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Devitalization of the Right to a Speedy Trial: The Per Case Method v. the Per Se Theory.

J. Michael Myers

DEVITALIZATION OF THE RIGHT TO A SPEEDY TRIAL: THE "PER CASE" METHOD v. THE "PER SE" THEORY

J. MICHAEL MYERS

Emanating initially from the Magna Carta, the protection afforded the criminally accused of a right to a speedy trial has ascended through history to its present day status as a fundamental and basic privilege. This assurance against excessive pretrial delay as guaranteed by the sixth amendment has been adopted by all 50 states.[1] Although the United States Supreme Court has infrequently been called upon to adjudicate disputes arising under speedy trial claims,[2] there remains considerable confusion as to what constitutes a deprivation of the right to a speedy trial. The gravamen of the problem is that the Court has consistently avoided prescribing a doctrine that would circumvent much of the maze in which the right to a speedy trial is embroiled. Although this sixth amendment assurance has survived almost 300 years of American jurisprudence, there has never been a uniform standard by which to measure speedy trial claims. While the state legislatures and courts have been active in prescribing limitation periods in which to bring the criminal defendant to trial, the federal courts are only now in the process of confronting the problem. The inability of the Supreme Court to pronounce a specific doctrine has shifted this burden to the lower federal courts. The innovators among the circuits, in encountering this challenge, have proposed and adopted plans by which to facilitate the prompt disposition of criminal cases. Limitation periods in which to bring the accused to trial, and the similar approach in which the defendant is prejudiced "per se" if he is not brought to trial within a certain time period have been advocated by the courts. In adopting defined standards by which to determine speedy trial claims, a constant and uniform application is effected in which the same standards are applied to each presented case. These methods are preferable to the generally applied "per case" theory, under which the courts have been compelled to adjudicate each case on an *ad hoc* basis, employing varied methods with often unjust results. It is the purpose of this paper to reveal the injustices generated by the continued use of the presently administered "per case" method, and to describe the beneficial aspects of the en-

1. Klopfer v. North Carolina, 386 U.S. 213, 226, 87 S. Ct. 988, 995, 18 L. Ed. 2d 1, 9 (1967).

2. Barker v. Wingo, 407 U.S. 514, —, 92 S. Ct. 2182, 2184, 33 L. Ed. 2d 101, 108 (1972).

actment of consistent principles that would diminish the plight in which the courts are currently enmeshed when dealing with a contention of denial of the right to a speedy trial.

SPEEDY TRIAL GENERALLY

On the surface, the right to a speedy trial would seem to be a corporeal term which has long been one of the most fundamental rights granted under the Constitution. However, upon application, severe difficulties arise, as there has never been a valid definition of speedy trial. The greatest problem has been that of time—when is the criminal defendant deprived of a speedy trial? There have been as yet no answers to this query, although the courts are presently weighing possible alternatives to apply to speedy trial claims. Without the enactment of a defined standard, the right to a speedy trial is seriously endangered. Thus the alternatives—the vague "per case" method or balancing test and the specific "per se" approach—have taken on an exceptional importance, and it is imperative to the preservation of the speedy trial right that the courts make the proper choice. To gain a greater understanding of these standards and of the right to a speedy trial generally, it is necessary to examine the foundations under which this sixth amendment right has arisen.

Foundation of the Sixth Amendment

The sixth amendment provides for a speedy trial in all criminal prosecutions.[3] It has been stated that the right to a speedy trial "has its roots in the very foundation of our English law heritage"[4] and is as fundamental as any of the rights bestowed by the sixth amendment.[5] Although the intentions of the founders in enacting the sixth amendment are not known,[6] such has been constructed by an examination of the legal literature which they then had at their access.[7] Yet there have been no concrete interpretations as to what is meant in the bestowal of a right to a speedy trial, although it has been concluded that "[t]he right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed."[8] Even this definition suffers by the lack of defining *promptly*, which is easily equated with *speedy*. Therefore it may be expedient to look at the criteria generally utilized in formulating a decision as to

3. U.S. CONST. amend. VI.
4. Klopfer v. North Carolina, 386 U.S. 213, 223, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1, 8 (1967).
5. *Id.* at 223, 87 S. Ct. at 993, 18 L. Ed. 2d at 8.
6. *Id.* at 225, 87 S. Ct. at 994, 18 L. Ed. 2d at 9.
7. *Id.* at 225, 87 S. Ct. at 994, 18 L. Ed. 2d at 9.
8. Dickey v. Florida, 398 U.S. 30, 37, 90 S. Ct. 1564, 1568, 26 L. Ed. 2d 26, 32 (1970).

whether or not the criminally accused has been denied his right to a speedy trial.

The Role of Prejudice in Speedy Trial Determination

Most jurisdictions agree that prejudice is an essential element of a speedy trial claim.[9] The Supreme Court defined the purpose of the sixth amendment as being:

> [T]o prevent *undue and oppressive incarceration* prior to trial, to minimize *anxiety and concern accompanying public accusation* and to limit the possibilities that *long delay will impair the ability of an accused to defend himself.*[10]

These elements have generally been held to be the tests in determining whether or not the defendant has sustained prejudice resulting from delay.[11] It has also been stated that lengthy prosecution may subject an accused to "public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes."[12] Yet concrete evidence of prejudice is often difficult to display.[13] The task of proving actual prejudice is feasible when the defendant alleges prejudice by way of "undue and oppressive incarceration prior to trial"[14] or through "anxiety and concern."[15] However, the defendant is under an obvious detriment when making an allegation that there has been an impairment of his right to defend himself. The difficulty of measuring the cost of delay in terms of the dimmed memories and unavailability of witnesses was expressed in *Dickey v. Florida*,[16] and it was concluded that proof of the materiality of once available witnesses and documents would be almost impossible.[17]

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9. *See* United States v. Gray, 429 F.2d 1323 (4th Cir.), *cert. denied*, 400 U.S. 960 (1970); United States v. Orsinger, 428 F.2d 1105, 1114-15 (D.C. Cir.), *cert. denied*, 400 U.S. 831 (1970); Brooks v. United States, 423 F.2d 1149 (8th Cir.), *cert. denied*, 400 U.S. 872 (1970); Needel v. Scafati, 412 F.2d 761 (1st Cir.), *cert. denied*, 396 U.S. 861 (1969); Oden v. United States, 410 F.2d 103 (5th Cir.), *cert. denied*, 396 U.S. 863 (1969); Guillory v. Wilson, 402 F.2d 34 (9th Cir. 1968).

10. United States v. Ewell, 383 U.S. 116, 120, 86 S. Ct. 773, 776, 15 L. Ed. 2d 627, 630 (1966) (emphasis added).

11. United States v. Colitto, 319 F. Supp. 1077, 1078 (E.D.N.Y. 1970).

12. Klopfer v. North Carolina, 386 U.S. 213, 222, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1, 7 (1967).

13. Dickey v. Florida, 398 U.S. 30, 53, 90 S. Ct. 1564, 1576, 26 L. Ed. 2d 26, 41 (1970).

14. *See generally* United States v. Strunk, 467 F.2d 969, 971 (7th Cir. 1972); Coleman v. United States, 442 F.2d 150 (D.C. Cir. 1971); United States v. Wynn, 54 F.R.D. 72, 75 (E.D. Pa. 1971).

15. Clark v. Oliver, 346 F. Supp. 1345, 1350 (E.D. Va. 1972). The court stated that "at the very least he [the defendant] was prejudiced by virtue of living under a cloud of suspicion and anxiety."

16. 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970).

17. *Id.* at 53, 90 S. Ct. at 1577, 26 L. Ed. at 41.

The concurring opinion of Mr. Justice Brennan in *Dickey* expressly directed attention to the role of prejudice in relation to the constitutional guarantee of speedy trial and the complexities generated by it. Justice Brennan, in recognizing prejudice to be an essential element of speedy trial violations,[18] urged that there be an assumption of prejudice in favor of the accused upon a showing of denial of rapid prosecution.[19] Mr. Justice Brennan concluded:

> The difficulty in such an approach, of course, lies in determining how long a prosecution must be delayed before prejudice is assumed. It is likely that generalized standards would have to be developed to indicate when during the course of a delay there arises a probability of substantial prejudice. Until delay exceeds that point, the burden most probably would remain on the accused to show that he was actually harmed.[20]

Nevertheless the Court in *Dickey* declined to assert that an unreasonable and unnecessary delay of almost *8 years*, accompanied by numerous demands by the defendant that he be brought to trial, constituted prejudice "per se."[21]

The Court was confronted with similar difficulties in *United States v. Marion,*[22] and expanded its previous position by stating that "[p]ossible prejudice is inherent in any delay, however short."[23] Yet the Court went on to justify a *3-year* delay between indictment and trial as not being "sufficient reason to wrench the Sixth Amendment from its proper context."[24] Prejudice to the defendant is only one of the criteria to be applied in determining speedy trial claims, and without some degree of delay, prejudice is insignificant.

Delay as an Essential Element in Denial of the Right to a Speedy Trial

Although delay has taken on a secondary import to the role of prejudice, it is nevertheless a necessary ingredient for a speedy trial claim. The Supreme Court, in *Beavers v. Haubert,*[25] noted that "[t]he right of a speedy trial is necessarily relative. It is consistent with delays . . . . It does not preclude the rights of public justice."[26] This statement was subsequently qualified by the Court as meaning that the delay should be neither purposeful nor oppressive[27] and that the fundamental element is orderly expedition

18. *Id.* at 53, 90 S. Ct. at 1576, 26 L. Ed. 2d at 41.
19. *Id.* at 55, 90 S. Ct. at 1577, 26 L. Ed. 2d at 42.
20. *Id.* at 55, 90 S. Ct. at 1577, 26 L. Ed. 2d at 42.
21. *Id.* at 38, 90 S. Ct. at 1569, 26 L. Ed. 2d at 32.
22. 404 U.S. 1, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971).
23. *Id.* at 14, 92 S. Ct. at 464, 30 L. Ed. 2d at 479.
24. *Id.* at 14, 92 S. Ct. at 464, 30 L. Ed. 2d at 479.
25. 198 U.S. 77, 25 S. Ct. 573, 49 L. Ed. 950 (1905).
26. *Id.* at 87, 25 S. Ct. at 576, 49 L. Ed. at 954.
27. Pollard v. United States, 352 U.S. 354, 361, 77 S. Ct. 481, 486, 1 L. Ed. 2d 393, 399 (1957).

of the case and not mere speed.[28] Even though it has been generally held that mere time alone will not suffice in a contention of denial of speedy trial,[29] it has been observed that passage of time may dangerously reduce the defendant's capacity to counter the charges of the prosecution.[30]

Wide discrepancies have emerged among the courts in their attempts to calculate the length of time that shall be deemed excessive,[31] depending generally on the circumstances of each case. It is necessary, therefore to examine what delay on the part of the prosecution is to be considered reasonable.

There are no set standards by which to measure reasonable delay, but instead a myriad of decisions based upon diverse circumstances. Obviously the delay must not be purposeful or oppressive,[32] but otherwise any delay seems reasonable, no matter how insubstantial the reason. Factors such as the judge being committed to another case,[33] illness of the judge,[34] shortage of prosecuting attorneys,[35] lack of a judge in the district,[36] and the death of the judge[37] have been held to constitute sufficient cause for the delay. However, mere inconvenience in scheduling the trial[38] and insufficient funds to transport the defendant to the place of trial[39] have been held not to be

28. Smith v. United States, 360 U.S. 1, 10, 79 S. Ct. 991, 997, 3 L. Ed. 2d 1041, 1048 (1959).

29. United States v. DeMasi, 445 F.2d 251, 255 (2d Cir. 1971); United States v. DeCosta, 435 F.2d 630, 632 (1st Cir. 1970).

30. Dickey v. Florida, 398 U.S. 30, 42, 90 S. Ct. 1564, 1571, 26 L. Ed. 2d 26, 34 (1970).

31. *See, e.g.*, United States v. Strunk, 467 F.2d 969, 972 (7th Cir. 1972) (finding that a delay of 8 months was excessive). *Contra,* Hardy v. United States, 343 F.2d 233, 234 (D.C. Cir. 1964) (holding that a delay of 8 months was not excessive).

32. *See* Brady v. Superintendent, 443 F.2d 1307 (4th Cir. 1971); United States v. Butler, 426 F.2d 1275, 1277 (1st Cir. 1970) (finding that "the delays must serve some legitimate purpose"); Brooks v. United States, 423 F.2d 1149 (8th Cir. 1970); United States v. Dooling, 406 F.2d 192 (2d Cir. 1969); Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965); United States v. Baron, 336 F. Supp. 303 (S.D.N.Y. 1971); *cf.* United States v. Cartano, 420 F.2d 362, 363 (1st Cir.), *cert. denied,* 397 U.S. 1054 (1970), wherein it is stated that "the denial of a motion to dismiss . . . for a delay which falls short of a constitutional defect, will be reversed only on a showing of an abuse of discretion." United States v. DeCosta, 435 F.2d 630, 632 (1st Cir. 1970). The court held that the defendant must show improper motivation on the part of the government.

33. Hodges v. United States, 408 F.2d 543, 551 (8th Cir. 1969).

34. *Id.* at 552.

35. United States v. Heard, 443 F.2d 856 (6th Cir.), *cert. denied,* 404 U.S. 850 (1971).

36. United States v. Williams, 416 F.2d 4, 9 (5th Cir. 1969), *cert. denied,* 397 U.S. 968 (1970).

37. United States v. Jackson, 369 F.2d 936, 939 (4th Cir. 1966).

38. United States v. Polley, 453 F.2d 400, 401 (5th Cir. 1971).

39. Beck v. United States, 442 F.2d 1037, 1038 (5th Cir. 1971); *cf.* Falgout v. Trujillo, 270 F. Supp. 685, 688 (D. Colo. 1966) in which the court, in stating that "there has to be some point at which the period of delay becomes so intolerable that it is not enough that one is being treated the same as other defendants," found that

good cause for delay. Thus, as with the tests for prejudice and length of delay, the courts are hampered without the benefit of defined rules on which to base their judgments. A look at the attempts of the federal courts to apply the indefinite standards of the "per case" method, and a view of the benefits in the utilization of the "per se" method should aid in an understanding of the difficulties involved.

THE "PER CASE" APPROACH IN DETERMINING WHETHER OR NOT THE CRIMINALLY ACCUSED HAS BEEN DENIED THE RIGHT TO A SPEEDY TRIAL

Lacking the benefit of a standard as to what comprises a denial of the right to a speedy trial, the courts have had to grapple with the problem employing a "per case" method in which each case is decided on its own facts. Although the methods applied have been similar, the resulting interpretations have varied considerably. Prejudice to the defendant is generally considered to be one of the most crucial criteria for determining impermissible pretrial delay,[40] although some jurisdictions have prescribed a rule whereby a showing of prejudice is not necessary when the criminal defendant asserts a speedy trial claim.[41] However, in those jurisdictions basing the determination of speedy trial claims on prejudice, even the definition of "prejudice" has proven to be a thorny problem. According to some constructions, the criminal defendant may not be considered prejudiced unless there has been a purposeful oppression or prejudice to the ability of the accused to defend himself at trial.[42]

The Federal Courts

The "per case" approach has been almost universally applied by the federal courts, with a wide disparity of results. Undue delays that have seen the death of witnesses,[43] refusals by witnesses to testify[44] and faded memories of witnesses[45] have been determined not to be prejudicial to the defendant's case. However, the court in *United States v. Johnston,*[46] while admitting that "prejudice may be presumed . . . from the fact that the passage of

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it is not an excuse that the court is conducting its business in an orderly manner. *Id.* at 688.

40. United Staes v. Alo, 439 F.2d 751, 755 (2d Cir.), *cert. denied,* 404 U.S. 850 (1971). *See also* United States v. Colitto, 319 F. Supp. 1077, 1079 (E.D.N.Y. 1970).

41. United States v. Lustman, 258 F.2d 475, 477 (2d Cir. 1958).

42. Morton v. Haynes, 332 F. Supp. 890, 893 (E.D. Mo. 1971); *cf.* United States v. Johnston, 328 F. Supp. 100, 110 (S.D.N.Y. 1971). The court held that there must be a "compelling showing of prejudice."

43. Woody v. United States, 370 F.2d 214, 217 (D.C. Cir. 1966).

44. *Id.* at 217.

45. Murray v. Wainwright, 450 F.2d 465, 471 (5th Cir. 1971).

46. 328 F. Supp. 100 (S.D.N.Y. 1971).

time will have dimmed the memory of witnesses,"[47] nevertheless found that the defendant had not been deprived of his right to a speedy trial even though he had been incarcerated in excess of *8 years* between indictment and trial.[48] Like decisions have been rendered even though the pretrial delay has been caused by administrative blunders in the district attorney's office[49] and by the trial court's erroneous assumption that it had no jurisdiction to proceed.[50] It has been held, however, that a negligent prosecutorial delay may violate the constitutional guarantees to a speedy trial.[51] Thus it may be seen that the federal courts have found it difficult to discern if and upon what circumstances the criminal defendant has been prejudiced by an excessive delay.

The various circuits have also adhered to the rule that a mere lapse of time is not sufficient to establish a violation of the speedy trial right.[52] In *United States v. Mancusi*[53] the court, in noting that dismissal has rarely been granted for a delay over several years,[54] stated that it knew of "no case . . . in which a delay of less than a year has been thought to satisfy the '*length of delay*' requirement."[55] Moreover it has been found that there are cases that demand preparation in excess of 34 months, and some situations may warrant a much longer period,[56] with the burden on the defendant to show that he has been denied his right to a speedy trial.[57] A few circuits have followed this theory:

> [A]ny appreciable delay between arrest and trial *in and of itself* raises the issue [of denial of the defendant's right to a speedy trial] and at the very least places on the prosecution a heavy burden of demonstrating that the defendant's Sixth Amendment right has not been abridged.[58]

The length of delay requirement has been clothed in terms such as "appreciable delay,"[59] "inexcusable delay,"[60] and "excessive delay"[61]—vague measures to apply in deciphering whether or not a criminal defendant has been dispossessed of a constitutionally guaranteed right. Yet both the federal courts and the United States Supreme Court have been hesitant to adopt a

47. *Id.* at 110.
48. *Id.* at 110.
49. Stuart v. Craven, 456 F.2d 913, 915 (9th Cir. 1972).
50. United States v. James, 459 F.2d 443, 444-45 (5th Cir. 1972).
51. Hanrahan v. United States, 348 F.2d 363, 368 (D.C. Cir. 1965).
52. Fleming v. United States, 378 F.2d 502, 504 (1st Cir. 1967).
53. 412 F.2d 88 (2d Cir. 1969).
54. *Id.* at 90.
55. *Id.* at 90 (emphasis added).
56. United States v. Mark II Electronics, 283 F. Supp. 280, 285 (E.D. La. 1968).
57. *See* United States v. DeCosta, 435 F.2d 630, 632 (1st Cir. 1970); United States v. Dooling, 406 F.2d 192, 196 (2d Cir. 1969); United States v. Pinero, 329 F. Supp. 992, 994 (S.D.N.Y. 1971).
58. Clark v. Oliver, 346 F. Supp. 1345, 1349 (E.D. Va. 1972) (emphasis added).
59. *Id.* at 1349.
60. United States v. Blauner, 337 F. Supp. 1383, 1390 (S.D.N.Y. 1971).
61. United States v. Colitto, 319 F. Supp. 1077, 1079 (E.D.N.Y. 1970).

prejudice "per se" approach,[62] which would alleviate much of the doubt and facilitate the rights of both the defendant and the public, in recognizing a stated time period of limitation in which the criminally accused must be brought to trial.

BARKER V. WINGO

The Supreme Court had the opportunity to allay much of the doubt and perplexity in which the right to a speedy trial was immersed when it recently decided the case of *Barker v. Wingo*.[63] In *Barker* the defendant and one Silas Manning were accused in the beating death of an elderly couple on July 20, 1958. Barker and Manning were indicted shortly thereafter, and Barker's case was set for trial approximately 1 month after the issuance of the indictment. The state, having the stronger case against Manning, believed Barker could not be convicted unless Manning was first convicted. This they set out to do, obtaining the first of what eventually resulted in 16 continuances of the Barker trial. More than 4 years later, Manning was convicted on both counts. Even so, numerous delays followed, all occasioned by the prosecution, and Barker was brought to trial only after *5-year* prorocation since issuance of the indictment. Upon trial, Barker was convicted and given a life sentence. He appealed, contending his right to a speedy trial had been violated.

The Court, in distinguishing the right to a speedy trial as being "generically different from any of the other rights enshrined in the Constitution for the protection of the accused,"[64] discussed the right at length and set out the criteria by which the courts should ascertain whether a defendant may be considered as having been denied his right to a speedy trial.[65] In citing *United States v. Simmons*,[66] the Court stated the four factors to be considered as: length of delay, the reason for the delay, the defendant's assertion of his right[67] and prejudice to the defendant.[68] The Court went on to state that these factors were not to be considered individually, but instead should be taken together along with other circumstances that might be relevant to the case at hand.[69]

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62. *See, e.g.*, Stuart v. Craven, 456 F.2d 913, 915 (9th Cir. 1972). *See also* United States v. Hanna, 41 U.S.L.W. 2163 (D. Del. Oct. 3, 1972); United States v. Daley, 454 F.2d 505, 508 (1st Cir. 1972).

63. 407 U.S. 514, —, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

64. *Id.* at —, 92 S. Ct. at 2186, 33 L. Ed. 2d at 110.

65. *Id.* at —, 92 S. Ct. at 2192-93, 33 L. Ed. 2d at 117-18.

66. 338 F.2d 804, 807 (2d Cir.), *cert. denied*, 380 U.S. 383 (1965).

67. Barker v. Wingo, 407 U.S. 514, —, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972), wherein the Court stated that "[t]he more serious the deprivation, the more likely the defendant is to complain." However, the Court went on to weaken the impact of this standard by rejecting the rule that a defendant who fails to demand a speedy trial forever waives his right. *Id.* at —, 92 S. Ct. at 2191, 33 L. Ed. 2d at 115.

68. *Id.* at —, 92 S. Ct. at 2192, 33 L. Ed. 2d at 117.

69. *Id.* at —, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118.

In reference to the length of the delay requirement, the Court discussed the suggestion that a method be adopted wherein a criminal defendant must be offered a trial within a specified time period.[70] While the Court recognized that the adoption of such a standard would clarify when there was an infringement of the right as well as aid the court's application of it,[71] the Court found it impossible to determine when the right had been denied.[72] The Court concluded that there was "*no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months.*"[73] While endorsing such an approach for the states,[74] the Court nevertheless adopted a balancing ("per case") test in which the aforementioned criteria would be applied in weighing the conduct of both the prosecution and the defendant.[75]

Thus the Court in effect adopted a "per case" method in which different weights would be assigned to different reasons[76]—a standard almost identical to the procedure previously applied to contentions by criminal defendants alleging a denial of the right to a speedy trial. In accepting the balancing test and rejecting the defined limitation period ("per se" method) in which a criminally accused would be brought to trial, the Court promulgated the defects that have created the quandary among the courts in the application of the right to a speedy trial, and avoided prescribing an approach that would result in a method that could be uniformly and specifically administered. Unlike the Supreme Court, the courts of the military have been rapid in formulating an exact standard to apply in speedy trial claims.

The Military Courts

The right to a speedy trial is one of the sixth amendment rights which has inured to an accused in the military.[77] The courts of the military originally adopted the "per case" method, holding that "the interval of time between initial confinement in connection with the charge and the date of trial is not the sole determinant of the issue, but only one of the factors to be considered,"[78] and rejected the "per se" approach.[79]

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70. *Id.* at —, 92 S. Ct. at 2188, 33 L. Ed. 2d at 112.
71. *Id.* at —, 92 S. Ct. at 2188, 33 L. Ed. 2d at 112.
72. *Id.* at —, 92 S. Ct. at 2187, 33 L. Ed. 2d at 112.
73. *Id.* at —, 92 S. Ct. at 2188, 33 L. Ed. 2d at 113.
74. *Id.* at —, 92 S. Ct. at 2191, 33 L. Ed. 2d at 113.
75. *Id.* at —, 92 S. Ct. at 2191, 33 L. Ed. 2d at 116.
76. *Id.* at —, 92 S. Ct. at 2192, 33 L. Ed. 2d at 117.
77. United States v. Hounshell, 21 C.M.R. 129 (1955). *See also* United States v. Cluff, 41 C.M.R. 1017 (1970).
78. United States v. Hawes, 40 C.M.R. 176, 177 (1969). *See generally* United States v. Parish, 38 C.M.R. 209 (1968); United States v. Callahan, 27 C.M.R. 230 (1959).
79. United States v. Pierce, 41 C.M.R. 225 (1970).

However, the military courts have more recently revised their standard, finding that undue pretrial delay may become incidental and unusual punishment.[80] The court in *United States v. Burton*,[81] while expressing a hesitancy to apply rigid time limits,[82] nevertheless found that in some situations the length and circumstances of pretrial confinement can be prejudicial in themselves.[83] The court concluded that "in the absence of defense requests for continuance, a presumption of . . . violation will exist when pretrial confinement exceeds three months."[84] In applying this presumption, a heavy burden is placed on the prosecution to show diligence, and in the absence of such a showing, charges will be dismissed.[85] To discharge this burden, the prosecution must show that it has proceeded with reasonable diligence in bringing the charge to trial.[86] This is done when the government accounts for the period of time from the date the accused was restrained or from the date charges were preferred, whichever is earliest.[87] It has been held that where the prosecution offers no explanation for the delay there is a denial of the right to a speedy trial.[88]

Delays caused by complex investigations,[89] detention of the accused by civil authorities,[90] the need of additional investigation[91] and investigation of unrelated charges[92] have been held to be good reasons for excessive pretrial dentention. However, delays resulting in the deprival of the personal testimony of witnesses[93] and the processing of additional charges[94] have been held not to be valid reasons. The government may not excuse lengthy delay by inadvertent negligence[95] or good faith in prosecuting the defendant.[96] It has been determined that the yardstick for measuring denial of the speedy trial right is reasonable diligence in bringing the criminal defendant to trial.[97]

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80. United States v. Jameson, 42 C.M.R. 929, 932 (1970).
81. 44 C.M.R. 166 (1971).
82. *Id.* at 172. *See also* United States v. Goode, 38 C.M.R. 382 (1968).
83. *Id.* at 171; *see* United States v. Keaton, 40 C.M.R. 212 (1969).
84. *Id.* at 172.
85. *Id.* at 172.
86. United States v. Owes, 44 C.M.R. 591, 593 (1971). *See also* United States v. Tibbs, 35 C.M.R. 322 (1965).
87. *Id.* at 593; *see* United States v. Williams, 30 C.M.R. 81 (1961); United States v. Callahan, 27 C.M.R. 230 (1959).
88. United States v. Hubbard, 44 C.M.R. 185, 187 (1971).
89. United States v. Safford, 40 C.M.R. 528 (1970).
90. United States v. Keaton, 40 C.M.R. 458 (1970).
91. United States v. Dunn, 44 C.M.R.. 929, 934 (1972).
92. United States v. Owes, 44 C.M.R. 591, 594 (1971). *See also* United States v. Ray, 43 C.M.R. 171 (1971); United States v. Brakefield, 43 C.M.R. 828 (1971).
93. United States v. DuPree, 42 C.M.R. 681, 682 (1970).
94. United States v. Phare, 44 C.M.R. 348, 350-51 (1971).
95. United States v. Ervin, 42 C.M.R. 289, 290 (1970).
96. *Id.* at 290.
97. United States v. Lutz, 44 C.M.R. 518, 520 (1971).

The military courts have in effect formulated a blending of the "per se" and "per case" theories, placing a heavy burden on the prosecution after delay has exceeded 3 months, but allowing the prosecution to discharge this burden by a showing of reasonable diligence. While the military courts have been rapid to prescribe easily applicable standards by which to adjudicate speedy trial claims, the state and federal courts are only presently searching for a uniform method, and the United States Supreme Court has made an outright rejection of such an approach.

THE "PER SE" APPROACH IN DETERMINING WHETHER OR NOT THE CRIMINALLY ACCUSED HAS BEEN DENIED THE RIGHT TO A SPEEDY TRIAL

Each of the 50 states has embodied the right to a speedy trial within their individual state statutes[98] and the fourteenth amendment makes the sixth amendment guarantee of a right to a speedy trial applicable to the states.[99] The Supreme Court, in rendering the *Barker* decision, stated that "[t]he states . . . are free to prescribe a reasonable period consistent with constitutional standards,"[100] while rejecting the adoption of such a standard for the federal courts.[101] Thirty-four state legislatures have enacted statutes limiting the period in which a criminal defendant may be brought to trial,[102]

98. Klopfer v. North Carolina, 386 U.S. 213, 226, 87 S. Ct. 988, 995, 18 L. Ed. 2d 1, 9 (1967).

99. *Id.* at 222, 87 S. Ct. at 993, 18 L. Ed. 2d at 8.

100. Barker v. Wingo, 407 U.S. 514, —, 92 S. Ct. 2182, 2191, 33 L. Ed. 2d 101, 113 (1972).

101. *Id.* at —, 92 S. Ct. at 2191, 33 L. Ed. 2d at 113.

102. ARK. STAT. ANN. § 43-1708 (1964) (If incarcerated, the defendant must be brought to trial by the second court term after indictment); *Id.* § 43-1709 (1964) (If on bail, the defendant must be brought to trial by the third court term after indictment); CAL. GEN. LAWS ANN. § 1382 (Deering 1970) (defendant must be brought to trial within 60 days after the finding of the indictment); COLO. REV. STAT. ANN. § 39-1-3 (1963) (defendant must be brought to trial within 3 years after indictment); DEL. CODE ANN. tit. 10, § 6910 (1953) (second term after indictment); FLA. STAT. ANN. § 3.191 (Supp. 1972) (90 days for a misdemeanor; 180 days for a felony); GA. CODE ANN. § 27-1901 (1972) (next term after indictment); HAWAII REV. LAWS § 635-3 (1968) (6 years after indictment); IDAHO CODE ANN. § 19-3501 (1948) (next term after indictment); ILL. REV. STAT. ch. 38, § 103-5 (1970) (if incarcerated, 120 days from the date taken into custody; if on bail, 160 days from the date the defendant demands trial); IND. ANN. STAT. § 9-1402 (1956) (two terms after indictment if incarcerated); *Id.* § 9-1403 (three terms after indictment if on bail); IOWA CODE ANN. § 795.2 (Supp. 1973) (60 days after indictment); KAN. STAT. ANN. § 62-1301 (1964) (same term as indictment); ME. REV. STAT. ANN. tit. 15, § 1201 (1964) (next term after indictment); MASS. ANN. LAWS ch. 277, § 72 (1968) (the defendant must be brought to trial within 6 months if incarcerated); MINN. STAT. ANN. § 611.04 (1964) (next term of court after indictment); MO. ANN. STAT. § 545.890 (1953) (second court term after indictment); MONT. REV. CODES ANN. § 95-1703 (Supp. 1971) (6 months after indictment); NEB. REV. STAT. § 29-1202 (1965) (second term of court after indictment); NEV. REV. STAT. § 178.495 (1963) (60 days after indictment); N.M. STAT. ANN. § 41-23-37 (Supp. 1972) (6 months after indictment);

thus adopting an approach whereby the criminal defendant is prejudiced per se if the stated period is violated and good cause is not shown for the excessive delay.[103]

These statutes, implementing state constitutional provisions,[104] define speedy trial in quantitative terms of days,[105] months[106] and court terms.[107] By the enactment of such limitation periods the States provide for a more accelerated pretrial procedure than the federal courts have required under the indefinite standard of the sixth amendment. Numerous state statutes bestow rights to those incarcerated and those free on bail, and the relief is acquittal of the charge;[108] other statutes benefit only those held in actual custody, and the relief is release on bail or recognizance.[109]

One jurisdictional treatment of the statutory limitation period is that of a strict construction and unless the prosecution can present a good excuse for the unreasonable delay, the indictment against the criminal defendant is dismissed.[110] Other jurisdictions interpret the limitation periods with laxity,

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N.Y. CONSOLIDATED LAWS § 30330 (McKinney Supp. 1973) (90 days from commencement of a criminal action where the defendant is accused of a felony; 6 months from commencement of a criminal action where the defendant is accused of a misdemeanor); N.C. GEN. STAT. § 15-10 (1965) (second court term after indictment); N.D. CENT. CODE § 29-18-01 (1960) (next term after indictment); OHIO REV. CODE ANN. § 2945.71 (Baldwin 1971) (two terms after indictment); OKLA. STAT. ANN. tit. 22, § 812 (1969) (next court term after indictment); R.I. GEN. LAWS ANN. § 12-13-7 (Supp. 1972) (6 months after indictment); S.C. CODE ANN. § 17-509 (1962) (second court term after indictment); TENN. CODE ANN. § 40-2102 (1955) (next court term after indictment); TEX. CODE CRIM. PROC. art. 32.01 (1966) (next term of court after taken into custody if no indictment is presented); UTAH CODE ANN. § 77-51-1 (1953) (next term after indictment); VA. CODE ANN. § 19.1-191 (1960) (third court term after indictment); WASH. REV. CODE ANN. § 10.46.010 (1961) (60 days after indictment); WIS. STAT. ANN. § 955.10 (1958) (next term after indictment); WYO. STAT. ANN. § 7-236 (1957) (next term after imprisonment).

103. *See, e.g.*, IOWA CODE ANN. § 795.2 (Supp. 1973); MINN. STAT. ANN. § 611.04 (1964); MONT. REV. CODES ANN. § 95-1703 (Supp. 1971).

104. ARIZ. REV. STAT. § 13-161 (1956); MINN. STAT. ANN. art. 1, § 6 (1946). OKLA. STAT. ANN. tit. 22, § 13 (1969); TENN. CODE ANN. § 40-2001 (1955); TEX. CONST. art. I, § 10 stating that "[i]n all criminal prosecutions the accused shall have a speedy public trial by an impartial jury." *See also* TEX. CODE CRIM. PROC. art. 1.05 (1966).

105. FLA. STAT. ANN. § 3.191 (Supp. 1972).

106. MASS. ANN. LAWS ch. 277, § 72 (1968).

107. GA. CODE ANN. § 27-1901 (1972).

108. *E.g.*, ME. REV. STAT. ANN. tit. 15, § 1201 (1964).

109. IOWA CODE ANN. § 795.2 (Supp. 1973).

110. *See* State v. Mathis, 319 P.2d 134, 136 (Utah 1957) wherein it is stated that "the statutory limitations . . . are maximums, and . . . anyone accused of a crime, especially one incarcerated awaiting trial, is entitled under our law to have his case tried with all possible dispatch, if he so desires." *See also* Blevins v. State, 149 S.E.2d 423, 425 (Ga. Ct. App. 1966) which, in citing 21 AM. JUR. *Criminal Law* § 242 (1965), construed the intent of the limitation statute as being to prevent the defendant "from being exposed to the hazard of trial after the lapse of so great a time that the means of proving his innocence may have been lost."

often reluctant to allow the defendant dismissal.[111] The reasoning within the jurisdictions varies considerably, from the theory that speedy trial does not mean immediate trial but rather trial without unreasonable and unnecessary delay,[112] to rulings based on the supposition that "[t]he mere passage of time alone . . . is insufficient to reverse and dismiss charges because of the denial of a right of a speedy trial."[113] Such decisions have endorsed delays in excess of 5 years.[114] Obviously these jurisdictions, although theoretically bound by the statutory provisions, are acting on a "per case" approach in viewing the circumstances of each presented case.

Since the *Barker* decision a number of the state courts have employed the recommended balancing test,[115] although at least one jurisdiction, Pennsylvania, has denounced such a standard. In *Commonwealth v. Hamilton*[116] the court stated that "experience has demonstrated that under this type of approach [the balancing test], there has been little success in eliminating criminal backlogs in populous counties where delays and the evils they create are most severe."[117] The court thus repudiated the balancing test and adopted a stated time period within which the criminally accused must be

111. *See* State v. Falter, 495 P.2d 694, 695 (Wash. Ct. App. 1972) (emphasis added) in which the court declared that "when the legislature enacted the *60-day* rule, it did not conceive nor contemplate that the limitation so established should become an inflexible yardstick by which the constitutional guarantees to a speedy trial of felony charges would be measured." *See also* State v. Jennings, 195 N.W.2d 351 (Iowa 1972); State v. Peterson, 189 N.W.2d 891 (Iowa 1971).

112. State v. Frith, 194 So. 1, 5 (La. 1940); *see* Clark v. Commonwealth, 293 S.W.2d 465 (Ky. Ct. App. 1956), *cert. denied,* 353 U.S. 923 (1957); State v. Keefe, 98 P. 122, 126 (Wyo. 1908); *cf.* People v. Lanigan, 140 P.2d 24, 30 (Cal. 1943) (finding that docket congestion is a sufficient ground for delay); State v. Goodmiller, 386 P.2d 365, 367 (Idaho 1963); State v. Campbell, 85 P. 784, 787 (Kan. 1906) (standing for the proposition that a delay made necessary by the usual and ordinary procedure in criminal cases is permissible); State v. Kuhnhausen, 272 P.2d 225, 241 (Ore. 1954); State v. Lee, 224 P. 627, 628 (Ore. 1924); State v. Pratt, 107 N.W. 538, 539 (S.D. 1906) (finding that postponement of trial because of the absence of a material prosecution witness does not violate the defendant's constitutional rights); Denham v. Robinson, 77 S.E. 970, 974 (W. Va. 1913) (lack of time during the remainder of the term to try a case on its merits constitutes unavoidable delay). *But cf.* State v. Carillo, 16 P.2d 965, 966 (Ariz. 1932) (finding that delay is not warranted on a contention that there were not enough cases to justify summoning a trial jury); Castle v. State, 143 N.E.2d 570, 573 (Ind. 1957) (finding that delays beyond the period required by an implementing statute are not justified by inadequate court room facilities).

113. Courtney v. State, 472 S.W.2d 151, 154 (Tex. Crim. App. 1971). *But see* Editorial, 7 TEX. BAR J. 5 (1944) stating that "[l]ong unnecessary delays . . . can and should, be avoided." *See generally* Pitts v. North Carolina, 395 F.2d 182 (4th Cir. 1968).

114. *See* Robinson v. State, 470 S.W.2d 697, 699 (Tex. Crim. App. 1971). *See generally* Josey v. State, 117 S.E.2d 641, 643 (Ga. Ct. App. 1960).

115. *See, e.g.,* State v. Hunter, 295 A.2d 779 (Md. Ct. App. 1972); Tate v. Howard, 296 A.2d 19 (R.I. 1972).

116. 297 A.2d 127 (Pa. 1972).

117. *Id.* at 131.

either brought to trial or released from any threat of prosecution.[118] The rationale for formulating such a rule was to eliminate "the inherent vagueness encompassed in any balancing process"[119] by avoiding the necessity of a court determining a violation of a constitutional right on a case by case basis.[120] The court went on to note that the mandatory time requirement would stimulate those entrusted with the responsibility of managing court calendars,[121] help eliminate court congestion[122] and act as a more effective protection of the speedy trial right.[123] Thus the foundations of the balancing test are already beginning to weaken and the state court application of the prejudice "per se" doctrine will certainly see expansion in the future.

THE FEDERAL COURTS—A TREND TO THE "PER SE" DOCTRINE

Judicial Treatment

Although the prevalent formula utilized by the federal courts in adjudicating controversies involving the right to a speedy trial is that of viewing the circumstances of each case, there has been strong opposition to the "per case" method.

The Court of Appeals for the District of Columbia Circuit has proclaimed that "any delay which exceeds a period of one year between arrest and trial raises a speedy trial claim of *prima facie* merit."[124] It has also been stated that unreasonable delays are by nature prejudicial,[125] and that it is generally unnecessary for the defendant to make an affirmative demonstration of prejudice.[126] In *Smith v. United States*[127] the court expressed the opinion that "a delay prior to trial of more than one year, not attributable to the defense, *automatically* calls for dismissal of the indictment, due to prejudice to the person."[128] The court went on to observe that intolerable delays prior to trial help breed crime.[129]

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118. *Id.* at 133.
119. *Id.* at 132.
120. *Id.* at 132-33.
121. *Id.* at 133.
122. *Id.* at 133.
123. *Id.* at 133.
124. United States v. Hines, 455 F.2d 1317, 1332 (D.C. Cir.), *cert. denied,* 406 U.S. 969 (1972).
125. Hedgepeth v. United States, 364 F.2d 684, 686 (D.C. Cir. 1966).
126. *Id.* at 688. The court went on to state that "[t]here is no touchstone of time which sets a fixed maximum period that automatically requires application of the Sixth Amendment and dismissal of the indictment. Time is but one factor, albeit the most important; the longer the time between arrest and trial, the heavier the burden of the Government in arguing that the right to a speedy trial has not been abridged." *Id.* at 687.
127. 418 F.2d 1120 (D.C. Cir.), *cert. denied,* 396 U.S. 936 (1969).
128. *Id.* at 1122 (emphasis added).
129. *Id.* at 1121. *See also* Tate v. Howard, 296 A.2d 19, 27 (R.I. 1972). The court held that "[l]engthy pretrial detention is costly, contributes to the overcrowding of penal institutions and can cause violence to erupt within the prison population."

Expressing his opinion in *United States v. Dunn*,[130] Circuit Judge Tamm advised the adoption of a 1-year rule[131] within which to bring the criminal defendant to trial. In proposing such a plan, Judge Tamm stated that this period should be calculated

> from the date on which the formal charge against the defendant is brought in cases where the defendant is in custody on that date. Where the defendant is not in custody on the date of bringing of formal charges the year should begin to run from the date of his apprehension.[132]

By the adoption of such a rule, which is "in line with the requirements of the Constitution,"[133] the view was that there would be an elimination of the potential abuses that could arise.[134]

While the action on the part of the District of Columbia Circuit has been limited to an expression of dissatisfaction with the "per case" method, the Court of Appeals for the Second Circuit has been the innovator in employing the stated time limitations.[135] Based on the observation that the number of claims of violation of speedy trial rights had assumed alarming proportions,[136] the court in *United States ex rel. Frizer v. McMann*[137] enacted a set of rules designed to accelerate the processing of criminal cases by supplementing the sixth amendment requirements with specific administrative standards. Among these rules it is declared that "[i]n cases where a defendant is detained, the government must be ready for trial within 90 days from the date of detention. If the government is not ready for trial within such time . . . the defendant shall be released."[138] However, it must be noted that this rule does not apply to those defendants serving a term of imprisonment for another offense[139] or charged with another crime subsequent to release.[140] As for those defendants not imprisoned, the rules of the Second Circuit provide that "[i]n all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried . . . whichever is earliest."[141] If there is a violation of this time standard the result is dismissal of the charge.[142]

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130. 459 F.2d 1115 (D.C. Cir. 1972).
131. *Id.* at 1125.
132. *Id.* at 1125.
133. *Id.* at 1125.
134. *Id.* at 1125.
135. Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971) (hereinafter referred to as 2d Cir. R.).
136. United States *ex rel.* Frizer v. McMann, 437 F.2d 1312, 1314 (2d Cir. 1971). *See also* Comment, 71 COLUM. L. REV. 1059 (1971).
137. 437 F.2d 1312 (2d Cir. 1971).
138. 2d CIR. R. at 2.
139. 2d CIR. R. at 2.
140. 2d CIR. R. at 2.
141. 2d CIR. R. at 2.
142. 2d CIR. R. at 2.

While the judicial treatment of the "per se" method has been pronounced, the extra-judicial authorities have been even more adamant in prescribing remedies by which to dispose of the inadequacies propounded by the "per case" standard.

Extra-Judicial Treatment

In 1967 the President's Crime Commission[143] proposed that the period from arrest to trial of felony cases be not more than 4 months.[144] In citing the Crime Commission report, the American Bar Association recommended that the speedy trial right be expressed by statute in terms of days or months running from a specified event,[145] although there was no attempt to identify the number of days or months which, if exceeded without cause, would constitute a denial of a speedy trial.[146] An even more stringent limitation was expressed by the Honorable William J. Campbell in an address before the Conference of Metropolitan Chief Judges of the Federal Judicial Center:[147]

> The arraignment and plea on an indictment would have to be scheduled within a period of two weeks after return of the indictment. A required conference between prosecutor and defense counsel . . . must be held within five days after the arraignment. At the conclusion of the pretrial conference a trial date, no less than one nor more than three months from the date of the conference, should be set.[148]

Although these recommendations have generated little response, the Judicial Conference of the United States[149] recently voted to recommend to the Supreme Court the adoption of an amendment to the Federal Rules of Criminal Procedure requiring each federal district court to adopt a plan for the prompt disposition of criminal cases.[150] Included in the plans were rules relating to the time limits within which procedures prior to trial and trial itself should take place.[151]

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143. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 155 (1967).

144. *Id.* In addition, the American Bar Association stated that "[a]lthough the federal constitution and the constitutions of the states . . . provide that the accused shall enjoy the right to a speedy trial, the precise boundaries of the speedy trial guarantee are far from clear." Furthermore the ABA reported that "the courts . . . have found the task of determining what events justify extension of the statutory limits a most difficult one." STANDARDS RELATING TO A SPEEDY TRIAL—AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE 2, 15 (Approved draft 1968).

145. *Id.* at 14.

146. *Id.* at 14.

147. 55 F.R.D. 229 (1972).

148. *Id.* at 244.

149. Judicial Conference, 40 U.S.L.W. 2284 (1972).

150. *Id.*

151. *Id.*

The Federal Rules of Criminal Procedure were accordingly amended,[152] requiring that a plan for the prompt disposition of criminal cases be adopted by each federal district court,[153] subject to the approval of the Judicial Council of the circuit in which the district is located.[154] Each plan is to provide for rules relating to time limits in an attempt to minimize undue delay.[155]

Pursuant to this requirement, the judges of the United States District Court for the Western District of Texas have adopted such a plan providing for stated limitation periods.[156] The proposed limitation periods specify that "[t]he trial shall commence within 90 days after a plea of not guilty, if the defendant is held in custody, or within 180 days if he is not in custody."[157] While stating a variety of reasons which would justify an extension of these time periods,[158] noncompliance with the rules would result in, but not be

152. FED. R. CRIM. P. 50(b).
153. *Id.*
154. *Id.*
155. *Id.*
156. PLAN OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES (Proposed Plan 1972).
157. *Id.* at 2.
158. *Id.* at 2, 3, 4. Under proposed rule 3, it is stated:

> Any period of time prescribed by these rules may be extended by the Court before or after the particular period to be extended has run. The reason for granting any such extension shall be set out as a part of the order of extension. Among other reasons, the Court may take into consideration:
>
> (a) A reasonable period of delay resulting from other proceedings concerning the defendant, including, but not limited to, proceedings for the determination of competency and the period during which he is incompetent to stand trial, extraordinary pre-trial motions, stays, interlocutory appeals, trial of other charges, and the period during which such matters are under consideration.
>
> (b) The period of delay resulting from continuances granted by the Court. The Court shall grant such continuances only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges and the interest of the defendant in a speedy trial. Reasons for granting continuances may include but need not be limited to:
>
> (i) a reasonable request made by or with the consent of the defendant or his counsel;
>
> (ii) the unavailability of evidence material to the government's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period;
>
> (iii) reasonable additional time needed to prepare the government's case when justified by exceptional circumstances;
>
> (iv) the absence or unavailability of the defendant;
>
> (v) inability to proceed to trial as to one or more co-defendants when there is good cause for not granting a severance;
>
> (vi) detention of the defendant in another jurisdiction, provided the prosecuting attorney makes a showing that he has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial;
>
> (vii) lack of counsel for the defendant if it is the result of reasons other than the failure of the Court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel;
>
> (viii) any period of delay occasioned by exceptional circumstances.

limited to, dismissal of the action for unnecessary delay.[159] Thus at least one of the proposed plans has opened the door for the federal courts to grant relief other than the serious remedy of dismissal,[160] which the United States Supreme Court has stated is the only possible remedy.[161]

Although these plans for the federal district courts will become effective only upon approval of reviewing panels,[162] their likely adoption may establish the rudiments of a trend that will in effect renounce the vague balancing test recommended by the Supreme Court. The reasons for adopting plans relating to the prejudice "per se" method and the stated limitation periods are glaringly obvious. Mr. Chief Justice Burger, in his first State of the Judiciary address to the American Bar Association,[163] stated:

> If ever the law is to have genuine deterrent effect on the criminal conduct giving us immediate concern, we must make some drastic changes. The most simple and most obvious remedy is to give the courts the manpower and tools . . . to try criminal cases within sixty days after indictment and then see what happens. I predict it would sharply reduce the crime rate.[164]

There is, however, one monumental defect in the plans as they are presently being drafted. Each plan stipulates that a violation of the stated time periods will not give rise to a constitutional claim,[165] thus thwarting the impact these plans would have on the speedy trial right. Although it is at present uncertain what the effect of the likely adoption of the plans will be on the right to a speedy trial, there is an obvious attempt by the rule makers to circumvent this constitutional guarantee. It is submitted that the plans would be much more effective if prejudice "per se" provisions were incorporated into the plans, thereby eliminating trial docket backlog as well as reaffirming the speedy trial right.

CONTRAST AND REMEDIES

The Supreme Court and the "per se" method advocates present two distinct streams of thought in their treatment of the right to a speedy trial. The major areas of contrast involve: (1) the question of the constitutionality of defined periods of limitation; (2) the Court's inability to name a

159. *Id.* at 4, 5.
160. *Id.* at 5, 6.
161. Barker v. Wingo, 407 U.S. 514, —, 92 S. Ct. 2182, 2188, 33 L. Ed. 2d 101, 112 (1972).
162. PLAN OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES at 9 (Proposed Plan 1972).
163. Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929 (1970).
164. *Id.* at 932.
165. PLAN OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES at 1 (Proposed Plan 1972).

precise period after which the criminal defendant has been denied his speedy trial right; (3) the Court's unimaginative vision concerning remedies for a denial of the right.

Constitutional Basis

"We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months."[166]

"[T]his method of calculating the period . . . is in line with the requirements of the Constitution . . . ."[167]

While subject to interpretation, the dichotomy between the viewpoints of the Supreme Court and the "per se" supporters is most apparent when dealing with the differing constructions of the sixth amendment. The Court's position becomes even more untenable in view of the recommendation that the state courts adopt such a plan.[168] The Court in *Klopfer* found that the states are bound by the sixth amendment,[169] and their exhortation that the states adopt a defined limitation period is indicative that there is a constitutional basis for this standard. Clearly the continuation of impalpable standards such as the "per case" method and the balancing test can only result in the rights bestowed upon the citizens by the sixth amendment remaining intangible and obscure.

Determination of When the Right Has Been Denied

"It is . . . impossible to determine with precision when the right has been denied."[170]

The Supreme Court may find it onerous to prescribe a precise time period, but the majority of the state courts and the innovators among the federal courts have encountered no such predicament. The inability of the Court to advocate such a standard only compounds the confusion surrounding the sixth amendment. The Court of Appeals for the Second Circuit has enacted specific time periods in which to bring the criminal defendant to trial, which, if surpassed, raises a presumption that the defendant's speedy trial right has been violated.[171]

The diverse and often unjust consequences of touchstones such as the

166. Barker v. Wingo, 407 U.S. 514, —, 92 S. Ct. 2182, 2188, 33 L. Ed. 2d 101, 113 (1972).
167. United States v. Dunn, 459 F.2d 1115, 1125 (D.C. Cir. 1972).
168. Barker v. Wingo, 407 U.S. 514, —, 92 S. Ct. 2182, 2188, 33 L. Ed. 2d 101, 112-13 (1972).
169. Klopfer v. North Carolina, 386 U.S. 213, 222, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1, 7 (1967).
170. Barker v. Wingo, 407 U.S. 514, —, 92 S. Ct. 2182, 2187, 33 L. Ed. 2d 101, 112 (1972).
171. 2d CIR. R.

"per case" theory need not be abided when the more profitable approach induced by the "per se" method is available. Instead of excessive, unwarrantable delays often prejudicing the criminal defendant, the practice of the "per se" method will eliminate trial docket backlogs and congestion of the courts while similarly insuring the defendant and the public of the preservation of the right to a speedy trial. The limitation periods by which the "per se" theory would be enforced need not be so strictly applied as to impede the labors of the prosecution. The "per se" method should not be an inflexible yardstick by which to determine the right to a speedy trial, but simply a universal standard by which to abrogate injustices arising thereunder.

Judge Tamm, in expressing his opinion in *Dunn,* stated that "[n]o longer can we sit by and watch unconscionable delay being justified by equally unconscionable judicial verbiage."[172] The standards of a constitutional guarantee should be express and defined, instead of being concealed in the present form of vague, unclear terminology applied with hesitancy and misconception.

Dismissal v. Alternative Remedies

"[T]he unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived . . . is the only possible remedy."[173]

The proponents of the prejudice "per se" method and defined limitation periods between indictment and trial are many. The general objection to the adoption of such standards is based on the view that the final result will be the rather harsh relief of absolute dismissal of the indictment. Many of the courts are obviously reluctant to dismiss a criminal defendant against whom the prosecution has a formidable case, simply on the ground that there has been a violation of the defendant's right to a speedy trial. Such need not be the case. The court in *United States v. Strunk,*[174] while conceding that the defendant had been denied his right to a speedy trial,[175] balked at the possibility of dismissal of the indictment.[176] Instead, the court credited the convicted defendant with the time accrued in the delay, making it applicable on his sentence. In this way the court avoided the detrimental relief of outright dismissal, and simultaneously granted the defendant relief upon a valid claim of denial of the right to speedy trial. There are alternatives to the uncomfortable relief of complete dismissal of the indictment. No longer do the courts have a potent argument for the con-

172. United States v. Dunn, 459 F.2d 1115, 1125 (D.C. Cir. 1972).
173. Barker v. Wingo, 407 U.S. 514, —, 92 S. Ct. 2182, 2188, 33 L. Ed. 2d 101, 112 (1972).
174. 467 F.2d 969 (7th Cir. 1972).
175. *Id.* at 973.
176. *Id.* at 973.

tinued practice of the indefinite "per case" system, particularly when the perpetuation of this irresolute standard endangers other rights due the criminal defendant.

CONCLUSION

A fundamental right is jeopardized by the excessive pretrial delays enhanced by the vacillating sixth amendment standards. Undue delay in bringing a criminal defendant to trial is in direct antithesis with the basic tenet that a defendant is presumed innocent until proven guilty. The Supreme Court has stated that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[177] Obviously there is a hopeless contradiction between the presumption of innocence and an undue pretrial delay. While remedies such as dismissal and "good time" application might be considered relief for the guilty defendant, any delay in bringing an innocent defendant to trial is quite intolerable. If the courts are to continue the "innocent until proven guilty" presumption, pretrial delay becomes even more indefensible, as all defendants must be treated as innocent until they are granted the speedy and public trial guaranteed them by the sixth amendment. Enactment of the prejudice "per se" method will bolster the right of presumption of innocence as well as act as a reassertion of the speedy trial guarantee.

Adoption of the prejudice "per se" method implemented with the stated time limitations will support the right to a speedy trial with the proper degree of uniformity and clarity. The federal courts should be lauded for their recent achievements in requiring the adoption of time limitation plans, but they should be encouraged to incorporate within such plans provisions whereby undue delay on the part of the prosecution will give rise to a constitutional claim. Such advantages are invaluable in dealing with the guarantee provided in the sixth amendment, and it is suggested that the federal district courts adopt prejudice "per se" provisions within their plans in order to avoid the injustices promulgated by the "per case" method and the balancing test.

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177. Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 403, 39 L. Ed. 481, 491 (1895). *See generally* Cochran v. United States, 157 U.S. 286, 299, 15 S. Ct. 628, 633, 39 L. Ed. 704, 708-09 (1895); Raffour v. United States, 284 F. 720 (9th Cir. 1922); Sylvia v. United States, 264 F. 593 (6th Cir. 1920).