AN OVERVIEW OF THE RIGHT TO SPEEDY TRIAL IN CRIMINAL CASES IN THE UNITED STATES

*Rya W. Zobel**

I. CONSTITUTIONAL MANDATE

Article 37 of the Constitution of Japan and the Sixth Amendment to the Constitution of the United States guarantee to all criminal defendants the right to a speedy and public trial. It is in both documents a right granted to the defendant; it cannot be invoked by the prosecution. In neither is the right in any way detailed or defined. That is, the Constitutions do not explain what constitutes "speedy"or rather, what period of time is too long, nor do they describe the consequences for exceeding that undefined time.

In the United States, relatively few Supreme Court cases have interpreted this Constitutional provision. However, in 1967 the Court established that the right to a speedy trial is "fundamental", *Klopfer v. North Carolina*, U. S. 213. 223 (1967), and in 1972, it set out the criteria by which the assertion of the right is to be judged, *Barker v. Wingo*, 407 U. S. 514 (1972). It is interesting to review the facts of the *Wingo* case as they explain the diifficulties inherent in fashioning a rule for all cases.

On July 20, 1958, an elderly couple was beaten to death in a rural county in Kentucky. Two suspects, Silas Manning and Willie Barker, ultimately the petitioner in the Supreme Court, were arrested shortly thereafter and were indicted on September 15, 1958. Two days later, counsel was appointed for Barker. For reasons not clear in the record,the Commonwealth did not try the defendants jointly and chose to proceed first against Manning on the theory that once convicted, he could be required to testify against Barker. The theory encountered numerous difficulties in practice. Manning's first trial ended in a hung jury; the second resulted in conviction, but reversal on appeal; the third, again conviction and again reversal on appeal; the fourth once more a hung jury. Finally, on the fifth try, in March 1962, the Commonwealth succeeded in convicting Manning of murdering one victim, and on the sixth attempt, the second. It was December 1962. In the meantime Barker's trial, which had initially been scheduled to start in September 1958, was continued again and again. Although he had been held in jail after his arrest, he was released on bail in June 1959, ten months after his arrest and he remained at large until his conviction and sentence.

Barker's counsel did not object to the first eleven continuances; his objection to the twelfth and his motion to dismiss the indictment were overruled; he again failed to object to numbers 13 and 14, but did assert his right when the Commonwealth sought twice more thereafter to postpone his trial in March and June 1963. He was finally tried and convicted in October 1963, more than five years after the murder and the filing of the indictment against him.

On appeal from that conviction he argued, among other things, that his right to a speedy trial had been violated and that the conviction should therefore be set aside and the indictment, dismissed. He lost the

* U.S. District Court judge for the District of Massachusetts; Director, Federal Judicial Centre, United States of America.

argument in the courts of Kentucky and in the lower federal courts. The Supreme Court agreed to consider his case. Incidentally, the delay from conviction to the hearing and decision of the case in the Supreme Court was due entirely to Barker's delay in requesting review by the Supreme Court - nearly eight years.

Justice Powell, writing for a umanimous court, pointed out that the right to a speedy trial, although a fundamental right, is nevertheless different from the others in the Constitution. It is, of course, a right of the defendant, but, unlike the others, it also protects a societal interest in the swift disposition of criminal cases. Backlogs in the court's docket enable defendants to manipulate the system by, for example, negotiating more lenient plea. From the standpoint of the trial itself, time plays tricks with witness' memories. Defendants released on bail for long periods of time may pose a danger to the community if they commit additional crimes. On the other hand, lengthy pretrial detention is not only unfair to the defendant, but also very expensive.

Finally, the Supreme Court points out, "the right to a speedy trial is a more vague concept than other procedural rights" (at p.521). It is vague because there exists no fixed time after which the right has been denied. The violation of the right also necessarily, that is, for lack of alternative remedies, leads to an unsatisfactory and severe remedy, namely dismissal of the indictment. Given the inherent lack of clarity, the Supreme Court declines to prescribe any rules of thumb, but rather instructs that trial courts are to balance the conduct of the prosecution and defence, case by case. In so doing, they are to consider the length of the delay (one month clearly not enough, five years too long), the reason for the delay (the convenience of the prosecutor does not justify delay, the illness of a crucial witness might), the defendant's assertion of their right (Barker failed to protest the postponements of his trial for more than three years), and prejudice to the defendant from the delay (the disappearance of crucial defence witnesses may so hobble the defence that relief is appropriate). Barker, however, was not so fortunate. The delay was, in the Court's words, "extraordinary", but Barker had not only failed to object to the postponements of his trials over a very long time, he clearly did not want a speedy trial. When he finally did object, the delay was excusable in that it was caused by the illness of an important witness. Finally, Barker could show no harm from the long wait. Such was the law until Congress passed the Speedy Trial Act of 1974.

II. STATUTE AND LEGISLATIVE HISTORY

The Speedy Trial Act of 1974 was prompted by a number of concerns, some overlapping, some conflicting. The Eighth Amendment to our Constitution prohibits the imposition of "excessive" bail. As a practical matter, most persons accused of an offence are released pending their trial. As the United States experienced an ever greater increase in violent crimes and drug offences, the criminal justice system became overburdened, the courts' dockets became overcrowded and, given the right to bail, large numbers of persons accused of crimes remained on the street. The crowded dockets in the courts not only delayed trials, but the delay, in turn, often hampered the efforts of the prosecution. Witnesses' memories diminished, witnesses disappeared, evidence was lost. This allowed defendants to negotiate more effectively for pleas of guilty to lesser offences and to lower sentences. At the same time, defendants awaiting trial demonstrably often continued their antisocial activities. Thus the defendant's

right to a speedy trial also became the public's right. The Supreme Court in the Barker case referred to the "societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused" (at p.519).

Congress was clearly aware of all of these cross-currents as it began to address what had become very real problems for the society and the criminal justice system. The first Speedy Trial Bill was introduced into to the United States Senate in 1970 by Senator Sam Ervin Jr., the Chairman of the Senate Judiciary Committee's Subcommittee on Constitutional Rights. Many state legislatures had already adopted their own versions of speedy trial mandates. While early federal efforts failed, in 1973, Senator Ervin reintroduced a bill, S. 754,93d Cong., 2d Sess., 120 Cong. Rec. 24668 (1974), that eventually was negotiated, with some changes, to become the Speedy Trial Act of 1974. Echoing the Supreme Court's view, Senator Ervin described the bill as a balance between the needs of society and the Sixth Amendment right to a speedy and fair trial. He summarized the purpose of the bill as follows:

> Unfortunately, while it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial. The court, defendant, his attorney, and the prosecutor may have different reasons not to push for trial, but they all have some reason. The overworked courts, prosecutors, and defence attorneys depend on delay in order to cope with their heavy caseloads. The end of one trial only means the start of another. To them, there is little incentive to move quickly in what they see as an unending series of cases. The defendant, of course, is in no hurry for trial, because he wishes to delay his day of reckoning as long as possible. 120 Cong. Rec. 41618 (1974).

Congress, when considering the bill,was confronted by several major policy choices. The first was what the time limit should be for bringing a criminal matter to trial. Should there be one timeline - from arrest to trial - or a multifaceted system that might take into account the way in which the process normally proceeds, from arrest to indictment by a grand jury, to arraignment, pretrial motion practice, trial and, upon conviction, sentence? That is, should the statute fix one period or a series of separate periods for each part of the process? Should the time periods be fixed irrevocably by statute or should the courts be given a measure of flexibility? Finally, one of the most contentious issues was sanctions. It was well recognized that the only effective sanction for violating speedy trial constraints is the dismissal of the indictment, indeed dismissal with prejudice. That means, of course, that a defendant, no matter how guilty, would truly get off on a technicality. The defendant could not be tried then, or ever, for the offence for which s/he had been indicted, simply because the system had failed to bring him/her to trial on time.

From the point of view of a trial judge, who has to work with the limitations imposed by the statute, the Congress did a masterful job of resolving these, at the time, highly contentious matters. It chose a series of time limits for the several parts of a criminal case, beginning the count with the arrest and indictment. It fixed ultimate limits for each period, and ultimately for the entire case, but it added flexibility by a device called "excludable time". Certain time periods did not count toward the total of 70 days from arrest to conviction. It gave full discretion to the trial judge to impose the ultimate sanction of dismissal, with or

without prejudice, depending on the circumstances of the case and the reasons for the violation of the Act. Finally, the Congress allowed for a lengthy period of transition before the statute would take effect to allow the courts, the litigants and the lawyers ample time to plan and adapt to the new regime.

III. SUMMARY OF PROVISIONS OF STATUTE

It is important to remember that the Speedy Trial Act was designed to implement, enforce and define the Constitution's Sixth Amendment right to a speedy trial. It provides specificity where none existed before. It does not, however, supplant or diminish the requirements of the Sixth Amendment. Thus one can imagine a situation where compliance with the Act is achieved while the Constitution is nevertheless violated, as might happen if excessive excludable time orders are entered over the defendant's objections. The following is a brief outline of the Act.

First, the Speedy Trial Act specifies that any information or grand jury indictment must be filed within thirty days of an arrest or service of a summons (see 18 U.S.C. §3161(b)). Note that this requirement, and indeed the entire statute, apply only to federal prosecutions. Subject only to the same Sixth Amendment constraints applicable in the federal courts, the states retain sovereignty over their judicial processes. In fact, a defendant arrested by federal authorities is not subject to the Act if turned over to state authorities. Only if the defendant is held in federal custody, or is served a federal arrest warrant, does the Act take over (*see United States v. Beede*, 974 F.2d 948, 949 (8th Cir. 1992)). Conversely, a defendant held in federal custody while awaiting state charges is not subject to the time clock of the federal Speedy Trial Act (*see United States v. Johnson*, 815 F.2d 309, 312 (5th Cir. 1987)). It is also the case that a formal arrest or summons is necessary to trigger the Act. The temporary seizure of a person, without formal charges, does not trigger the time limitations under the provisions of the Act (*see United States v. Sayers*, 698 F.2d 1128, 1131 (11th Cir. 1983): temporarily taking a defendant into custody or control while photographing or fingerprinting, and then releasing to defendant, does not trigger the Act's time clock; *see also United States v. Davis*, 785 F.2d 610, 614-15 (8th Cir. 1986); *United States v. Walker*, 856 F.2d 26, 27 (5th Cir. 1985)).

Second, after being charged with a crime, the defendant must be brought to trial within seventy days from the filing date of the indictment or information, or the date the defendant first appears before a judicial officer, whichever is later (*see* 18 U.S.C. § 3161(C)(1)). Within that time frame, the statute nevertheless provides the defendant with a guaranteed time of thirty days to prepare. Thus, the trial may not commence less than thirty days after the defendant first appears in court through his or her attorney (*see* 18 U.S.C. § 3161(C)(2)). The beginning of the trial means the start of the jury selection process in a given trial (*see United States v. A-A-A Electronic. Co., Inc.*, 788 F.2d 242, 246 (4th Cir. 1986); *United States v. Howell*, 719 F.2d 1258, 1262 (5th Cir. 1983)). As noted earlier, these exceedingly rigid and short time periods are much tempered by the device of excludable time, which in practice, provides great flexibility.

Third, "excludable time" means nothing more than time that is not counted. The statute is specific and clear about the contingencies that stop the count and the length of the time out (*see* 18 U.S.C. § 3161(h)). It lists four basic categories of delays that stop the clock: 1) delays from pretrial motions and interlocutory appeals;

2) delays relating to the defendant's condition or actions, 3) delays caused by the unavailability of witnesses or defendants; and 4) delays granted "in the interest of justice", when the court determines that the ends of justice outweigh the interest of the defendant or the public in a speedy trial.

Virtually every case calls for counsel to seek infomation, challenge the indictment or shape the case to his/her client's advantage. Thus counsel will file motions for discovery, to dismiss, to sever and the like. These motions are generally necessary and not trivial. They take time to consider and therefore give rise to excludable time. Interestingly, the statute seemingly allows unlimited time from filing to hearing, but limits the time for deciding to 30 days. The case law has, however, built into the unlimited portion a requirement of reasonableness (*see Henderson v, United States*, 476 U.S. 321, 326 (1986)).

Several provisions toll the time for delays that relate to the defendant, including an agreement by the defendant to defer prosecution or delays resulting from a mental examination of the defendant. So also a delay due to the defendant's mental incompetence or physical ailment is deemed reasonable and consequently excludable. Time may even be excludable if needed by one defendant over the objection of another.

Delays caused by the absence of an essential witness to the trial should, and do, give rise to excludable time. However, the government must always exercise "due diligence" in making the witness available (*see United States v. Barragan*, 793 F.2d 1255 (11th Cir. 1986)). This provision applies with equal force to the defence.

Finally, the Court is empowered to grant delays as the "ends of justice" require. Because this provision grants broad discretion to the judge, s/he is required to explain their reasons for any orders under this section (*see United States v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990); *United States v. Vasser*, 916 F.2d 624 (11th Cir. 1990)). The Act sets forth four factors for courts to consider when determining whether to grant a continuance to serve the ends of justice: 1) whether to grant a continuance would make the continuation of the proceedings impossible or result in a miscarriage of justice; 2) whether the case is so unusual or complex that the parties could not reasonably prepare for trial within the Act's time limitation; 3) whether the delay in filing an indictment is because it was difficult for a grand jury to indict with the time limits, including whether a grand jury is in session when the defendant was arrested; and 4) the failure to grant a continuance would deny the defendant reasonable time to obtain counsel, or time for counsel to properly prepare for trial, which may occur in very large complex criminal cases.

Violations of any of the provisions of the statute may lead to sanctions. As mentioned earlier, the only possible and realistic sanction is dismissal of the case. The serious question then remaining is whether the dismissal is to be with or without prejudice. Since the right to a speedy trial is the defendant's right, the statute assumes implicitly that a defendant cannot violate the Act, and it provides no remedy against a defendant other than continuation of the criminal proceeding against them. In deciding the severity of the sanction, the judge is to evaluate the matter according to three enumerated factors: 1) the seriousness of the offence; 2) the facts and circumstances of the case which led to the dismissal; and 3) the impact of a reprosecution on the Act and the administration of justice. As a matter of practical reality, the trial court has great

discretion to dismiss a case with or without prejudice, as the factors are fairly open-ended for the trial judge to use to determine this.

The Act also requires that District Courts adopt plans for prompt disposition of criminal cases, including the formation of a working group consisting of the Chief Judge, United States Attorney, the Federal Public Defender, and other skilled individuals from the criminal justice community (*see* 18 U.S.C. § 3165). The purpose of the group is not to develop its own Speedy Trial Act, but to provide local procedures to implemet an efficient court system, taking into consideration the needs of the individual district court region. Since the federal judicial system has 94 district courts, and since each has a unique culture and tradition, the working groups were most useful in facilitating the transition to the new system of counting in the several courts. They enabled those who had to implement this system to buy into it, and to gain a stake in making it succeed.

IV. SOME CONCLUSIONS

Several aspects of the Act are worth noting specially. First, as described above, Congress showed a concern for the trial courts, not always present in legislation, that prescribe and proscribe the manner in which the courts do their work. Both houses of Congress acknowledged that they did not know the reasons for pretrial delay in criminal cases, and both recognized that a speedy trial mandate, if it were to have any teeth, would have a serious impact on the courts and would severely test their ability to achieve compliance with the proposed statutory provisions. The Act as passed, and all earlier versions, would effectively give preferential treatment to criminal cases by putting them always at the head of the queue of a judge's or a court's docket. Courts had to devise mechanisms, perhaps change rules, to accommodate this now expedited criminal docket without delaying the disposition of civil cases. Congress was not alone in its ignorance. Little research had been done on these questions within or without the judiciary.

Two responses emerged. First, full implementation of the statute was delayed, ultimately by nearly four years, to allow the courts, indeed the criminal justice system as a whole, to prepare for the impending change. Second, Congress tried to foster knowledge and understanding of the criminal justice process. Thus the Act includes several provisions that require the Courts to develop plans not only for implementation, but also for the collection of a wide range of information and statistics about the administration of criminal justice within each court. Much of the data to be collected was to inform the courts and, by means of periodic reports, Congress, about the causes of pretrial delay, the cost of compliance with the Act, and the effects of the speedy trial provisions on the management of the courts' entire docket, criminal and civil.

The courts did collect vast amounts of data and they did report to Congress. However, not much use was made of the data. The studies and insights to be derived therefrom simply did not materialize. It is the case that implementation of the Speedy Trial Act requirements was, in the end, remarkably uneventful. Perhaps because of the long transition period, or because the courts had to plan for implementation, trial judges, prosecutors and defence counsels were quite ready to accept these new requirements and to make the statute work. Indeed, the most interesting fact about this piece of legislation is how quickly and totally it was accepted by those most affected by it, and how well it has worked.

One of the areas of concern and contention had been the matter of sanctions. Yet dismissals, particularly dismissals with prejudice, have been rare and with few exceptions, the courts have managed to dispose of criminal cases within the time frames established by the Act,without unduly delaying the civil docket. The lesson I would draw from this experience is that the judicial system, bound as it may be to custom and unwilling to change, is nevertheless able to accommodate even major adjustments if they are properly managed and the goal is one the judges and lawyers accept.