



Fall 9-1-1964

Speedy Trial And Pre-Trial Incarceration

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Criminal Procedure Commons](#), and the [Fourteenth Amendment Commons](#)

Recommended Citation

Speedy Trial And Pre-Trial Incarceration, 21 Wash. & Lee L. Rev. 278 (1964).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol21/iss2/8>

This Comment is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

CASE COMMENTS

SPEEDY TRIAL AND PRE-TRIAL INCARCERATION

The sixth amendment of the United States Constitution guarantees a speedy trial to those accused of crime.¹ However, no definite time period is prescribed within which their trial must be commenced,² and a determination of whether the right has been violated must be made on the basis of the circumstances of each particular case.³ As a result, the provision has been a constant source of litigation in the federal courts.⁴

¹"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . ." U.S. Const. amend. VI. See *United States v. Fox*, 3 Mont. 512 (1880), for a discussion of the origin and development of the protection. See generally, Note, 57 Colum. L. Rev. 846 (1957); Note, 5 Stan. L. Rev. 95 (1952); 64 Yale L.J. 1208 (1955).

²It is usually said that the right to a speedy trial accrues only after an accused has been formally charged with a crime. Prior to that, the Government is bound only by the statute of limitations on the particular crime, and may seek to have the accused indicted at any time within the applicable period. *Harlow v. United States*, 301 F.2d 361 (5th Cir. 1962); *Foley v. United States*, 290 F.2d 562 (8th Cir. 1961); *Hoopengartner v. United States*, 270 F.2d 465 (6th Cir. 1959); *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *United States v. Hunter Pharmacy, Inc.*, 213 F. Supp. 323 (S.D.N.Y. 1963); *United States v. Hanlin*, 29 F.R.D. 481 (W.D. Mo. 1962); *United States v. Abrams*, 29 F.R.D. 178 (S.D.N.Y. 1961). But see *Mann v. United States*, 304 F.2d 394, 396 n.4 (D.C. Cir. 1962) where the court said, "While the point is not important here, we note that in our view, and contrary to some recent opinion, . . . the Constitutional guarantee protects against undue delays in presenting formal charge as well as delays between indictment and trial." See also *United States v. Provoo*, 17 F.R.D. 183 (D. Md. 1955).

³*Pollard v. United States*, 352 U.S. 354 (1957); *Beavers v. Haubert*, 198 U.S. 77 (1905); *United States v. Graham*, 289 F.2d 352 (7th Cir. 1961); *United States ex rel. Hanson v. Ragen*, 166 F.2d 608 (7th Cir. 1948); *MacKnight v. United States*, 263 Fed. 832 (1st Cir. 1920); *United States v. Palermo*, 27 F.R.D. 393 (S.D.N.Y. 1961).

⁴It has been held that the sixth amendment does not apply to the states. *Gaines v. Washington*, 277 U.S. 81 (1928); *Phillips v. Nash*, 311 F.2d 513 (7th Cir. 1962); *Falkowski v. Mayo*, 173 F.2d 742 (5th Cir. 1949); *United States ex rel. Von Cseh v. Fay*, 195 F. Supp. 432 (S.D.N.Y. 1961); *Chick v. Kentucky*, 140 F. Supp. 418 (E.D. Ky. 1956); *Copley v. Sweet*, 133 F. Supp. 502 (W.D. Mich. 1955); *Ex parte Whistler*, 65 F. Supp. 40 (E.D. Wis. 1945); *Ex parte Barnard*, 52 F. Supp. 102 (E.D. Ill. 1943). Nevertheless, some federal cases proceed under the assumption that state criminal defendants are protected by the sixth amendment. *Mattoon v. Rhay*, 313 F.2d 683 (9th Cir. 1963); *Nelson v. Sacks*, 290 F.2d 604 (6th Cir. 1961); *Suit v. Ellis*, 282 F.2d 145 (5th Cir. 1960); *Gordon v. Overlade*, 143 F. Supp. 577 (N.D. Ind. 1956). It seems clear that if the delay in a state court is too flagrant, it runs afoul of the fourteenth amendment. *Hughes v. Heinze*, 268 F.2d 864 (9th Cir. 1959); *Petition of Sawyer*, 229 F.2d 805 (7th Cir. 1956); *Germany v. Hudspeth*, 209 F.2d 15 (10th

In the recent case of *Smith v. United States*,⁵ the accused was arrested in Washington, D. C. October 24, 1961, on a narcotics charge. Unable to make bail, he was confined in jail to await trial. He was indicted November 13, arraigned November 17, and trial was set for January 3, 1962. But a succession of six continuances delayed trial until April 16, 1962, five months after indictment. Upon conviction, defendant appealed, alleging that he was denied a speedy trial. The appeal was heard by a division⁶ of the United States Court of Appeals, District of Columbia Circuit, and decided in defendant-appellant's favor.⁷ His conviction was vacated and the indictment dismissed.⁸ Subsequently, on the Government's motion, a rehearing en banc was ordered, at which time the opinion and order of the three-judge divisional court were withdrawn. Upon rehearing, it was held that there was no violation of defendant's right to a speedy trial, although his conviction was reversed on other grounds.

Failure to receive a speedy trial as guaranteed by the sixth amendment has been frequently asserted by criminal defendants when challenging their convictions. But in the overwhelming majority of cases, the plea has not been well taken. There are two main reasons for this.

First, the courts have consistently held that the provision guaranteeing a speedy trial confers only a personal right, which may be

Cir. 1954); In re Kominski, 168 F. Supp. 836 (D. Del. 1958). Anyway most states guarantee a speedy trial in criminal cases. The exceptions are Massachusetts, Nevada, New Hampshire, New York, and North Carolina. Note, 57 Colum. L. Rev. 846, 847 n.7 (1957). Furthermore, many states provide a definite time period within which trial must be had. See Note, 57 Colum. L. Rev. 846, 852 n.35 (1957) for examples. Also, some cases intimate that the right applies in court-martial cases. Gorko v. Commanding Officer, Second Air Force, 314 F.2d 858 (10th Cir. 1963); Day v. Davis, 235 F.2d 379 (10th Cir. 1956); Sima v. United States, 96 F. Supp. 932 (Ct. Cl. 1951). Compare Ex Parte Benton, 63 F. Supp. 808 (N.D. Cal. 1945).

⁵No. 17106 D.C. Cir., Feb. 20, 1964.

⁶The Court was composed of Edgerton, Senior Circuit Judge and Danaher and Wright, Circuit Judges.

⁷No. 17106, D.C. Cir., Aug 15, 1963.

⁸Federal courts have inherent power to dismiss an indictment for lack of a speedy trial. Ex parte Altman, 34 F. Supp. 106 (S.D. Cal. 1940). But the matter has been complicated by Rule 48(b) Fed. R. Crim. P., which authorizes the court to dismiss for want of prosecution. Dismissal pursuant to the sixth amendment bars reprosecution for the same offense, Mann v. United States, 304 F.2d 394 (D.C. Cir. 1962). Dismissal pursuant to Rule 48(b) does not prevent reprosecution, Mann v. United States, 304 F.2d at 397-98. Also, there is some question whether a dismissal under Rule 48(b) is appealable, United States v. Apex Distrib. Co., 270 F.2d 747 (9th Cir. 1959). Cf., United States v. Gunther, 259 F.2d 173 (D.C. Cir. 1958). See also United States v. McWilliams, 163 F.2d 695 (D.C. Cir. 1947) and United States v. Palermo, 27 F.R.D. 393 (S.D.N.Y. 1961).

waived.⁹ The courts have been quick to find waiver upon a showing of inaction on the part of defendant in failing to demand a speedy trial.¹⁰ It has also been held that where the defendant does not object to delays, he impliedly acquiesces in them and is thereby barred from later complaining of them.¹¹

Second, most courts have taken a very liberal view as to what constitutes a speedy trial. Perhaps the most influential decision in this area has been *Beavers v. Haubert*,¹² a United States Supreme Court case, wherein the Court said, "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."¹³ This language has been frequently cited in later decisions.¹⁴ Where the delay has been long, some courts have said that it must be shown that defendant's case has not been prejudiced, although it is not clear who has the burden of proof on the issue.¹⁵ Gen-

⁹*United States v. Lustman*, 258 F.2d 475 (2d Cir. 1958); *Fouts v. United States*, 253 F.2d 215 (6th Cir. 1958); *Chinn v. United States*, 228 F. 2d 151 (4th Cir. 1955); *Campononico v. United States*, 222 F.2d 310 (9th Cir. 1955); *Shepherd v. United States*, 163 F.2d 974 (8th Cir. 1947); *Collins v. United States*, 157 F.2d 409 (9th Cir. 1946).

¹⁰*Danziger v. United States*, 161 F.2d 299 (9th Cir. 1947); *O'Brien v. United States*, 25 F.2d 90 (7th Cir. 1928); *Poffenbarger v. United States*, 20 F.2d 42 (8th Cir. 1927); *United States v. Fassoulis*, 179 F. Supp. 645 (S.D.N.Y. 1959); *Ex parte Pickerill*, 44 F. Supp. 741 (N.D. Tex. 1942). Some courts are stricter in their application of the doctrine of waiver than others. Compare *United States v. Patrioso*, 21 F.R.D. 363 (S.D.N.Y. 1958) and *United States v. Dillon*, 183 F. Supp. 541 (S.D.N.Y. 1960). See also *United States v. Chase*, 135 F. Supp. 230 (N.D. Ill. 1955). It is at least proper, if not necessary to bring mandamus if attempts to secure a speedy trial fail. *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953); *Fowler v. Hunter*, 164 F.2d 668 (10th Cir. 1947); *United States ex rel Coleman v. Cox*, 47 F.2d 988 (5th Cir. 1931); *Frankel v. Woodrough*, 10 F.2d 360 (8th Cir. 1926).

¹¹*Pietch v. United States*, 110 F.2d 817 (10th Cir. 1940); *Daniels v. United States*, 17 F.2d 339 (9th Cir. 1927); *Worthington v. United States*, 1 F.2d 154 (7th Cir. 1924); *Phillips v. United States*, 201 Fed. 259 (8th Cir. 1912); *United States v. Wai Lau*, 215 F. Supp. 684 (S.D.N.Y. 1963); *United States v. Stein*, 18 F.R.D. 17 (S.D.N.Y. 1955). Of course if the defendant causes the delay, he cannot complain of it. *Pate v. United States*, 297 F.2d 166 (8th Cir. 1962); *Dandridge v. United States*, 265 F. 2d 349 (D.C. Cir. 1959); *United States v. Postma*, 242 F.2d 488 (2d Cir. 1957); *Morland v. United States*, 193 F.2d 297 (10th Cir. 1951); *Hart v. United States*, 183 Fed. 368 (6th Cir. 1910); *Hollman v. Wilkinson*, 124 F. Supp. 849 (M.D. Pa. 1954).

¹²198 U.S. 77 (1905).

¹³*Id.* at 87.

¹⁴*Pollard v. United States*, 352 U.S. 354, 361 (1957); *United States v. Graham*, 289 F.2d 352, 353 (7th Cir. 1961); *United States ex rel. Hanson v. Ragen*, 166 F.2d 608, 610 (7th Cir. 1948); *MacKnight v. United States*, 263 Fed. 832, 835 (1st Cir. 1920); *United States v. Palermo*, 27 F.R.D. 393, 395 (S.D.N.Y. 1961).

¹⁵*United States v. Farley*, 292 F.2d 789 (2d Cir. 1961); *United States v. Lustman*, 258 F.2d 475 (2d Cir. 1958); *United States v. Kaye*, 251 F.2d 87 (2d Cir. 1958);

erally, the federal courts have been very indulgent with dilatory prosecutions. Only a few federal court cases¹⁶ have upheld the contention of a denial of the right to a speedy trial pursuant to the sixth amendment. However, all these cases were decided after 1954, allowing the speculation that the law in this area is in transition.

The United States Court of Appeals for the District of Columbia Circuit has been particularly active in this area. Three comparatively recent cases from that court have found a violation of the right to a speedy trial. In each of these cases, however, the delay was great and the unfairness apparent.¹⁷ Then, in 1959, the Court decided *King v. United States*,¹⁸ where the delay was only 140 days from arraignment to trial (144 days from indictment to trial). The Court, sitting en banc, found that there was no denial of a speedy trial.¹⁹ The majority, however, stressed the fact that the delays were not caused by the prosecution,²⁰ and carefully distinguished cases in which the delays were caused by the prosecution. It said, "Cases such as *United States v. Provoo*, *Taylor v. United States*, *United States v. McWilliams*, and *United States v. Chase*, cited by appellant, are not applicable here, because the delays involved in those cases were attributable to the prosecution."²¹

The inference is inescapable that a more serious question would

Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957); *United States v. Holmes*, 168 F.2d 888 (3d Cir. 1948); *United States v. Shelton*, 211 F. Supp. 869 (D.D.C. 1962).

¹⁶*United States v. Gunther*, 259 F.2d 173 (D.C. Cir. 1958); *Williams v. United States*, 250 F.2d 19 (D.C. Cir. 1957); *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956); *United States v. Dillon*, 183 F. Supp. 541 (S.D.N.Y. 1960); *United States v. Barnes*, 175 F. Supp. 60 (S.D. Cal. 1959); *United States v. Chase*, 135 F. Supp. 230 (N.D. Ill. 1955); *United States v. Provoo*, 17 F.R.D. 183 (D. Md. 1955). One other case is *United States v. Fox*, 3 Mont. 512 (1880), which was decided by the Supreme Court of the Montana Territory. This appears to be the first case to find a violation of the sixth amendment guarantee of a speedy trial. There have also been some cases dismissed under Rule 48(b) for lack of prosecution, a different ground from lack of a speedy trial. See e.g., *United States v. Apex Distrib. Co.*, 270 F.2d 747 (9th Cir. 1959); *United States v. McWilliams*, 163 F.2d 695 (D.C. Cir. 1947); *United States v. Pack*, 20 F.R.D. 209 (D. Del. 1957).

¹⁷*United States v. Gunther*, supra note 16 (six year delay); *Williams v. United States*, supra note 16 (seven year delay from indictment to trial); *Taylor v. United States*, supra note 16 (six year delay from date of crime to date of trial).

¹⁸265 F.2d 567 (D.C. Cir. 1959).

¹⁹The court was divided five to four. See dissenting opinion at 571.

²⁰"It is argued that the view we support proceeds from the premise that none of the delay in the case at bar was caused by the prosecutor, an inadequate premise. Our reasoning does not so proceed. The non-involvement of the prosecutor is merely one of the features of the case." 265 F.2d at 570. It appears, however, that it was the most compelling factor.

²¹265 F.2d at 569.

have been presented if the delays had been caused by the prosecution. That situation was squarely presented in the appeal heard by the three-judge divisional court, since the majority there found that the delays were caused entirely by the prosecution (except for one day, caused by the crowded criminal court calendar). The majority found for the defendant on this ground. Referring to the above quoted language from *King*, the court said:

"This implies that if the delays involved in the *King* case had been attributable to the prosecution they would have raised a serious constitutional question. Since the delays in the present case are attributable to the prosecution and in other respects are similar to those in *King*, that question is before us.

We answer the constitutional question in favor of the appellant and do not reach his other contentions. Because his right to a speedy trial was denied, the judgment of conviction must be vacated and the indictment dismissed."²²

The interesting aspect of this holding is that the motives of the prosecution in procuring the delays were not inquired into. Other federal cases have stated that for a delay caused by the prosecution to be improper, it must be shown that it was procured deliberately, with the intent to vex the defendant.²³ The decision was unprecedented in the weight it gave to the fact that the delays were caused by the prosecution, without an inquiry into the motives.

The other basis for the decision of the original panel was the fact that the defendant was imprisoned from the time of his arrest until the time of his trial, a span of six months, because he was unable to make bond.²⁴ It had never been clear, prior to that decision, to what extent pre-trial incarceration of a defendant was a factor in the speedy trial problem.²⁵ This raises the question as to whether an incarcerated defendant is entitled to a "more speedy" trial than a defendant free on bail.²⁶

²²No. 17106, p. 6, D.C. Cir., Aug. 15, 1963.

²³*Davidson v. United States*, 312 F.2d 163 (8th Cir. 1963); *United States v. Hill*, 310 F.2d 601 (4th Cir. 1962); *Bullock v. United States*, 265 F.2d 683 (6th Cir. 1959); *United States v. Provoo* 17 F.R.D. 183, 197 (D. Md. 1955); *United States v. Fox*, 3 Mont. 512 (1880).

²⁴Pre-trial incarceration is to be distinguished from incarceration pursuant to a prior conviction. The latter problem was recently discussed in Comment, *Convict's Right to Speedy Trial on a Pending Indictment*, 21 Wash. & Lee L. Rev. 128 (1964).

²⁵108 U. Pa. L. Rev. 414, 416, n.16 (1960). See also *United States ex rel. Whitaker v. Henning*, 15 F.2d 760, 761 (9th Cir. 1926).

²⁶Sometimes a mentally incompetent defendant is held in a mental institution either to determine his capacity to stand trial, or until he becomes fit to stand trial. It is generally held that such delays do not run afoul the sixth amendment.

In *King*, the defendant was in jail from the time of his arrest until the time of his trial, a period of six months, but this matter was noted by the majority only in passing. The Court said, "We do suggest that the District Court give the problem continuing attention, especially in respect to defendants held in jail."²⁷ The matter was discussed more fully in the dissenting opinion, in which Circuit Judge Bazelon said:

"Here the appellant was in jail, as if serving sentence, though not tried and though presumed to be innocent until convicted. He was not free on bail bond. The system accordingly operated to the prejudice of appellant by depriving him of liberty for substantial period of time. . . ."²⁸

The pre-trial imprisonment situation was again presented in *Porter v. United States*.²⁹ There the defendant was indicted on December 23, 1957, and tried on May 20, 1958, after five postponements. The defendant was in jail from the time of his arrest November 28, 1957, until his trial, a period of six months, because he was unable to furnish bail. The imprisonment aspect was again passed over by the majority, who decided against defendant on his plea of denial of a speedy trial. Again Judge Bazelon dissented.³⁰

Judge Bazelon's view of the imprisonment aspect of the speedy trial problem seems to have prevailed upon the original three-judge panel in the *Smith* case. The majority said:

"Because he could not buy a \$2500 bail bond the appellant was imprisoned, despite the legal presumption of innocence, while he waited to be tried. This means that for nearly six months he was imprisoned not because he was guilty but because he was poor. . . . In our opinion the right to a speedy trial includes, in the circumstances of this case, a right not to be kept in jail for months without trial for the convenience of the prosecution."³¹

In the present case the Court, sitting en banc, took, a different view than did the majority of the original three-judge panel, not only of the facts of the case, but of the law on the subject of speedy trial.

United States ex rel. Ciehala v. LaVallee, 312 F.2d 308 (2d Cir. 1963); Howard v. United States, 261 F.2d 729 (5th Cir. 1958); Barfield v. Settle, 209 F. Supp. 143 (W.D. Mo. 1962); Petition of Daniels, 150 F. Supp. 734 (S.D.N.Y. 1957); United States v. Miller, 131 F. Supp. 88 (D. Vt. 1955). However, the detention must not be unreasonably long. Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957).

²⁷265 F.2d at 569.

²⁸Id. at 572.

²⁹270 F.2d 453 (D.C. Cir. 1959).

³⁰Ibid.

³¹No. 17106, p. 5, D.C. Cir., Aug. 15, 1963.

First, the Court found that the delays were not all caused by the prosecution. It found that the tactics of the defendant contributed substantially to the delay.³² This would seem to have been sufficient reason to reverse the prior decision, on the reasoning of the *King* case. But the Court went further. It said:

"We do not assess the resolution of the issue simply in terms of 'fault.' Rather, weighing all the 'circumstances,' as we are bound to do, there is not on this record a showing of such oppression or of purposeful, vexatious or arbitrary action as amounts to a deprivation of the appellant's constitutional right."³³

This language seems clear. The Court is rejecting the test of the *King* case, as interpreted by the original three-judge court in the present appeal. The test is not who caused the delay, or who was at "fault" in causing it. Instead, the court will test the motives of the prosecution in seeking the delay. If the delay is sought for the purpose of oppressing or vexing the defendant, violation of the right will be found, providing the delay is sufficient. If, on the other hand, the delay is either unavoidable, or reasonable under the circumstances, no violation will be found, unless perhaps the delay is unreasonably long.

Second, the majority opinion does not mention in its discussion of the speedy trial issue, the fact that defendant was imprisoned pending trial, although this is the prime consideration in the dissenting opinion of Circuit Judge Wright.³⁴ Whether the Court's silence on this point can be interpreted as a rejection of the argument that incarcerated defendants are entitled to a more speedy trial than defendants free on bail is perhaps conjectural. At least, the majority did not feel the argument of sufficient merit so as to require affirmance of the original appeal decision.

It is submitted that the test applied in the present case is the proper one. That is, the court makes its determination on the basis of all the circumstances of the case, not on the basis of one particular factor or another. But it is also believed that the factor of pre-trial incarceration is a circumstance which should be considered by the court in reaching its decision. At the present time there appears to be no definitive treatment of pre-trial incarceration in the case law on the subject of speedy trial. But the trend of recent cases, particularly in the District of Columbia Circuit, makes it likely that pre-trial incarceration will become recognized as a factor of significant importance

³²No. 17106, p. 11, D.C. Cir., Feb. 20 1964.

³³Ibid.

³⁴Id. at 18.