁷ Justice Powell wrote that whether or not a defendant asserts their rights, and the manner in which the rights are asserted, "is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudices . . . that he experiences."⁶⁸

5. *Prejudice to Defendant*

The final factor the Court discussed is prejudice to the defendant.⁶⁹ This factor is to "be assessed in light of the interests of [the] defendant" which is meant to be protected by the right to a speedy trial.⁷⁰ The Court listed three such interests that are protected by this right: the prevention of "oppressive pretrial incarceration"; minimalizing the "anxiety and concern of the accused"; and limiting "the possibility that the defense will be impaired."⁷¹ The third of these interests is the most serious because if a defendant is unable to adequately prepare his case, then the fairness of the proceedings is altered.⁷²

III. THE SPEEDY TRIAL ACT

In the mid-1970's, Congress acknowledged that the right to a speedy trial, as protected by the Sixth Amendment, lacked the teeth necessary to prevent the pretrial delays plaguing federal courts.⁷³ Congress observed that "both the defense and the prosecution rely upon delay as a tactic in the trial of criminal cases"⁷⁴ to the detriment of the rights of the defendant.⁷⁵ In addition, Congress found that the Supreme Court had not provided

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 532.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See H.R. REP. NO. 93-1508 (1974), reprinted in 1974 U.S.C.C.A.N. 7401, 7407-08.

⁷⁴ *Id.*

⁷⁵ *Id.* at 7407.

lower courts with “adequate guidance.”⁷⁶ As a result, Congress determined that in order to “give real meaning”⁷⁷ to the right to a speedy trial, it would be necessary to enact legislation. The result was the Speedy Trial Act (STA).⁷⁸

The STA was not well received by the courts⁷⁹ and the Judicial Conference of the United States not only opposed the bill, but they also requested that Congress delay its enactment pending an opportunity to evaluate its effectiveness of its ability to reduce pretrial delays.⁸⁰ While the STA was passed and signed into law, courts were not shy about voicing their disapproval.⁸¹ Additionally, not all courts were compliant with the requirements of the STA.⁸² Regardless, the STA remains in effect.

A. *Time to Trial*

The STA requires that in all cases involving a defendant charged with an offense, the judicial officer shall, at the earliest possible time and after consulting with the counsel for the defendant and the Government’s attorney, set the case so as to assure a speedy trial.⁸³ As part of this concern, the government is required to file an information or indictment charging an individual with the commission of an offense within thirty days from the date that the person was arrested or served with a summons.⁸⁴ Once a plea of not guilty is entered, the trial of the defendant charged in an information or indictment shall commence within seventy days from either the filing date of the information or indictment, or the date the defendant has appeared before a judicial officer of the court in which

⁷⁶ *Id.* at 7405.

⁷⁷ *Id.* at 7404.

⁷⁸ Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1974).

⁷⁹ H.R. REP. NO. 96-390, at 4 (1979), *reprinted in* 1979 U.S.C.C.A.N. 805, 808 (“[B]oth the Department of Justice and the Judicial Conference opposed enactment of the legislation in 1974, and information available to the committee leads us to the conclusion that, 5 years later, opposition within the Justice Department and the courts has not entirely withered away.”).

⁸⁰ Letter from Rowland F. Kirks, Dir. of the Admin. Off. of the U.S. Cts., to the Hon. Peter W. Rodino, Chairman of the H. Judiciary Comm. (Nov. 8, 1974) (printed in H.R. REP. NO. 93-1508 (1974), *reprinted in* 1974 U.S.C.C.A.N., at 7446).

⁸¹ *See United States v. Howard*, 440 F.Supp. 1106, 1109 (D. Md. 1977) (stating that the Speedy Trial Act constitutes an “unconstitutional legislative encroachment” on the judicial branch).

⁸² *See* Robert L. Misner, *District Court Compliance with the Speedy Trial Act of 1974: The Ninth Circuit Experience*, 1977 ARIZ. ST. L.J. 1, 25–26 (1977).

⁸³ 18 U.S.C. § 3161(a) (2012).

⁸⁴ *Id.* § 3161(b).

the charge is pending.⁸⁵ Unless a defendant consents in writing, a trial shall not commence less than thirty days from the date on which the defendant makes their first appearance through counsel, or expressly waives counsel and chooses to proceed *pro se*.⁸⁶

Additionally, the STA requires that if an indictment or information is dismissed upon a defendant's motion, or if any charge contained in a complaint filed against an individual is dismissed or dropped (and a new complaint is subsequently filed against the same defendant charging them with the same offense or an offense based on the same conduct or criminal episode), the provisions regarding timelines for setting the trial date will be applicable to the subsequent filings.⁸⁷ In the event that a case has been dismissed but is reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final.⁸⁸ The court retrying the case may extend the period for the trial to 180 days should the availability of witnesses or other factors make a trial within seventy days too difficult.⁸⁹

The STA does account for the possibility that a case may be delayed for legitimate reasons. In particular, eight specific exceptions to the time requirements are listed including:

- (A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;
- (B) delay resulting from trial with respect to other charges against the defendant;
- (C) delay resulting from any interlocutory appeal;
- (D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
- (E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;
- (F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the

⁸⁵ *Id.* § 3161(c)(1).

⁸⁶ *Id.* § 3161(c)(2).

⁸⁷ *Id.* § 3161(d)(1).

⁸⁸ *Id.* § 3161(d)(2).

⁸⁹ *Id.*

defendant's arrival at the destination shall be presumed to be unreasonable; (G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and (H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.⁹⁰

The STA does take into account several other possible reasons for delay including the “unavailability of the defendant or an essential witness”⁹¹ and “delay resulting from the defendant being mentally incompetent or physically unable to stand trial.”⁹² Delay may also be appropriate when the defendant is joined with a codefendant for trial, whose timeline for trial has not expired and who has not had a motion for severance granted.⁹³ A period of delay resulting from a continuance based on a motion by either the government, the defendant, or the judge *sua sponte*, is also acceptable provided that the judge finds that “the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.”⁹⁴ In granting the continuance, the judge must consider certain criteria.⁹⁵

⁹⁰ *Id.* § 3161(h)(1)(A)–(H) (These make up the bulk of the exceptions to the time requirements for a speedy trial).

⁹¹ *Id.* § 3161(h)(3)(A).

⁹² *Id.* § 3161(h)(4).

⁹³ *Id.* § 3161(h)(6).

⁹⁴ *Id.* § 3161(h)(7)(A).

⁹⁵ *Id.* § 3161(h)(7)(B). The factors include:

- (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuance of such proceeding impossible, or result in a miscarriage of justice.
- (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
- (iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in §3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.
- (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of

(continued)

B. Sanctions

In the event that there is a speedy trial violation, the STA provides for sanctions.⁹⁶ In cases involving an individual against whom a complaint is filed and charging that individual with an offense, if no indictment or information is filed within the time limits required by §3161(b) through §3161(h), the charge against the individual shall be dismissed or dropped.⁹⁷ Additionally, if the accused individual is not brought to trial within the time limit required by §3161(b) through §3161(h), the information or indictment shall be dismissed upon the defendant's motion.⁹⁸ If the defendant fails to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere, that failure constitutes a waiver of the right to dismissal.⁹⁹

Misconduct by counsel for either the defendant or the Government is also contemplated by the STA. Specifically, the STA covers four acts in which counsel may engage:

- (1) knowingly allow[ing a] case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial;
- (2) fil[ing] a motion solely for the purpose of delay which [the attorney] knows is totally frivolous and without merit;
- (3) mak[ing] a statement for the purpose of obtaining a continuance which [the attorney] knows to be false and which is material to the granting of a continuance; or
- (4) otherwise willfully fail[ing] to proceed to trial without justification consistent with section 3161¹⁰⁰

The STA lists several potential remedies in the event of any of these violations. If the offending attorney is an appointed defense counsel, the

counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

Id. § 3161(h)(7)(B)(i)–(iv).

⁹⁶ *See generally id.* § 3162.

⁹⁷ *Id.* § 3162(a)(1) (Whether the case is dismissed with or without prejudice is determined by the court when considering factors including: “the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.”).

⁹⁸ *Id.* § 3162(a)(2).

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 3162(b).

amount of compensation that would have otherwise been paid is subject to a reduction of up to twenty-five percent.¹⁰¹ A retained defense counsel is subject to a similar fine.¹⁰² An attorney for the government may be fined up to \$250.¹⁰³ Finally, the court may deny the government attorney the right to practice before the court for a period of no more than ninety days.¹⁰⁴ The court may also consider filing a report with the appropriate disciplinary committee.¹⁰⁵

C. Interpretation by the Courts

In *Zedner v. United States*, the United States Supreme Court visited the issue of whether or not defendants can waive their right to a speedy trial under the STA.¹⁰⁶ In that case, the defendant was indicted on seven counts of attempting to defraud a financial institution and one count of knowingly possessing counterfeit obligations of the United States.¹⁰⁷ The date of the indictment was April 4, 1996.¹⁰⁸ On June 26, 1996, the District Court for the Eastern District of New York granted an “ends-of-justice” continuance until September 6 of the same year.¹⁰⁹ Another continuance was then granted until November 8 at which time, the defendant requested another continuance.¹¹⁰ At that time, the District Court informed the defendant: “I think if I’m going to give you that long an adjournment, I will have to take a waiver for all time.”¹¹¹ The defendant and the defendant’s counsel then signed a waiver provided by the District Court (and apparent of the District Court’s own design).¹¹²

Following a series of delays, the defendant’s case finally began on April 7, 2003, seven years after he had been indicted.¹¹³ A jury found the defendant guilty on six counts of attempting to defraud a financial institution, and the District Court sentenced him to sixty-three months in prison.¹¹⁴ On appeal, the Second Circuit affirmed the conviction saying

¹⁰¹ *Id.* § 3162(b)(A).

¹⁰² *Id.* § 3162(b)(B).

¹⁰³ *Id.* § 3162(b)(C).

¹⁰⁴ *Id.* § 3162(b)(D).

¹⁰⁵ *Id.* § 3162(b)(E).

¹⁰⁶ 547 U.S. 489, 490 (2006).

¹⁰⁷ *Id.* at 493.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 493–94 (internal citations omitted).

¹¹² *Id.* at 494.

¹¹³ *Id.* at 496.

¹¹⁴ *Id.*

that although “a defendant’s waiver of rights under the Speedy Trial Act may be ineffective” due to the public interest served by compliance with the STA, there is an exception “when [a] defendant’s conduct causes or contributes to a period of delay.”¹¹⁵

After granting *certiorari*, the United States Supreme Court, in an opinion by Justice Alito, found that a defendant may not prospectively waive the rights under the STA.¹¹⁶ In reaching this decision, the Court made several arguments. First, Justice Alito argued that the STA provides specific situations that are exempted from the STA timeline and that the omission of a rule involving the defendant’s waiver is an intentional omission.¹¹⁷ Next, the Court argued that the STA was designed to protect the interests of the defendant as well as the interests of the public, and the public interest cannot be served if defendants may opt out of the STA.¹¹⁸ The Court also made an argument from the legislative history of the STA.¹¹⁹

Despite the possibility of a prospective waiver being shut down by the Supreme Court, the lower courts have found ways to circumvent the STA. Professor Shon Hopwood argues that district courts have made extensive use of the “ends-of-justice continuance” in order to delay trials.¹²⁰ Several U.S. Circuits allow the “ends-of-justice continuance” to serve as an open-ended continuance.¹²¹ The Third Circuit Court of Appeals has also allowed

¹¹⁵ *Id.* at 496–97 (internal citations omitted).

¹¹⁶ *Id.* at 500.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 500–01.

¹¹⁹ *Id.* at 501–02. This argument will not be addressed because Justice Scalia quite rightly pointed out:

The Act’s language rejects the possibility of a prospective waiver, and even expresses the very point that the Court relies on legislative history to support—that the Act protects the interests of the public as well as those of the defendant. . . . Use of legislative history in this context thus conflicts not just with my own views but with this Court’s repeated statements that when the language of the statute is plain, legislative history is irrelevant.

Id. at 510 (Scalia, J., concurring) (internal citations omitted).

¹²⁰ Shon Hopwood, *The Not So Speedy Trial Act*, 89 WASH. L. REV. 709, 719 (2014).

¹²¹ *Id.* at 724. *See also, e.g.*, *United States v. Rush*, 738 F.2d 497, 508 (1st Cir. 1984) (arguing that it is inevitable that a trial court may need to grant continuances “without knowing exactly how long the reasons supporting the continuance will remain valid.”); *United States v. Jones*, 56 F.3d 581, 586 (5th Cir. 1995) (finding that, sometimes “it is impossible, or at least quite difficult, for the parties or the court to gauge the length of an otherwise justified continuance.”).

open-ended “ends-of-justice continuances,” provided that they are “reasonable in length.”¹²²

Professor Hopwood has suggested that STA violations continue to occur because neither courts nor the parties in front of them have any incentive to comply.¹²³ Additionally, crowded criminal dockets and defense attorneys—paid by the hour—play a role in delaying speedy trials.¹²⁴ For these reasons, Professor Hopwood contends that the STA has become toothless.¹²⁵

IV. DIFFERENCES AND PROTECTED INTERESTS

A. *Interests Protected by the Right to a Speedy Trial*

1. *Interests of Individuals*

The Supreme Court has recognized that criminal defendants have three constitutional interests protected by the Sixth Amendment’s right to a speedy trial. These interests include preventing oppressive pretrial incarceration, minimizing public obloquy, and preventing prejudice against the defendant at trial.¹²⁶ Each interest should be considered individually.

a. *Preventing Oppressive Pretrial Incarceration*

The first individual interest protected by the Sixth Amendment’s right to a speedy trial is preventing the accused from undergoing “oppressive pretrial incarceration.”¹²⁷ English law, where American law descended, had a history of conducting criminal prosecutions with “brutality,” “unfairness,” and the enjoyment of the courts in wielding their powers over the defendants.¹²⁸ While it is important to protect the accused and those convicted from abuse at the hands of the government, protecting this individual interest is a deeper issue than merely looking at what goes on inside the jails before trial.

¹²² See *United States v. Lattany*, 982 F.2d 866, 868 (3d Cir. 1992).

¹²³ Hopwood, *supra* note 120, at 738–39.

¹²⁴ *Id.* at 739.

¹²⁵ *Id.*

¹²⁶ *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

¹²⁷ *Id.*

¹²⁸ Brian P. Brooks, *A New Speedy Trial Standard for Barker v. Wingo: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. CHI. L. REV. 587, 597 (1994) (quoting FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 13 (Greenwood Press, 2d ed. 1969)).

Around the world, nearly 11 million people are imprisoned annually prior to conviction.¹²⁹ In the United States, nearly half a million people are being detained prior to trial on any given day.¹³⁰ Many of those detained will have difficulty securing release because of high bail costs and low income.¹³¹ Professor Dobbie and his associates have found that in the year prior to being arrested, “the typical defendant earned less than \$7,000”¹³² At the same time, research shows that average bail for felony defendants was around \$55,000 in 2013.¹³³ Close to 50% of defendants are unable to post bail even when it is set as low as \$5,000.¹³⁴

These numbers, as a representation of the number of defendants remaining in custody, are troubling enough, but what about when we consider the economically oppressive factors of pre-trial incarceration? Extended detention is disruptive, leading to job loss and difficulty securing new employment.¹³⁵ The results for those criminal defendants who lack the means to secure release on bail—being deprived of the right to a speedy trial and, consequently, subjected to extended incarceration—can be devastating.

b. Minimizing Public Obloquy

The defendant’s second protected interest is in limiting the amount of “anxiety and concern” that comes with a public accusation of criminal wrongdoing.¹³⁶ The United States Supreme Court acknowledged the significance of this concern in *United States v. Marion*, saying:

[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused’s defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources,

¹²⁹ Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201 (2018).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 201–02.

¹³³ *Id.* at 201.

¹³⁴ *Id.* at 202.

¹³⁵ *Id.* at 235.

¹³⁶ *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.¹³⁷

c. Preventing Prejudice Against the Defendant at Trial

The third protected interest is preventing prejudice against the defendant at trial.¹³⁸ In *Barker*, the Supreme Court noted that this is the most important of the defendant's interests because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system."¹³⁹ The Supreme Court considered several ways where the defendant's case can be prejudiced, including the death or disappearance of a witness during a delay, as well as memory loss of a witness.¹⁴⁰

Barker recognized that this kind of prejudice is the most difficult to show since the record often cannot reflect what information has been forgotten.¹⁴¹ Because of this, the Supreme Court has accepted that it must "generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."¹⁴² In part, this difficulty has resulted in the Court finding that "affirmative proof of particularized prejudice is not essential to every speedy trial claim."¹⁴³

2. Interests of Society

The *Barker* Court found that, much like criminal defendants, society also has interests protected by the right to a speedy trial.¹⁴⁴ These interests include: (1) effective prosecution of criminal cases;¹⁴⁵ (2) preventing unincarcerated criminal defendants from committing further crimes;¹⁴⁶ and (3) the costs associated with lengthy prosecutions.¹⁴⁷

¹³⁷ *United States v. Marion*, 404 U.S. 307, 320 (1971) (*Marion* seems to indicate that the defendant's interest in avoiding public obloquy ought to be taken as seriously as preventing oppressive pretrial incarceration).

¹³⁸ *Barker*, 407 U.S. at 532.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Doggett v. United States*, 505 U.S. 647, 655 (1992).

¹⁴³ *Id.*

¹⁴⁴ *See Barker*, 407 U.S. at 519–21.

¹⁴⁵ *See Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J., concurring).

¹⁴⁶ *Id.*

¹⁴⁷ *See Barker*, 407 U.S. at 520–21.

a. Effective Prosecution of Criminal Cases

It may seem that the right to a speedy trial hampers the ability of the government to present the best possible case; memories fade, witnesses become unavailable, and people recant statements. Paradoxically, time can also be a prosecutor's friend, especially in factually complex cases or those where the conviction of an accomplice is critical to the case.¹⁴⁸ Certainly, it is in the best interest of society for the government to prepare the best possible case against criminal defendants.

At the same time, "effective prosecution" does not grant the government free reign to delay trials. In *Dickey v. Florida*, Justice Brennan wrote that "[t]he Speedy Trial Clause . . . serves the public interest by penalizing official abuse of the criminal process and discouraging official lawlessness."¹⁴⁹ Though there may be legitimate reasons for the delay of a trial, Justice Brennan believed that the purpose of the right to a speedy trial was to ensure that the "government prosecute, not persecute, those whom it accuses of crime."¹⁵⁰

b. Preventing an Accused who is not Incarcerated from Committing Further Crimes

The second societal interest is in preventing persons accused of crimes, not yet incarcerated, from committing further crimes.¹⁵¹ The right to a speedy trial is not limited to those persons who are incarcerated while awaiting trial; it extends to those persons who are free as well.¹⁵² Unfortunately, some of those individuals who are released from custody will commit further criminal acts.¹⁵³ It is certainly in the interest of society to prevent further crimes by swiftly convicting and punishing those who have committed crimes.¹⁵⁴

c. Costs of Delayed Trials

A third societal interest in guaranteeing the right to a speedy trial relates to the costs associated with a delayed trial.¹⁵⁵ These costs fall into

¹⁴⁸ See, e.g., *id.* at 516.

¹⁴⁹ *Dickey*, 398 U.S. at 43 (Brennan, J., concurring).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 42.

¹⁵² See, e.g., *Doggett v. United States*, 505 U.S. 647, 650 (1992) (*Doggett* was free from custody for nearly eight and a half years between his indictment and his trial).

¹⁵³ *Dickey*, 398 U.S. at 42.

¹⁵⁴ *Id.*

¹⁵⁵ See *Barker v. Wingo*, 407 U.S. 514, 520–21 (1972).

two different categories that merit consideration: costs of prosecution and costs to the economy.¹⁵⁶

First, the government has limited means to pursue criminal prosecutions.¹⁵⁷ Prosecutors' offices have budgets and must be cognizant of the monetary costs of trying cases.¹⁵⁸ Similarly, delaying trial has negative effects on judicial economy.¹⁵⁹ With a limited number of judicial officers (most of whom face crowded dockets), moving criminal cases quickly from indictment to trial allows the courts to better serve the interests of justice.¹⁶⁰

The second manner where the costs of delaying trial affect society is the effect on the economy.¹⁶¹ This is particularly important in the case of those individuals who languish in jail awaiting trial because they cannot afford bail.¹⁶² Professor Dobbie and associates have found that release from pretrial incarceration potentially affects labor markets in three ways: (1) increased labor market attachment since incarcerated individuals cannot formally work; (2) job loss; and (3) lower employment through the stigma of criminal conviction.¹⁶³ Additionally, society often must assume some responsibility for the dependents of incarcerated persons with delayed trials featuring a commensurate increase in these costs.¹⁶⁴

B. Differences Between the Sixth Amendment Analysis and the Speedy Trial Act

Considering that there are both individual and societal interests at play in the application of the right to a speedy trial, it is necessary to look at how the Sixth Amendment and the STA differ in application. These differences demonstrate a lack of cohesion in the law protecting the right to a speedy trial. It is important to consider these differences in order to adopt a test that adequately covers both the Sixth Amendment and the STA.

¹⁵⁶ *Id.* at 519–21.

¹⁵⁷ See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 Nw. U. L. REV. 261, 262–64 (2011).

¹⁵⁸ *Id.* at 297–98.

¹⁵⁹ See *Barker*, 407 U.S. at 520–21.

¹⁶⁰ *Id.* at 519–20.

¹⁶¹ *Id.* at 527.

¹⁶² *Id.* at 520, 532.

¹⁶³ See Dobbie, *supra* note 129, at 235.

¹⁶⁴ See *Barker*, 407 U.S. at 521.

1. Demand for Speedy Trial

The most conspicuous difference between the Sixth Amendment and the STA is their respective approaches to whether a defendant must assert their right to a speedy trial.

In *Barker*, the Supreme Court made clear that criminal defendants have a responsibility to assert their right to a speedy trial.¹⁶⁵ In that case, the Court asserted that whether and how the defendant asserts his right is closely related to the other factors of the *Barker* test.¹⁶⁶ The Court assumed that defendants are more likely to complain if their trial is delayed for less valid reasons.¹⁶⁷ Most importantly, the Court states that “failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.”¹⁶⁸

While not stating an outright requirement that a defendant must assert their right to a speedy trial, *Barker* seems to suggest that failing to do so will disadvantage a defendant who raises a Sixth Amendment claim. Some rights guaranteed by the Constitution are announced to persons accused of crimes at the time of their arrest; specifically, the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel.¹⁶⁹ This is not the case for the right to a speedy trial. Unfortunately, this disadvantages those defendants who may have enough income to be ineligible for a public defender, yet not enough income to realistically afford a private attorney (as well as those who elect to proceed pro se).¹⁷⁰ In both of these cases, there may be no one available to advise the accused that they have the right to a speedy trial.¹⁷¹

¹⁶⁵ *Id.* at 531.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 532.

¹⁶⁹ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

¹⁷⁰ See *Barker*, 407 U.S. at 531–32 (Under the *Barker* balancing analysis, the fact that a defendant asserts his right to a speedy trial is given “strong evidentiary weight” in determining whether a deprivation occurred. However, “failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.”). Cf. Debra Cassens Weiss, *Self-represented litigants perceive bias and disadvantage in court process, report finds*, ABA J. (June 9, 2016, 6:15 AM), http://www.abajournal.com/news/article/self-represented_litigants_perceive_bias_and_disadvantage_in_court_process/ [<https://perma.cc/4S4T-7ZUT>] (a study found that “self-represented litigants generally wanted legal assistance, but it wasn’t an option because of the cost and other financial responsibilities . . . [and] free and reduced-cost legal services were not readily available.”).

¹⁷¹ Cf. Weiss, *supra* note 170 (“The litigants also struggle with how to present their case in court as they try to deal with evidentiary matters and courtroom procedures. Some litigants simply gave up rights rather than deal with the court processes.”).

In *Zedner*, the Supreme Court did not consider whether a defendant needed to assert their right to a speedy trial under the STA.¹⁷² Because the STA provides the only means by which a dismissal for violation of the STA can be waived, and the Supreme Court found that a prospective waiver cannot be made at all, there is no reason to believe that a defendant needs to affirmatively state their demand for a speedy trial.¹⁷³

2. Causes of Delay

Another area of discrepancy between the Sixth Amendment and the STA is the approach to considering the cause of a delay. Bearing in mind that the ultimate goal of both is to ensure accused individuals the right to a speedy trial, these two laws address the causes of trial delay in very different manners. In order for the two to function in harmony, some sort of reconciliation is in order.

Barker considers the reason the government gives to justify the delay as a factor in determining how heavily to weigh this factor.¹⁷⁴ Various justifications are weighted differently under the *Barker* test, with deliberate attempts to delay trial in order to impede the defense being weighted most heavily against the government.¹⁷⁵ Ostensibly neutral causes, such as overcrowded dockets and governmental negligence, should also be weighed against the government but not as heavily.¹⁷⁶ Finally, valid reasons, such as missing witnesses, are considered appropriate justifications for delay.¹⁷⁷

Under the STA, the justifiable causes for delay are carefully listed in the statute.¹⁷⁸ There is little speculation as to what actions the Government or the defendant (or for that matter, the court) can undertake to delay trial. The result is that under the STA, it is easier for courts to determine whether a delay has violated the defendant's right to a speedy trial.

An extreme case example of the manner in which a cause for delay may be deemed unjustifiable under the *Barker* test is the case of *Doggett v. United States*.¹⁷⁹ In that case, Doggett was indicted in early 1980 on several drug-related offenses, but managed to flee the country before he

¹⁷² See generally *Zedner v. United States*, 547 U.S. 489 (2006).

¹⁷³ *Id.* at 502–03.

¹⁷⁴ See *Barker*, 407 U.S. at 531.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See 18 U.S.C. § 3161(h) (2012).

¹⁷⁹ See 505 U.S. 647, 653 (1992).

could be arrested.¹⁸⁰ The Drug Enforcement Agency (DEA) later found out that Doggett had been imprisoned in Panama and requested that he be sent back to the United States—the request was never followed up.¹⁸¹ The DEA then made no further attempts to locate Doggett and they were unaware that he moved back to the United States in 1982.¹⁸² After moving back to the United States, Doggett lived openly under his own name, got married, attended college, obtained respectable employment, and did not further violate the law.¹⁸³ It was only when the U.S. Marshall's Service ran credit checks on individuals with outstanding warrants that Doggett was located.¹⁸⁴ He was arrested in September of 1988; eight and a half years after he was indicted.¹⁸⁵ Doggett filed a motion claiming that his Sixth Amendment rights had been violated, but the District Court denied the motion.¹⁸⁶ The Eleventh Circuit Court of Appeals affirmed the District Court finding that Doggett had failed to demonstrate how the delay had prejudiced his ability to defend the charges eight years after they had been filed.¹⁸⁷

The Supreme Court reversed the Eleventh Circuit, holding that the lower court had incorrectly determined that the delay in Doggett's case should not be weighed against the government.¹⁸⁸ It is difficult to imagine a case such as Doggett's making its way to the Supreme Court if challenged under the STA. "We stopped looking for him" would certainly fail to suffice under any of the statutorily justified exceptions to the trial timeline, and it would likely fail to satisfy even the maddeningly vague "ends-of-justice" argument.

3. *Length of Delay*

A third area in which these two laws differ is the approach taken to the length of the delay. The length of the delay is a critical factor in determining whether or not a defendant's right to a speedy trial has been violated. Again, however, the STA takes a different approach from the Sixth Amendment analysis resulting in yet another area where the two should be reconciled to provide consistency in the law.

¹⁸⁰ *Id.* at 647.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *United States v. Doggett*, 906 F.2d 573, 580–82 (11th Cir. 1990).

¹⁸⁸ *Doggett*, 505 U.S. at 657–58.

Barker treats the length of the delay as a threshold for determining whether or not a violation has occurred.¹⁸⁹ The length of the delay is, under *Barker*, considered to be case specific.¹⁹⁰ While it is reasonable to take into account the specific facts of each case in order to determine whether a delay has violated the right to a speedy trial, the reality is that this subjective standard opens the door for inconsistent results.

The STA, on the other hand, provides concrete timelines for the commencement of criminal trials. While less flexible on its face, the STA still provides for the possibility of continuances and delays to the statutorily imposed timeline when the reasons for the delays are justifiable.

V. RECONCILING THE RIGHT TO A SPEEDY TRIAL

Considering the interests, both individual and social, protected by the right to a speedy trial, as well as the differences between the *Barker* analysis and the STA, it seems reasonable that a new test should be established that recognizes the identical aims of both the Sixth Amendment and the STA. To that end, I suggest a new two-pronged test that both streamlines the analysis and considers the interest served by the right to a speedy trial. The first part of the test would require the accused to show that the length of delay was unreasonable. Once the accused proves the unreasonable length of delay, the burden would shift to the government to show that their reason for delaying trial was valid.

A. *Unreasonable Length of Delay*

When a person believes that they have been denied the right to a speedy trial, the burden is, and ought to be, on them to show that the length of the delay is unreasonable. The courts have acknowledged that length of delay is a threshold issue being both presumptively prejudicial¹⁹¹ and dependent on the circumstances of the delay.¹⁹² Congress, on the other hand, has opted for a specified length of time before a delay is considered to be unreasonable.¹⁹³

Both of these approaches have merit; *Barker* because of its flexibility and the STA because of its clarity. An ideal approach would be to combine the best of both, allowing delay to be determined on a case-by-case basis, but setting a precedent that allowed for predictable outcomes.

¹⁸⁹ See *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

¹⁹⁰ *Id.*

¹⁹¹ See *id.*

¹⁹² See *id.* at 530–31.

¹⁹³ See 18 U.S.C. § 3161(c) (2012).

With that in mind, an optimal approach would require that, barring a valid reason for delay, a case should go to trial within a predetermined range of dates. I suggest seventy-five to ninety days.

The reasons for having a range instead of a hard deadline are clear: first, it provides guidance on how long a case may wait before the delay becomes prejudicial; and second, if, at the beginning of the range, an issue prevents the case from being tried, there is a window of time during which the state may address issues (such as a missing or unavailable witnesses) that might otherwise delay a trial. This provides some of the flexibility that would be provided under the *Barker* analysis. At the same time, having a date range provides a degree of certainty that tells both the prosecutor and the defendant that, once the upper limit is reached, the delay is becoming unreasonable.

It may seem that selecting a date range would result in dates that are arbitrary (and that is true to a certain extent). Yet it is no more arbitrary than the seventy days allotted under the STA, but it is also more forgiving with the realities that come with trying a case. Using a date range provides the flexibility necessary to adjust for missing or unavailable witnesses, the finding of new evidence, obtaining delayed results from lab testing, or any of a host of reasons that a trial may be delayed. At the same time, there is a clear idea of when a delay is becoming unreasonable.

B. Valid Reason for Delay

1. Shifting Burden

Unnecessary delay of trial is considered presumptively prejudicial.¹⁹⁴ Because of this, once a defendant can show that a delay caused by the State has been unduly long, the burden should shift to the State to show that its reasons for the delay are valid. The reasons for this are simple: first, the defendant bears the burden of showing that the delay was unnecessarily long, and therefore presumptively prejudicial.¹⁹⁵ Since the prejudice is presumed, the State ought to be required to show why the delay is not prejudicial. Second, criminal defendants have no duty to bring themselves to trial; that duty belongs to the State as does the responsibility of ensuring due process.¹⁹⁶

An argument might be made that this places an undue burden on the State, especially since the burden of proof generally falls on the party

¹⁹⁴ See *Barker*, 407 U.S. at 530.

¹⁹⁵ See *id.* at 529.

¹⁹⁶ See *id.* at 527.

asking for relief. But such an argument fails to account for the reality that preventing a claim that the State has violated a defendant's Sixth Amendment right to a speedy trial can often be managed simply by making a good record. It is not asking too much to require the State to show, on the record, that its reasons for requesting a delay are justified by the unique circumstances of the case.

2. *Reason for Delay*

Once the defendant has shown that the delay is presumptively prejudicial, the burden should shift to the State to show that its reason for delaying trial is valid. Such a showing would necessarily be dependent on the facts of each case; for example, a complex financial crime may encounter delays due to the availability of experts that a typical burglary prosecution may not. At the same time, the valid reasons for delay would likely be similar in each case.

The STA lists various justifiable causes of delay and there is no reason why those causes should not be equally valid under a Sixth Amendment analysis.¹⁹⁷ Additionally, courts could find that other reasons also justify delay including a missing witness,¹⁹⁸ discovery of new evidence, or some other possible reason. Any of these justifications would likely warrant a continuance and not create an unreasonable delay of trial.

C. *A Note About Asserting The Right to a Speedy Trial and Prejudice*

This two-part test would remove two factors of the *Barker* test: (1) the assertion of the right to a speedy trial; and (2) prejudice to the defendant. The first of these factors, asserting the right to a speedy trial, would be removed because there is simply no Constitutional basis for the argument that the text of the Sixth Amendment imposes a requirement that a defendant assert their right to a speedy trial.¹⁹⁹ To come to such a conclusion risks reading the Bill of Rights as a code of criminal procedure, rather than the expounding of the general principles underpinning our legal system. That is something no court should do.²⁰⁰

This two-part test would also remove the *Barker* prejudice factor. Though prejudice is certainly an important issue when considering whether

¹⁹⁷ See 18 U.S.C. § 3161(h) (2012).

¹⁹⁸ See *Barker*, 407 U.S. at 531.

¹⁹⁹ See U.S. CONST. amend. VI, cl. 1–2 (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

²⁰⁰ See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 953–54 (1965).

an accused has been denied a speedy trial, it is also the fact that unreasonable delays are presumptively prejudicial. Because of this presumption of prejudice, an additional showing of prejudice is redundant. Additionally, prejudice is difficult enough to prove; increased costs are the easiest to show, but anxiety is difficult to quantify. As mentioned above, the harm to a defendant's case may not appear until trial itself because of the risk of a witness experiencing memory loss over time.

Another related reason for eliminating the prejudice factor is that many types of prejudice would be addressed while arguing that a delay is unreasonable. One example might be arguing that a key interest in the right to a speedy trial is preventing oppressive pre-trial incarceration and that the delay caused by the State is unreasonable because it has extended the defendant's incarceration by several months past the date that trial would have ended.²⁰¹ Because issues of prejudice are likely to appear in arguing that a delay is unreasonable, there is no benefit to parties or the court in then requiring counsel to rehash those arguments to also show prejudice.

VI. CONCLUSION

The right to a speedy trial is enshrined in the Sixth Amendment, applied to the states via the Fourteenth Amendment, and codified in the STA. Unfortunately, the Sixth Amendment and the STA vary in how they approach determining whether the right to a speedy trial has been violated. The STA was created in order to eliminate some of the ambiguity in the Sixth Amendment, meaning that there ought to be consistency in the analysis of both a claim under the STA, and a claim under the Sixth Amendment. For this reason, it is time to retire the *Barker* test and replace it with a test that accommodates the flexibility of the Sixth Amendment and the clarity of the STA.

²⁰¹ See *Barker*, 407 U.S. at 532 (preventing oppressive pretrial incarceration is one of the three interests considered when determining whether a defendant has been prejudiced).