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The Filing of an Indictment against a Criminal Defendant Activates His Sixth Amendment Right to a Speedy Trial, Notwithstanding the Fact that the Defendant Had No Knowledge of the Indictment Until the Time of His Arrest.

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CONSTITUTIONAL LAW—Speedy Trial—The Filing of an Indictment Against a Criminal Defendant Activates His Sixth Amendment Right to a Speedy Trial, Notwithstanding the Fact that the Defendant Had No Knowledge of the Indictment Until the Time of His Arrest.

Doggett v. United States,
__ U.S. __, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

On February 22, 1980, Marc Doggett was indicted for conspiring to import and distribute cocaine in violation of federal law.[1] However, before the Drug Enforcement Administration (DEA) could secure his arrest, Doggett fled the United States to South America.[2] In September of 1981, the DEA discovered that the Panamanian government had imprisoned Doggett and was holding him pending trial on drug charges.[3] Doggett was released by the Panamanian government and unbeknownst to customs authorities or the DEA, reentered the United States on September 25, 1983, resuming a normal life.[4] For over five years after Doggett's return to the United States, the

1. Doggett v. United States, __ U.S. __, __, 112 S. Ct. 2686, 2689, 120 L. Ed. 2d 520, 525 (1992). Marc Doggett, Petitioner, was indicted for conspiring to import cocaine in violation of 21 U.S.C. Section 963 and for conspiring to distribute cocaine in violation of 21 U.S.C. Section 846. United States v. Doggett, 906 F.2d 573, 575 (11th Cir. 1990), *cert. granted*, __ U.S. __, 111 S. Ct. 1070, 112 L. Ed. 2d 1176 (1991). A warrant for Doggett's arrest was issued on the same day he was indicted. *Id.* The DEA informed the United States Marshal's Service that the DEA would coordinate Doggett's arrest. *Id.*

2. *Doggett*, __ U.S. at __, 112 S. Ct. at 2689, 120 L. Ed. 2d at 526. In March of 1980, two law enforcement officers, on orders from the DEA Administrative Agent assigned to the case, attempted to arrest Doggett at his parents' home. *Id.* Doggett's mother informed the officers that her son had left for Colombia four days prior to the attempted arrest. *Id.* In hopes of apprehending Doggett upon his return to the country, the DEA alerted all United States Customs stations via the Treasury Enforcement Communications System that Doggett was wanted by the DEA. *Id.*

3. *Doggett*, __ U.S. at __, 112 S. Ct. at 2689, 120 L. Ed. 2d at 526. The DEA initiated informal expulsion proceedings which had been used by the DEA previously in similar situations, believing that efforts to formally extradite Doggett would be to no avail given the nature of Doggett's crimes in Panama. *Doggett*, 906 F.2d at 576. Despite the fact that Panamanian authorities agreed to return Doggett to the United States once he had been prosecuted in Panama, Doggett was released from Panamanian custody and was allowed to travel to Colombia. *Id.*

4. *Doggett*, __ U.S. at __, 112 S. Ct. at 2689, 120 L. Ed. 2d at 526-27. Between 1982 and 1988 Doggett lived openly in Virginia, using his real name. *Id.* He married, graduated from college, obtained gainful employment, registered to vote, obtained a driver's license, took out

DEA operated under the assumption that he remained incarcerated in Panama.[5] Eventually, the United States Marshal's Service located Doggett through a routine credit check on individuals with outstanding arrest warrants.[6] On September 5, 1988, eight and one-half years after his indictment, Doggett was finally arrested.[7]

Before a federal magistrate, Doggett moved to dismiss the indictment, contending that the delay of eight and one-half years in his prosecution violated his Sixth Amendment right to a speedy trial.[8] On the federal magistrate's recommendation, the United States District Court for the Middle District of Florida denied the motion, holding that the delay had not impaired Doggett's ability to present a successful defense.[9] The Eleventh Circuit Court of Appeals affirmed the district court's decision, reiterating that Doggett was required to prove actual prejudice to his defense in order to receive relief via a speedy trial claim.[10] Doggett then appealed to the United States Supreme Court, which granted certiorari.[11] Held—*Reversed.* The filing of an indictment against a defendant activates his Sixth Amendment right to a speedy trial, notwithstanding the fact that the defendant has no

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mortgages on two homes, possessed credit cards, and filed income tax returns. *Doggett*, 906 F.2d at 577.

5. *Doggett*, __ U.S. at __, 112 S. Ct. at 2689, 120 L. Ed. 2d at 527. The American Embassy in Panama had sent information regarding Doggett's status to the United States State Department upon Doggett's release, but the DEA never received that information. *Id.*

6. *Id.* at __, 112 S. Ct. at 2689-90, 120 L. Ed. 2d at 527 (1992). The credit check was issued pursuant to WANT II, a service of the United States Marshal's office verifying whether or not outstanding warrants have been served. *Doggett*, 906 F.2d at 577.

7. *Doggett*, __ U.S. at __, 112 S. Ct. at 2690, 120 L. Ed. 2d at 527.

8. *Id.* at __, 112 S. Ct. at 2690, 120 L. Ed. 2d at 527.

9. *Id.* The district court took the recommendation of the Federal Magistrate who heard Doggett's motion. *Id.* The Magistrate applied a four-prong test set out in *Barker v. Wingo* to assist courts in assessing speedy trial claims. *Doggett*, __ U.S. at __, 112 S. Ct. at 2690-91, 120 L. Ed. 2d at 527-28 (citing Barker v. Wingo, 467 U.S. 514, 530 (1972)). The four prongs of the *Barker* test include: "length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530. The Magistrate determined that, although Doggett's case satisfied the first three prongs of the test, he failed to prove any particular prejudice to his defense and, as such, Doggett's speedy trial claim could not stand. *Doggett*, __ U.S. at __, 112 S. Ct. 2690, 120 L. Ed. 2d at 527. Doggett then entered a conditional guilty plea, reserving the right to appeal on speedy trial grounds. *Id.*

10. United States v. Doggett, 906 F.2d 573, 582 (11th Cir. 1990), *cert. granted*, __ U.S. __, 111 S. Ct. 1070, 112 L. Ed. 2d 1176 (1991). The Court of Appeals determined that in order for Doggett to prevail on his speedy trial claim, he had to either establish actual prejudice to his defense or establish that the first three prongs of the test weighed so heavily in his favor as to preclude consideration of the fourth prong. *Id.* at 579. The court concluded that Doggett failed to establish either one of these criteria. *Id.* at 582.

11. Doggett v. United States, __ U.S. __, __, 111 S. Ct. 1070, 1070, 112 L. Ed. 2d 1176, 1176 (1991).

knowledge of the indictment until his arrest.[12]

The right to a speedy trial has its roots in the early English common law.[13] The earliest significant expressions of the right to a speedy trial are found in the Assize of Clarendon of 1166[14] and the Magna Charta of 1215.[15] The first specific recognition of the right to a speedy trial in the United States appeared in the Virginia Declaration of Rights of 1776.[16] In 1791, the

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12. *Doggett*, __ U.S. at __, 112 S. Ct. at 2694, 120 L. Ed. 2d at 532.

13. *See, e.g.*, United States v. Marion, 404 U.S. 307, 314 n.5-6 (1971) (tracing historical background of speedy trial guarantee); Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967) (Chief Justice Warren commenting extensively on historical underpinnings of right to speedy trial); United States v. Provoo, 17 F.R.D. 183, 197 n.6 (D. Md.), *aff'd*, 350 U.S. 857 (1955) (analyzing British impact on Bill of Rights focusing on right to speedy trial); *see also* Habeas Corpus Act of 1679, *reprinted in* 1 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 124-25 (2d series 1982). The Habeas Corpus Act afforded "more speedy relief of all persons imprisoned for any . . . criminal or supposed criminal matters." *Id.* at 125. Principally, the Act created a definite speedy trial right for those "committed for high treason or felony." *Id.* at 128. *See generally* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 111-12 (5th ed. 1956) (describing evolution of speedy trial right in English common law history); Z. JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 1-2 (London, MacMillan 1883) (describing development of right to speedy trial through English legal history); Natalia Nicolaidis, *The Sixth Amendment Right to a Speedy and Public Trial*, 26 AM. CRIM. L. REV. 1489, 1489-92 (1989) (describing British background of right to speedy trial).

14. *See* Assize of Clarendon, 12 Hen. 2, ch. 4 (1166), *reprinted in* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 113 (5th ed. 1956). The Assize of Clarendon provided:

> When a robber, murderer, thief, or receiver of such is captured . . ., the sheriff shall send to the nearest justice (if there are no justices shortly visiting the country wherein he was captured) by an intelligent man saying that he has captured so many men. And the justices shall reply telling the sheriff where the prisoners are to be brought before them. And the sheriff shall bring them before the justices together with [local representatives] to bring the record . . . as to why they were captured; and there they shall make their law before the justices.

Id.

15. *See* Magna Charta, ch. 40 (1215), *quoted in* 1 FREDERICK POLLACK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 172 (2d ed. 1911) (tracing development of English common law). A rough form of the right to a speedy trial was included in the Magna Charta's catalogue of royal concessions: "To none will we sell, to none will we deny, to none will we delay right or justice." *Provoo*, 17 F.R.D. at 196.

16. *See Marion*, 404 U.S. at 314 n.6 (noting that Article 8 of Virginia Declaration of Rights "may have been the model Madison used for the Sixth Amendment"); *Klopfer*, 386 U.S. at 225 (noting fundamentality of Speedy Trial Clause); *Provoo*, 17 F.R.D. at 197 n.6 (noting that Article 8 of Virginia Declaration of Rights was adopted from British Habeas Corpus Act). The Virginia Declaration of Rights of 1776, Article 8 "secured the right to a speedy trial in 'criminal prosecutions' where 'a man hath a right to demand the cause and nature of his accusation.' " *Marion*, 404 U.S. at 314-15 n.6. Following the Revolutionary War, a similar provision appeared in the constitutions of several states, including Delaware, Pennsylvania, Virginia, and Massachusetts. DEL. CONST. art. I, § 7; PA. CONST. art. I, § 9; MASS. CONST. pt. 1, art. XI; VA. CONST. art. I, § 8; *see also* 10 WILLIAM F. SWINDLER,

United States adopted the Sixth Amendment to the Constitution, which protects criminal defendants, *inter alia*, from undue post-accusation delay by providing that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."[17] In the 1967 decision of *Klopfer v. North Carolina*,[18] the United States Supreme Court held that the right to a speedy trial is as fundamental as any other right guaranteed by the Sixth Amendment.[19] The Supreme Court stated that the purpose of the Speedy Trail

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SOURCES AND DOCUMENTS OF THE UNITED STATES CONSTITUTION 49 (1979) (describing important role various colonial constitutions played in development of Bill of Rights); Dan Donovan et al., *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH L. REV. 1043, 1044 (1979) (explaining development of Speedy Trial Clause); Gregory P.N. Joseph, *Speedy Trial Rights in Application*, 48 FORDHAM L. REVIEW 611, 613 (1980) (recognizing state constitutions replicating Sixth Amendment speedy trial language).

17. U.S. CONST. amend. VI. The amendment reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.; *see, e.g.*, *Klopfer*, 386 U.S. at 222 (stating that right to speedy trial guaranteed by United States Constitution); United States v. Ewell, 383 U.S. 116, 126 (1966) (describing Constitution as bulwark for right to speedy trial); Pollard v. United States, 352 U.S. 354, 361 (1957) (stating that Sixth Amendment guarantees right to speedy trial); Beavers v. Haubert, 198 U.S. 77, 86 (1905) (stating that Constitution preserves each criminal defendant's right to speedy trial); Dan Donovan et al., *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH L. REV. 1043, 1044 (1979) (surveying history of Speedy Trial Clause); Alan N. Schneider, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 477 (1968) (describing historical underpinnings of Speedy Trial Clause). The constitutional right to a speedy trial has also been augmented through statutes. *See* Federal Speedy Trial Act of 1974, 18 U.S.C. § 3161-74 (1988) (establishing procedures and time limits between arrest indictment and trial, and permissible delays within each period); FED. R. CRIM. P. 48(b) (empowering courts to dismiss indictments for unnecessary government delay); FED R. CRIM. P. 50(b) (mandating prompt disposition of cases at district court level).

18. 386 U.S. 213 (1967).

19. *Id.* at 223 (establishing speedy trial right to be fundamental given its foundations in traditional English jurisprudence); *see also* Barker v. Wingo, 407 U.S. 514, 519 (1972) (noting that right to speedy trial is guaranteed by Constitution). Defendant had the right to be tried "in accordance with the protection of the . . . Sixth Amendment and that guarantee . . . is to be enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Klopfer*, 386 U.S. at 222 (quoting Pointer v. Texas, 380 U.S. 400, 406 (1965)); *see also* Nancy N. Kerr, Note, 14 ST. MARY'S L.J. 113, 114 (1982) (giving general discussion of historical background of Speedy Trial Clause); Alan N. Schneider, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 483 (1968) (discussing history of right to speedy trial). All but three states have established parallel provisions in their constitutions. *See, e.g.*, ALA. CONST. art. I, § 7; ALASKA CONST. art. I, § 11; ARIZ. CONST. art. 2, § 24; ARK. CONST. art. 2, § 10; CAL. CONST. art. 1, § 15; COLO. CONST. art. II, § 16; CONN. CONST. art. 1, § 8; DEL. CONST. art. I, § 7; FLA. CONST.

Clause is to prevent undue and oppressive pre-trial incarceration,[20] to limit the anxiety accompanying public accusation,[21] and to diminish delays that might cripple a defendant's ability to prepare an adequate defense.[22] In ad-

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art. 1, § 6; GA. CONST. art. I, § 1, ¶ 11; HAW. CONST. art. I, § 14; IDAHO CONST. art. 1, § 13; ILL. CONST. art. 1, § 8; IND. CONST. art. 1, § 12; IOWA CONST. art. 1, § 10; KAN. BILL OF RIGHTS § 10; KY. CONST. § 11; LA. CONST. art. 1, § 16; ME. CONST. art. I, § 6; MD. DECLARATION OF RIGHTS art. 21; MASS. CONST. pt. 1, art. XI; MICH. CONST. art. 1, § 20; MINN. CONST. art. 1, § 6; MISS. CONST. art. 3, § 26; MO. CONST. art. 1, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art. I, § 11; N.H. CONST. pt. 1, art. 14; N.J. CONST. art. 1, § 10; N.M. CONST. art. II, § 14; N.D. CONST. art. 1, § 13; OHIO CONST. art. I, § 10; OKLA. CONST. art. 2, § 20; OR. CONST. art. I, § 10; PA. CONST. art. 1, § 9; R.I. CONST. art. 1, § 10; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 7; TENN. CONST. art. 1, § 9; TEX. CONST. art. 1, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. I, art. § 10; VA. CONST. art. I, § 8; WASH. CONST. art. 1, § 22 & amend. 10; W. VA. CONST. art. 3, § 14; WIS. CONST. art. 1, § 7; WYO. CONST. art. 1, § 10. The three states without state constitutional speedy trial provisions are Nevada, New York, and North Carolina; each confers statutory speedy trial rights upon defendants; North Carolina recognizes an unwritten but fundamental right to a speedy trial which is construed in accordance with federal constitutional standards. State v. Wright, 224 S.E.2d 624, 627 (N.C. 1976), *cert. denied*, 429 U.S. 1049 (1977).

20. *See Barker*, 407 U.S. at 532 (noting that time in jail may cause loss of job and disruption of family life); *Marion*, 404 U.S. at 320 (describing prevention of lengthy incarceration as major purpose of speedy trial guarantee); *Ewell*, 383 U.S. at 120 (establishing prevention or lengthy incarceration as purpose of Speedy Trial Clause); Gary A. Winters, Project, *Preliminary Proceedings—Speedy Trial*, 79 GEO. L.J. 591, 864-79 (1991) (noting Speedy Trial Clause implemented to prevent lengthy incarceration); Daniel Brown, Note, Meshell v. State: *The Death of Texas Speedy Trial?*, 41 BAYLOR L. REV. 341, 345 (1989) (discussing prevention of lengthy incarceration as one purpose of speedy trial guarantee).

21. *Barker*, 407 U.S. at 532. Even if an accused is not incarcerated, his liberty may be hampered by "living under a cloud of anxiety, suspicion and even hostility." *Id.* at 533; *see also Marion*, 404 U.S. at 320 (noting effects of public accusation on defendant). The Marion court reasoned, "[a]rrest 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 financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Id.*; *see also Klopfer*, 386 U.S. at 222 (discussing anxiety experienced by defendants while waiting for trial). Imprisonment is not the only way in which a defendant's liberty may be restricted. *Id.* at 221-22. The pending indictment may subject him to "public scorn and deprive him of employment and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." *Id.* at 222; *see also* Daniel Brown, Note, Meshell v. State: *The Death of Texas Speedy Trial?*, 41 BAYLOR L. REV. 341, 344 (1989) (noting significance of fact that speedy trial right applies to those who are not incarcerated as well as to those who are); Alan N. Schneider, Note, *The Right to a Speed Trial*, 20 STAN. L. REV. 476, 476 (1968) (describing purposes of speedy trial guarantee).

22. *See Barker*, 407 U.S. at 532 (discussing prejudice to defense as major concern of Speedy Trial Clause). The possibility of the accused's defense being impaired through dimming memories and loss of exculpatory evidence is the most serious concern of the Speedy Trial Clause because "the inability of a defendant to adequately prepare his case skews the fairness of the entire system." *Id.*; *see also* Dickey v. Florida, 398 U.S. 30, 42 (1970) (Brennan, J., concurring) (noting importance of Speedy Trial Clause in protecting against prejudice to defense). Delay could possibly result in the death or disappearance of key witnesses, and the

dition to protecting the accused, the Speedy Trial Clause also protects certain societal interests, such as the desire to reduce the possibility that the accused will commit further crimes.[23] The interests protected by the speedy trial guarantee are so fundamental that, if a defendant is denied his right to a speedy trial, the Court has stipulated that dismissal of charges is the only possible remedy.[24]

Although the Supreme Court had established who was eligible for protection under the Speedy Trial Clause, it was not until the case of *Barker v. Wingo*[25] that the Court outlined exactly what constitutes a violation of the right.[26] However, instead of establishing a bright line standard to demarcate

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veracity of available witnesses may be called into question due to memory loss over the lapse of time. *Id. Contra Marion*, 404 U.S. at 322 (noting that protecting against prejudice to defense is not major concern of Speedy Trial Clause). The court acknowledged that prejudice to the defendant's case is a concern of the speedy trial guarantee, but insisted that the "possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context." *Id.*; *see also* Gary A. Winters, Project, *Preliminary Proceedings—Speedy Trial*, 79 GEO. L.J. 591, 866 (1991) (describing prejudice to defense as one purpose of speedy trial guarantee); Daniel Brown, Note, Meshell v. State: *The Death of Texas Speedy Trial?*, 41 BAYLOR L. REV. 341, 351-53 (1989) (describing prejudice to defense as perhaps most important concern of Speedy Trial Clause).

23. *See* Strunk v. United States, 412 U.S. 434, 437 (1973) (stating that public interest in broad sense, as well as Constitution, demands prompt disposition of criminal charges). Persons released on bail have opportunity to commit other crimes, and those that remain in jail have an increased temptation to escape as the pre-trial delay increases. *Barker*, 407 U.S. at 519; *see also Dickey*, 398 U.S. at 42 (Brennan, J., concurring) (explaining that lengthy pre-trial delays result in clogged dockets and increased opportunity for defendants to plea bargain or commit further crimes); John C. Godbold, *Speedy Trial — Major Surgery for A National Ill*, 24 ALA. L. REV. 265, 266 (1972) (stating that public safety is at issue when defendants released on bond are subject to lengthy pre-trial delay); Daniel Brown, Note, Meshell v. State: *The Death of Texas Speedy Trial?*, 41 BAYLOR L. REV. 341, 344-346 (1989) (describing societal interests in speedy disposition of trials).

24. *Strunk*, 412 U.S. at 439-40 (holding dismissal of charge was only possible remedy for denying defendant speedy trial); *Barker*, 407 U.S. at 522 (stating only remedy for denial of right to speedy trial is absolute dismissal of indictment). The Court has noted that dismissal is a serious consequence because it means that a defendant who may be guilty will go free, without having been tried. *Id.* Dismissal is more serious than application of an exclusionary rule or reversal for new trial, but according to *Barker* it is the only remedy. Sam H. Clinton, *Speedy Trial—Texas Style*, 33 BAYLOR L. REV. 707, 715-16 (1981); *see also* Gary A. Winters, Project, *Preliminary Proceedings—Speedy Trial*, 79 GEO. L.J. 591, 864-79 (1991) (discussing dismissal as sole recourse for violation of speedy trial right); Nancy N. Kerr, Note, 14 ST. MARY'S L.J. 113, 114 (1982) (stating that dismissal is only remedy available for speedy trial violations).

25. 407 U.S. 514 (1972).

26. *See* Dickey v. Florida, 398 U.S 30, 40-41 (1970) (Brennan, J., concurring) (stating that parameters of right to speedy trial had yet to be defined). Prior to 1971, the Supreme Court had acknowledged the right to a speedy trial, defined its purpose, established when it applied, and determined to whom it applied; however, the Court had not established any specific guidelines as to how the right should be analyzed. *See, e.g.*, United States v. Marion, 404

the period within which the defendant's trial must be held, the Court in *Barker* created a balancing test which requires courts to weigh several factors on an ad hoc basis in order to determine whether an individual's speedy trial right has been violated.[27] According to the *Barker* test, the court should assess the length of the delay,[28] the reason for the delay,[29] whether

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U.S. 307, 318 (1971) (defining when right was triggered); Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (declaring right to be fundamental); United States v. Ewell, 383 U.S. 116, 120 (1966) (establishing major concerns of right to speedy trial); Beavers v. Haubert, 198 U.S. 77, 86 (1905) (recognizing right to speedy trial guaranteed by Constitution); *see also* H. Richard Uviller, Barker v. Wingo: *Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1376 (1972) (noting that *Barker* was first attempt Supreme Court made to supply uniformity to speedy trial analysis); F.D. Lake, Jr., Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1588 (1965) (discussing lack of guidance courts had in assessing speedy trial claims).

27. *Barker*, 407 U.S at 530. The right to a speedy trial cannot turn on a specified number of days; rather, the issue requires careful balancing of several issues. *Id.*; *see also* United States v. DeLuna, 763 F.2d 897, 921-22 (8th Cir. 1985) (stating that various factors should be balanced in determining if defendant's right to speedy trial was violated), *cert. denied*, 474 U.S. 980 (1986); United States v. Jenkins, 701 F.2d 850, 856 (10th Cir. 1983) (holding that every speedy trial issue should be analyzed using the *Barker* test); United States v. Carreon, 626 F.2d 528, 534 (7th Cir. 1980) (holding that *Barker* test entails balancing of several factors to determine speedy trial violation); Hill v. Wainwright, 617 F.2d 375, 377 (5th Cir. 1980) (stating that *Barker* test requires balancing several relevant factors in light of each speedy trial claim); United States v. Netterville, 553 F.2d 903, 913 (5th Cir. 1977) (holding that in determining whether speedy trial right was violated, courts must give attention to various factors), *cert. denied*, 434 U.S. 861 (1978); Gregory P.N. Joseph, *Speedy Trial Rights in Application*, 48 FORDHAM L. REVIEW 611, 617 (1980) (opining that *Barker* test did not establish bright line standard); H. Richard Uviller, Barker v. Wingo: *Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1389-91 (1972) (arguing that *Barker* Court rejected rigid rule in favor of balancing test in order to determine speedy trial violation).

28. *Barker*, 407 U.S. at 530. The Court established that the length of the delay must be presumptively prejudicial before an investigation of the other three factors takes place. *Id.*; *see also* Terry v. Duckworth, 715 F.2d 1217, 1219 (7th Cir. 1983) (stating that *Barker* balancing test is not triggered until delay in bringing defendant to trial becomes presumptively prejudicial; only at that point must court balance all *Barker* factors). Generally, a delay in excess of one year is considered presumptively prejudicial. *See, e.g.*, Ringstaff v. Howard, 885 F.2d 1542, 1543 (11th Cir. 1989) (holding 23-month delay between arrest and trial presumptively prejudicial), *cert. denied*, 496 U.S. 927 (1990); Government of Virgin Islands v. Pemberton, 813 F.2d 626, 628 (3d Cir. 1987) (finding 16-month delay sufficient to trigger *Barker* analysis); Redd v. Sowders, 809 F.2d 1266, 1269 (6th Cir. 1987) (stating that 32-month delay triggered *Barker* analysis); United States v. Richards, 707 F.2d 995, 997 (8th Cir. 1983) (holding that 35-month delay triggered analysis of other *Barker* factors); United States v. DiFrancesco, 604 F.2d 769, 776-77 (2d Cir. 1976) (holding 30-month delay presumptively prejudicial); United States v. Edwards, 577 F.2d 883, 888 (5th Cir.) (finding 21-month lapse sufficient to trigger *Barker* analysis), *cert. denied*, 439 U.S. 968 (1978); United States v. Michaud, 590 A.2d 538, 540 (Me. 1991) (holding that lapse of 32 months from indictment to trial raised presumption of prejudice); Dan Donovan et al., *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH L. REV. 1043, 1049 (1979) (describing length of delay as important element of *Barker* test); H. Richard Uviller, Barker v. Wingo: *Speedy Trial*

and how the defendant has asserted his speedy trial right,[30] and the amount of prejudice the defendant has incurred due to the delay.[31]

Gets a Fast Shuffle, 72 COLUM. L. REV. 1376, 1384 (1972) (discussing length of delay as triggering factor of *Barker* analysis).

29. *Barker*, 407 U.S. at 531. Delays intended to gain tactical advantage over the defendant weigh more heavily against the Government than prosecutorial negligence and crowded court dockets. *Id.*; *see also* United States v. Simmons, 536 F.2d 827, 831 (9th Cir. 1976) (holding that Government negligence should be factor in *Barker* analysis, although it should be weighed less heavily than deliberate delays), *cert. denied*, 429 U.S. 854 (1978). *Compare* United States v. Lara, 520 F.2d 460, 464-65 (D.C. Cir. 1975) (weighing Government's use of delay to "court shop" heavily in defendant's favor) *and* Arrant v. Wainwright, 468 F.2d 677, 682 (5th Cir. 1972) (holding delay by Government used to convince witnesses to change testimony strongly prejudicial against Government), *cert. denied*, 410 U.S. 947 (1973) *with* Davis v. Puckett, 857 F.2d 1035, 1040-41 (5th Cir. 1988) (finding that shortage of prosecutorial staff and court's limited time should not weigh heavily against Government) *and* Government of Virgin Islands v. Burmingham, 788 F.2d 933, 937 (3d Cir. 1986) (stating that delay due to crowded court dockets is not weighed strongly against Government). The Government will not be held responsible at all for delays resulting from defendant's own actions. *Barker*, 407 U.S. at 530; *see also* United States v. Carter, 603 F.2d 1204, 1206-07 (5th Cir. 1979) (holding 16-month delay not deprivation of defendant's right to speedy trial where reason for delay was defendant's deliberate disappearance); United States v. Redmond, 546 F.2d 1386, 1388-89 (10th Cir.) (finding no denial of speedy trial when delay was result of defendant being incarcerated in different country), *cert. denied*, 435 U.S. 995 (1977); United States v. Weber, 479 F.2d 331, 332-33 (8th Cir. 1973) (finding no denial of defendant's right to speedy trial where delay was directly caused by defendant being fugitive from justice); ROBERT L. MISNER, SPEEDY TRIAL—FEDERAL AND STATE PRACTICE 19 (1983) (reasoning that reason for delay factor of the *Barker* test is highly fact specific); H. Richard Uviller, Barker v. Wingo: *Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1385-87 (1972) (discussing various reasons for delay to be used in *Barker* analysis).

30. *Barker*, 407 U.S. at 529-31. The Court reasoned that it would not find a valid waiver of the speedy trial right unless it was voluntarily and consciously made. *Id.* While the accused is not required to demand his Sixth Amendment right to a speedy trial, failure to assert the right can make proof of waiver difficult. *Id.*; *see also* United States v. Vachon, 869 F.2d 653, 657 (1st Cir. 1989) (weighing against defendant fact that he waited until 2 days prior to trial to assert right to speedy trial after 13-month delay); Garcia Montalvo v. United States, 862 F.2d 425, 426 (2d Cir. 1988) (holding that failure of defendant to asserts right after delay of six years weighed against him); Bell v. Lynaugh, 828 F.2d 1085, 1094 (5th Cir.) (finding no speedy trial violation where defendant failed to assert right during eight-year delay), *cert. denied*, 484 U.S. 933 (1987); United States v. Maizumi 526 F.2d 848, 851 (5th Cir. 1976) (holding that defendant's failure to assert right during delay undercut speedy trial contentions); ROBERT L. MISNER, SPEEDY TRIAL—FEDERAL AND STATE PRACTICE 19-20 (1983) (stating defendant's failure to claim right to speedy trial weighs against him per *Barker* test); Dan Donovan et al., *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH L. REV. 1043, 1054-55 (1979) (discussing defendant's assertion of right to speedy trial as factor in *Barker* analysis).

31. *Barker*, 407 U.S. at 532. The Barker Court held that in order for a speedy trial claim to withstand inquiry, the defendant must show actual prejudice to his defense. *Id.* However, a subsequent decision by the Court determined that a showing of merely potential prejudice would withstand the scrutiny of the *Barker* test. Moore v. Arizona, 414 U.S. 25, 26 (1973). Nevertheless, most courts still require a showing of actual prejudice. *See, e.g.*, United States v.

None of the four *Barker* factors is dispositive of a denial of the right to a speedy trial; rather, the test is suggestive as opposed to exhaustive.[32] Courts have repeatedly stressed that the right to a speedy trial is, by its nature, relative, which compels analysis of speedy trial questions in light of the circumstances of each particular case.[33] The four-part test set forth in *Barker* is the standard by which all recent speedy trial claims have been analyzed.[34]

According to common law precedent as well as the explicit wording of the

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DeClue, 899 F.2d 1465, 1470-71 (6th Cir. 1990) (holding that defendant must show substantial prejudice); Russell v. Lynaugh, 892 F.2d 1205, 1216 (5th Cir. 1989) (stating that defendant *must* show prejudice); *Burmingham*, 788 F.2d at 936 (stating that absence of showing of prejudice is decisive); United States v. Beidler, 417 F. Supp. 608, 618 (M.D. Fla. 1976) (holding that actual prejudice must be established to show denial of right to speedy trial); Dan Donovan et al., *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH L. REV. 1043, 1048 (1979) (noting prejudice factor of *Barker* balancing test); H. Richard Uviller, Barker v. Wingo: *Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1388 (1972) (discussing defendant's assertion of right to speedy trial as factor in *Barker* analysis).

32. *Barker*, 407 U.S. at 533. Justice Powell noted that none of the factors possessed "talismanic" qualities; thus, by its nature, the test required courts to engage in a balancing process. *Id.*; *see also* Hutchison v. Marshall, 744 F.2d 44, 48 (6th Cir. 1984) (upholding lower court decision that one of four factors by itself does not prove existence of speedy trial issue), *cert. denied*, 469 U.S. 1221 (1985); United States v. Avalos, 541 F.2d 1100, 1110 (5th Cir. 1976) (finding other factors to be used in analysis implicit in *Barker* test); Turner v. Estelle, 515 F.2d 853, 855 (5th Cir.) (stating that nature of speedy trial right requires consideration on ad hoc basis), *cert. denied*, 424 U.S. 955 (1976); Dan Donovan et al., *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH L. REV. 1043, 1049 (1979) (arguing that no one factor of *Barker* test is sufficient to prove denial of right to speedy trial); H. Richard Uviller, Barker v. Wingo: *Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1383 (1972) (stating that factors should be balanced on ad hoc basis).

33. *See Marion*, 404 U.S. at 325 (holding that courts must make speedy trial judgments on facts of each case); Ewell, 383 U.S. at 120 (stating that whether violation of speedy trial right occurred depends on circumstances of individual case); *Beavers*, 198 U.S. at 87 (holding facts of each case controlling); Wallace v. Kern, 499 F.2d 1345, 1351 (2d Cir.) (arguing that circumstances of particular case play important part in determining if defendant's right to speedy trial denied), *cert. denied*, 420 U.S. 947 (1975); Evans v. United States, 397 F.2d 675, 676 (D.C. Cir. 1968) (finding right to speedy trial relative), *cert. denied*, 394 U.S. 907 (1969); Palmer v. Judge & Dist. Attorney Gen. of the Thirteenth Judicial Dist. of Tenn., 411 F. Supp. 1029, 1034 (W.D. Tenn. 1976) (stating that analysis of speedy trial issue depends on circumstances); Sander v. Ohio, 365 F. Supp. 1251, 1253 (S.D. Ohio 1973) (stating that speedy trial claims must be considered on case-by-case basis), *aff'd*, 500 F.2d 1403 (6th Cir.), *and cert. denied*, 419 U.S. 1026 (1974); State v. Bailey, 572 A.2d 544, 554 (Md. 1990) (holding that determination of speedy trial question depends on facts); Dan Donovan et al., *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH L. REV. 1043, 1048 (1979) (determining that factors of *Barker* test must be considered in light of each individual case); Gary A. Winters, Project, *Preliminary Proceedings—Speedy Trial*, 79 GEO. L.J. 591, 867 (1991) (stating that *Barker* test compels courts to evaluate speedy trial claims on ad hoc basis).

34. Doggett v. United States, __ U.S. __,__, 112 S. Ct. 2686, 2690, 120 L. Ed. 2d 520, 528 (1992).

Sixth Amendment, the right to a speedy trial does not become available to an individual until he becomes "an accused."[35] Only formal indictment, information, or actual restraint imposed by arrest will activate the protection of the Speedy Trial Clause[36] because, until arrest or indictment takes place, the defendant suffers no restraint on his liberty.[37] Although the Speedy Trial Clause applies only to post-accusation delays, defendants are afforded protection from pre-accusation delays by the relevant statutes of limitation.[38] Because statutes of limitation often do not comprehensively protect a

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35. *Marion*, 404 U.S. at 313; *see* State v. Cowger, 581 So. 2d 283, 286 (La. Ct. App. 1991) (attaching speedy trial right when defendant accused); Wiley v. State, 582 So. 2d 1008, 1011 (Miss. 1991) (finding that constitutional right to speedy trial attaches once defendant accused); Galloway v. State, 574 So. 2d 1, 2 (Miss. 1990) (stating that right to speedy trial attaches at time defendant accused); *see also* Paul R. Clevenger, Note, *Narrowing the Scope of the Speedy Trial Right:* U.S. v. MacDonald, 36 SW. L.J. 1213, 1215-20 (1983) (discussing courts' determinations of when right to speedy trial attaches); Nancy N. Kerr, Note, 14 ST. MARY'S L.J. 113, 117-20 (1982) (discussing when clock begins to run for speedy trial purposes).

36. *See* United States v. MacDonald, 456 U.S. 1, 6-7 (1987) (stating that Sixth Amendment right to speedy trial attaches when formal charges brought and/or prosecution begins); Dillingham v. United States, 423 U.S. 64, 65 (1975) (finding that right to speedy trial attaches at arrest); *Marion*, 404 U.S. at 313 (equating indictment with accusation for speedy trial purposes); Redd v. Sowders, 809 F.2d 1266, 1269 (6th Cir. 1987) (triggering speedy trial clock at indictment or arrest, whichever is earlier); United States v. Feinberg, 383 F.2d 60, 65 (2d Cir. 1967) (holding right to speedy trial available after arrest); Wheeler v. State, 596 A.2d 78, 81 (Md. 1991) (opining that arrest or formal charges, whichever first, activates Sixth Amendment right to speedy trial); Osborne v. State, 806 P.2d 272, 277 (Wyo. 1991) (activating speedy trial right upon arrest or filing of indictment); Gary A. Winters, Project, *Preliminary Proceedings—Speedy Trial*, 79 GEO. L.J. 591, 866 (1991) (stating that Sixth Amendment protects defendant's speedy trial right after arrest or indictment). *But see* Alan N. Schneider, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 482 (1968) (stating that speedy trial right need not be implemented by indictment or information).

37. *See Marion*, 404 U.S. at 321 (finding no speedy trial violation when government knew of crime but waited three years to deliver indictment). Justice White stressed that until an individual is arrested or held to answer for a crime, he suffers no restraint on his lifestyle and is not subject to public accusation. *Id.*; *see also* United States v. Loud Hawk, 474 U.S. 302, 312 (1986) (holding that Sixth Amendment does not attach when defendant arrested and released since charges dropped and no bail imposed); *MacDonald*, 456 U.S. at 5-6 (finding no speedy trial violation when defendant indicted in federal court four years after identical charges dropped in military court); United States v. Fuesting, 845 F.2d 664, 668 (7th Cir. 1988) (stating that no speedy trial violation found if defendant not subject to incarceration or bail); Gary A. Winters, Project, *Preliminary Proceedings—Speedy Trial*, 79 GEO. L.J. 591, 866 (1991) (noting that speedy trial right attaches at either arrest or indictment); Paul R. Clevenger, Note, *Narrowing the Scope of the Speedy Trial Right:* U.S. v. MacDonald, 36 SW. L.J. 1213, 1215 (1983) (noting that formal indictment or arrest triggers speedy trial clause).

38. *See Marion*, 404 U.S. at 322 (arguing that statutes of limitation guard against pre-accusation delays that might result in prejudice to defendant's case); *Ewell*, 383 U.S. at 122 (finding statute of limitation primary guarantee against pre-accusation delay); United States v. Zane, 489 F.2d 269, 270 n.1 (5th Cir.) (opining that statute of limitation is primary form of protection against pre-accusation delay), *cert. denied*, 416 U.S. 959 (1973); United States v.

defendant from oppressive delay, the Due Process Clause of the Fifth Amendment also plays a significant role in protecting defendants from undue pre-accusation delays in prosecution.[39] The Due Process Clause may, in fact, require the dismissal of charges, provided the defendant shows that the pre-indictment or pre-arrest delay caused him actual prejudice.[40] Historically, the defendant claiming a speedy trial violation could find recourse through the Due Process Clause only in situations of pre-accusation delay.[41] However, the Due Process Clause, by its design, serves to prevent any unfair or unjust treatment by the Government and could theoretically also apply to post-accusation delays.[42]

Grayson, 416 F.2d 1073, 1076 (5th Cir.) (finding that interval between date of offense and date of prosecution relates to statute of limitations), *cert. denied*, 396 U.S. 1059 (1969); Gary A. Winters, Project, *Preliminary Proceedings—Speedy Trial*, 79 GEO. L.J. 591, 864 (1991) (discussing statute of limitation as means of protecting against pre-trial delay); Nancy N. Kerr, Note, 14 ST. MARY'S L.J. 113, 118 (1982) (noting statute of limitation's role in protecting against pre-indictment delay).

39. *See* United States v. Lovasco, 431 U.S. 783, 788-89 (1977) (arguing that Due Process Clause provides protection from excessive pre-trial delay); *Marion*, 404 U.S. at 324 (finding that Due Process Clause could require dismissal if pre-trial delay impaired defendant's right to fair trial); *Fuesting*, 845 F.2d at 669 (stating that protection from pre-accusation delay must come from Due Process Clause); United States v. Simmons, 536 F.2d 827, 830 (9th Cir.) (reasoning that relief from pre-indictment delay afforded by Due Process Clause), *cert. denied*, 429 U.S. 854 (1976); Nancy N. Kerr, Note, 14 ST. MARY'S L.J. 113, 118 (1982) (pointing out that Due Process Clause guards against pre-indictment delay); Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 861 (1957) (noting that Due Process Clause has role in protecting against speedy trial violations).

40. *See Lovasco*, 431 U.S. at 789 (requiring proof of actual prejudice to defendant and departure from justice on part of prosecution to establish due process claim); *Marion*, 404 U.S. at 324 (entitling defendant to dismissal on due process grounds if he proves substantial prejudice or intentional action by Government to gain tactical advantage); United States v. MacClain, 501 F.2d 1006, 1010 (10th Cir. 1974) (finding no violation of due process without showing of actual prejudice or governmental foul play); United States v. Gambale, 610 F. Supp. 1515, 1549 (D. Mass. 1985) (requiring that defendant show actual prejudice from delay or that actions of Government violate fundamental concepts of justice in order to claim denial of due process); LORD DENNING, THE DUE PROCESS OF LAW 93 (London, Butterworths 1980) (arguing that dismissal requires inordinate delay causing serious prejudice); Nancy N. Kerr, Note, 14 ST. MARY'S L.J. 113, 118 (1982) (noting that dismissal on due process grounds mandates showing actual prejudice).

41. *See Lovasco*, 431 U.S. 783, 788 (1977) (explaining that Due Process Clause provides protection from delays prior to arrest or indictment); *Marion*, 404 U.S. at 324 (reasoning that Due Process Clause protects defendant's rights regarding events prior to indictment); *Simmons*, 536 F.2d at 830 (pointing out that due process provides defendants with remedy in case of prosecutorial delay in pre-indictment stage); Gary A. Winters, Project, *Preliminary Proceedings—Speedy Trial*, 79 GEO. L.J. 591, 866-70 (1991) (noting that Due Process Clause provides constitutional safeguard against pre-accusation delay); Nancy N. Kerr, Note, 14 ST. MARY'S L.J. 113, 118 (1982) (stating that delays preceding arrest are protected against by Due Process Clause).

42. *See, e.g.*, Hampton v. United States, 425 U.S. 484, 490 (1976) (stating that due pro-

Justice Souter, in writing for the majority, began his analysis of *United States v. Doggett* with the *Barker* test in mind.[43] Justice Souter acknowledged that the first *Barker* element, length of delay, is a triggering mechanism as well as an important element in the analysis.[44] Justice Souter established that the *Barker* test was the appropriate test analyzing *Doggett* because the eight and one-half year lag between Doggett's indictment and arrest was more than sufficient to trigger the *Barker* analysis.[45] After determining the proper analysis, Justice Souter turned to the second criterion of the *Barker* test, the reason for the delay.[46] Justice Souter conceded that, according to established speedy trial standards, pre-trial delay is often inevitable and, as such, is entirely justifiable.[47] In light of these established standards, Justice Souter concluded that, had the Government pursued Doggett with due diligence from the time of indictment to the time of arrest, Doggett could not have claimed a violation of his right to a speedy trial unless he could have positively proven that his defense had been prejudiced by the delay.[48] However, Justice Souter gave great deference to the district court's determination that the Government had been negligent in its handling of the *Doggett* case.[49] Justice Souter established that negligence in prosecution falls somewhere between diligence in prosecution and a bad faith delay, and that, although negligent delay does not automatically mandate relief for the defendant, a delay as extensive as that in the present case should not be tolerated.[50] Justice Souter argued that a court's tolerance for governmental

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cess comes into play when governmental activity violates protected right of defendant); Bloom v. Illinois, 391 U.S. 194, 195 (1968) (stating that Due Process Clause forbids federal government from depriving any person of life, liberty, or property without due process of law); Galvan v. Press, 347 U.S. 522, 530 (1954) (arguing that governmental fair play is essence of due process); United States v. La Monica, 472 F.2d 580, 581 (9th Cir. 1972) (reasoning that Due Process Clause is intended to protect individuals from governmental over-reaching). *See generally* LUCIUS POLK MCGEHEE, DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION (1906) (describing guarantees of Due Process Clause); RODNEY L. MOTT, DUE PROCESS OF LAW (1973) (analyzing historical use of Due Process Clause).

43. Doggett v. United States, __ U.S. __, __, 112 S. Ct. 2686, 2690, 120 L. Ed. 2d 520, 528 (1992). The *Barker* test limits the broad language of the Clause and establishes a workable standard for dealing with speedy trial issues. *See id.* (citing *Barker*, 407 U.S. at 530, for proposition that case law limits broad reach of Speedy Trial Clause).

44. *Id.* at __, 112 S. Ct. at 2690, 120 L. Ed. 2d at 528.

45. *Id.* at __, 112 S. Ct. at 2691, 120 L. Ed. 2d at 528.

46. *Id.*

47. *Doggett*, __ U.S. at __, 112 S. Ct. at 2693, 120 L. Ed. 2d at 531. Justice Souter noted that the Government often needs time to locate and prepare witnesses, respond to pre-trial motions, and track down fugitive defendants. *Id.*

48. *Id.* at __, 112 S. Ct. at 2693, 120 L. Ed. 2d at 529.

49. *Id.* at __, 112 S. Ct. at 2691, 120 L. Ed. 2d at 528-29. Justice Souter commented that, had the Government made any serious effort to locate Doggett during the six years he was living in the United States, it would have found him in minutes. *Id.*

50. *Id.* at __, 112 S. Ct. at 2693, 120 L. Ed. 2d at 531.

negligence in prosecution should be inversely related to the length of the delay.[51]

Continuing his application of the *Barker* criteria to the facts in the case at hand, Justice Souter rejected the Government's contention that, because Doggett failed to assert his right to a speedy trial, the third element of the *Barker* test should weigh heavily against him.[52] The majority strongly reiterated the lower court's finding that Doggett was unaware of his indictment until the time of his arrest.[53] Therefore, according to Justice Souter, Doggett could not be penalized for his delay in asserting his right to a speedy trial.[54]

In addressing the final element of the *Barker* test, Justice Souter pointed out that courts in prior relevant cases have established certain purposes for the Speedy Trial Clause.[55] In particular, Justice Souter identified prejudice to the defendant's trial as the most serious concern.[56] Justice Souter stressed that, once the prosecutorial process has been triggered by arrest or formal accusation, a court faced with a speedy trial inquiry must consider the effect of any delay on the defendant's ability adequately to defend himself.[57] In response to the Government's claim that Doggett had failed conclusively to establish prejudice to his defense by the delay, Justice Souter declared that affirmative proof of prejudice is not necessary.[58] Establishing the impair-

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51. *Doggett*, __ U.S. at __, 112 S. Ct. at 2693, 120 L. Ed. 2d at 531. Prejudice to defense increases as the delay increases, and when there is no compelling reason for the delay, the defendant should not suffer for the Government's negligence. *Id.* Unjustified delays indicate a lack of interest in prosecuting the defendant; therefore, the Government should have little complaint with the dismissal of the case on speedy trial grounds. *Id.*

52. *Id.* at __, 112 S. Ct. at 2691, 120 L. Ed. 2d at 529-30.

53. *Id.* The Government had introduced no evidence at Doggett's speedy trial hearing that would contradict the testimony of Doggett's mother and wife, who both stated that Doggett was unaware of the indictment. *Id.* at __, 112 S. Ct. at 2691, 120 L. Ed. 2d at 529. Justice Souter also quoted from the record of the hearing in which the Government conceded the point, stating that it had "no information that Doggett was aware of the indictment . . . prior to his arrest." *Id.*

54. *Id.*

55. *Doggett*, __ U.S. at __, 112 S. Ct. at 2692, 120 L. Ed. 2d 532. Justice Souter relied on *Barker* to reiterate the purposes of speedy trial guarantee, *Smith v. Hooey* to describe what the speedy trial was intended to protect against, and *Ewell* to establish the purposes of the Speedy Trial Clause. *Id.* These cases explain that the Speedy Trial Clause protects against: 1) undue incarceration; 2) the anxiety associated with awaiting trial; and 3) prejudice to the defendant's trial. *Id.*

56. *Id.* Prejudice to the defendant is the most serious concern of the Speedy Trial Clause "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system". *Id.* (quoting *Barker*, 407 U.S. at 532).

57. *Id.*

58. *Id.* at __, 112 S. Ct. at 2692, 120 L. Ed. 2d at 530. Justice Souter did acknowledge, however, that Doggett had failed to demonstrate that the delay in his arrest led to any deficiency in his ability to defend himself at trial. *Id.*

ment of an accused's defense is an extremely onerous burden because it is difficult, if not impossible, to prove the loss of valuable testimony or evidence.[59] Because of this difficulty in making an affirmative showing of prejudice, Justice Souter established that an excessive delay creates a presumption of prejudice which becomes stronger as the length of the delay increases.[60] The majority opinion concluded by stipulating that the presumption of prejudice created by the delay of eight and one-half years between Doggett's indictment and his trial, coupled with the Government's negligence in prosecuting the case, entitled Doggett to relief under the Sixth Amendment.[61]

In her dissent, Justice O'Connor agreed with the majority's use of the *Barker* test in its analysis of *Doggett*; however, the Justice took issue with the majority's liberal application of the fourth element of the test.[62] According to Justice O'Connor, the defendant should be required to show actual prejudice to his defense before such prejudice is considered in the *Barker* analysis.[63] Relying on language in *United States v. Loud Hawk*,[64] Justice O'Connor concluded that speculative harm, and the possibility of prejudice, should not be sufficient to support a contention that a speedy trial violation has occurred.[65]

In a strong dissent, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, questioned the applicability of the *Barker* test in situations where the defendant is unaware of the indictment prior to arrest.[66] Justice Thomas insisted that during the eight and one-half years between Doggett's indictment and arrest, he suffered none of the abuses against which the Speedy Trial Clause was directed.[67] The Justice rejected the majority's contention that prejudice against a defendant's ability to defend himself at trial is an independent and fundamental concern of the Speedy Trial Clause.[68]

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59. *Doggett*, __ U.S. at __, 112 S. Ct. at 2692-93, 120 L. Ed. 2d at 530-31.

60. *Id.* at __, 112 S. Ct. at 2693, 120 L. Ed. at 531. Justice Souter noted that the presumption of prejudice must be taken together with the other *Barker* criteria as a mix of relevant facts and could not be considered exclusively. *Id.*

61. *Id.* at __, 112 S. Ct. at 2694, 120 L. Ed. 2d at 532 (O'Connor, J., dissenting).

62. *Id.*

63. *Doggett*, __ U.S. at __, 112 S. Ct. at 2694, 210 L. Ed. 2d at 532 (O'Connor J., dissenting).

64. 474 U.S. 302, 315 (1986).

65. *Doggett*, __ U.S. at __, 112 S. Ct. at 2694, 120 L. Ed. 2d at 533 (O'Connor, J., dissenting). Justice O'Connor reasoned that such a standard would not be overly burdensome to the defendant as lengthy pre-trial delay is a "two-edged sword." *Id.* Given that the Government has the burden of proof, excessive delay will increase the likelihood that the Government will not be able to prove its case beyond a reasonable doubt and that the defendant will be exonerated. *Id.*

66. *Id.* at __, 112 S. Ct. at 2695, 120 L. Ed. 2d at 533 (Thomas J., dissenting).

67. *Id.*

68. *Id.*

Relying on *United States v. Marion*,[69] Justice Thomas emphasized that the "major evils" which the Speedy Trial Clause was designed to prevent were oppressive incarceration and anxiety accompanying public accusation.[70] The Justice categorized these major concerns as obstructions of liberty.[71] While Justice Thomas acknowledged that a lengthy pre-trial delay may affect the defendant in any number of ways,[72] the Justice pointed out that the Speedy Trial Clause is tailored not to prevent all injurious effects but to prevent any effects that restrict the defendant's liberty.[73] Justice Thomas explained that statutes of limitation and the Due Process Clause are the appropriate recourses for an individual who believes that his defense has been impaired by governmental delay in the post-accusation prosecution of his case.[74]

Justice Thomas noted that there was a divergence of opinion on the issue of whether prejudice to the defense is an independent concern of the speedy trial guarantee.[75] However, he was quick to point out that the language in *Barker*, which suggests that the prevention of prejudice to the defense is a major concern of the Speedy Trial Clause, is merely dictum.[76] The facts in Doggett were so unusual that Justice Thomas believed they could not have been contemplated by the Court when making previous decisions.[77] Never, explained Justice Thomas, had there been a case before the Court in which a defendant who was subjected to lengthy pre-trial delay suffered no restrictions on his liberty.[78]

In concluding his dissent, Justice Thomas retained the long-standing requisite that each speedy trial analysis must be made according to the individual circumstances of that case.[79] With this consideration in mind, Justice

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69. 404 U.S. 307 (1971).

70. *Doggett*, __ U.S. at __, 112 S. Ct. at 2695, 120 L. Ed. 2d at 533 (Thomas, J., dissenting). Justice Thomas went on to say that neither of the "major" concerns of the clause were implicated in the present case. *Id.* Doggett was certainly not incarcerated, and he suffered no pre-trial anxiety as he was unaware of his indictment until the time of his arrest. *Id.*

71. *Id.* at __, 112 S. Ct. at 2695, 120 L. Ed. 2d at 534 (Thomas, J., dissenting).

72. *Id.* at __, 112 S. Ct. at 2695, 120 L. Ed. 2d at 535 (Thomas, J., dissenting).

73. *Id.*

74. *Doggett*, __ U. S. at __, 112 S. Ct. at 2698, 120 L. Ed. 2d at 537 (Thomas, J., dissenting). Justice Thomas stressed that the primary purpose of the Due Process Clause is to protect individuals from unfair treatment in criminal prosecutions. *Id.*

75. *Id.* at __, 112 S. Ct. at 2696, 120 L. Ed. 2d at 535 (Thomas, J., dissenting). Justice Thomas compared *Marion*, *McDonald*, and *Loud Hawk*, all cases requiring a restriction on liberty before a speedy trial issue may be raised, with *Barker*, *Smith*, and *Ewell*, all cases deeming prejudice to the defense to be an independent concern of the Speedy Trial Clause. *Id.*

76. *Id.* at __, 112 S. Ct. at 2696, 120 L. Ed. 2d at 536 (Thomas, J., dissenting).

77. *Id.* at __, 112 S. Ct. at 2695, 120 L. Ed. 2d at 536 (Thomas, J., dissenting).

78. *Doggett*, __ U.S. at __, 112 S. Ct. at 2695, 120 L. Ed. 2d at 536 (Thomas, J., dissenting).

79. *Id.* at __, 112 S. Ct. at 2700, 120 L. Ed. 2d at 540 (Thomas, J., dissenting).

Thomas argued that the *Barker* test should not be used as a blanket analysis of all speedy trial claims; rather, it should be used only in situations involving a restriction of liberty.[80] According to Justice Thomas, although Doggett was subjected to an extraordinary pre-trial delay, he suffered no restrictions on his liberty from that delay; therefore, his right to a speedy trial was not at issue, and the *Barker* test should not apply.[81]

In *Doggett*, the Court applied the *Barker* test with little regard for the unusual circumstances of the case.[82] In so doing, the Court lost sight of the character and intention of the right to a speedy trial as established in the Sixth Amendment and as developed through precedent.[83] There is no evidence in the centuries preceding the enactment of the Bill of Rights that the

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80. *Id.* at __, 112 S. Ct. at 2700, 120 L. Ed. 2d at 539 (Thomas, J., dissenting). Justice Thomas feared that the *Barker* test had "taken on a life of its own" instead of being used a tool in the determination of whether an individual had been deprived of a liberty protected by the speedy trial guarantee. *Id.* Justice Thomas went on to say that the *Barker* test itself had been used by the majority to bestow new liberties on defendants. *Id.*

81. *Id.*

82. *See* Beavers v. Haubert, 198 U.S. 77, 87 (1905) (recognizing that determining whether delay involved in criminal prosecution violates defendant's right to speedy trial depends on circumstances of case). The *Beavers* Court stated, "The right to 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." *Id.*; *see also* Barker v. Wingo, 407 U.S. 514, 522 (1972) (holding that each speedy trial question must be answered based upon its own set of circumstances); United States v. Ewell, 383 U.S. 116, 120 (1966) (stating that right to speedy trial is relative); Pollard v. United States, 352 U.S. 354, 361 (1957) (emphasizing that whether delay in completing prosecution amounts to deprivation of speedy trial right depends upon circumstances). The right to a speedy trial is a more vague concept than other procedural rights, and it is impossible to determine with any precision when the right has been denied. *Barker*, 407 U.S. at 522. What length of delay will be considered a violation of the speedy trial right depends on facts of each individual case, and length considered is directly proportional to the complexities of the case. State v. Hefferman, 809 P.2d 566, 568 (Mont. 1991); *see also* Dan Donovan et al., *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH L. REV. 1043, 1048 (1979) (weighing factors of *Barker* test must be done in light of circumstances in each case); Gary A. Winters, Project, *Preliminary Proceedings—Speedy Trial*, 79 GEO. L.J. 591, 867 (1991) (stating that *Barker* test compels courts to evaluate speedy trial claims on ad hoc basis).

83. *See* Doggett v. United States, __ U.S. __, __, 112 S. Ct. 2686, 2700, 120 L. Ed. 2d 520, 539 (1992) (Thomas, J., dissenting) (stating, "So engrossed is the Court in applying the . . . test set forth in *Barker* that it loses sight of the nature and purpose of the speedy trial guarantee . . ."). Justice Thomas noted the long-established standard of evaluating speedy trial issues on a case-by-case basis. *Id.*; *see Beavers*, 198 U.S. at 87 (recognizing for first time that evaluation of speedy trial claim is contextual inquiry). The *Barker* test was established as a means to give the necessarily contextual analysis of alleged speedy trial violations some form of structure, not as an end in itself. *See Barker*, 407 U.S. at 533 (establishing *Barker* test as mechanism to be used in analysis of speedy trial issues); *see also* Dan Donovan et al., *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH L. REV. 1043, 1048 (1979) (stating that factors of *Barker* test must be considered in light of individual case); Gary A. Winters, Project, *Preliminary Proceedings—Speedy Trial*, 79 GEO. L.J. 591, 867

right to a speedy trial was triggered until a defendant was arrested and held to answer for a criminal offense, at which point his liberty was actually restricted.[84] Moreover, there is no suggestion that there was any intention on the part of the authors of the Bill of Rights to depart from the practiced understanding of the British right to a speedy trial.[85] With this historical

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(1991) (concluding that *Barker* test compels courts to evaluate speedy trial claims on ad hoc basis).

84. *See* SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND ch. xxvi at 43 (David S. Berkowitz & Samuel E. Thorne, eds., Garland Publishing, Inc. 1979) (providing commentary on Chapter 40 of Magna Charta). Sir Edward Coke stated, "Justices of . . . Gaole delivery came at the least into every county twice every year; . . . and . . . the Justices . . . have not suffered the prisoners to be long detained, but at their next coming have given the prisoner full and speedy justice. . . ." *Id.*; *see* Klopfer v. North Carolina, 386 U.S. 213, 223-24 (1967) (discussing Chapter 40 of the Magna Charta in reference to modern speedy trial concerns); United States v. Provoo, 17 F.R.D. 183, 196 (D. Md.), *aff'd*, 350 U.S. 857 (1955) (discussing Magna Charta in reference to modern speedy trial concerns); Natalia Nicolaidis, *The Sixth Amendment Right to a Speedy and Public Trial*, 26 AM. CRIM. L. REV. 1489, 1489-90 (1989) (discussing British history of right to speedy trial). Because this command was directed to the justices, and not to the sheriff, it is clear that the command was only to have effect in situations wherein the prisoner was being held. *See* SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND ch. xxvi at 46 (David S. Berkowitz & Samuel E. Thorne, eds., Garland Publishing, Inc. 1979). The role of the justices was to provide speedy adjudication, not to apprehend and arrest alleged wrongdoers; thus, the Magna Charta's provision requiring expedition on the part of only the justices suggests that the speedy trial right was directed only to delays occurring after arrest. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES at *318-19 (discussing procedures sheriffs used to apprehend criminals). Additionally, the Habeas Corpus Act of 1679 definitively states that the purpose of the Act was to deal exclusively with those already arrested: "Whereas great delays have been used by sheriffs and other officers, to whose custody any of the King's subjects have been committed for criminal or supposed criminal matters, . . . whereby many of the King's subjects have been and hereafter may be long detained in prison." Habeas Corpus Act of 1679, *reprinted in* 1 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 124-31 (2d series 1982); *see also* United States v. Marion, 404 U.S. 307, 314 n.6 (1971) (noting that Habeas Corpus Act did not allude to delays preceding arrest). According to William Blackstone in his commentary on the right to a speedy trial, the same understanding of the right prevailed in the eighteenth century. 4 WILLIAM BLACKSTONE, COMMENTARIES *351. Blackstone noted, "It is usual to try all felons immediately, or soon after their arraignment." *Id.* That assertion by design applied only to those already arrested, because an arraignment could not occur unless the criminal was already in custody. *Id.* at *317.

85. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 934 (1833) (tracing events up to ratification of Constitution). Virginia's 1776 Declaration of Rights provided, "[I]n all capital or criminal prosecutions a man hath a right to a speedy trial." VIRGINIA DECLARATION OF RIGHTS of 1776, § 8, *reprinted in* 10 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 48-50 (1979). Article 8 of the Virginia Declaration of Rights may have been the foundation used by the framers of the Constitution in drafting the Sixth Amendment. *Marion*, 404 U.S. at 314 n.6. Several other states ratified analogous provisions. *E.g.*, MARYLAND DECLARATION OF RIGHTS of 1776, art. 19, *reprinted in* 4 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 373 (1975) (stating that ". . . every man hath a right to a

mandate in mind, courts have limited the application of the Speedy Trial Clause to situations in which the defendant has been held to answer on criminal charges[86] because until the defendant's liberty is restricted, none of the traditional concerns of the speedy trial guarantee is implicated.[87]

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speedy trial"); PENNSYLVANIA DECLARATION OF RIGHTS of 1776, § 9 *reprinted in* 8 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 278-79 (1979) (also stating that ". . . a man hath a right to . . . a speedy public trial"); *see also Klopfer*, 386 U.S. at 225-26 n.21 (listing various speedy trial provisions in constitutions of states of new nation). The British protections, used by the states as a basis for these provisions, did not deal with periods before arrest. *See* Magna Charta, ch. 40 (1215), *quoted in* FREDERICK POLLACK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 172 (2d ed. 1898); Habeas Corpus Act of 1679, *reprinted in* 1 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 124-25 (2d series 1982). Records of the First Congress show only one passage discussing the Speedy Trial Clause, while there are records of extensive debate on other provisions contained in the Bill of Rights. *See* FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 31 (1951) (discussing limited records of debate); Alan L. Schneider, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 484 (discussing debate). The debate centered around the belief of certain congressmen that the speedy trial problem would be adequately addressed by the Compulsory Process Clause or through judicial regulation. 1 ANNALS OF CONG. 756 (Joseph Gales, ed., 1789). The proposed revision was rejected. *Id.* There was no mention during the enactment of the Bill of Rights that the Speedy Trial Clause should differ in form or in scope from its British counterparts. *Id.*

86. *See* United States v. MacDonald, 456 U.S. 1, 6-7 (1982) (attaching right to speedy trial when formal charges are brought or when prosecution begins). As far as speedy trial claims are concerned, a pre-indictment delay is irrelevant since only formal indictment or actual restraint imposed by arrest triggers the protection of the clause. United States v. Lovasco, 431 U.S. 783, 788-89 (1977). It is either formal indictment or information, or actual arrest and holding to answer on a criminal charge, that engages the protection of the Sixth Amendment's right to a speedy trial. *Marion*, 404 U.S. at 313; *cf.* Hoffa v. United States, 385 U.S. 293, 310 (1966) (noting that "there is no constitutional right to be arrested"). The Court in *Hoffa* stated, "The police are not required to guess, at their peril, the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, or a violation of the Sixth Amendment if they wait too long." *Id.* Further, the Speedy Trial Act augments the significance placed on the defendant's being held to answer before the speedy trial right attaches. *See* Speedy Trial Act, 18 U.S.C. § 3161 (c)(1) (1989) (providing that statutory clock would run from date of indictment or date that "the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date occurs last"). In other words, the statutory speedy trial guarantee is not activated until the defendant has been held to answer for his crime. *Id.* In passing the Speedy Trial Act, Congress sought to "make effective the Sixth Amendment right to a speedy trial." *See* S. REP. NO. 1021, 93d Cong., 2d Sess. 1 (1974) (providing evidence of congressional intent in passing the Act). The same result is reached under the Federal Rules of Criminal Procedure 48(b). *See Marion*, 404 U.S. at 319 (stating that rule 48(b) "is clearly limited to post-arrest situations").

87. *See Ewell*, 383 U.S. at 120 (outlining purposes of Speedy Trial Clause). The Supreme Court pointed out that the Speedy Trial Clause is "an important safeguard to 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

As the majority correctly points out, the delay of eight and one-half years between Doggett's indictment and trial was extraordinarily long.[88] However, what is paramount in assessing the delay in this particular case is that Doggett was not aware of the indictment against him until the day of his arrest.[89] The situation of the defendant who is unaware of the charges

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accused to defend himself." *Id.* However, in later cases, the Court identified the "major evils" against which the clause protects as undue and oppressive incarceration and anxiety and concern accompanying public accusation, noticeably omitting impairment to the accused's defense. *See* United States v. Loud Hawk, 474 U.S. 302, 311 (1986) (discussing core concerns of Speedy Trial Clause). In *Loud Hawk*, the court reasoned:

> The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

Id.; *see also Marion*, 404 U.S. at 320 (considering purposes for Sixth Amendment's speedy trial provision). The Court, in *Marion*, acknowledged that a third concern of the Speedy Trial Clause is to limit the possibilities that a delay will hamper a defendant's ability to properly defend himself. *Id.* However, the Court went on to explain that impairment of defense was not a major evil addressed by the clause, and thus, taken alone, is insufficient to warrant an extension of the clause's reach. *Id.* at 321-323; *see also* Gary A. Winters, Project, *Preliminary Proceedings—Speedy Trial*, 79 GEO. L.J. 591, 864-79 (1991) (describing purpose of speedy trial guarantee). When a defendant is not subject to such restraints as incarceration, impairment of liberty accompanying bail, or disruption of life due to arrest, the Sixth Amendment is not implicated. *Id.* at 866-67. *But see Barker*, 407 U.S. at 532 (prejudice to defense is most serious concern of Speedy Trial Clause); Daniel Brown, Note, Meshell v. State: *The Death of Texas Speedy Trial?*, 41 BAYLOR L. REV. 341, 351-53 (1989) (describing prejudice to defense as perhaps most important concern of Speedy Trial Clause).

88. *See Doggett*, __ U.S. at __, 112 S. Ct. at 2694, 120 L. Ed. 2d at 532 (noting that "we have called shorter delays extraordinary"); *Barker*, 407 U.S. at 533 (calling five-year delay between arrest and trial "extraordinary"); Ricon v. Garrison, 517 F.2d 628, 632-33 (4th Cir.) (finding 36-month delay sufficiently "unusual" to act as catalyst into inquiry of speedy trial violation), *cert. denied*, 423 U.S. 895 (1975); United States v. Calloway, 505 F.2d 311, 316 (D.C. Cir. 1974) (stating that delay of more than one year raises speedy trial claim of prima facie merit under Sixth Amendment). Lower courts have established that any post-accusation delay approaching a year is sufficient to warrant a speedy trial inquiry. *See* 2 WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 18.2, at 405 (1984) (describing procedure used for raising speedy trial claim); Gregory P.N. Joseph, *Speedy Trial Rights in Application*, 48 FORDHAM L. REVIEW 611, 623 (1980) (describing when inquiry into speedy trial may generally take place). *But see* Barber v. Hendrick, 315 F. Supp. 798, 800-01 (E.D. Penn. 1970) (reasoning that 14-month delay was not so substantial as to warrant prima facie violation of clause).

89. *See Doggett*, __ U.S. at __, 112 S. Ct. at 2691, 120 L. Ed. 2d at 529 (pointing out that Government presented "no information that Doggett was aware of the indictment before he left the U.S., or prior to his arrest"). The *Doggett* Court noted that the "*Barker* test does not apply at all . . . when an accused is entirely unaware of pending indictment against him." *Id.* at __, 112 S. Ct. at 2700, 120 L. Ed. 2d at 540; *see also* United States v. Redmond, 546 F.2d 1386, 1388-89 (10th Cir. 1977) (finding no denial of speedy trial where delay due to defendant being out of country and aware of charges); United States v. Agreda, 612 F. Supp. 153, 158 (E.D.N.Y. 1985) (no speedy trial violation when defendant was in Venezuela while govern-

against him is clearly distinguishable from that of a defendant who has been arrested or held to answer.[90] Doggett was not deprived of liberty or otherwise subject to restraint during the period of delay; consequently, he was in the same position he would have been in had the indictment been returned shortly before his arrest.[91] Under those circumstances, the speedy trial guar-

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ment attempted to locate and apprehend him). It is important to note that had Doggett been aware of the charges against him, his Sixth Amendment claim would most certainly have been weakened because of his delay in asserting his right to a speedy trial. *See Barker*, 407 U.S. at 532 (stating "[W]e emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."). Although a defendant's assertion of his right to a speedy trial is only a factor to be weighed into the analysis, the ultimate impact "depends on efforts made by the accused." Sam H. Clinton, *Speedy Trial—Texas Style*, 33 BAYLOR L. REV. 707, 717 (1981); *see also* Nancy N. Kerr, Note, 14 ST. MARY'S L.J. 113, 116 (1982) (finding that courts have required defendant to demand trial in order to later claim speedy trial violation).

90. *See Marion*, 404 U.S. at 321 (declining to extend reach of amendment to period prior to arrest). In such a situation the defendant suffers neither restraint due to arrest or bond, nor the anxiety and humiliation accompanying pending charges. *See id.* at 319-26 (stating that protections of Sixth Amendment right to speedy trial are not engaged until accused has suffered some deprivation of liberty). If a defendant is unaware of charges against him, he certainly suffers no incarceration and there can be no anxiety or concern generated by public accusation. Paul R. Clevenger, Note, *Narrowing the Scope of the Speedy Trial Right:* U.S. v. MacDonald, 36 SW. L.J. 1213, 1215 (1983); *cf.* LEWIS R. KATZ, JUSTICE IS THE CRIME: PRE-TRIAL DELAY IN FELONY CASES 56-59 (1972) (discussing repercussions of pre-trial delays on defendants); C.C. Marvel, Annotation, *Speedy Trial—Delay Before Arrest*, 85 A.L.R. 2D 981, 986 (1962) (citing cases in which defendant was not aware of indictment against him). A helpful illustration of the contention that an inquiry into a pre-trial delay depends on the defendant's circumstances is the situation in which a defendant avoids arrest after being indicted—such a defendant is not protected under the Sixth Amendment. *See* United States v. DeLeon, 710 F.2d 1218, 1222 (7th Cir. 1983) (finding no denial of right to speedy trial where delay was result of defendant's fugitive status); United States v. Tarrack, 515 F.2d 558, 559 (9th Cir. 1975) (holding that delay caused by defendant's evasion of capture did not give rise to denial of right to speedy trial); United States v. Weber, 479 F.2d 331, 333 (8th Cir. 1973) (finding no denial of speedy trial right where defendant was fugitive from justice).

91. *See* Halcomb v. Eckle, 165 N.E.2d 479, 480-81 (Ohio 1959) (reasoning that three-year lapse between indictment and trial did not constitute speedy trial violation because defendant did not suffer oppression). The Ohio Supreme Court explained that the defendant was not in jail or on bail between the complaint and the arrest, and thus, according to the principle that the right to speedy trial was designed to prevent unjust oppression, the defendant was not denied his right to speedy trial. *Id.* Delay between indictment and arrest should not be considered in determining whether a defendant's right to speedy trial has been denied where none of the interests protected by the amendment's guarantee were effected during the delay. *See* United States v. Williams, 782 F.2d 1462, 1465-66 (9th Cir. 1985) (holding defendant's Sixth Amendment right to speedy trial not violated where there was valid reason for delay and defendant suffered no substantial impairments to his liberty); United States v. Hay, 527 F.2d 990, 994 (10th Cir.) (finding that delay did not equal violation of speedy trial), *cert.denied*, 425 U.S. 935 (1975); Paul R. Clevenger, Note, *Narrowing the Scope of the Speedy Trial Right:* U.S. v. MacDonald, 36 SW. L.J. 1213, 1220-23 (1983) (discussing courts' determination of when right to speedy trial attaches); David M. Furr, Note, *Right to a Speedy Trial in Civilian Prose-*

antee would not have been an issue, yet the effect of the delay on Doggett would have been the same as under the present scenario.[92] Because Doggett suffered no restriction of his liberty, he should not be entitled to the presumption of prejudice that would normally attend so long a delay.[93] Had

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cution Denied by Delay Following Dismissal of Military Charges: United States v. MacDonald, 17 WAKE FOREST L. REV. 89, 119 (1981) (arguing that speedy trial question not at issue when defendant not subject to either arrest or indictment).

92. *See Marion*, 404 U.S. at 313 (noting that Sixth Amendment has no application until defendant becomes accused). In *Marion*, the Court determined that although the Government knew about the defendants' crime and their identities for over three years before they were indicted, there was no Sixth Amendment violation because the clock does not begin to run on a speedy trial claim until a defendant is either arrested or held to answer on criminal charges. *Id.* at 311-13; *cf. Doggett* __ U.S. at __, 112 S. Ct. at 2696, 120 L. Ed. 2d at 536 (Thomas, J., dissenting) (stating that formal charge irrelevant as to whether defendant suffers prejudice). Justice Thomas reasoned, "A defendant prosecuted ten years after a crime is just as hampered in his ability to defend himself whether he was indicted the week after the crime or a week before the trial—but no one would suggest that the Clause protects him in the latter situation." *Id.*; *see also* Fritz v. State, 811 P.2d 1353, 1365 (Okla. Crim. App. 1991) (finding that time lapse of five years between murder and indictment did not violate defendant's right to speedy trial). The Oklahoma Court of Criminal Appeals Court affirmed *Marion*, stating that the defendant became entitled to a speedy trial only when a felony information was filed. *Fritz*, 811 P.2d at 1365; *cf.* Paul R. Clevenger, Note, *Narrowing the Scope of the Speedy Trial Right:* U.S. v. MacDonald, 36 SW. L.J. 1213, 1223 (1983) (stating that when charges are dismissed, defendant does not suffer any more anxiety or restraint on liberty than defendant who was merely under investigation).

93. *See Doggett*, __ U.S. at __, 112 S. Ct. at 2697, 120 L. Ed. 2d at 536 (Thomas, J., dissenting) (stating, "Never, until today, have we confronted a case where a defendant subjected to a lengthy delay after indictment nonetheless failed to suffer any substantial impairment of his liberty."). In dealing with questions of constitutional violation, the Court has historically focused on the prejudice suffered by the defendant. *See* H. Richard Uviller, Barker v. Wingo: *Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1392 (1972) (discussing various forms of prejudice courts analyze when dealing with constitutional violations); *see also* United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982) (requiring showing of prejudice to establish claim of compulsory process violation); United States v. Morrison, 449 U.S. 361, 365 (1981) (requiring that prejudice be shown to claim violation of defendant's right to counsel); *Lavasco*, 431 U.S. at 790 (requiring proof of prejudice for dismissal due to pre-indictment delay); Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that suppression of evidence causing defendant prejudice violates due process). It follows that the same analysis applies to speedy trial claims because in all the cases in which this Court has granted relief under the Speedy Trial Clause, the defendant suffered some form of prejudice. *See, e.g.*, Dillingham v. United States, 423 U.S. 64, 64-65 (1975) (defendant subject to anxiety where arrest preceded indictment by 22 months); Moore v. Arizona, 414 U.S. 25, 26-27 (1973) (defendant tried for murder three years after charge subject to anxiety pending trial); Smith v. Hooey, 393 U.S. 374, 378 (1969) (defendant subject to prison detention pending trial); *Klopfer*, 386 U.S. at 222 (bailed defendant subject to public scorn while awaiting trial). Most lower court decisions have stressed the need for defendants to prove actual prejudice as a result of pre-trial delay in order to successfully claim a speedy trial violation. Dan Donovan et al., *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH L. REV. 1043, 1057 (1979).

the majority analyzed *Doggett* in terms of the effect of the delay, rather than simply in terms of the length of delay, it should have been obvious that Doggett's situation raised no issues within the traditional scope of the Speedy Trial Clause.[94] Given that the Fifth Amendment Due Process Clause protects individuals from such governmental over-reaching, Doggett was not without recourse for the extraordinary delay in his arrest.[95] When a defendant is not subject to restraints on his freedom or the anxiety accompanying knowledge of the existence of an indictment, the Sixth Amendment is not implicated, and protection must come from due process guarantees.[96] The

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94. *See Loud Hawk*, 474 U.S. at 312 (reasoning that core concern of Speedy Trial Clause is impairment of liberty). In *Loud Hawk*, the district court twice dismissed an indictment against the defendant. *Id.* at 305. The Government twice appealed the dismissals. *Id.* In deciding whether the time in which the case was on appeal was to be counted for purposes of the Speedy Trial Clause, the Court held that because the defendants were not subject to restraints on their liberty, their situation did not "warrant relief under the Speedy Trial Clause." *Loud Hawk*, 474 U.S. at 311. The *Loud Hawk* Court stated, "When defendants are not incarcerated or subject to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause." *Id.* at 312; *see also MacDonald*, 456 U.S. at 9 (finding no denial of speedy trial right when defendant not restrained in any way). The Court in *MacDonald* held that a five-year delay between dismissal of military charges and filing of civilian charges should not be counted in determining pre-trial delay. *Id.* The court explained, "MacDonald was not under arrest, not in custody . . . [h]e was free to go about his affairs, to practice his profession, and to continue with his life." *Id.* at 10. *See generally* Paul R. Clevenger, Note, *Narrowing the Scope of the Speedy Trial Right:* U.S. v. MacDonald, 36 SW. L.J. 1213, 1220-23 (1983) (providing commentary on *MacDonald*); Nancy N. Kerr, Note, 14 ST. MARY'S L.J. 113, 118 (1982) (commenting on *MacDonald*). Because Doggett was not incarcerated and suffered no restriction of his liberty, *MacDonald* and *Loud Hawk* suggest that the period between his indictment and his arrest should be disregarded in calculating his speedy trial claim. *Loud Hawk*, 474 U.S. at 311; *MacDonald*, 456 U.S. at 10; *accord Doggett*, __ U.S. at __, 112 S. Ct. at 2693, 120 L. Ed. 2d at 535-536 (Thomas, J., dissenting) (discussing precedent established by *Loud Hawk* and *MacDonald*).

95. U.S. CONST., amend. V. The Fifth Amendment states, in part, that no person shall "be deprived of life, liberty, or property, without due process of law." *Id.*; *see also* Hampton v. United States, 425 U.S. 484, 490 (1976) (stating that due process comes into play when government activity violates some protected right of defendant); Bloom v. State of Illinois, 391 U.S. 194, 195 (1968) (stating that Due Process Clause forbids federal government from depriving any person of life, liberty, or property without due process of law); Galvan v. Press, 347 U.S. 522, 530 (1954) (reasoning that governmental fair play is essence of due process). *See generally*, Allyn Z. Lite, *The Pre-Accusation Delay Dilemma*, 10 SETON HALL L. REV. 539, 540-45 (1980) (describing relationship between speedy trial analysis and Fifth Amendment). When a delay violates "fundamental conceptions of justice" which define "the community's sense of fair play and decency," a governmental delay in bringing a defendant to trial can violate the Due Process Clause. David M. Furr, Note, *Right to a Speedy Trial in Civilian Prosecution Denied by Delay Following Dismissal of Military Charges:* United States v. MacDonald, 17 WAKE FOREST L. REV. 89, 118 (1981).

96. *See MacDonald*, 456 U.S. at 8 (reasoning that "[t]he Sixth Amendment right to a speedy trial is not primarily intended to prevent prejudice to defense caused by the passage of time; that interest is protected primarily by the Due Process Clause"); *see also* David M. Furr,

majority in *Doggett* accurately applied the four *Barker* criteria to the facts of the case. However, by so facilely applying the *Barker* analysis in a situation where it was clearly unnecessary, the Court has wrenched the *Barker* test from its role as a tool in the determination of speedy trial violations and has given it a life of its own.[97]

By applying speedy trial analysis to a situation in which the defendant was not in any way harmed by the delay between his indictment and arrest, the Court has created a bright line standard for determining speedy trial violations which focuses solely on time. Such a standard presupposes that the concerns of the Speedy Trial Clause have been implicated. However, it is well-established that the analysis of a speedy trial claim is a contextual inquiry. The *Barker* test provides guidelines for assessing a speedy trial claim only when it has been determined that the Speedy Trial Clause is at issue. The Court has, in effect, turned the right to a speedy trial into a post-accusation statute of limitation. This transformation of the Speedy Trial Clause encourages judicial paternalism by forcing courts to second-guess and oversee the government's prosecutorial efforts. Given that there is no constitu-

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Note, *Right to a Speedy Trial in Civilian Prosecution Denied by Delay Following Dismissal of Military Charges:* United States v. MacDonald, 17 WAKE FOREST L. REV. 89, 104-05 (1981) (discussing role of Due Process Clause in guarding against unreasonable delays). In situations of delay in which the concerns of the Speedy Trial Clause are not implicated, the Court has directed defendants to the Due Process Clause for relief. *See Loud Hawk*, 474 U.S. at 312 (directing defendant to Due Process Clause as recourse for delay when right to speedy trial did not attach); *Marion*, 404 U.S. at 324 (stating that defendant could find relief only through due process protection because right to speedy trial not at issue); United States v. Wallace, 848 F.2d at 1464, 1469 (9th Cir. 1988) (stating that speedy trial concerns not at issue when delay may be reviewed by due process pre-accusation standard); United States v. Fuesting, 845 F.2d 664, 669 (7th Cir. 1988) (reasoning that if speedy trial concerns not implicated, defendant must turn to Due Process Clause); *see also* Sam H. Clinton, *Speedy Trial—Texas Style*, 33 BAYLOR L. REV. 707, 717 (1981) (due process prevents dismissal of criminal proceedings due solely to prosecution's lack of judgment in returning indictment).

97. *See Barker*, 407 U.S. at 533 (establishing *Barker* test to provide courts with guidance in considering speedy trial claims). Courts have repeatedly stressed that the *Barker* test is to be used as a means to an end when the particulars of a case lend themselves to the analysis. *See, e.g.*, United States v. Mills, 925 F.2d 455, 464 (D.C. Cir. 1991) (analyzing speedy trial violation necessarily entails case-by-case consideration of all relevant factors, including *Barker* criteria); United States v. Avalos, 541 F.2d 1100, 1110 (5th Cir. 1976) (finding *Barker* test suggestive rather then exhaustive); Handley v. State, 574 So. 2d 671, 676 (Miss. 1990) (determining speedy trial violation requires court to analyze each relevant factor, including but not limited to *Barker* factors); State v. Van Voast, 805 P.2d 1380, 1384 (Mont. 1991) (stating that each facet of *Barker* analysis to be considered in light of surrounding circumstances); Dan Donovan et al., *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes*, 10 TEX. TECH L. REV. 1043, 1048 (1979) (stating that *Barker* test supplies guidelines to courts on how to approach speedy trial issue); H. Richard Uviller, Barker v. Wingo: *Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1381-82 (1972) (finding that *Barker* test is not rigid, mechanical rule used to indicate speedy trial violation).

tional or common law right to a speedy arrest, *Doggett* is at odds with established concepts of constitutional jurisprudence.

The Sixth Amendment right to a speedy trial serves to vindicate the rights of individuals who have incurred impediments to their personal liberty because of governmental negligence in prosecution. Restriction of liberty is the fundamental concern of the Speedy Trial Clause. Absent such prejudice, it is difficult to justify the abolition of society's right to vindicate its interest in punishing an admitted criminal.

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