REPORT

OF

THE SPEEDY TRIAL ACT STUDY COMMITTEE

TO

CHIEF JUSTICE JAMES G. EXUM, JR.
THE SUPREME COURT OF NORTH CAROLINA

North Carolina. Speedy Trial Act Study Committee.

Rec'd 7-17-89

March 8, 1989

MEMBERS
OF
THE SPEEDY TRIAL ACT STUDY COMMITTEE

W. Douglas Albright, Chairman
Senior Resident Superior Court Judge
Judicial District 18

F. Gordon Battle
Senior Resident Superior Court Judge
Judicial District 15B

Forrest A. Ferrell
Senior Resident Superior Court Judge
Judicial District 25

Joe Hackney
Member, House of Representatives
North Carolina General Assembly

Donald Jacobs
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Prosecutorial District 8

Isabel Scott Day
Public Defender
Judicial District 26

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Committee Staff:

Robert E. Giles
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Research and Planning Division
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INTRODUCTION

The Speedy Trial Act Study Committee was appointed in November 1988 by Chief Justice Exum of the Supreme Court of North Carolina. The Chief Justice asked the Committee to study the Speedy Trial Act and determine whether that Act is having an adverse impact on the calendaring of criminal cases in superior courts. In addition, the Committee was asked to study the statutes relating to arraignment and determine whether those statutes are having an adverse impact on the calendaring of criminal cases in superior courts. The Committee was asked to recommend statutory or administrative remedies for any problems found to exist.

The Committee met on the following dates: December 29, 1988; January 27, 1989; February 10, 1989; February 17, 1989; and March 3, 1989.

The Committee received staff assistance from the Research and Planning Division of the Administrative Office of the Courts, which provided the Committee statistical data on speedy trial dismissals in the superior courts, ages of criminal cases pending in the superior courts, ages of criminal cases at the time of disposition, information on speedy trial statutes in other states, and information on the constitutional requirements for a speedy trial under the United States and North Carolina Constitutions. In addition, at the request of the Committee, the Administrative Office of the Courts obtained from clerks' offices throughout the state a copy of all superior court criminal trial calendars and calendar minutes for the week of court beginning January 9, 1989, along with a copy of each order of case continuance pertaining to a case on that week's criminal trial calendars. This information was provided by the clerk of superior court in each county which had criminal court scheduled during the week of January 9, 1989.

Based upon the information and data provided to the Committee and the collective experience and judgment of committee members, conclusions have been reached on recommendations to be submitted to the Chief Justice.

IMPACT OF SPEEDY TRIAL ACT ON CALENDARING OF CASES IN SUPERIOR COURTS

The Committee concludes that the operation of the Speedy Trial Act does have an adverse impact on calendaring of cases in the superior courts. Large numbers of criminal cases are being placed on the trial calendars with no realistic expectation that the cases can be reached for trial. Rather, they are put on the trial calendar to establish a record of continuances of cases and resulting exclusions of time under the Speedy Trial Act. This practice has greatly increased paper work for clerks, judges, and district attorney offices, has increased the burdens on sheriffs for service of subpoenas, and has resulted in greater costs and inconvenience for witnesses and attorneys.

The Committee believes that a variety of factors has contributed to the development of this widespread calendaring problem: (1) the large caseloads and the limited resources of district attorneys; (2) a lack of courtrooms in counties with inadequate facilities, and a lack of superior court judges to assign to extra sessions of criminal court; (3) reduced superior court time for trial of cases because of court time required for arraignments and probation hearings; and (4) the great amount of trial time required for a capital case or other complicated felony case. And, on occasion, a district attorney may not plan ahead and manage the trial calendar as well as would have been possible with the resources at hand.

If the district attorney has the evidence to justify prosecution on an offense, and the defendant has shown no desire for a prompt trial and can show no prejudice from additional time taken to get to trial, it does not appear to be in the public interest to have that case dismissed simply because the 120-day standard under the State's speedy trial statutes was not met. Under such circumstances, it is understandable that the district attorney would use the speedy trial statutes to obtain additional time by getting large numbers of cases continued. This particular procedure, however, has created the problems already described.

For the January 9 week of criminal superior court across the State, information was collected from the 37 counties holding court that week. Although there was much variation among the individual counties, a summary of the data statewide shows that approximately 50 percent of all trial cases and 48 percent of all trial defendants were continued from the week of January 9 (See Appendix B). About 55 percent of the orders for case continuance listed as the reason for case continuance, "the trial of other cases prevented the trial of this case during this session." While recognizing the limitations in a one-week sample, for purposes of drawing statistical conclusions about a period of, for example, a year, the Committee believes that the data collected does indeed suffice to illustrate the magnitude of the case continuance problem: the problem is statewide, it is significant, and it needs remedial attention.

Six of the seven members of the Committee recommend a revision of the current Speedy Trial Act, and the text of a draft bill for this purpose is contained in Appendix C. The main points of the proposed revision are as follows:

(1) Repeals G.S. 15A-701 through G.S. 15A-703.

(2) Adds a policy statement that "criminal charges be resolved without undue delay."

(3) Increases from 120 days to 180 days the time limit within which the trial of a defendant charged with a criminal offense must begin.

(4) Keeps the same starting points from which the time begins to run (arrest, service of process, indictment, etc.)

(5) Eliminates all former exclusions of time except the period of time from the time the district attorney enters a dismissal with leave for the defendant's failure to appear until the district attorney reinstates the proceedings.

(6) Adds a provision giving superior court judges discretionary authority to extend the time for trial of a case, upon motion of the state or defendant and for good cause shown.

(7) Specifies some factors which a judge shall consider in determining whether to extend the time: a) miscarriage of justice, b) limited number of court sessions scheduled for the county, c) complexity of the case, d) a trial participant's obligation to the State of North Carolina, and e) an abused victim or witness.

(8) Eliminates presumptions for counties with limited court sessions, other than as one factor to use when the judge is considering whether to extend the time for commencement of the criminal action.

(9) Provides for dismissal with prejudice, dismissal without prejudice, or other appropriate order for failure to commence trial within the statutory period of 180 days (or extensions granted).

(10) Retains the provision that failure of the defendant to move for speedy trial dismissal prior to trial or entry of a plea of guilty or no contest constitutes a waiver of the right to dismissal.

(11) Retains the provision that the sanctions provided shall not apply to proceedings in the district court division.

(12) Includes an express provision allowing the defendant to move for an expedited trial.

The majority of the Committee endorses this proposal because it alleviates the trial calendaring problem in several ways. Of foremost importance is the fact that, should district attorneys need an extension of time for some cases, they would place the cases on the motions calendar rather than on the trial calendar. This practice will eliminate the need for the subpoena of witnesses, which in turn lessens the workload for the clerks' and sheriffs' offices and eliminates waste of time by persons subpoenaed. In addition, the trial calendar, with only the cases that could likely be reached, would be far more realistic.

Increasing the time limit from 120 days to 180 days gives the district attorney more time initially within which to try a case without intervention of any kind by the court: fewer cases would require extension orders. Case data from fiscal year 1987-88 shows that almost 80 percent of felony cases and 84 percent of misdemeanor cases were disposed within 180 days of being filed in superior court. (See Appendix A.)

The provision allowing defendants to petition for an expedited trial (in proposed G.S. 15A-703 of the draft bill) would protect defendants who could show good cause for a trial earlier than the 180-day limit.

The district attorney member of the Committee does not endorse the proposed revision. He reported that district attorneys prefer to leave the Speedy Trial Act as it is, and to deal with calendaring problems administratively. The Committee acknowledges the problems created for district attorneys by their heavy caseloads and recommends that more resources be provided for personnel and case management training for district attorney offices.

IMPACT OF ARRAIGNMENT STATUTES ON CALENDARING

The requirement in G.S. 15A-943 that arraignments be held at the beginning of a court session creates a situation in which the freshest and most productive time of a week of superior court is spent calling the arraignment calendar. The situation is further aggravated by the provision in the current law that "[n]o cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared."

After due consideration, all members recommend providing flexibility to district attorneys concerning the times arraignments are scheduled. Section 1 of the draft bill in Appendix D frees the district attorney to calendar arraignments on any day or days of the session so as to make the maximum best use of time during the session for the trial of cases.

Section 2 of the draft bill set out in Appendix D provides that arraignments in superior court would no longer be required in misdemeanor cases appealed from district court. Under the proposed revision, giving notice of appeal to superior court would create the presumption that a plea of not guilty is entered on behalf of the appellant. In addition, this section of the draft bill provides that the district court would determine whether the appellant was entitled, as an indigent, to appointment of counsel. If so, the district court would make such appointment.

Five members of the Committee support a change in the statutes to eliminate the present provision for arraignments in misdemeanor cases appealed to superior court, but one of the five members would leave to the district attorney the discretionary authority to schedule or not schedule arraignments in such cases. Four members of the Committee support a revision in the statute to authorize appointment by the district court of counsel for indigent defendants in misdemeanor cases appealed to superior court, and one member reserves judgment on this issue. The other two members of the Committee do not support Section 2 of the draft bill in Appendix D.

PROBLEM OF DELAY OF INDICTMENT AND TRIAL OF JAILED DEFENDANTS

During the course of its studies, the Committee has concluded that the operation of the Speedy Trial Act has had and is having an impact on jail populations throughout the State. The Speedy trial Act has, to a degree, contributed to the overcrowding of our jails. This situation has come about because district attorneys have a clear incentive under the Speedy Trial Act to try the older criminal cases first, even where the older cases involve defendants who are not in jail.

The Committee believes that priority in the trial of criminal cases should be given to those defendants who are held in jail awaiting trial, in either district or superior court, and recommends draft legislation to achieve this result.

A draft bill is set out in Appendix E. All members of the Committee support Sections 2-7 of the draft bill, and all members of the Committee but one support Section 1 of the draft bill (mandatory review and action by the court on the list of jailed defendants).

SUMMARY OF LIST OF RECOMMENDATIONS

I. A majority of the Committee recommends the draft bill set out in Appendix C, which would rewrite the current Speedy Trial Act. District Attorney Jacobs, preferring to retain the current statutes, does not support any part of this recommended draft. Representative Hackney supports the draft bill except proposed G.S. 15A-703 (which authorizes the court to order an expedited trial upon motion of a defendant who shows good cause).

II. All members of the Committee recommend legislation to provide the district attorneys flexibility in scheduling arraignments and endorse Section 1 of the draft bill in Appendix D. As to eliminating arraignments in misdemeanor cases appealed to superior court, Judge Albright, Judge Ferrell, and District Attorney Jacobs support Section 2 of the draft bill in Appendix D. Judge Battle supports Section 2 except that portion relating to appointment of indigent defense counsel (as to which he reserves his position for later decision). Representative Hackney supports Section 2, except that he would give the district attorney the discretionary authority to schedule, or not schedule, arraignments in misdemeanor appeal cases. Committee members Day and Shuart oppose Section 2 of the draft bill in Appendix D.

III. All members of the Committee recommend legislation to give priority to defendants held in jail awaiting indictment or awaiting trial, and recommend the draft bill set out in Appendix E, except that District Attorney Jacobs is opposed to Section 1 of the draft bill (mandatory review of the jail list by the judges).

APPENDICES

APPENDIX A	CASE DATA FROM THE ANNUAL REPORTS OF THE ADMINISTRATIVE OFFICE OF THE COURTS: 1979-80 -- 1987-88
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APPENDIX A

CASE DATA FROM THE ANNUAL REPORTS
OF THE ADMINISTRATIVE OFFICE OF THE COURTS
1979-80 -- 1987-88

Number of Speedy Trial Dismissals in Superior Court

	Felonies	Misdemeanors	Total
1979-80	40	39	79
1980-81	22	24	46
1981-82	48	15	63
1982-83	72	20	92
1983-84	41	41	82
1984-85	42	29	71
1985-86	24	30	54
1986-87	23	25	48
1987-88	39	13	52

Ages of Felony Cases Disposed in Superior Court

	Total Disposed	Mean Age	Median Age	120 Days or Less	121-180 Days	181-365 Days	>365 Days
1979-80	36,169	102.9	68.2	27,428 (75.8%)	4,222 (11.7%)	3,092 (8.5%)	1,427 (3.9%)[1]
1980-81	41,341	100.4	71.0	31,063 (75.1%)	5,333 (12.9%)	3,794 (9.2%)	1,151 (2.8%)
1981-82	40,715	104.6	73.0	29,693 (72.9%)	5,468 (13.4%)	4,178 (10.3%)	1,376 (3.4%)
1982-83	42,966	115.6	81.0	29,290 (68.2%)	6,664 (15.5%)	5,321 (12.4%)	1,691 (3.9%)
1983-84	41,698	120.8	80.0	27,859 (66.8%)	6,075 (14.6%)	5,878 (14.1%)	1,886 (4.5%)
1984-85	40,603	123.0	84.0	26,362 (64.9%)	6,243 (15.4%)	5,844 (14.4%)	2,154 (5.3%)
1985-86	43,402	125.6	86.0	28,253 (65.1%)	6,894 (15.9%)	6,082 (14.0%)	2,173 (5.0%)
1986-87	48,890	129.9	91.0	31,598 (64.6%)	7,365 (15.1%)	7,346 (15.0%)	2,581 (5.3%)
1987-88	53,420	124.4	86.0	34,473 (64.5%)	8,208 (15.4%)	8,110 (15.2%)	2,629 (4.9%)

[1] Percentages shown for a given year may not add to 100% due to rounding.

Ages of Misdemeanor Cases Disposed in Superior Court

	Total Disposed	Mean Age	Median Age	120 Days or Less	121-180 Days	181-365 Days	>365 Days
1979-80	25,047	93.5	59.2	19,610 (78.3%)	2,528 (10.1%)	2,118 (8.5%)	791 (3.2%)[1]
1980-81	25,223	93.7	64.0	19,423 (77.0%)	2,906 (11.5%)	2,226 (8.8%)	668 (2.6%)
1981-82	26,468	92.9	62.0	20,494 (77.4%)	2,895 (10.9%)	2,290 (8.7%)	789 (3.0%)
1982-83	27,154	96.7	66.0	20,611 (75.9%)	3,182 (11.7%)	2,608 (9.6%)	753 (2.8%)
1983-84	25,311	97.5	65.0	19,150 (75.7%)	2,882 (11.4%)	2,557 (10.1%)	722 (2.9%)
1984-85	30,366	124.4	67.0	22,334 (73.5%)	3,634 (12.0%)	3,325 (10.9%)	1,073 (3.5%)
1985-86	30,598	100.6	67.0	22,389 (73.2%)	3,811 (12.5%)	3,493 (11.4%)	905 (3.0%)
1986-87	32,246	105.8	71.0	23,044 (71.5%)	4,163 (12.9%)	3,925 (12.2%)	1,114 (3.5%)
1987-88	31,703	106.3	70.0	22,674 (71.5%)	3,937 (12.4%)	3,914 (12.3%)	1,178 (3.7%)

[1] Percentages shown for a given year may not add to 100% due to rounding.

APPENDIX B

SUMMARY OF
CALENDARING AND CONTINUANCE DATA FROM ONE-WEEK STATEWIDE SAMPLE OF SUPERIOR COURT CRIMINAL CALENDARS

(37 counties)

SUMMARY OF CASES CALENDARED AND CONTINUED

GRAND TOTAL OF 37 COUNTIES
Superior Court Criminal Calendars
January 9-13, 1989

	TRIAL		ARRAIGNMENT		OTHER		GRAND TOTALS	
	TOTALS	PERCENTAGES	TOTALS	PERCENTAGES	TOTALS	PERCENTAGES	TOTALS	PERCENTAGES
1. No. of cases on calendar	4268	--	1178	--	859	--	6305	--
2. No. of defendants on calendar	1999	--	620	--	547	--	3166	--
3. No. of cases cont. (minutes)	2119	% of trial cases 49.6%	376	% of arr'nt cases 31.9%	200	% of other cases 23.3%	2695	% of total cases 42.7%
4. No. of defendants cont. (minutes)	956	% of trial def. 47.8%	195	% of arr'nt def. 31.5%	123	% of other def. 22.5%	1274	% of total def. 40.2%
5. No. of orders of case continuance	807	% of trial def. 40.4%	163	% of arr'nt def. 26.3%	52	% of other def. 9.5%	1022	% of total def. 32.3%
a. Defense request	229	% of orders 28.4%	91	% of orders 55.8%	21	% of orders 40.4%	341	% of orders 33.4%
b. State request	520	64.4%	61	37.4%	28	53.8%	609	59.6%
c. Judge request	0	0.0%	0	0.0%	0	0.0%	0	0.0%
d. State & defense request	2	0.2%	0	0.0%	0	0.0%	2	0.2%
e. Unknown	56	6.9%	11	6.7%	3	5.8%	70	6.8%
6. Reasons for continuances								
a. Inadequate prep. time--defense	94	% of reasons 11.6%	25	% of reasons 15.3%	9	% of reasons 17.3%	128	% of reasons 12.5%
b. Counsel cannot be present	33	4.1%	9	5.5%	3	5.8%	45	4.4%
c. Other trials prevented trial	443	54.9%	42	25.8%	24	46.2%	509	49.8%
d. Other trials & lim. no. ct. sess.	31	3.8%	0	0.0%	0	0.0%	31	3.0%
e. Need pretrial motion hearing	14	1.7%	1	0.6%	0	0.0%	15	1.5%
f. Defendant unavailable	9	1.1%	0	0.0%	0	0.0%	9	0.9%
g. Essent. state witness unavailable	9	1.1%	0	0.0%	0	0.0%	9	0.9%
h. Essent. def. witness unavailable	4	0.5%	0	0.0%	0	0.0%	4	0.4%
i. Def. undergoing exam. or trmt.	11	1.4%	2	1.2%	0	0.0%	13	1.3%
j. Prosecution deferred	1	0.1%	0	0.0%	0	0.0%	1	0.1%
k. Other specified reason	133	16.5%	71	43.6%	15	28.8%	219	21.4%
l. Not reported	26	3.2%	13	8.0%	1	1.9%	40	3.9%
7. No. of cases cont. by orders	1806	% of trial cases 42.3%	317	% of arr'nt cases 26.9%	77	% of other cases 9.0%	2200	% of total cases 34.9%

APPENDIX C

DRAFT BILL
ON
REVISION OF THE NORTH CAROLINA SPEEDY TRIAL STATUTES

DRAFT BILL

REVISION OF THE NORTH CAROLINA SPEEDY TRIAL STATUTES

G.S. 15A-701 through G.S. 15A-703 are repealed and in lieu thereof the following provisions are enacted.

G.S. 15A-701--TIME LIMITS

A. It is the public policy of the State of North Carolina that criminal charges be resolved without undue delay.

B. Unless the time is extended by an order of a superior court judge as provided by Section D of this statute, the trial of the defendant charged with a criminal offense shall begin within 180 days of the following:

(1) The date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last;

(2) The first regularly scheduled criminal session of superior court, for which a calendar has not been published at the time of notice of appeal, held after the defendant has given notice of appeal in a misdemeanor case for trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-702 or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterwards charged with the same offense or an offense based on the same act or transactions connected together

or constituting parts of a single scheme or plan, then from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge;

(4) The date a mistrial is declared; or

(5) From the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

C. The period of time from the time the district attorney enters a dismissal with leave for the nonappearance of the defendant until the district attorney reinstates the proceedings pursuant to G.S. 15A-932 shall be excluded in computing the time within which the trial of a criminal offense must begin.

D. Upon motion of the state or the defendant and for good cause shown, a superior court judge assigned to hold court in the district or a resident superior court judge of the district may enter a written order specifying a later date within which the criminal trial shall begin. For good cause shown, additional extension orders may be entered.

In considering whether to extend the time for commencement of the trial, the judge shall consider whether the ends of justice will be served by the extension of time and whether the reasons for the extension outweigh the interests of the public and the defendant in an earlier trial. The factors, among others, which a judge shall consider in determining whether to extend the time are as follows:

(1) whether the failure to extend the time would be likely to result in a miscarriage of justice;

(2) whether the delay is due to the limited number of court sessions scheduled for the county;

(3) whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits established;

(4) good cause for extending the time shall include those instances when the defendant, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly; and

(5) whether the case involves physical or sexual child abuse when a victim or witness is under sixteen (16) years of age, and whether further delay would have an adverse impact on the well-being of the child.

G.S. 15A-702--SANCTIONS

A. If a defendant is not brought to trial within the time required by G.S. 15A-701, then upon motion of the defendant the court shall:

(1) enter an order dismissing the action with prejudice; or

(2) enter an order dismissing the action without prejudice; or

(3) enter such other order as may be appropriate under the circumstances.

In determining the order to be entered, the court shall consider, among other matters, the seriousness of the offense, the facts and circumstances of the case which led to the failure to begin the trial within the time allowed, and the impact of reprosecution on the administration of justice.

B. A dismissal with prejudice shall bar further prosecution of the defendant for the same offense or an offense based upon the same act or transaction, or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan. A dismissal without prejudice shall not bar further prosecution.

C. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or no contest shall constitute a waiver of the right to dismissal under this section.

D. The sanctions authorized by this section shall not apply to proceedings in the district court division of the General Court of Justice.

G.S. 15A-703--EXPEDITED TRIAL

Upon motion of the defendant and for good cause shown, a judge may enter an order for an expedited trial of a pending criminal case. In ruling on such a motion, the judge shall consider, among other matters, prejudice to the defendant if an expedited trial is not ordered and the ability of the State, with available resources, to expedite the trial.

APPENDIX D

DRAFT BILL
ON
AN ACT TO PROVIDE FOR TIMELY CALENDARING OF ARRAIGNMENTS AND TO ELIMINATE ARRAIGNMENTS FOR MISDEMEANOR APPELLANTS IN SUPERIOR COURT

DRAFT BILL

AN ACT TO PROVIDE FOR TIMELY CALENDARING OF ARRAIGNMENTS AND TO ELIMINATE ARRAIGNMENTS FOR MISDEMEANOR APPELLANTS IN SUPERIOR COURT

The General Assembly of North Carolina enacts:

Section 1. Subsection (a) of G.S. 15A-943 is amended to read as follows:

"(a) At trial sessions of superior court at which criminal cases are heard, the district attorney shall calendar arraignments on any day or days of the session so as to make the maximum best use of time during the session for the trial of cases."

Sec. 2. Subsection (c) of G.S. 15A-943 is rewritten to read as follows:

"(c) Arraignments shall not be held in misdemeanor cases appealed from district court. Upon giving notice of appeal to superior court in a misdemeanor case, the defendant shall be presumed to have entered a plea of not guilty. The district court shall determine whether the defendant is entitled, as an indigent, to appointment of counsel for the misdemeanor appeal, and shall appoint such counsel if the defendant is so entitled."

Sec. 3. This act shall be effective July 1, 1989.

APPENDIX E

DRAFT BILL
ON
AN ACT TO PROVIDE FOR SPEEDY CRIMINAL CASE PROCESSING FOR DEFENDANTS HELD IN JAIL AWAITING INDICTMENT OR TRIAL

DRAFT BILL

AN ACT TO PROVIDE FOR SPEEDY CRIMINAL CASE PROCESSING FOR DEFENDANTS HELD IN JAIL AWAITING INDICTMENT OR TRIAL

The General Assembly of North Carolina enacts:

Section 1. The judge receiving a list of jailed defendants from the clerk of superior court, as provided by G.S. 7A-109.1, shall make a timely review of such list and shall enter such orders as are determined to be necessary for compliance with the provisions of this act.

Sec. 2. Any defendant held in jail awaiting indictment shall be released from custody if indictment is not returned at the next term of superior court following arrest or returned within 60 days following arrest, whichever is later. The judge may impose conditions on such release pursuant to G.S. 15A-534; provided, no condition shall be imposed that prevents the defendant's release from custody.

Sec. 3. Defendants held in jail awaiting trial, in either district or superior court, shall have priority on the criminal case trial calendars.

Sec. 4. G.S. 15-10 is hereby repealed.

Sec. 5. G.S. 7A-109.1(a) is amended by adding the following sentence:

> "Persons held in confinement prior to trial or awaiting some further court proceeding shall be listed separately."

Sec. 6. G.S. 7A-109.1(b) is amended to read as follows:

"(b) the clerk must file the report with the superior court judge, or senior superior court judge, presiding over a mixed or criminal session at the beginning of each session; and must file the report with the district court judge, or senior district court judge, at each criminal session of district court, or weekly, whichever is the less frequent."

Sec. 7. This act shall be effective July 1, 1989.

SPEEDY TRIAL

THE UNANSWERED QUESTIONS

by Michael E. Raiden

Author's Preface: In 1984 the Florida Supreme Court, upon petition of the Florida Prosecuting Attorneys' Association, approved a revised version of Florida Rule of Criminal Procedure 3.191, the "speedy trial" rule.[1] The revisions were outlined by Criminal Procedure Rules Committee member John Yetter in an article published in the spring of 1985 by the Florida State University Law Review.[2] Because the effect of these significant rule changes was yet to be determined at the time of Professor Yetter's article, he also attempted to predict how the system would react to the changes. The speedy trial decisions published since 1985 reveal Professor Yetter's predictions to have been quite perceptive. On the other hand, the relatively small number of opinions interpreting the new rule appear to have raised as many significant questions as they have answered. The following is an overview of how the amended rule has been applied, and of where the courts have yet to speak to the rule changes.

Before 1984 Criminal Procedure Rule 3.191 provided that a defendant charged with felony offenses should be tried within 180 days of arrest. If that time period elapsed without the defendant's having been brought to trial, absent certain exceptions specified in the rule, the defendant was entitled to discharge.

The rule change came about after Florida prosecutors convinced the Criminal Procedure Rules Committee and the Supreme Court that automatic discharge was too harsh a sanction against the state for the failure to try an accused felon within 180 days. The rules committee envisioned a "window of recapture" whereby the state would be afforded one last opportunity to try a defendant before the trial court could order him discharged.[3]

The amended rule, which became effective January 1, 1985, actually shortened the time for *requesting* discharge from 180 to 175 days.[4] However, after that time has expired, the defendant is entitled only to *move for* discharge.[5] This motion must be heard no later than five days after it is filed.[6] Unless the trial court finds that the defendant has at some time prior to the hearing waived his right to a speedy trial, or a valid extension otherwise was granted, the state must try the case within 10 days or it loses the right to do so.[7]

Which Rule Controls?

At the outset there was a difference of opinion as to which version of the speedy trial rule applied to defendants arrested prior to, but not brought to trial by, January 1, 1985 (the effective date of the revisions). When the law changes in the interim, should the trial court apply the rule in effect at the time of arrest or the rule as it exists at the time of the motion for discharge? Neither the amendments to Rule 3.191 nor the accompanying commentary expressly provided for the transitional period.[8] The importance of this question to the parties is obvious. A good many defendants were arrested, but not tried, before the effective date of the amended rule. Did they enjoy a substantive right to discharge after 180 days, or was the rule change merely procedural such that the state still had the right to try them even though the speedy trial time limits had expired?

The taking of a defendant into custody starts the speedy trial clock running.[9] Furthermore, rules of court have prospective effect only, absent express language to the contrary.[10] Amended Rule 3.191(i) was specifically made effective January 1, 1985.[11] Therefore, reasoned the Second District Court of Appeal in *State v. Green*, 473 So.2d 823 (Fla. 2d DCA 1985), a defendant arrested prior to 1985 should be entitled to outright discharge once the speedy trial period expires, regardless of when the expiration date actually occurs.[12] However, in *Bloom v. McKnight*, 502 So.2d 422 (Fla. 1987), the Supreme Court applied to the speedy trial rule the general principle that rules changes are procedural rather than substantive. The rule in effect at the time of the motion for discharge governs, regardless of when the defendant may have been taken into custody.[13]

Thus, as it stands now, the amended rule is applied to all cases ripening after January 1, 1985.[14]

Two other cases are of interest. In *Yohn v. Sirmons*, 500 So.2d 172 (Fla. 1st DCA), *petition for review denied*, 497 So.2d 1218 (Fla. 1986), a pre-1985 conviction had been reversed for a new trial after the effective date of the amended speedy trial rule. Citing *Durrance v. Rudd*, 398 So.2d 1012 (Fla. 1st DCA 1981), the district court held that since the 90-day post-appeal speedy trial period[15] was intended to operate separately from the 180-day pretrial period, and because the operative date is the receipt of mandate, not arrest, the new rule would govern the procedure to be used and would establish the right of the defendant to discharge regardless of which rule may have been in effect as of arrest date. In *Gordon v. Leffler*, 495 So.2d 200 (Fla. 5th DCA 1986), *petition for review denied*, 503 So.2d 327 (Fla. 1987), trial was held not within 180 days of arrest (old rule) or 15 days from motion or 10 days from hearing (new rule). Thus it was unnecessary for the court to decide which rule applied for either would require discharge.

Commencement of 10-day Rule

The next major question resolved by the appellate courts concerns when the 10-day period specified in Rule 3.191(i)(4), within which the state must try the defendant, should commence — from the date of the hearing on the defendant's motion for discharge, or from the time the court makes a decision on the motion and renders its order?

The minutes of the Criminal Procedure Rules Committee indicate some disagreement as to this question, particularly the minutes of the first meeting following the decision of the Second District Court of Appeal in *Apolinari v. Ulmer*, 483 So.2d 75 (Fla. 2d DCA), *petition for review denied*, 492 So.2d 1335 (Fla. 1986).[16] In *Apolinari* the rule was interpreted as requiring trial within 10 days of the *hearing*, or else the defendant would be entitled to discharge. The *Apolinari* panel reminded the parties that prior to the amendment of the rule the state had *no* opportunity to "recapture" a defendant.[17] The court also affirmed that, since the rule was changed for the benefit of the state, it was the state's burden and not the defendant's to schedule a prompt hearing on a motion for discharge.

While *Apolinari* produced a harsh result, in that it requires a "snap judgment" from the trial court in close cases, the alternative provided by the old rule is certainly harsher still. To hold otherwise than did *Apolinari* would do little to encourage timely disposition of motions and could effectively eviscerate the rule even beyond its present adulterated condition. Such a result would "deprive the speedy trial rule of its objective of equality of treatment ... since the actual time limit would depend upon the circumstances of particular courts and prosecutors."[18]

Total Length of the "Window of Recapture"?

The next question concerning the effect of the new rule involves the exact number of days that must elapse before the defendant is entitled to discharge. Unlike the old rule, there now exist two intermediate steps between the filing of a meritorious motion and defendant's discharge. As previously noted, the trial court must first conduct a hearing on the motion no later than five days after it is filed. Second, trial must be scheduled within 10 days of the hearing. This suggests a 15-day total "window of recapture," but the period is actually a good deal more flexible.

First, let us examine the source of this 15-day figure. The committee note to the amended rule and dicta in certain recent appellate decisions have contributed to an assumption that the rule requires trial within 15 days. The committee note states, "The intent of (i)(4) is to provide the state attorney with 15 days within which to bring a defendant to trial from the date of the filing of the motion for discharge."[19] The 15-day figure was a committee compromise between those who wanted a lesser figure such as 10 days (giving "the system" insufficient time to ready itself for trial) and those who wanted more, such as 30 days (with far less incentive to maintain docket control).[20] A motion to word the rule itself along the lines of the note was not successful.[21]

The problem with strict adherence to a 15-day period is that the rule itself can be — and has been — read to contemplate two distinct procedures with different time calculations. The first interval is the briefer of the two, falling between the filing of the motion for discharge and the hearing. What is the effect, first of all, for refusing or failing to hold a hearing on the motion within five days? Given the fact that the hearing alone does not entitle the defendant to immediate discharge, probably none.[22]

In *Lasker v. Parker*, 513 So.2d 1374 (Fla. 2d DCA 1987), the court went one step farther to suggest that a hearing on the motion for discharge could be eliminated altogether if there was no disagreement as to the defendant's entitlement to speedy trial. The inherent hazard in continuing or abandoning motion hearings is the effect of such delays upon the proper calculation of the last permissible date for trial — one could easily overshoot the critical date. Similarly, the peculiar factual scenario of the *Lasker* case[23] augurs against assuming a motion is not well-taken, or has been waived,, and in favor of prompt hearings.

Another wrinkle in the application of the new rule is the effect of Fla. R. Crim. P. 3.040, which concerns the calculation of time under the rules.[24] Unquestionably, if the last day for trial under the rule falls on a weekend or holiday, Rule 3.040 should permit the trial date to be advanced to the next business day.[25] But what about the effect of Rule 3.040 on the discharge hearing? If the fifth day from the filing of the motion is not a business day, may the hearing be postponed accordingly? So held the Second District Court of Appeal in *Ricci v. Parker*, 518 So.2d 284 (Fla. 2d DCA 1987), *petition for review denied*, 519 So.2d 988 (Fla. 1988). The *Ricci* panel concluded that, absent express language to the contrary, Rules 3.040 and 3.191 had to be construed in harmony. In fact, since Rule 3.040 excludes *intervening* weekends and holidays whenever a period prescribed by a rule is less than seven days, these days *never* count when calculating that fifth day.[26]

The *Ricci* decision also settled a related question, and in so doing largely undermined reliance upon a 15-day "window": Assuming the motion hearing is legally timely, but actually held more than five days after the filing of the motion, when must the trial itself be scheduled to preclude discharge of the defendant? Here, though expressing concern about lax or even abusive enforcement of Rule 3.191,[27] the court chose not to adopt suggestions that this application of Rule 3.040 should not affect the overall trial "window,"[28] and instead held that the two calculations under Rule 3.191 — five days to hear the motion, 10 days to try the case — were separate and distinct. In other words, once a discharge hearing is deemed timely, the ten-day clock only then begins to run, itself subject to the limitations of Rule 3.040.

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The opinions expressed in this article do not necessarily reflect the views of the Second District Court of Appeal or any of its individual judges.

■

The conclusion reached by *Ricci* follows from that court's earlier decision in *Apolinari v. Ulmer*, which had stated that trial should be held within 10 days of the *hearing* on the motion for discharge (which, in that case, was also untimely). This in turn is based on the plain language of the rule itself, which nowhere mentions the 15 days specifically. The Fifth District Court of Appeal, in *Gordon v. Leffler*, had implied that the rule requires trial within 15 days of the filing of the motion.[29] In neither case was computation of time the precise question, for the trial judge in *Apolinari* had determined speedy trial was waived and in *Gordon* the trial was clearly untimely by anyone's calculation, following 22 days after the motion. *Ricci* is the first instance when the issue was presented squarely, and thus the first opportunity for close scrutiny of the rule language on this point. The Fifth District Court of Appeal in *State v. Edwards*, ___ So.2d ___, 13 F.L.W. 1655 (Fla. 1st D.C.A. 1988), has conceded that 15-day language in *Gordon v. Leffler* and *Lenard v. Moxley* is dicta, and elected to follow *Ricci v. Parker*.

If both *Ricci* and *Lasker* (even though the petitioners in the latter case were ordered discharged) militate against literal adherence to certain portions of Rule 3.191, one still should distinguish between a hearing that was deliberately, negligently, or even justifiably scheduled late, and one that is "late" only because strict compliance with the five-day figure is impossible. The former ought not to justify extending the 15-day deadline that is still *suggested* by the rule, whereas the latter ought to deprive the defendant of a right to discharge absolute even though trial is not held within fifteen days.

The Criminal Procedure Rules Committee expressed some concern that *Ricci* was inconsistent with their intentions in promulgating the "window," but eventually determined that the situation presented would arise so rarely that a corrective amendment to the rule was unnecessary.[30]

Seeking Appellate Review

Most of the decisions involving amended Rule 3.191 have arisen on petitions for prohibition, which is an accepted remedy for a violation of speedy trial rights.[31] Under the new rule it is not quite so clear when the trial court loses jurisdiction. A motion for discharge is not really "denied" unless the court finds that a waiver or other exceptional circumstance has taken the defendant entirely out of the 175/190-day speedy trial period; an order setting the case for trial within 10 days is tantamount to an order granting the motion for discharge. Only if that requirement cannot be satisfied is the court divested of jurisdiction over the defendant.[32]

Therefore, prohibition would not be appropriate if, at the five-day hearing, the trial court orders trial to commence in accordance with Rule 3.191(i)(4). The appellate court cannot supply a remedy unavailable from the trial court. If, on the other hand, the trial court determines that the defendant has at some point waived the right to peedy trial, the better practice probably is to wait until the 10 days have expired before seeking reversal via prohibition.[33] To do otherwise arguably would "stay the running of the 15 days [and] give the state at least the remainder of the 15-day window to bring the defendant to trial following a possible reversal on appeal."[34] Additionally, some practitioners have, at the expiration of the 10 days, renewed their motion for "discharge absolute" at the trial level before petitioning the appellate court, although there is nothing in either the language of the rule or case law to suggest this step is essential.

There remain questions, not yet satisfactorily answered, regarding interlocutory review of speedy trial orders by the state. Since an order requiring trial within 10 days presumably presents the state with more difficulty than an order simply denying the motion for discharge, may the state take an interlocutory appeal from such order?[35] At this juncture the state essentially has two options: Petition for relief immediately (certiorari is one suggested remedy) or permit the trial court to discharge the defendant and then appeal.[36] To permit the state to seek review of orders requiring trial (*i.e.*, preliminarily granting the motion for discharge) arguably "would render the window meaningless" since the state's appeal likely would be accompanied by a motion to extend speedy trial pending the appeal.[37] The very few recent speedy trial cases that have originated as state appeals have come after outright discharge.[38]

At this time it seems fair to characterize the "window" provisions as offering the state only a very limited choice of remedies for those cases in which the defendant simply slipped through the cracks — literally one last chance to seek a conviction. Further, it may not always be possible to forestall interference with the exercise of that last chance. Judge Parker, specially concurring in *State v. Freeman*, 520 So.2d 110 (Fla. 2d DCA 1988), expressed concern that no recourse is available to the state if the "window" expires through no fault of the prosecutor. In *Freeman* the defendant's speedy trial rights were acknowledged but the trial court could find no room in its docket to try the case within 10 days of the hearing. The state appealed after the defendant had been discharged and the district court affirmed. Judge Parker suggested a modification of the rule to permit the state to force compliance with the rule by the trial judge.[39]

When the trial court has found that speedy trial was waived prior to the motion for discharge, the question arises what if anything the state should do next. The effect of the judge's order is a declaration that it need not hurry to trial.[40] However, if an appellate court were to find this conclusion incorrect, the right to try the defendant would be lost because that court would direct discharge. Thus, the state, to best protect its interests, should make every effort to bring speedy trial problem cases to a swift conclusion. This suggests that discharge hearings should not be vigorously contested unless the state is confident of the correctness of its position.

On the other hand, when the court has ordered trial to commence despite evidence of a waiver, should the prosecution go forward with a trial it may not be prepared to present, running the risk of a nonappealable acquittal, or should it simply allow the 10 days to "slide," resulting in an appealable order discharging defendant? And, in the event the state chooses the latter option, might not a defendant plausibly claim estoppel or bad faith? Again, the best cure is preventive: Caution against permitting important cases to grow stale, or a request for extension prior to the expiration of speedy trial time. In the final analysis, the state should not view the rule amendments as significantly relaxing its responsibilities with respect to case preparation.

There remain questions regarding interlocutory review of speedy trial orders by the state

Other Questions

It is questionable whether the "window of recapture" can ever be extended for exceptional circumstances.[41] Rule 3.191(d)(2) provides that the "periods of time established by this rule" may be extended upon a showing of the sort of circumstances enumerated in Rule 3.191(f).[42] The 1984 amendment did not specifically exempt the "window" provision from this subsection "although the commentary clearly states a rationale which would preclude extensions."[43]

The rule has never permitted such extensions *nunc pro tunc*, once the underlying speedy trial time has already expired.[44] That is, a request to extend the speedy trial limit is not a valid comeback to a motion for discharge. Even with the new recapture provisions, "[i]t is worth repeating that in these cases the basic speedy trial time will have been violated."[45] Thus, even though the mere filing of a motion for discharge now takes on strategic connotations,[46] a strong argument can be made that the 15-day "window" affords the state the sole remedy of trial vis-a-vis those defendants with meritorious motions. However, this precise question has yet to be addressed at the appellate level.

In sum, the new rule appears generally to have satisfied the purpose for which it is enacted — the avoidance of setting defendants free merely because an arbitrarily-selected period of time has expired, arguably as genuine a "technicality" as Florida criminal law has ever presented. The extent of the largesse that the amendments offer the state remains to be seen; such cases as *Apolinari v. Ulmer* suggest it is far from unlimited. The willingness of the courts to track the language of the rule and accompanying commentary suggests careful craftsmanship on the part of the rules committee. The most notable exception is the decision on the part of the Second District Court of Appeal, in *Ricci v. Parker*, to contravene the committee's apparent preference for a 15-day total recapture period.☐

1 The Florida Bar Re: Amendment to Rules–Criminal Procedure, 462 So.2d 386 (Fla. 1984).

2 Yetter, *Florida's New Speedy Trial Rule: The "Window of Recapture,"* 13 Fla. St. U. L. Rev. 11 (1985) (henceforth "Yetter").

3 The Pentagonesque phrase "window of recapture" appears to have originated with the committee. *See* Yetter, at 10, n.4.

4 Fla. R. Crim. P. 3.191(a)(1).

5 Fla. R. Crim. P. 3.191(d)(1).

6 Fla. R. Crim. P. 3.191(i)(4).

7 *Id.*

8 *See* Yetter, at 9 n.1.

9 Jackson v. Green, 402 So.2d 553 (Fla. 1st D.C.A. 1981).

10 *See, e.g.*, Poyntz v. Reynolds, 37 Fla. 533, 19 So. 649 (1896); Arnold v. State, 429 So.2d 819 (Fla. 2d D.C.A. 1983).

11 462 So.2d 386 (Fla. 1984).

12 *See also*, Keehn v. Evans, 491 So.2d 315 (Fla. 2d D.C.A. 1986); Tirado v. Reese, 478 So.2d 883 (Fla. 2d D.C.A. 1985); LaPorte v. Coe, 475 So.2d 732 (Fla. 2d D.C.A. 1985).

13 The Third District Court of Appeal, sitting en banc in Zabrani v. Cowart, 502 So.2d 1257 (Fla. 3d D.C.A. 1986), *approved*, 506 So.2d 1035 (Fla. 1987), had already receded from its previous holding in McKnight v. Bloom, 490 So.2d 92 (Fla. 3d D.C.A. 1986), acknowledging conflict with State v. Green.

14 Yetter, comparing and contrasting the concerns underlying the right of speedy trial with

those addressed by statutes of limitations, anticipated this conclusion by opining that "[i]t would make sense . . . to apply the amendment to any case where the accused is taken into custody after January 1, 1985." Yetter, at 9 n.1.

[15] "A person who is to be tried again or whose trial has been delayed by an appeal by the State or the defendant shall be brought to trial within 90 days. . . ." FLA. R. CRIM. P. 3.191(g). This subsection now specifically incorporates the recapture provisions of Rule 3.191(i).

[16] Minutes of the Criminal Procedure Rules Committee of The Florida Bar, March 14, 1986 (henceforth "Committee").

[17] 483 So.2d at 77.

[18] Yetter, at 17-18.

[19] 462 So.2d at 388. As noted in Ricci v. Parker, 518 So.2d 284, 286 (Fla. 2d D.C.A. 1987), the Supreme Court did not adopt the committee notes to new Rule 3.191. *See* 462 So.2d 386.

[20] *Id.* Yetter felt that a strict 15-day rule would increase motivation to observe the underlying time limits (such as the five days for hearing the motion for discharge), but concedes that the strongly-worded committee note was not adopted as part of the rule and so is not dispositive. Yetter, at 16-17.

[21] Committee, January 27, 1984.

[22] Yetter, noting that no sanctions were created that were directed solely to such delays, described this period as "irrelevant to discharge." Yetter, at 16. He suggested, albeit not uncritically, that the motion hearing could be continued upon a reasonable request. Yetter, at 18.

In an analogous situation the court in State v. White, 523 So.2d 1259 (Fla. 2d D.C.A. 1988), reversed an order of discharge entered because of the failure to hold a "calendar call" within five days of a demand for speedy trial. FLA. R. CRIM. P. 3.191(a)(2)(1). The First District Court of Appeal, following Lasker v. Parker, has affirmed that important date is that of the trial, not the hearing on the motion for discharge. Climpson v. State, ____ So.2d ____, 13 F.L.W. 1805 (Fla. 1st D.C.A. 1988).

[23] Lasker and her codefendant Morse were arrested and released in October 1985; formal charges were not filed until March 1987. Because of this considerable gap defense counsel filed simultaneously a demand for discovery and motion for speedy trial discharge. Upon receipt of this paperwork the prosecutor telephoned counsel and advised trial would be set within a very few days, and suggested no hearing on the motion was necessary. Defense counsel admitted that he was unprepared for trial, in that he was only recently appointed to the case, whereupon the prosecutor advised the trial judge by letter that the speedy trial issue was being "abandoned." Despite a counter letter of objection from Lasker's counsel, no hearings were held in the case until some weeks later.

[24] Anticipated by the Yetter article. *See, e.g.*, Yetter, at 12 n.7 and 13 n.8.

[25] Under the old rule if day 180 was a holiday the trial could be scheduled on the next business day. State ex rel. Williams v. Bruce, 327 So.2d 51 (Fla. 1st D.C.A. 1976).

[26] Again, Professor Yetter foresaw this occurrence, advancing a scenario wherein the hearing would not occur for 10 days. Yetter, at 13 n.8.

[27] 518 So.2d at 287, n.2.

[28] *See, e.g.*, Yetter, at 13 n.8.

[29] Lenard v. Moxley, 497 So.2d 973 (Fla. 5th D.C.A. 1986), also implies that jurisdiction is lost if no trial is held within 15 days of the motion.

[30] Committee, September 18, 1987, and personal recollections of the author.

[31] Sherrod v. Franza, 427 So.2d 161 (Fla. 1983).

[32] *See, e.g.*, the opinion on rehearing in Winfield v. State, 503 So.2d 333 (Fla. 2d D.C.A. 1987). Initially, believing the old rule applicable, the court held that Winfield was entitled to discharge. The rehearing was prompted by the supreme court's decision in Bloom v. McKnight, and the DCA, finding that Winfield had been tried within 10 days of the hearing on his motion for discharge, changed its position and affirmed.

[33] This procedure was followed by the petitioner in *Apolinari v. Ulmer.*

[34] Yetter, at 26.

[35] Yetter, at 21 and ff.

[36] The latter recourse has always been available. FLA. R. APP. P. 9.140(c)(1)(E).

[37] FLA. R. CRIM. P. 3.191(d)(2); Yetter, at 25.

[38] *See, e.g.*, State v. Freeman, 520 So.2d 110 (Fla. 2d D.C.A. 1988).

[39] Mandamus is one conceivable remedy, except that the severe time constraints involved suggest it may be impractical.

[40] Except, of course, that an unsuccessful motion for discharge restarts the speedy trial clock. FLA. R. CRIM. P. 3.191(d)(3). In State v. Veliz, 524 So.2d 1157 (Fla. 3d D.C.A. 1988), the court held that this 90-day period was also susceptible to the "window of recapture," as would be the post-appeal or post-mistrial 90-day limit of Rule 3.191(g). Note, however, that Rule 3.191(g) specifically refers to the recapture provisions of 3.191(i), whereas 3.191(d)(3), the subsection involved in *Veliz*, does not. The *Veliz* panel nevertheless looked to the "underlying purpose of the 1985 amendments" and found that the only remedy for a speedy trial violation is a motion for discharge, which is governed by 3.191(i).

[41] Yetter, at 18 and ff.

[42] Examples include the unexpected illness of a person whose presence is "uniquely necessary," an unusually complex case, important evidence that is unavailable despite diligent efforts to secure it, disruption of proceedings by the accused, and delay necessary to accommodate a codefendant where there is reason not to sever the cases.

[43] Yetter, at 20.

[44] *See, e.g.*, Rogers v. Keating, 411 So.2d 231 (Fla. 5th D.C.A. 1982).

[45] Yetter, at 20.

[46] *See, e.g.*, Lasker v. Parker, 513 So.2d at 1377, and Yetter, at 21.

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SPEEDY TRIALS AND PRETRIAL CRIME IN WISCONSIN:

Preliminary Report

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TABLE OF CONTENTS

Executive Summary

The purpose of this research study is to answer several basic questions regarding two problems facing the criminal justice system in Wisconsin: case processing delay and pretrial crime. The study has been designed to examine the relationship of several offense and case processing factors to these two problems and to examine the relationship of the problems to each other. To accomplish this purpose, data were first collected from a representative sample of all felony cases disposed in 1979 and reported to the Wisconsin Court Information System (WCIS); data were then collected on all new felony and misdemeanor offenses committed by defendants in the original sample. It should be noted that Milwaukee County does not report data to the WCIS; and was not included in the sample. This report describes the general characteristics of cases in the original sample and examines preliminary findings about the incidence of pre-disposition felony offenses.

The findings in this report are based on data collected from an original sample of 502 cases from 11 counties. Two hundred thirty (230) cases are from four "urban" counties and 272 cases are from seven "rural" counties (terms are defined in Study Methodology). The main body of the report is divided into two parts; Part I describes characteristics of the original 502 cases studied, focusing on charges filed, characteristics and pre-disposition release status of defendants and case processing time; Part II examines the frequency and type of new felony offenses committed by defendants in the sample prior to disposition of their original charges.

Summary of Part I

Original Charges: Data were collected on the major charge filed against the defendant in each case. Most of the defendants in the study were median time to disposition was 91 days. Although most cases were disposed within generally acceptable time limits, a minority of cases took considerably longer; 22% of the cases, for example, were still pending after six months. Several factors, including the defendant's release status and whether the case was from an urban or rural county, were found to be significantly related to case processing time. Cases were processed significantly faster in rural counties and when the defendant was in custody.

Summary of Part II

Frequency of New Felonies: Defendants in 23 (4.6%) of the 502 original cases were arrested for a total of 25 pre-disposition felony offenses. All the defendants who committed new felonies were male, with 19 (82.6%) being White. There was a significant difference between the urban and rural cases in the frequency of new felonies; 18 (72%) of the 25 new felonies were committed by defendants from urban counties.

New Charges: Of the 25 new offenses, the major charge in 20 (80%) was a property crime; three new offenses were violent crimes (two robbery, one assault). In 17 of the 20 new property crimes and all three of the new violent crimes, the major charge in the defendant's original case was a property crime.

Time of New Offense: The pre-disposition felonies occurred in an average of 78 days and a median of 55 days after the initial appearance. Further analysis shows that 60% of the new felonies occurred within 60 days of the initial appearance and that new felonies occurred significantly sooner in rural cases than in urban cases. Despite the fact that most of the new felonies occurred relatively early in the processing of the original case, original cases in which the defendant committed a pre-disposition felony took substantially longer to process than other original cases in the

Introduction

During the 1979-80 session of the Wisconsin Legislature a great deal of attention was focused on bail and pretrial release of persons accused of crimes. Much of the attention resulted from a few highly publicized incidents where violent crimes were committed by persons on pretrial release. In response, the legislature, which had earlier eliminated the use of commerical bondsmen, approved bills to:

- allow courts to revoke bail for persons charged with additional serious crimes while awaiting trial;
- eliminate the provision allowing defendants to be released on a deposit equal to 10% of the required cash bond;
- establish a Special Committee on Pretrial Release to examine the use of bail and bail evaluation programs; and
- amend the State Constitution to allow courts to deny release to persons accused of certain crimes. (Note: Before the amendment can take effect it must be approved by a second elected legislature and a public referendum.)

During the discussions in the legislature and the media it became clear that very little information existed about bail and pretrial crime in Wisconsin. The few adequate studies done in other parts of the country offered little hope for simple policy solutions to the problem of reducing pretrial crimes. While several studies found defendants' characteristics such as prior criminality to be generally associated with pretrial crime, none have demonstrated an ability to predict in individual cases which defendants would commit crimes. After an extensive review of the research available, John Galvin, in Instead of Jail, Volume 2: Alternatives to Pretrial Detention, concluded that "at this time common sense and political judgment are the best sources of guidance in selecting people for pretrial release..."[1]

period than areas with speedier trials. In addition, study results may be affected by the researchers' choice of measure (for example, date of arrest vs. date an offense was committed; arrest for any violation vs. arrests for serious crimes). Before these findings can be reasonably applied to Wisconsin it is necessary to resolve some of these questions and to determine more about the nature and extent of the problem in Wisconsin.

The intent of this study is to address these and other basic questions about pretrial release and pretrial crime in Wisconsin. In addition, the study provides data to determine whether adjustments in case processing time could be expected to have an impact on the amount of pretrial crime in Wisconsin.

This report presents the preliminary results of the study. The data presented reflect broad areas of concern. Detailed analysis of issues and relationships brought to light by these findings will be presented in later papers.

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[1] Galvin, John, et al, Instead of Jail, Vol. 2: Alternatives to Pretrial Detention, LEAA, Washington, D.C., 1977, p. 98.

[2] Roth, Jeff and Paul Wice, Pretrial Release and Misconduct in the District of Columbia, Institute for Law and Social Research, 1980.

Toborg, Mary and Martin Sorin, National Evaluation of Pretrial Release, Lazar Institute. (From a paper presented to the American Society of Crimirtology, November 7, 1980.)

[3] Angel, Arthur, et al, "Preventive Detention - An Empirical Analysis," Harvard Civil Rights - Civil Liberties Law Review, Vol. 6, 1971.

[4] Toborg and Smith, op cit., p. 5

the Department of Justice Crime Information Bureau (CIB). Those records provided information about defendants' law enforcement contacts throughout the state. New arrests were recorded, and in those cases where the offense charged was a felony or had a statute number which included felonies and misdemeanors, the District Attorney's office in the reporting county was contacted for information on offense date and class. CIB records were also used to supplement information about defendants' prior criminal record.

All data collection and preparation was completed by the end of December 1980. Each "case" involves one defendant. It should be noted, however, that a few defendants were involved in more than one case in the sample. Thus the number of different defendants represented by these data is slightly less than 502. The final sample consists of 272 cases from the "rural" counties (Crawford, Jackson, Juneau, Oneida, Portage, Vernon and Vilas) and 230 "urban" cases (Brown, Kenosha, Racine and Waukesha).

The reader should note that Milwaukee County was not included in the sample studied. Since Milwaukee differs from the rest of the state in several important respects (e.g. population, volume of cases, ethnic breakdown), findings and conclusions should not be generalized to Milwaukee. The amount of time and resources necessary to study Milwaukee precluded its inclusion. While this limits the utility of the research findings it does not detract from the validity of the conclusions for the rest of Wisconsin.

The urban-rural breakdown of offenses shows relatively few differences in the types of offenses charged although urban cases had a slightly higher proportion of drug offenses (Chapter 161) and rural cases had more of the "infrequent" offenses not listed seperately.

The major charge data show that most cases involved profit motivated offenses without the use or threat of harm to any persons. The most frequent violent offense in the total sample was sexual assault although these were slightly out-numbered by Assault: Special Circumstances (for example, Battery to Police Officer) in rural areas.

The specific charge often does not describe the seriousness of the criminal act since offenses such as theft and sexual assault cover broad ranges of "harm." Table 2 provides a general breakdown of the "seriousness" of offenses by listing the class of the major charges. Almost half of the charges were Class C offenses (ten year maximum sentence) and less than 10% of the cases involved the more serious class A or B offenses. There were no substantial differences in the "seriousness" of offenses based on urban-rural classification.

Table 2

CLASS OF MAJOR OFFENSES CHARGED

CLASS	URBAN (%)	RURAL (%)	TOTAL (%)	MAXIMUM PENALTY (YEARS)
A	0.0%	0.4%	0.2%	Life
B	9.6%	7.7%	8.6%	20
C	48.7%	46.1%	47.3%	10
D	7.5%	12.6%	10.2%	5
E	17.5%	23.6%	20.8%	2
Not Classified*	16.7%	9.6%	12.8%	Variable
TOTAL	100.0%	100.0%	99.9%	

*Includes Drug Violations, Public Assistance Offenses, Habitual Criminal, etc.

Table 3

DEFENDANT CHARACTERISTICS

	URBAN	RURAL	TOTAL SAMPLE
AGE:			
Median (yrs.)	23	22.5	23
Range	17-70	17-66	17-70
RACE:			
White	109 (76.8%)	204 (89.5%)	313 (84.6%)
Black	23 (16.2%)	3 (1.3%)	26 (7.0%)
Spanish Surname	2 (1.4%)	0 (---)	2 (0.5%)
Native American	8 (5.6%)	21 (9.2%)	29 (7.8%)
Missing	88	44	132
SEX:			
Male	213 (92.6%)	249 (91.5%)	462 (92.0%)
Female	17 (7.4%)	23 (8.5%)	40 (8.0%)
RESIDENCE:			
County Resident	151 (78.6%)	156 (67.0%)	307 (72.2%)
Not County Resident	41 (21.4%)	77 (33.0%)	118 (27.8%)
Missing	38	39	77
PRIOR RECORD:			
*Prior Felony	56 (30.8%)	55 (30.6%)	111 (30.7%)
*Prior Misdemeanor	95 (51.4%)	72 (40.7%)	167 (44.9%)
No Prior Record	78 (42.2%)	92 (51.1%)	170 (46.6%)
Missing	46	92	138

*Categories Are Not Mutually Exclusive.

Percentages based on number of known cases.

C. Pretrial Release Experiences

A central issue in the study of pretrial crime is the rate at which defendants are released to await disposition of their case. In this report, "release" refers to release following the initial appearance in court on the offense charged. While pretrial release may occur prior to this point, the initial appearance is usually the first opportunity for release conditions to be determined by the court.

In the cases studied, release was an issue in 457 cases. (The remaining cases were either resolved at the initial appearance or the defendant was not present.) In the relevant cases, 77.9% of the defendants were released prior to disposition of their charges. Table 4 describes the amount of time defendants chance of remaining in custody until disposition.

Table 5 describes the proportion of defendants having certain characteristics who were able to obtain their release. A factor that appears to have a major effect on the likelihood of release is the presence of a prior felony conviction. In both the urban and rural subsets defendants with a prior felony were released at much lower rates than other defendants. Chi-square tests on both subsets were significant ($p < .01$). There was also a significant relationship between release and class of felony charged. The data show that release rates declined as offenses grew more serious. An apparent exception to the pattern is shown for Class D offenses, which had a low rate of release. This may be explained in part by the fact that this category includes offenses such as Bail Jumping and Escape from State Institutions. For such offenses the low rate of releases is not surprising.

Table 5

RELEASE STATUS BY DEFENDANT CHARACTERISTIC

	% RELEASED		
CHARACTERISTIC	URBAN	RURAL	TOTAL
SEX:			
Male	74.9%	76.8%	75.9%
Female	93.3%	100.0%	97.3%
RACE:			
White	76.0%	80.3%	78.8%
Black	59.1%	33.3%	56.0%
Spanish Surname	100.0%	---	100.0%
Native American	37.5%	66.7%	57.7%
RESIDENCE:			
County Resident	72.3%	80.1%	76.2%
Not County Resident	84.6%	78.8%	80.1%
PRIOR RECORD:			
Prior Felony	52.7%	46.7%	50.0%
No Prior Felony	84.9%	85.3%	85.1%
CLASS OF FELONY CHARGED:			
A	---	0.0%	0.0%
B	59.1%	75.0%	69.0%
C	73.0%	76.3%	75.8%
D	53.3%	71.9%	66.0%
E	90.0%	82.1%	85.4%
Not Assigned	90.3%	94.7%	92.0%

mately twice as often as did urban defendants. However, signature bonds were the most frequent conditions of release in both groups of cases, and even though the differences are statistically significant they may have little practical importance.

Table 6

CONDITIONS OF RELEASE

	Urban	Rural	Total Sample
Signature Bond	54.7%	49.2%	51.8%
% Deposit Bail	18.9%	21.8%	20.4%
Cash Bail	10.7%	21.8%	16.6%
Other	15.7%	7.3%	11.3%

D. Pre-Sentence Release

Up to this point, discussions of release have focused on pre-trial release. There is however another aspect of release which usually receives much less attention than does release before trial, that is; release after a judgment or finding of guilt pending imposition of a sentence. The extent to which this becomes an issue depends on the number of cases in which courts delay sentencing after a finding of guilty. Pre-sentence investigations are often requested to enable judges to determine a fair sentence, but these investigations require time for collecting and verifying information and scheduling another court appearance. In some other cases, the court may not request a pre-sentence investigation but may delay sentencing for some other reason.

received by defendants convicted of a felony for those released to await sentencing, those not released, and those sentenced on the day of conviction. The data show that a significant relationship does exist between release status and type of sentence imposed (chi-square test significant at $p < .001$), and that release prior to sentencing is associated with a high probability of receiving a non-prison sentence.

Table 7

SENTENCE TYPE BY PRE-SENTENCE RELEASE STATUS FOR DEFENDANTS CONVICTED OF FELONY OFFENSE

	RELEASED	NOT RELEASED	SENTENCED ON DAY OF CONVICTION	TOTAL SAMPLE
Prison	9.6%	55.3%	37.4%	30.7%
Jail (Only)	0.0%	2.6%	12.1%	5.9%
Jail and Probation	50.7%	26.3%	23.1%	33.7%
Probation	32.9%	13.2%	18.7%	22.8%
Fine	1.4%	0.0%	3.3%	2.0%
Other	5.5%	2.6%	5.5%	5.0%
Total Incarceration (Combine Prison, Jail (Only) and Jail and Probation Sentences)	60.3%	84.2%	72.6%	70.3%

Table 7 shows that for all categories of release status a majority of convicted felons received a sentence involving incarceration. However, defendants released prior to sentencing were likely to serve their sentences in county jail. That is, the sentences were less than one year, while defendants not released were most likely to receive prison sentences. Defendants sentenced on the day of conviction were almost equally split between jail and prison sentences. Defendants not released were sentenced to prison almost six times as often as those who were released prior to sentencing (55.3% to 9.6%, respectively).

processing times will disproportionately affect the "average" processing time but will affect the median very little.

Table 8 demonstrates how the presence of some extreme values affect the interpretation of processing time data. Although half the cases had reached the preliminary hearing stage within about two weeks of initial appearance, the average time was more than one month (32.3 days). Similar effects are shown for each subsequent stage.

Table 8

TIME TO MAJOR STAGES IN PROCESSING

Days From Initial Appearance To:	Average	Median
Preliminary Hearing	32.3	14.4
Information Filed	36.8	19.7
Arraignment	56.8	33.9
Judgment	114.0	76.8
Disposition	126.6	91.0

Looking only at the median times, it appears that most cases are processed within time frames close to those advocated in various sets of standards. However, the average times indicate that a substantial number of cases take considerably longer. In this sample of cases, six months after the initial appearance 22% of the cases had not been disposed, 18% had not had a judgment rendered and 5% had not yet been arraigned.

Several variables were significantly related to the length of time to disposition. An analysis of variance was performed on several case characteristics (variables). This test basically determines whether the average time to disposition differed significantly when broken down by the categories of a given variable. All the variables in Table 9 discussed below

PART II: PRE-DISPOSITION CRIMES

A. Definitions

Although criminal activity by persons on bail or other forms of release is generally referred to as "pretrial" crime, a more precise description of the data in this section is "pre-disposition" crime. As seen in Part I, the risk period often extends beyond the date of trial or conviction and crimes occurring between judgment and sentencing are also of interest.

It is worth repeating that the basic unit of analysis is a "case." New offenses and arrests are described for each case. If a defendant was involved in more than one original case any new arrest would be recorded for each case. This approach is used because each original case involved a separate release decision regardless of whether the defendant had been involved in other cases.

B. Pre-Disposition Arrests

The most convenient measure of criminal activity is the number of times a defendant was arrested. In this study of 502 cases, defendants in 42 cases (8.4%) had a total of 50 new arrests before disposition of their original charges. Thirty (30) of these arrests involved new felony charges and 20 involved misdemeanors. The number of arrests in a given period does not accurately reflect the pattern of crime, however, since an arrest can occur long after an offense. For eleven (37%) of the 30 pre-disposition felony arrests, the new offense occurred prior to the defendant's initial appearance

Table 10

NEW FELONY MAJOR CHARGE BY ORIGINAL FELONY MAJOR CHARGE

	ORIGINAL FELONY CHARGE						
	Ch. 161 Controlled Substance	Ch. 940 Personal Injury	Ch. 941 Public Safety	Ch. 943 Burglary	Ch. 943 Forgery	Ch. 943 Other	Total
Ch. 161 Controlled Substance						1	1
Ch. 940 Personal Injury				1			1
943.10 Burglary	2	1		3	3	1	10
943.38 Forgery				3	1		4
Ch. 943 Other Property				2	2	2	6
Ch. 946 Government		1	1			1	3
Total	2	2	1	9	6	5	25

Three of the 502 cases (0.6%) had a pre-disposition felony involving the use or threat of violence. The three new offenses were robbery (two cases) and assault. None of the defendants in these cases had originally been charged with violent offenses; two had been charged with burglary, one with forgery.

Of the 25 new felonies, 18 (72%) were committed by defendants from urban counties and seven (28%) by rural county defendants. This large difference (corrected chi-square $p < .025$) is somewhat striking since there were no significant differences between the original urban and rural cases in terms of type of offense, seriousness of offense or prior felony record of defendants. As indicated in Part I, Section E, however, there is a large difference in the average processing time between

The table shows that 60% of the new felonies were committed within 60 days of the original initial appearance; 24% were committed after 90 days. The largest proportion of new felonies were committed between 31 and 60 days after the original case filing.

Although the discussion of the time periods of initial appearance and release to the new offense has thus far focused on all 25 new cases, there appears to be a notable difference in these time periods between the urban and rural cases. For clarity, the average and median of these two time periods for urban and rural cases are presented as Table 12 below.

Table 12

TIME TO NEW FELONY OFFENSE FOR URBAN AND RURAL CASES

		Average	Median	Number of Cases
Urban	From Filing	90.6	60	18
	From Release	83.9	60	18
Rural	From Filing	32.4	41	7
	From Release	35.5	36	6

The table shows that there are substantial differences in these time time periods between urban and rural cases. The difference is particularly evident in the averages. In fact the difference between the urban and rural averages is statistically significant ($p < .05$) for both time periods. Again, as was often the case in Part I, Section E, the difference between the average and median for each period should be noted. For the urban cases, this difference indicates there are a few very long time periods present which increase the average. For the rural cases, the difference indicates that may help prolong a pending case. This issue will be examined more closely in future analyses.

The dispositions of the new felony cases are presented in Table 13, categorized by the major charge in the new case. As shown in the table, 17 (68%) of the 25 new cases resulted in a conviction. The 17 convictions include two cases in which the charges were consolidated with, or read-in to, another case. In the remaining eight (32%) cases the charges were dismissed or the defendant acquitted. This report has not focused closely on the outcomes of either the original or the new felony cases since many complicated factors are involved in determining those outcomes. It may be noted, however, that none of the defendants charged with pre-disposition felonies escaped conviction totally. The defendants in the eight new cases which did not result in a conviction were each convicted in the original case against them. In fact, the original case did not result in conviction in only two of the 25 new felony cases; and the defendants in those two cases were convicted in the new felony case.

Table 13

NEW FELONY DISPOSITION TYPE BY NEW FELONY CHARGE

	NEW FELONY CHARGE						
	Ch. 161 Controlled Substance	Ch. 940 Personal Injury	Ch. 943			Ch. 946	
			Burglary	Forgery	Other	Government	Total
Convicted			9	4	2	2	17
Dismissed	1	1			4		6
Acquitted			1			1	2
Total	1	1	10	4	6	3	25

new felonies occurring in this sample it may be extremely difficult to reduce disposition times to a level that would eliminate a substantial number of pre-disposition felonies.

> tion of the judicial power in cases which could be resolved by a little reflection on the school board's part and a haircut on Conyers' seems unnecessarily to delay decision of more important matters.[33]

On the other hand, in the process of getting government off our backs, we should not lose sight of society's legitimate concerns. In our quest for liberty, we must not embrace that concept of natural rights and minimal police power which gave rise to such cases as *Lochner v. New York*.[34] Just as too much government can jeopardize liberty, not enough government can also oppress those who need the protection of reasonable police powers.

Finally, of course, I want to say that I very much share in the enthusiasm for our state constitution's supplementation of the federal charter. However, as a citizen of the United States, I am more broadly concerned about the fundamental liberty and property rights of all Americans, wherever they reside. We must not "return to the time when the state courts were the sole guardians against abusive state power"[35]; we must not allow our country to develop mere pockets of liberty while leaving other regions with lesser freedom. The core of our liberty must remain under the federal umbrella of the Fourteenth Amendment so that all Americans can experience its fundamental protection.

Conclusion

It is clear that we are entitled to the full measure of protection inherent in both the state and federal constitutions. Without such dual protection, the people of Connecticut will be shortchanged in the realization of their fundamental rights. It is the duty of our state courts to give meaning to the state constitution in response to the changing needs of society. And indeed, our state courts are now willing to shoulder their responsibility in this system of dual protection by vigorously asserting the full spectrum of liberties embodied in the Connecticut Constitution.

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[33] Conyers v. Glenn, 243 So.2d 204, 209 (Fla. App. 1971).

[34] 198 U. S. 45 (1905) (holding unconstitutional a state law which limited bakers to ten hours of work a day).

[35] Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533, 564 (1976).

THE FEDERAL SPEEDY TRIAL: SPEEDY INJUSTICE?

By Tobias Weiss*

A speedy trial in criminal cases is a cardinal constitutional right.[1] No one would minimize its importance.[2] But it has also become an easy slogan, blindly applied, without an awareness that newly developed crimes of the contemporary world do not fit the mold of the historic crimes for which the speedy trial safeguard originated. These are the so-called "white collar" crimes, with which federal courts and federal prosecutors have become obsessed.[3]

Thoughtless or impulsive application of the speedy trial concept to these new crimes sacrifices rather than preserves an accused's rights. In the context of these crimes, the speedy trial cannot have its traditional meaning and has to be administered with care if injustice is to be avoided.

I. The White Collar Predicament.

White collar crimes typically occur in substantive areas which are subject to government regulation or supervision, or to which government requirements or exactions apply. The elements of the crime are largely the same as underlie counterpart civil liability for the same conduct. The difference between the civil and

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* Of the Stamford Bar

[1] U.S. Const., Sixth Amendment; Conn. Const., Art. I, Sec. 8; F.R. Cr. P. 48(b); Gideon v. Wainwright, 372 U.S. 335 (1963); Klopfer v. North Carolina, 386 U.S. 213, 226 (1967). In Commonwealth v. Weber, 256 Pa. Super. 249, 389 A.2d 1107 (1981), inaction in asserting a speedy trial claim was held to be a violation of the right to effective assistance of counsel.

[2] But some judges in Connecticut have criticized speedy trial emphasis as a numbers game in court administration. The Stamford Advocate, Dec. 31, 1979, p. 2, col. 3.

[3] A newspaper report on a recent sentencing in a federal income tax evasion case stated that the defendant:

> has been punished to show the community that white-collar criminals receive harsh treatment, the sentencing judge said.
>
> U.S. District Judge Warren Eginton said he saw no need for rehabilitating Richard Geist, but he did see a need to send a message to the community about justice in such cases. The Stamford Advocate, May 14, 1981, p. 7, col. 6.

See *Courts Impose More Jail Terms In White-Collar Criminal Cases*, N.Y. Times, May 5, 1980, p. 1, col. 5.

The U.S. Justice Department and the U.S. Attorneys devote major attention to white collar crime. *Symposium — White Collar Crime*, 10 MEMPHIS STATE UNIV. L. REV. 411, 414 (1980); N.Y. Times, Mar. 2, 1980, p. 31, col. 1.

criminal cases is mainly in the superimposed criminal penalty. The criminal case therefore poses problems of trial preparation for the accused which are the same in many respects as confront the defendant in the counterpart civil case. No one would seriously suggest that the pattern of the Speedy Trial Act[4] should be applied to the civil case; and it is equally inappropriate to impose that framework on the criminal case.

The prosecution of a conventional crime typically takes place within a short period after the criminal act. On occasion there may be some delay for ascertainment or apprehension of the perpetrator, but usually the significant components of the crime, and the case against which the defense must prepare, are known by both sides immediately or shortly after the criminal occurrence.[5] Lengthy investigation usually is not needed to determine whether a crime has been committed, since the criminal act is overt and external, and the prosecution and defense cases can be prepared virtually within the same time span following the criminal event.

By contrast, white collar crimes do not surface by themselves but have to be exposed, usually by a government agency which administers or oversees compliance. The charge of criminal conduct comes after a considerable period of investigation,[6] during which the prosecution case is developed and prepared by the agency, and then is handed to the prosecuting authority in substantially complete condition. However, prior to that point the target usually receives little or no information about the investigation and the case being developed against him,[7] and for much of that period he may not even know that an investigation is in progress. Neither the accused nor counsel he may retain is in a position to know the case against him and the supporting crucial

[4] 18 U.S.C. § 3161; Fraser, *The Speedy Trial Act of 1974*, 43 U. of Chi. L. Rev. 667 (1976).

[5] *Cf.* the view that the criminal proceeding begins when formal criminal charges are made against the accused, and only then do the guarantees of the Sixth Amendment apply. State v. Townsend, 167 Conn. 539, 556 (1975), *cert. den.* 423 U.S. 846 (1975); State v. Packard, 42 Conn. L. J. No. 48, p. 5, at 8 (1981).

[6] Fleming, *Trial Problems In The Defense Of White Collar Crime*, *in* 2 ALI-ABA Course Materials J. 6 (1978); Silbert, *Should The Administration Curb Prosecution Of White Collar Crime*, 5 Dist. Law. 24 (D.C. Bar, 1981).

[7] Thus, I.R.S. will not, and cannot be compelled under the Freedom of Information Act to, disclose its investigation data compiled for law enforcement purposes. Sands v. Murphy, 633 F.2d 968 (1st Cir. 1980); John Doe Corp. v. Miller, 499 F. Supp. 378 (E.D.N.Y. 1980). *Cf.* Lacy, *Adverse Publicity and SEC Enforcement*, 46 Ford L. Rev. 435 (1977).

detail before the investigation and administrative processing are concluded. The predicament of the white collar defendant is that it is only at that point, when the government case is already poised for trial, that in essence the effective preparation of the defense case can be undertaken.

It is therefore not surprising that, very soon after the administrative processing of a white collar case is finished, an indictment is procured and the prosecution seeks a trial in quick succession. The prosecution is ready but the accused is not.[8] He needs time and the processes of the court to prepare for trial in order to match the opportunity and power of the government used for its preparation. And yet the courts will push the accused into the straightjacket of a speedy trial. Nor do pleas to the court for modification of a speedy trial schedule, regardless of the explanation given, evoke a sympathetic response. Such defense requests are generally opposed by the prosecution[9]; and, on those infrequent occasions when the hostility of the court to such requests abates, the typical concession is only a miniscule extension which is inadequate for the needs of the defense.

II. An Illustrative Case.

A recent income tax case[10] illustrates the barrier to the defense interposed by a doctrinaire approach to a speedy trial.

The defendant was charged with income tax evasion for kickbacks received on paper products bought for his employer. The seller, payor of the kickbacks, produced his own records with self-serving entries to show the charged payments. But he had never withheld tax or filed the required returns for the alleged payments even though he was an accountant and fully familiar with the requirements. Moreover, although many of the payments were made in cash, the seller drew checks to defendant

[8] Doramus, *The White Collar Chafes: Looking For Evidence After Indictment*, 6 Litigation 16 (ABA Sec. of Litigation 1980): "After indictment [in a white collar case], the defendant usually must choose between his due process right to present a defense and his right to a speedy trial. The government is well on its way to trial preparation, since it has been conducting discovery for months or years. . . . With the Speedy Trial Act pushing the case to trial, and the enormous factual research involved in many white collar crime cases, a defendant has little time for proper preparation."

[9] There may be some suspicion that the handicapped position of the defense contributes to the prosecution's anxiety for "speedy justice."

[10] U.S. v. Harry M. Garr *et al.*, Crim. No. N-79-36 (D.C. Conn. 1979).

allegedly for those payments, and the seller, without apprising the defendant, then forged defendant's endorsement and cashed the checks himself. He claimed that the defendant was paid the entire proceeds of those checks. The defendant acknowledged receiving payments, but claimed that the amount was substantially less than asserted by the seller, and that the seller, as an accountant, had agreed to forward a sufficient remittance to the I.R.S. to cover income tax which might be due from defendant on the amounts actually paid to him.

The seller surfaced as an informer while his business was being audited by the I.R.S., and thereafter he was given immunity by the government. The prosecution thus was built on an informer-accomplice, and his information admittedly came from a polluted source."[11] His tale was clearly suspect, with sufficient self-interest to submit to distortion or manipulation of the truth.

The informer and his information therefore required probing by the defense in advance of trial. That could be done only through the compulsory processes of the court, since the informer could not be expected to make himself and his books and records voluntarily available for examination and audit by the defense, particularly while he was in the government's tow. The defense, in part, wanted to perform an audit to check the cash, assets, receipts and expenditures of the informer and his business, and for that purpose needed their bookkeeping, accounting, tax, and bank records. None of that could be undertaken until the indictment was filed and the case came to court.

While the indictment was filed in March 1979, the government investigation had begun at least four years earlier. During that four-year period, the prosecution case was developed and substantially completed. The defendant, however, could barely begin development of his case and preparation for trial during those years.[12] There was a serious and inherent disparity in the

[11] U.S. v. Beckman, 155 F.2d 580, 584 (2d Cir. 1946); State v. Williamson, 42 Conn. 261, 265 (1875); 2 Jones, EVIDENCE, § 20.60 at 736; *Keeping Informants Under Control*, N.Y. Times, Aug 3, 1981, p. A15, col. 1.

In the liquor license kickback trial of Gov. Ray Blanton of Tennessee, it was reported that the prosecution's "star witness" testified that he gave his testimony "out of fear of imprisonment because of income tax irregularities." N.Y. Times, May 1, 1981, p. A12, col. 5. *See also* Bryant v. U.S., 79-2 USTC par. 9660 (E.D. Pa. 1979) (I.R.S. pressure to assure testimony of a witness).

[12] The indictment itself, as is customary, was not informative beyond certain bare and conclusory assertions, and required explanation.

preparation positions of the two sides when the case came to court. The defense needed time for preparation which the government had already arranged for itself.

But the prosecution and the court, reflecting their typical attitude, were not inclined to allow the time. The prosecution pressed for a prompt trial, filing a statement of readiness. The court pushed the defendant in the same direction even though the defendant waived his rights under the Speedy Trial Act.[13] A date of March 29, 1979, within the same month as the indictment, was set by the court for pleading to the indictment by the defendant, and then was adjourned to April 20, 1979, when the court compelled defendant to plead even though he had motions pending attacking the indictment and seeking to set it aside.[14] And the court at the same time directed the case to be tried on June 5, 1979, apparently on the expectation that all pre-trial motions and proceedings would be resolved and the defense preparation completed within that six-week period.[15]

Reflecting the necessities of the defense and its requirement for time, the following motions were then filed by the defense[16]:

(1) Motion for discovery and inspection of financial and tax records of the informer in the government's hands, under Rule 16(a)(1)(C). Whether the informer had diverted any funds which he said were paid to the defendant, and whether the informer had any tax difficulties, visible or latent, had a direct bearing on the authenticity of the information supplied to the prosecution. The disclosure was opposed by the prosecution with respect to materials bearing on the I.R.S. audit and tax liability of the informer and his business, and the court denied the motion[17] without explanation to the extent that it was opposed.

[13] *See* note 4 *supra*.

[14] The defense objected that it should not be made to plead to allegations which might be invalid or defective, and that the plea should await decision of those matters. *Cf.* F. R. Cr. P. 7(f) (bill of particulars before arraignment); 2 F. Wharton, CRIMINAL PROCEDURE (12th ed.) § 349 (plea prior to motion may be waiver of certain defects); U.S. v. Weinstein, 511 F.2d 622 (2d Cir. 1975); Hilbert v. Dooling, 476 F.2d 355 (2d Cir. 1973). But there was no way to brake the court's onrushing urge for speed. Eventually these motions were denied by the court.

An order denying a motion to dismiss an indictment has been held not appealable. U.S. v. Robbins, 81-2 USTC Par. 9494 (6th Cir. 1981).

[15] In fact, the trial date subsequently was postponed.

[16] The Rule references are to the Federal Rules of Criminal Procedure.

[17] *But see* U.S. v. Greater Bouse Contractors Assn., 171 F. Supp. 213 (S.D.N.Y. 1959).

There is no general right to discovery in a criminal case. Weatherford v.

(2) Motions for bills of particulars under Rule 7(f), to obtain information about the alleged payments made by the informer and about meetings alleged as overt acts in a conspiracy count.[18] With one exception relating to the identity of the participants in the alleged conspiracy, the prosecution opposed the motions on the grounds that the information was not needed to prepare for trial and to avoid surprise, and that the motions were a "device to compel disclosure of the Government's evidence in advance of trial." The court sustained the prosecution,[19] again without explanation. Persistence by the defense thereafter obtained a concession from the court regarding the overt acts, requiring the prosecution to state the location and purpose of the meetings.[20] After several omissions to furnish this information, the prosecution eventually replied that the purpose was "to effect the objects of the conspiracy." Since that added nothing to the indictment allegation that there was a conspiracy, the defense moved to strike the indictment allegations of overt acts. But the court sustained the prosecution's response and denied the motion.

(3) Motions to direct the informer and the government to respond to subpoenas issued under Rule 17(c) to produce, in advance of trial,[21] specified books and records needed to audit the finances of the informer and his corporation.[22] The court at first denied the motions without prejudice. The motions then were made again, and were again denied without prejudice, referring to the *Iozia* case.[23] When made a third time, the motion was granted as to the informer and his corporation, who were ordered to produce the materials at the commencement of trial.[24]

Bursey, 429 U.S. 545, 559 (1977); Wardius v. Oregon, 412 U.S. 470, 474 (1973); 2 F. WHARTON, CRIMINAL PROCEDURE (12th ed.) § 381. But defense counsel has a duty, as part of his investigation, to try "to secure information in the possession of the prosecution and law enforcement authorities." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, § 4.1 (1971).

18 The amounts, dates, places, form of payments, records of those payments, tax withholding on those payments, and the filing of payor returns (such as Forms 1096 and 1099) were among the particulars sought.

19 Grant or denial of a motion for a bill of particulars rests in the sound discretion of the trial court but is reversible on appeal if the denial causes prejudice on trial. U.S. v. Diecidue, 603 F.2d 535, 563 (5th Cir. 1979).

20 U.S. v. Crisona, 271 F. Supp. 150, 157 (S.D.N.Y. 1967).

21 *See* U.S. v. Nixon, 418 U.S. 683, 698-700 (1974); U.S. v. Keen, 509 F.2d 1273, 1275 (6th Cir. 1975); U.S. v. Ward, 120 F. Supp. 57, 61 (S.D.N.Y. 1954).

22 The subpoenas also related to items in the government's use of the circumstantial net worth and bank deposits methods to establish unreported income.

23 U.S. v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952).

24 A plea arrangement was reached before that time, so that the production did not materialize.

(4) Motion to direct the government to furnish evidence in its possession or control which was exculpatory or otherwise favorable to the defendant,[25] including evidence to impeach the credibility of the informer,[26] inconsistent statements by him, and promises to him by the government or understandings between him and the government. That disclosure likewise was sought in advance of trial. With evidence in its portfolio of forgery by the informer of the defendant's signature as an endorsement on checks, of violation of federal tax statutes by the informer in his failure to file payor returns, of an income tax file on the I.R.S. audit of the informer and his corporation, and with the informer having been a participant in the kickback arrangement, the government nevertheless denied that it had anything to disclose in response to this motion other than the grant of use immunity to the informer. Equally surprising was the court's disposition of the motion with a curt "Except as complied with, Denied." As some of that information surfaced later, the defense made a further motion to compel the government to produce the I.R.S. audit materials and the tax returns of the informer and his business, and that motion was granted to the extent of requiring submission of the tax returns for examination by the court.[27]

(5) Motion for a copy of all transcripts of testimony before any grand jury considering this situation. The defense suspected that, consciously or otherwise, an unbalanced case had been presented to the grand jury, omitting evidence favorable to the defendant or casting doubt on the integrity or credibility of the informer or undermining the government's showing of tax evasion. The motion was opposed by the prosecution and was denied by the court. The opposition was based on the *Dennis* case.[28] The motion was then made again under the *Moten*[29] and *Youngblood*[30] cases, but was denied without explanation. A companion motion, to dismiss the indictment as resulting from a misleading presentation to the grand jury, was also denied, but the grand jury minutes were ordered sealed and made a court exhibit.

(6) Motion to strike from the indictment, and to suppress as

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25 Brady v. Maryland, 373 U.S. 83 (1963).

26 U.S. v. Liebert, 519 F.2d 542, 547 (3d Cir. 1975); U.S. v. Manson, 425 F. Supp. 1272 (D. Conn. 1977).

27 *See* note 24 *supra*.

28 Dennis v. U.S., 384 U.S. 855 (1966).

29 U.S. v. Moten, 582 F.2d 654, 663-664 (2d Cir. 1978).

30 U.S. v. Youngblood, 379 F.2d 365, 370 (2d Cir. 1967).

evidence, events alleged to have occurred at an interview between the defendant and an I.R.S. agent, on the ground that the I.R.S. inquiry had already entered the criminal phase but was disguised as a civil audit. There not only had not been any notice of the new phase or of any possible criminal liability but, per contra, the interview was preceded by a written notice that it did not imply any "suspicion of criminal liability." The motion was denied without explanation.

(7) Motion to dismiss the indictment for prosecutorial misconduct. The prosecution intended to use testimony and records of various financial institutions with which the defendant had some dealing. The prosecutor wrote to defense counsel proposing a stipulation for the agreed admission of that evidence, thereby surrendering the defense opportunity to confront witnesses, to object to evidence in the context of the trial, and to cross-examine,[31] and infringing the defendant's right to require the prosecution to prove its case against him. That letter then made the following threat of retaliation if the defense refused to stipulate:

> Finally, if your clients are convicted, you may expect that the Government will comment at sentencing about the great cost of an investigation such as this one, the expenditure of judicial time required to try such a case, and the large payments in travel expenses and witness fees which were required to bring defendants . . . to justice. By pointing to defendants' willingness to stipulate as to uncontested matters, you may blunt somewhat that Government argument.

That threat, of an increased sentence for the exercise of constitutional rights, was a raw and improper display of prosecutorial muscle.[32] However, the defense motion was denied and the court took no action against the prosecutor.

Defense effort to get time in advance of trial for preparation through such motions was resisted by the prosecution and the court, and that bias against allowing time found expression in a number of stereotyped responses:

(1) The defense does not need the material or information for

[31] Pointer v. Texas, 380 U.S. 400 (1965).

[32] *Cf.* State v. Christian, 3 ATLA Crim. Rep. 31 (Mo. 1980) (police statement that cooperation would result in lenient treatment rendered waiver of Miranda rights involuntary).

its trial preparation. But it is improper for the trial court or the prosecution[33] to substitute itself for defense counsel and trespass upon his judgment as to what is beneficial or useful for the defense. Judges, in particular, should stick to judging.

(2) The defense already has the material or knows the information, or can get it, because the defendant knows what he did. The rejoinder of Mr. Justice Whitaker, sitting as a district court judge, points up the vice of that position[34]: "This argument could be valid only if the defendant be presumed to be quilty. For only if he is presumed guilty could he know the facts and details of the crime. Instead of being presumed guilty, he is presumed to be innocent. Being presumed to be innocent, it must be assumed that he is ignorant of the facts on which the pleader founds his charges."

(3) The material is government evidence and therefore its disclosure cannot be compelled. This is the "spring the trap on the accused" mentality, and, to the extent it is applied, reduces the opportunity of the defendant for effective legal assistance.[35] In view of the typical time pattern in which white collar cases are developed, with the government in operation before the defendant can start effectively, this reasoning may exclude the accused from important evidence.

(4) The defense is not entitled to disclosure of material or information which the prosecution does not intend to use at trial. The premise here seems to be that the disclosure is to aid in cross-examination or counteracting steps at trial, and therefore is not needed if not used by the prosecution. This is a specious extension of the *Jencks*[36] thinking and ignores the pretrial preparation value of the material or information. The particular item may not serve the prosecution strategy and yet be of value to the defense.[37] It is unfair to place such a veto in the prosecution's hands.

(5) Where production is to be made in advance of trial, it will be required at the eve or commencement of trial. This is a

[33] U.S. v. Coplon, 185 F.2d 629, 636-639 (2d Cir. 1960).

[34] U.S. v. Smith, 16 F.R.D. 372, 375 (W.D. Mo. 1954).

[35] U.S. v. Crisona, 271 F. Supp. 150, 156 (S.D.N.Y. 1967).

[36] 18 U.S.C. § 3500.

[37] Rule 16(a) (1) (C) expressly provides for disclosure of matter which is "material to the preparation of his defense."

relaxation of the *Jencks* approach, which withholds the material until it is used at trial, but still leaves the defense in a problematic position. Thus, it would be difficult to start an audit at that time and run it concurrently with the trial, so that it would be necessary to interrupt or delay the trial.[38]

(6) On the matter of timing of a production or disclosure, the order of preference of the court and the prosecution, and the trend of the speedy trial syndrome, is the inverse of what is sensible for proper preparation[39]: their first choice is to prevent disclosure or production; however, if it must be made, squeeze it into the *Jencks* mold of production during trial; if that is not done, disclosure on the eve of trial is preferred; and, lastly and to be strenously resisted and seldom allowed, comes disclosure in advance of trial.

III. Speed Kills.

In white collar cases speed has a tendency to kill or maim constitutional rights. The federal[40] and state[41] constitutions guarantee an accused, with or without the white collar, the right to assistance by counsel, and that means effective legal assistance.[42] That assistance is impossible without the effective opportunity of preparation for trial. In like fashion the right to confront witnesses[43] has meaning only if there is an opportunity to prepare an effective confrontation. Even the presumption of innocence loses most of its force if preparation for trial is loaded in favor of the prosecution. What is at stake is a good part of the constitutional structure for criminal justice.

If constitutional damage is to be avoided, the scope of defense preparation in a white collar case must be appreciated, bearing in mind the context in which such a case arises, as discussed earlier. It is not just a matter of speaking to the accused or interviewing witnesses or collecting exhibits. Typically the case is complex and there has to be extensive audit of financial records

38 U.S. v. Algie, 503 F. Supp. 783 (E.D. Ky. 1980); U.S. v. Procario, 34 F.R.D. 486 (S.D.N.Y. 1963); U.S. v. Fancher, 195 F. Supp. 448 (D. Conn. 1961).

39 U.S. v. Algie, 503 F. Supp. 783 (E.D. Ky. 1980).

40 U.S. Const., Sixth Amendment.

41 Conn. Const., Art. I, Sec. 8.

42 Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

43 Pointer v. Texas, 380 U.S. 400 (1965).

or search and analysis of voluminous documents and records by experts. The case discussed here is only one example. There is a variety of many others.[44] The court must lend itself to the defense effort to obtain the records and documents, and then must allow the opportunity to do the proper job on those materials. Speed in the customary sense is deficient on both counts, as the illustrative case demonstrates. That speed may even be illusory as an efficient technique for dispensing judicial services.[45]

The Supreme Court has deplored the "obsession for speedy dispositions, regardless of the unfairness of the result."[46] The Supreme Court has also cautioned that effective legal assistance must be present in the pretrial stages when "thoroughgoing investigation and preparation [are] vitally important."[47] Those messages must be given expanded meaning and application by the appellate courts to produce the proper perception in the trial courts in white collar cases. To do so, the normal rules of appellate review are inadequate. The doctrine of harmless error,[48] the search for deficiencies in the record to justify affirmance of conviction,[49] or the requirement of specific evidence of prejudice,[50] cannot be used here, for interference with the opportunity of preparation for trial is often prejudicial in intangible and subtle ways which the record cannot show. The narrow perspective of appellate courts on the question of effective representation by counsel[51] is not encouraging for this purpose. Until their perspec-

44 "For example, in one case, an issue is whether or not a business was losing money, which is relevant as a possible motive for the commission of arson. This involves expert testimony on the financial records of the company. Another case involves the alleged acceptance of bribes or kickbacks by a public official. The kickbacks are alleged to have been made by an arrangement whereby a contract was let for services to a public housing authority, which services were allegedly never received. Proof in the case requires the analysis of financial and business records of the housing authority and the company rendering the services." U.S. v. Algie, 503 F. Supp. 783, 788, n. 9 (E.D. Ky. 1980).

45 One federal court found that by requiring production of materials before trial, rather than following the Jencks procedure of production during trial, shortened criminal trials by one-third to one half. U.S. v. Algie, 503 F. Supp. 783, 786-787 (E.D. Ky. 1980).

46 Argersinger v. Hamlin, 407 U.S. 25, 34 (1972).

47 Powell v. Alabama, 287 U.S. 45, 57 (1932).

48 *Harmful Use Of Harmless Error In Criminal Cases*, 64 Cornell L. Rev. 538 (1979).

49 Purver and Taylor, *Making and Preserving The Criminal Trial Record*, 86 Case & Comment 14 (1981).

50 Dispensing with that requirement, *see* U.S. v. Golub, 638 F.2d 185, 188 (10th Cir. 1980) *But see* U.S. v. Morrison, 449 U.S. 361 (1981).

51 See the narrow framework within which the question was considered in U.S. v. Badwan, 624 F.2d 1228 (4th Cir. 1980) (denial of motion for continuance of the trial date sustained); U.S. v. Golub, 638 F.2d 185 (10th Cir. 1980) (denial of

tive is enlarged, the Supreme Court's caveats will have little meaning in white collar cases.

Ultimately the courts, and particularly at the trial level, must be the instrument to assure the opportunity for trial preparation. As the illustrative case demonstrates, reliance cannot be placed on the prosecution, which typically is convinced of its virtue and looks on the defendant as an agent of Satan.[52] At present the prevailing attitude in the trial courts is to apply unrelenting pressure on the defense for a speedy trial,[53] and in that regard there is a court list, if not a bias, toward the prosecution. The unpleasant task of defense counsel, if he is to be faithful in his duty as an advocate, is to try to modify that attitude, by repetition in the face of denial if necessary, and to resist the effort to push him prematurely into trial.

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request for continuance of trial date reversed); Wolfs v. Britton, 509 F.2d 304, 308-310 (8th Cir. 1975); *cf.* Gillihan v. Rodriguez, 551 F.2d 1182, 1187 (10th Cir. 1977).

52 In reality the image of prosecution purity is often wide of the mark. *See e.g.* U.S. v. Morrison, 449 U.S. 361 (1981) (badgering of accused in her home by narcotics agents); U.S. v. Paynor, 447 U.S. 727 (1980) (evidence illegally seized from third person); U.S. v. Iverson, 637 F.2d 799 (D.C. Cir. 1980) (prosecutor's acquiescence in witness false testimony); U.S. v. Freeman, 634 F.2d 1267 (10th Cir. 1980) (government investigator in jury room during deliberations); U.S. v. Stahl, 616 F.2d 30 (2d Cir. 1980) (persistent appeal to class prejudice); U.S. v. Serubo, 604 F.2d 807 (3d Cir. 1979) (prosecutorial misconduct before grand jury); N.Y. Times, June 4, 1981, p. D7, col. 5, reporting the dismissal of an indictment against Sears, Roebuck & Co. for misconduct before the grand jury.

53 As a further example, see the response of the trial judge in U.S. v. Golub, note 51 *supra*, and see how close it to that of the trial judge in the illustrative case.

DISSENTIMENT: DENIALS OF CERTIORARI

By Carl J. Schuman*

The purpose of this column has been to publicize otherwise overlooked dissenting opinions.[1] Perhaps no dissent attracts *less* attention than a United States Supreme Court Justice *opposing* denial of certiorari. While a decision of the Court not to hear a case normally carries no precedential value,[2] pointed dissents from denials of certiorari often are instructive and significant.[3]

Dissents from denials of certiorari have novel properties insulating them against complete obscurity. Most unusual is the fact that certiorari dissenters can never number more than three in a given case. According to long standing rules of the Court, the vote of only four Justices is necessary to decide to hear a case.[4]

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1 *See* Editorial, 54 Conn. B.J. 175 (1980). For previous installments, see *Dissentiment: Brooding Spirit of the Law*, 54 Conn. B.J. 186 (1980); *Dissentiment*, 55 Conn. B.J. 159 (1981).

2 *See* United States v. Kras, 409 U.S. 434, 443 (1973). Similarly, a denial of certification by the Connecticut Supreme Court for an appeal from the Appellate Division of the Circuit Court, now the Appellate Session of the Superior Court, does not necessarily indicate the Supreme Court's approval of either the result reached or the opinion rendered by the Appellate Division. State v. Chisholm, 155 Conn. 706, 706-07, 236 A.2d 465, 465-66 (1967). *But see* Amica Mutual Ins. Co. v. Brown, 37 Conn. Supp. 618, 620, 430 A.2d 1317, 1318 (App. Sess. 1981) (Since Supreme Court denied certification in previous Appellate Session case raising same issue as appeal at bar, no reason exists for Appellate Session to change its position).

3 The same might be said when a Supreme Court Justice vigorously dissents from the denial of a stay. When the Court summarily refused to stay a robbery trial in California v. Minjares, 443 U.S. 916 (1979), Justice Rehnquist took the opportunity to write a lengthy plea to reexamine the exclusionary rule. *Id.* at 916-28. His dissent commenced as follows:

> In the ordinary case, anything more than the most summary statement of the reasons of an individual Justice for dissenting from the disposition of an application for a stay by the full Court would be both a useless and wasteful consumption of the dissenter's time. I believe, though, that this is not the ordinary case. . . . *Id.* at 916.

4 *See* Rogers v. Missouri Pac. R.R., 352 U.S. 500, 527, 529 (1957) (Frankfurter, J., dissenting). On the other hand, once the case is argued and briefed, four Justices cannot prevent the remaining five from dismissing a writ as "improvidently granted." *Id.* at 560 (Harlan, J., concurring and dissenting). *See also id.* at 526 n.4 (Frankfurter, J., dissenting). Under some circumstances, then, the so-called "rule of four" pertaining to grants of certiorari can become the "rule of five." *Id.* at 560-61 (Harlan J., concurring and dissenting).

On whether a Justice opposing a grant of certiorari should participate in the decision on the merits, compare *id.* at 524-32 (Frankfurter, J., dissenting) (no participation when a particular "class" of litigation is unjustifiably given a "special and privileged position") with *id.* at 559-62 (Harlan, J., concurring and dissenting) (once certiorari has been granted case should be disposed of on premise that it is properly in the Supreme Court).

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SPEEDY TRIAL ACT OF 1974—DISMISSAL SANCTION FOR NONCOMPLIANCE WITH THE ACT: DEFINING THE RANGE OF DISTRICT COURTS' DISCRETION TO DISMISS CASES WITH PREJUDICE

United States v. Taylor, 108 S. Ct. 2413 (1988).

I. INTRODUCTION

In *United States v. Taylor*,[1] the United States Supreme Court for the first time addressed the application of the dismissal sanction of the Speedy Trial Act of 1974.[2] The Court resolved several, but not all, of the ambiguities in the statute that had led lower courts to inconsistently interpret and apply the dismissal sanction since it went into effect in 1980.

The Speedy Trial Act mandates that individuals arrested for criminal offenses be indicted within thirty days,[3] and that such individuals be brought to trial within seventy days after the indictment.[4]

[1] 108 S. Ct. 2413 (1988).

[2] 18 U.S.C. §§ 3161-3174 (1982). The relevant section, § 3162(a)(2), pertains to dismissal sanctions. It states that:

> [i]f a defendant is not brought to trial within the time limit required . . . the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time [permitted by the Act]. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter . . . and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

18 U.S.C. § 3162(a)(2) (1982).

[3] § 3161(b) provides, in pertinent part, that "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b) (1982).

[4] 18 U.S.C. § 3161(c)(1) states, in pertinent part, that:

> [i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or

If these time restrictions are not complied with, dismissal of the charge is mandatory.[5] The Act allows the court to exercise its discretion in determining whether to dismiss the case with or without prejudice.[6] If the case is dismissed with prejudice, reprosecution is barred. The Act requires that courts be guided in their decisions by "among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice."[7]

In deciding to dismiss the charges in *Taylor* without prejudice, the Supreme Court clarified several inconsistencies in the interpretation of the dismissal sanction in the district and circuit courts. The Court held that: (1) there is no presumption that all dismissals should be with prejudice, or that dismissals without prejudice should be the exception to the rule;[8] (2) simple negligence on the part of the government in failing to comply with the Act does not necessarily warrant consideration absent a "truly neglectful attitude," as when bad faith or a pattern of neglect is present;[9] and (3) although the decision whether to dismiss a case with or without prejudice is in the district court's discretion, it is subject to reversal if it fails to indicate that it sufficiently weighed each factor in the balancing test.[10] The Court also emphasized that any contribution to the delay before trial on the part of the defendant weighs heavily in favor of dismissing the case without prejudice.[11]

This Note explores the interpretations the Court chose to attach to the balancing test factors in light of the legislative history of the Act and the dual goals it was designed to implement: safeguarding society from a perceived increase in crimes committed by defendants free on bail for extended periods, and giving substance to defendants' sixth amendment speedy trial rights by ensuring increased consistent judicial treatment.[12] Although these goals are in a sense contradictory, the Court's ruling in *Taylor* strikes a sensible balance in protecting each of them.

indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending.
18 U.S.C. § 3161(c)(1) (1982).

5 18 U.S.C. § 3162(a)(1)-(2) (1982).

6 18 U.S.C. § 3162(a)(2) (1982).

7 18 U.S.C. § 3162(a)(2).

8 *Taylor*, 108 S. Ct. at 2418.

9 *Id.* at 2420.

10 *Id.* at 2423.

11 *Id.* at 2421.

12 *See supra* notes 138-39 and accompanying text.

II. Summary of the Facts

The respondent, Larry Lee Taylor, was indicted by a federal grand jury on July 25, 1984, for conspiracy to distribute cocaine[13] and possession of 400 grams of cocaine with intent to distribute.[14] He was scheduled for trial in the Western District Court of Washington on November 19, 1984.[15] The seventy day period during which the prosecution could have properly brought him to trial under the Act[16] would have expired the following day.[17]

Taylor, however, failed to appear for trial.[18] The court then issued a bench warrant for his arrest.[19] Seventy-eight days later, on February 5, 1985, local police officers arrested Taylor in San Mateo County, California on a petty theft charge.[20]

Several factors contributed to a delay in returning Taylor to Washington to stand trial. On February 7, 1985, two days after his second arrest, he was transferred to federal custody on a writ of *habeas corpus ad testificandum* issued by the Northern District Court of California to secure his testimony as a defense witness in a federal narcotics prosecution in San Francisco.[21] He testified on February 21, and was held for possible recall until the next day, when the case ended in a mistrial.[22]

On February 28, 1985, all California charges against Taylor were dismissed.[23] The United States Marshal Service (USMS) was notified of this on the next day, March 1.[24] The United States' notice informed the USMS that "effective today [respondent] becomes your prisoner."[25]

On March 6, Taylor appeared before a magistrate of the Northern District Court of California in connection with the Washington

13 Taylor was indicted for this offense under 21 U.S.C. § 846 (1982).

14 Taylor was indicted for this offense under 21 U.S.C. § 841(a)(1), (b)(1)(A) (1982) and 18 U.S.C. § 2 (1982). *See* United States v. Taylor, 821 F.2d 1377, 1378-79 (9th Cir. 1987), *rev'd*, 108 S. Ct. 2413 (1988).

15 *Taylor*, 108 S. Ct. at 2415.

16 *See supra* note 4 and accompanying text.

17 *Taylor*, 108 S. Ct. at 2415.

18 *Id.*

19 *Id.*

20 United States v. Taylor, 821 F.2d 1377, 1379 (9th Cir. 1987), *rev'd*, 108 S. Ct. 2413 (1988).

21 Brief for the United States at 2, United States v. Taylor, 108 S. Ct. 2413 (1988)(No. 87-573).

22 *Id.* at 3.

23 *Taylor*, 821 F.2d at 1379.

24 *Id.*

25 Brief for the United States at 3 (citation omitted).

bench warrant.[26] The magistrate scheduled a second hearing for March 8.[27] On that date, the magistrate granted Taylor's request for a physical examination.[28] At that hearing, defense counsel indicated to the court that he was not in a hurry to have Taylor returned to Washington.[29] Indeed, he requested the court to set a removal hearing for a later date, expressing his desire to "keep [Taylor] here and organize what is gonna happen and talk to [Assistant U.S. Attorney] Wales up in Seattle."[30]

A status conference on the removal proceedings was set for March 18, 1985.[31] At the respondent's request, the court ultimately set the removal hearing for April 3.[32] On that date, Taylor waived his right to a hearing.[33]

The magistrate finally signed an order to transport Taylor to Washington on April 3.[34] The USMS, however, deemed it efficient and economical to wait until it could assemble a number of prisoners bound for Oregon and Washington and transport them at the same time.[35] As a result, Taylor did not leave California until two weeks later, April 17.[36] The next day, April 18, while Taylor was detained in Portland, Oregon, the Northern District Court of California issued a second writ ordering his return to San Francisco to testify at the retrial of the federal narcotics prosecution.[37] He was returned to California from Portland five days later, on April 23.[38]

On April 24, the Western District Court of Washington issued a superseding indictment realleging Taylor's narcotics offenses, including an indictment for failure to appear at trial.[39] After testifying at the federal narcotics retrial, which began on May 7, Taylor was finally returned to Washington on May 17, 1985.[40] This was 180 days after his trial date in Washington, and 102 days after his second arrest in California.

[26] *Id.* at 3-4.
[27] *Id.* at 4.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Taylor*, 821 F.2d at 1379.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Taylor*, 108 S. Ct. at 2415.
[40] Brief for the United States at 5, United States v. Taylor, 108 S. Ct. 2413 (1988) (No. 87-573).

Before Taylor was to be retried, he moved to dismiss the superseding narcotics indictment on the basis of the seventy day time limit of the Speedy Trial Act.[41] The district court granted this motion and dismissed both narcotics counts.[42] Taylor pleaded guilty to the failure to appear count, for which no speedy trial violation was found.[43]

The district court concluded that because only one day had remained on the "speedy trial clock" on November 19, 1984, when Taylor fled Washington, the government had a single day in which to bring him to trial.[44] Pursuant to the Act,[45] the court excluded a number of periods from its calculation of speedy trial time.[46] The first was the seventy-eight day period between the respondent's November 19, 1984 trial date and his second arrest on February 5, 1985.[47] Next, the court excluded the period between February 7 and February 22, 1985, when Taylor was detained both on the California charges and for the purpose of testifying in the first federal narcotics trial.[48] The court also excluded the period between March 6, when Taylor first appeared on the bench warrant, and April 3, when the removal hearing took place.[49] Finally, the court excluded a ten-day period during which the USMS reasonably could have

[41] *Id. See* 18 U.S.C. § 3161(c)(1) (1982).
[42] *Taylor*, 108 S. Ct. at 2416.
[43] Brief for the United States at 5 and n.3.
[44] *Taylor*, 821 F.2d at 1380.
[45] 18 U.S.C. § 3161(h) provides that:

> The following periods of delay shall be excluded in computing the time within which an information or indictment must be filed, or in computing the time within which the trial of any such offense must commence:
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . .
> (D) delay resulting from trial with respect to other charges against the defendant;
> . . . .
> (G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;
> (H) delay resulting from transportation of any defendant from another district, . . . except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;
> . . . .
> (3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness."

18 U.S.C. § 3161(h)(1) & (3) (1982).
[46] Brief for the United States at 6-7.
[47] *Taylor*, 108 S. Ct. at 2415-16. This period was excludable because Taylor was "absent" under 18 U.S.C. § 3161(h)(3)(A). *See Taylor*, 108 S. Ct. at 2416 and n.3.
[48] Brief for the United States at 6. *See* 18 U.S.C. § 3161(h)(1).
[49] Brief for the United States at 7. *See* 18 U.S.C. § 3161 (h)(1)(G).

transported Taylor to Washington.[50] The district court evidently assumed that the period after April 24 was excludable because of the superseding indictment.[51]

Ultimately, the court concluded that because fifteen non-excludable days had passed between Taylor's arrest in February and April 24, the seventy day limit imposed by the Act had been exceeded by fourteen days.[52] The Ninth Circuit affirmed this calculation.[53]

The government did not ask the Court to review the lower courts' conclusion that it had violated the Act, which made dismissal of the narcotics charges mandatory.[54] The issue that remained was whether the case should be dismissed with or without prejudice in light of the balancing test.[55]

The district court, characterizing the government's conduct as "lackadaisical," concluded that "justice would be seriously impaired if the court were not to respond sternly" to the violation, and dismissed the case with prejudice to avoid "tacitly condon[ing]" the government's behavior.[56] In a divided opinion, the Ninth Circuit affirmed this decision.[57] The sole question before the Supreme Court was whether the district court had abused its discretion in dismissing Taylor's case with prejudice.[58]

III. Summary of the Opinions

A. The Majority

The majority,[59] in an opinion written by Justice Blackmun, reversed the decision of the Ninth Circuit, and held that the district

50 Brief for the United States at 7. *See* 18 U.S.C. § 3161(h)(1)(H).

51 *Taylor*, 108 S. Ct. at 2415 n.2; United States v. Taylor, 812 F.2d 1377, 1383 (9th Cir. 1987).

52 *Taylor*, 108 S. Ct. at 2416.

53 *Taylor*, 821 F.2d at 1386.

54 *Taylor*, 108 S. Ct. at 2417. In its brief, the United States indicated that the district court had used a "now-outmoded method of calculating speedy trial time," and that a violation had not in fact occurred. Brief for the United States at 5 n.4. However, because the government neither raised that argument below nor pressed it before the Supreme Court, its merits were not reviewed. *Id.* at 6 n.4; *Taylor*, 108 S. Ct. at 2417 n.6.

55 *Taylor*, 108 S. Ct. at 2415. The Act requires that courts consider: the seriousness of the offense; the facts and circumstances surrounding the dismissal of the case; and the impact of the decision on the administration of the Act and justice in deciding whether to dismiss the case with or without prejudice. 18 U.S.C. § 3162(a)(2) (1982).

56 *Taylor*, 108 S. Ct. at 2416 (citation omitted).

57 *Taylor*, 821 F.2d at 1386.

58 *Taylor*, 108 S. Ct. at 2415.

59 Chief Justice Rehnquist, Justices Blackmun, White, O'Connor and Kennedy made up the majority. Justice White filed a concurring opinion. Justice Scalia filed an opinion concurring in all but part II-A of the decision.

court had abused its discretion in dismissing *Taylor* with prejudice.[60] This ruling was based on the majority's conclusion that the district court had "failed to consider all the factors relevant to the choice of a remedy" for violations of the Act.[61]

The Court first noted that the Speedy Trial Act lists specific factors that courts must consider in determining whether to dismiss a case with or without prejudice.[62] They are, " 'among others, . . . the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice.' "[63] In addition to these factors, the pertinent legislative history indicated to the Court that the lack or presence of prejudice caused to the defendant by the delay was a factor that should guide courts in their choice of remedy.[64]

After reviewing the legislative history of the Act, the Court concluded that "Congress did not intend any particular type of dismissal to serve as the presumptive remedy for a Speedy Trial Act violation."[65] Each dismissal decision, concluded the Court, must be made after an objective balancing of the factors listed in the Act.[66]

60 *Taylor*, 108 S. Ct. at 2423.

61 *Id.*

62 *Id.* at 2419.

63 *Id.* at 2417 (quoting 18 U.S.C. § 3162(a)(2)).

64 *Taylor*, 108 S. Ct. at 2418. The Court noted that Representative Dennis, for example, sought to establish the relevance of prejudice to the defendant through " 'legislative history.' " *Id.* (quoting 120 Cong. Rec. 41795 (1974)). The author of the compromise amendment, Representative Cohen, agreed that the factor was relevant. *Id.* (quoting 120 Cong. Rec. 41794-95 (1974)). However, he opposed including it in the statutory text because he was concerned that courts would treat a lack of prejudice to the defendant as dispositive. 108 S. Ct. at 2418 (citing 120 Cong. Rec. 41795 (1974)). The Court also cited United States v. Kramer, 827 F.2d 1174, 1178 (8th Cir. 1987); United States v. Caparella, 716 F.2d 976, 980 (2d Cir. 1983); and United States v. Bittle, 699 F.2d 1201, 1208 (D.C. Cir. 1983) to support the proposition that the issue of prejudice was relevant.

65 108 S. Ct. at 2418. The dismissal sanction issue was the subject of considerable controversy in Congress. *Id.* Some, for instance, then Representative Mikva, argued that unless the Act uniformly barred reprosecution, it would be largely ineffective because prosecutors would often be free to reinstate the case. A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 32 (1980). Others, such as Senator McClellan, feared that dismissing all cases with prejudice would allow criminals to unjustly escape prosecution. *Id.* The Court concluded that the Act as it stands represents a compromise between these competing positions. *Taylor*, 108 S. Ct. at 2418. The Court found support for this position in *Kramer*, 827 F.2d at 1176; United States v. Salgado-Hernandez, 790 F.2d 1265, 1267 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986); United States v. Russo, 741 F.2d 1264, 1266-67 (11th Cir. 1984); and *Caparella*, 716 F.2d at 980. For further discussion of the legislative history of the Speedy Trial Act, *see infra* notes 140-90 and accompanying text.

66 *Taylor*, 108 S. Ct. at 2419.

The Court next confirmed that the proper standard for reviewing lower court decisions pursuant to the dismissal sanction provision of the Act was whether or not the district court's decision constituted an abuse of discretion.[67] While recognizing that the factual findings of a district court are "entitled to substantial deference and will be reversed only for clear error,"[68] the Court stated that discretion is nonetheless " 'not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' "[69] Thus, said the Court, "[w]hether discretion has been abused depends . . . on the bounds of that discretion and the principles that guide its exercise."[70]

The Court explained that in the Speedy Trial Act, Congress expressly instructed that courts be guided in their exercise of discretion by a set of specific factors.[71] Therefore, the majority concluded that district courts must "carefully consider those factors as applied to the particular case and . . . clearly articulate their effect in order to permit meaningful appellate review."[72] The Court believed that the district court, however, had failed to "fully explicate its reasons for dismissing" Taylor's narcotics charges with prejudice.[73] Thus, the Court found it necessary to re-examine the facts of the case and weigh the balancing test factors anew in order to determine whether the district court had properly applied them.[74]

The majority agreed with the district and appellate courts that Taylor's narcotics offenses were "serious,"[75] a determination which weighed in favor of dismissing the case without prejudice. The Court then turned to the second factor, "the circumstances of the case leading to dismissal."[76] The Court noted that the district court had attached great weight to this factor.[77] The Court indicated that the district court had characterized the government's conduct relating to the delay as "lackadaisical" because of its unexcused failure to make "any particular show of concern" and to "respon[d] with dispatch" to the court order to return Taylor to Washington.[78]

67 *Id.*
68 *Id.* (citing Anderson v. Bessemer City, 470 U.S. 564 (1985)).
69 *Id.* at 2419 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975)(citations omitted).
70 *Taylor*, 108 S. Ct. at 2419.
71 *Id.*
72 *Id.*
73 *Id.* at 2420.
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.* at 2421.
78 *Id.* at 2420.

The majority rejected the district court's interpretation of the facts in *Taylor*, and its conclusion that the government's conduct supported a dismissal of the case with prejudice.[79] Although it agreed that the conduct of the government should be considered in the balancing test, in the Court's view, there was no evidence of a "truly neglectful attitude" on the part of the government.[80] The Court considered it significant that the district court had not found that the government had acted in bad faith toward Taylor, or that there was "any pattern of neglect by the local United States Attorney."[81] The Court stated that such findings "would clearly have altered the balance" in favor of dismissal with prejudice.[82] The Court noted that a large part of the delay in *Taylor*, however, was apparently the result of a simple "misunderstanding" as to whose duty it was to transport Taylor before the California charges were dismissed.[83] In the Court's opinion, as an "isolated unwitting violation," the government's conduct was not significant in terms of the Act's balancing test.[84]

Instead, the majority regarded Taylor's failure to appear at trial as a key factor in its decision to dismiss the case without prejudice.[85] Indeed, stated the Court, "it was respondent, not the prosecution, who prevented the trial from going forward in a timely fashion."[86] The Court determined that the district court and Ninth Circuit majority had erred in failing to take Taylor's "culpable conduct" and responsibility for the delay into account in weighing the balancing test factors.[87]

The Court briefly discussed the possibility, raised in oral argument, that the district court might have given Taylor a harsher sentence than it normally would have on the failure to appear charge in order to "wrap up the 'equities' in a single package."[88] While the district judge gave Taylor a five-year sentence on the failure to appear charge, noted the Court, she had given his original co-defendant a three-year sentence for the same narcotics offenses with which Taylor had been charged.[89] It had been suggested in oral argument

79 *Id.* at 2420-21, 2423.
80 *Id.* at 2420.
81 *Id.*
82 *Id.* at 2421.
83 *Id.* at n.10 (citing United States v. Taylor, 821 F.2d 1377, 1387 (9th Cir. 1987) (Poole, J., dissenting), *rev'd*, 108 S. Ct. 2413 (1988)).
84 *Taylor*, 108 S. Ct. at 2421.
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.* at 2420 n.9.
89 *Id.* at 2420.

that the district court may have justified its misapplication of the Act with the rationale that the "errors would balance out in the end."[90]

The Court did not find evidence indicating that the district court had in fact done this.[91] Nevertheless, it condemned the idea that a court, in misapplying the Act as a means of ensuring future governmental compliance, would violate a defendant's rights by imposing a heavy sentence on the basis of still "untested and unsubstantiated" facts related to the narcotics charges.[92]

The Court then considered the fact that the total delay of fourteen days caused by the government's conduct was relatively brief, and that Taylor was not prejudiced by it.[93] In the Court's view, the district court erred in neglecting to take this into account as a factor in the balancing test.[94] Not only was the delay brief, said the Court, but since Taylor was detained on the bench warrant as well as the narcotics charges, there were no "additional restrictions or burdens on his liberty as a result of the . . . violation."[95] Further, concluded the Court, there was no indication that the preparation of Taylor's defense was in any way hindered by the delay.[96]

With respect to the final factor specified in the Act, the impact of the decision on the administration of the Act and justice, the Court agreed with the district court that "dismissal with prejudice always sends a stronger message [to the government] than dismissal without prejudice, and is more likely to induce salutary changes in procedures, reducing pretrial delays."[97] The Court, however, rejected the notion that dismissal with prejudice should serve as the presumptive remedy for violations of the Act.[98] The Court held that the district court had erred in basing its decision principally on its desire to avoid "tacitly condon[ing]" the government's behavior and to send a strong message to encourage it to comply with the Act.[99]

90 *Id.* at n.9.
91 *Id.* at 2420 and n.9.
92 *Id.* at n.9.
93 *Id.* at 2421-22.
94 *Id.* at 2423.
95 *Id.* at 2422. Because delay is "closely related to the issue of prejudice to the defendant," the Court believed that this factor should figure into the balancing test. *Id.* at 2421. In support of this conclusion, the Court cited Barker v. Wingo, 407 U.S. 514, 537 (1972)(White, J., concurring), *quoting* United States v. Marion, 404 U.S. 307, 320 (1970)(emphasizing that the longer the delay, the more the defendant is likely to be prejudiced by it).
96 *Taylor*, 108 S. Ct. at 2422.
97 *Id.* (citing Brief for the United States at 31).
98 *Id.* at 2418.
99 *Id.* at 2422.

In response to the contention that dismissing cases without prejudice is a mere "toothless sanction," the Court pointed out that the government may find reprosecution too burdensome to pursue, or barred by the statute of limitations.[100] The Court also advocated the "liberal use of direct sanctions" that the Act provides to "send a message" when warranted.[101] The Court indicated that "dilatory" counsel may be penalized through fines,[102] suspension from practice,[103] or the reporting of the violation to disciplinary committees.[104] The majority stressed that the goal of deterring the government from violating the Act should not be the determinative factor in a court's decision to dismiss a case with prejudice.[105] Indeed, stated Justice Blackmun, "[i]f the greater deterrent effect of barring reprosecution could alone support a decision to dismiss with prejudice, the consideration of the other factors identified in § 3162(a)(2) would be superfluous, and all violations would warrant barring reprosecution."[106]

The Court concluded that, in the absence of a thorough explanation by the district court as to how it assessed each factor in the balancing test, it could only infer that the district court had dismissed the case with prejudice solely to send a strong message to the government.[107] In the Court's opinion, heavy reliance on this one factor, common to all Speedy Trial Act cases, could not support a decision to dismiss a case with prejudice, and was reversible error.[108]

B. JUSTICE WHITE, CONCURRING

Justice White filed a short concurrence.[109] He agreed with the majority that "when a defendant, through deliberate misconduct, interferes with compliance with the Speedy Trial Act and a violation of

100 *Id.*
101 *Id.* at n.14.
102 *Id.* § 3162(b)(C) provides that if the government's attorney knowingly and willfully causes an improper delay in trial, he may be fined in an amount not to exceed $250. 18 U.S.C. § 3162(b)(C) (1982).
103 *Taylor*, 108 S. Ct. at 2422 n.14. § 3162(b)(D) provides that such attorney may be denied "the right to practice before the court considering such case for a period of not to exceed ninety days." 18 U.S.C. § 3162(b)(D) (1982).
104 *Taylor*, 108 S. Ct. at 2422 n.14. § 3162(b)(E) provides that the court may discipline such attorney "by filing a report with an appropriate disciplinary committee." Note, however, that this argument is inapplicable in *Taylor*, in which the USMS, not the prosecuting attorney, occasioned the delay. 18 U.S.C. § 3162(b)(E) (1982).
105 *Taylor*, 108 S. Ct. at 2423.
106 *Id.* at 2422.
107 *Id.* at 2423.
108 *Id.*
109 *Id.* (White, J., concurring).

the Act then occurs," the case should not be dismissed with prejudice unless the violation of the Act is "much more serious" than in *Taylor*.[110] Justice White thus emphasized the point that a defendant's contribution to the delay should weigh heavily against dismissals with prejudice.[111]

C. JUSTICE SCALIA, CONCURRING IN PART

Justice Scalia agreed with the result reached by the majority, and that the issue of prejudice to the defendant must be taken into account in applying the balancing test. However, he opposed the majority's reliance on legislative history when the statute of the language was, as he thought, clear.[112] He indicated that the majority had reviewed the Act's legislative history to establish that prejudice to the defendant is one of the factors to which the phrase "among others" refers.[113] Justice Scalia believed that this point was "so utterly clear from the text" of the Act that the majority's recourse to legislative history was unjustified.[114]

Justice Scalia reasoned that it is dangerous to rely on statements made during the legislative process when Congress ultimately voted for an unambiguous act.[115] To do so, he said, could distort Congress' clear intent.[116] Justice Scalia recognized that in *Taylor*, the Court would have reached the same result whether the legislative history was considered or not, for the issue of prejudice was not dispositive in the majority's decision.[117] Yet, Justice Scalia argued that the majority had set a faulty precedent.[118] According to Justice

[110] *Id.* (White, J., concurring).

[111] *Id.* (White, J., concurring). Justice White, however, did not indicate what type of government conduct would have been sufficiently "serious" to warrant dismissal with prejudice.

[112] *Id.* at 2423 (Scalia, J., concurring in part).

[113] *Id.* (Scalia, J., concurring in part). *See supra* note 64 and accompanying text for the majority's position.

[114] *Taylor*, 108 S. Ct. at 2423 (Scalia, J., concurring in part). Note, however, that the majority did:

> not agree that the statutory text render[ed] it 'so obviou[s]' . . . that the presence or absence of prejudice to the defendant is one of the 'other factors' that a district court is required by the Speedy Trial Act to consider. A brief review of the [House] floor debate . . . demonstrate[d] that at least some Members of Congress were uncertain about, and repeatedly sought clarification of, precisely what they were voting for.

Id. at 2418 n.7 (citation omitted).

[115] *Id.* at 2424 (Scalia, J., concurring in part).

[116] *Id.* at 2423-24 (Scalia, J., concurring in part).

[117] *Id.* at 2424 (Scalia, J., concurring in part).

[118] *Id.* (Scalia, J., concurring in part). Justice Scalia drew attention to Representative Dennis, who stated on the House floor, "I have an amendment [specifying prejudice as a factor] here in my hand which could be offered, but if we can make up some legislative

Scalia, resorting to the legislative history when the statutory text is ambiguous could jeopardize the democratic process if done to argue in favor of elements that were in fact intentionally omitted from the language of statutes later securing congressional and presidential approval.[119]

D. THE DISSENT

Justice Stevens, joined by Justices Brennan and Marshall, wrote a lengthy dissent, arguing that the majority's ruling wrongly deprived the district judge of the discretion that the Act had granted to her.[120] The dissent stressed that the Act expressly granted district judges this discretion because they are in a "much better position" than appellate judges to assess the circumstances surrounding cases and to determine how those cases should properly be dismissed.[121] District judges, said Justice Stevens, have a unique

> understanding, not only of what actually happened, but also of the significance of certain events. . . . Moreover, the trial judge is privy to certain information . . . such as her impression of the demeanor and attitude of the parties, her intentions in handling the future course of the proceedings, and her understanding of how the limited issue faced on appeal fits within the larger factual and procedural context.[122]

The dissent strongly disagreed with the majority's failure to attach importance to the fact that the district judge gave Taylor a five-year sentence on the failure to appear charge, while Taylor's original co-defendant was given only a three-year sentence on the narcotics charges.[123] Indeed, Justice Stevens believed that it would have been proper to take the dismissed narcotics charges into account in imposing a harsh sentence on Taylor for his failure to appear.[124] The dissent noted that the statute under which Taylor was sentenced for failure to appear[125] defined two classes of violations: (i) failure to appear to face felony charges, punishable by a maximum of five years imprisonment, and (ii) failure to appear to face misdemeanor charges, punishable by a maximum of one year imprisonment.[126] The dissent reasoned that because the failure to ap-

history which would do the same thing, I am willing to do it." *Id.* (Scalia, J., concurring in part)(quoting 120 CONG. REC. 41795 (1974)).

[119] *Id.* (Scalia, J., concurring in part).

[120] *Id.* at 2428 (Stevens, J., dissenting).

[121] *Id.* at 2424 (Stevens, J., dissenting).

[122] *Id.* at 2424-25 (Stevens, J., dissenting)(footnote omitted).

[123] *Id.* at 2425 (Stevens, J., dissenting).

[124] *Id.* (Stevens, J., dissenting).

[125] 18 U.S.C. § 3150 (1982) (repealed).

[126] *Taylor*, 108 S. Ct. at 2425 (Stevens, J., dissenting).

pear statute itself differentiated between these two classes of accused persons—although the defendant, when sentenced, has not been convicted of the crime in question and therefore remains under a presumption of innocence with regard to it—it was proper to take the pending charges into account in sentencing.[127]

The dissent also contested the majority's conclusion that the district court had failed to offer any basis on which to characterize the government's conduct as "lackadaisical."[128] The dissent pointed out that the district court had taken note of the USMS' failure to promptly comply with a court order to transport Taylor, a "serious matter."[129] Indeed, said the dissent, the district judge had listed all instances of inexcludable delay and indicated that the government lacked a valid excuse for each of them.[130] In Justice Stevens' opinion, the district court had studied and carefully weighed every factor in the balancing test, and reached a "sensible" conclusion.[131]

Justice Stevens stated that had he been confronted with the case as a district judge, he was not certain how he would have dismissed it.[132] He stated that he would have assumed, however, that if he had "set forth a sensible explanation" for his holding, it would have withstood appellate review.[133] He added that dismissing the case without prejudice would be a "rather meaningless sanction" unless the statute of limitations had run, in which case it would not matter how the case was dismissed.[134] Justice Stevens was concerned that the majority's holding would encourage district courts to consistently dismiss cases without prejudice in order to avoid reversal on appeal.[135] This, he concluded, would run contrary to the spirit of the Act and deprive district courts of the discretion to which the Act properly entitles them.[136]

IV. Analysis

The Speedy Trial Act of 1974 was designed to promote greater efficiency in processing criminal cases in order to achieve two goals. The first was to establish a standard by which the sixth amendment

127 *Id.* at 2425-26 (Stevens, J., dissenting).
128 *Id.* at 2626 (Stevens, J., dissenting).
129 *Id.* (Stevens, J., dissenting).
130 *Id.* at 2427 (Stevens, J., dissenting).
131 *Id.* at 2426 (Stevens, J., dissenting).
132 *Id.* (Stevens, J., dissenting).
133 *Id.* (Stevens, J., dissenting).
134 *Id.* (Stevens, J., dissenting).
135 *Id.* at 2626 (Stevens, J., dissenting).
136 *Id.* at 2426, 2428 (Stevens, J., dissenting).

right to a speedy trial[137] could be more effectively and uniformly implemented than had been possible under either judicially created balancing tests or the Federal Rules of Criminal Procedure.[138] Second, the Act sought to respond to a national concern with increasing crime, which many attributed in part to offenses committed by criminal defendants who spent extended periods of time free on bail while awaiting trial.[139]

The dismissal sanction, which the Supreme Court addressed for the first time in *Taylor*, proved controversial from the start. Indeed, commentators and courts have raised persuasive counterarguments in response to several of the interpretations that the Court adopted for the balancing test factors. Nevertheless, *Taylor* is valuable as a guiding framework for courts applying the dismissal sanction, thus achieving a major purpose of the Act by furthering uniformity among decisions.

Moreover, *Taylor* serves as a signal to courts that the Act seeks to address the public interest in crime control as well as the defendant's sixth amendment rights, and that these factors cannot be neglected when the balancing test factors are interpreted and weighed. The balancing test factors in the Act implicitly respond to the competing interests of protecting the defendant's right to a speedy trial and society's interest in controlling crime. Courts must therefore take both of these purposes into account in deciding whether to dismiss cases with or without prejudice under the Act.

A. Background of the Dismissal Sanction: Legislative History

The concern for promptly disposing of criminal cases did not begin with the Speedy Trial Act of 1974. For quite some time, congressional bills had sought to clarify defendants' interest in, and right to, a speedy trial.[140] In the late 1960's, however, speedy trial legislation assumed an added dimension. Speedy trial guarantees came to be seen as a means of responding to the growing national

137 The sixth amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The Supreme Court has held this right to be "as fundamental as any of the rights secured by the Sixth Amendment." Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).
138 *See* Steinberg, *Right to a Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974*, 66 J. Crim. L. & Criminology 229, 230 (1975)(citing H.R. Rep. No. 1508, 93d Cong., 2d Sess. 11-12, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7404-05).
139 Steinberg, *supra* note 138, at 930 (citing H.R. Rep. No. 1508, 93d Cong., 2d Sess. 15-16, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7408-09).
140 A. Partridge, *supra* note 65, at 11.

problem of increasing crime. Society's interest in speedy trial guarantees was thus recognized.[141]

The "enormous increase in the rate of crime"[142] was believed to have been exasperbated by the Bail Reform Act of 1966,[143] which permitted defendants in non-capital cases to be liberally released before trial without having to post the conventional bail bond.[144] The Court has advanced that "the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape."[145]

The Bail Reform Act was also perceived as a vehicle by which defendants released on bond could "exert[] heavy pressure" on their lawyers to postpone trials as long as possible in the hope that the government's case would be weakened or dropped in the interval.[146] This factor contributed to an enormous backlog in the federal courts.[147]

This problem was also believed to be aggravated by the Criminal Justice Act of 1964.[148] The Act, which guaranteed indigent de-

[141] *Id.*

[142] Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 930 (1970).

[143] 18 U.S.C. §§ 3141-3156 (1982).

[144] Burger, *supra* note 142, at 930. The Supreme Court had also pointed out that "[i]n Washington, D.C., in 1968, 70.1% of the persons arrested for robbery and released prior to trial were re-arrested while on bail." Barker v. Wingo, 407 U.S. 514, 519 n.8 (1972), (citing Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1236 (1969)(citation omitted)). The legislative history, discussing the benefits of speedy trials to society, referred to a government study on recidivism which concluded, based on data gathered in 1968, that there was "(a) [a]n increased propensity to be re-arrested when released more than 280 days; and (b) an increased propensity of persons classified as dangerous . . . to be re-arrested in the period from 24 to 8 weeks prior to trial." H.R. REP. No. 1508, 93d Cong., 2d Sess. 16, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7408-09. *See also* Note, *The Speedy Trial Act of 1974: Defining the Sixth Amendment Right*, 25 CATH. U.L. REV. 130, 133 n.15. The House Judiciary Committee also noted that by 1974, approximately 75% of all defendants were released pending trial, which "means that persons who are likely to commit additional crimes could without adequate supervision . . . continue to reap the profits of criminal activity at the expense of the public." H.R. REP. No. 1508, 93d Cong., 2d Sess. 15, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7409.

[145] *Barker*, 407 U.S. at 520. The Court cited the ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 321 (1971) for the proposition that such offenses had been increasing in number.

[146] Burger, *supra* note 142, at 931. Chief Justice Burger stated that "[d]efendants, whether guilty or innocent, are human: They love freedom and hate punishment . . . We should not be surprised that a defendant on bail exerts a heavy pressure on his court-appointed lawyer to postpone the trial as long as possible so as to remain free." *Id.*

[147] In *Barker*, the Court stated that the "large backlog of cases in urban courts . . . enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system." *Barker*, 407 U.S. at 519 (citing REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 256 (1966)).

[148] 18 U.S.C. § 3006A (1982).

fendants an attorney at public expense and removed their monetary concerns, was thought to discourage defendants from disposing of their cases as quickly as they could by avoiding continuances and pleading guilty.[149]

Despite the increase in crime and the corresponding backlog in the federal courts, it was acknowledged that the "revolution in criminal justice" had secured gains for defendants that were important to preserve.[150] Speedy trial legislation arose as a means of decreasing the number of criminal defendants who were free on bail and alleviating congestion in the federal courts in a manner that would not contradict the goals of the Bail Reform and Criminal Justice Acts.[151]

At the same time, there was a concern that defendants' rights to a speedy trial under the sixth amendment were inadequately protected under the extant standards.[152] Before 1972 and the decision in *Barker v. Wingo*,[153] the Supreme Court had never attempted to establish uniform standards for the implementation of the sixth amendment speedy trial guarantee.[154]

The *Barker* Court recognized that "[t]he right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused," because in addition to the defendant's interest in being treated fairly, "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused."[155] With both these interests in mind, the Court adopted a balancing test to determine whether a defendant had been deprived of his sixth amendment right.[156] The Court identified four factors that must be

[149] Burger, *supra* note 142, at 930-31. According to Chief Justice Burger, "[a]s recently as 1950, three or four judges were able to handle all serious criminal cases [in Washington, D.C.]. By 1968, twelve judges out of fifteen in active service were assigned to the criminal calendar and could barely keep up." *Id.* at 931. He also stated:

> [w]e should not be surprised at delay when more and more defendants demand their undoubted constitutional right to a trial by jury because we have provided them with lawyers and other needs at public expense; nor should we be surprised that most convicted persons seek a new trial when the appeal costs them nothing and when failure to take the appeal will cost them freedom.

Id.

[150] *Id.* at 931.

[151] *See generally* A. PATRIDGE, *supra* note 65, at 13.

[152] H.R. REP. No. 1508, 93d Cong., 2d Sess. 11-12, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7404-05.

[153] 407 U.S. 514 (1972)(setting forth a balancing test for the determination of whether a defendant's sixth amendment speedy trial rights had been violated).

[154] *See* Steinberg, *supra* note 138, at 230 & n.21.

[155] *Barker*, 407 U.S. at 519.

[156] *Id.* at 530.

considered: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[157] Although the Court was aware of requests for more explicit standards, it found "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months."[158] Moreover, quantifying the speedy trial right would have required the Court to engage in "legislative or rulemaking activity," which, the Court said, was beyond its authority.[159]

The Federal Rules of Criminal Procedure went no further in satisfying proponents of more definite speedy trial standards.[160] Rule 50(b) provides that "each district court shall conduct a continuing study of the administration of criminal justice . . . and shall prepare plans for the prompt disposition of criminal cases."[161] Advocates of more specific standards believed, however, that "plans submitted under the rule had failed to provide a uniform definition of speedy trial and had only encouraged perpetuation of the status quo."[162] Rule 48(b) provides that "[i]f there is unnecessary delay in presenting the charge to a grand jury or in filing an information . . . or . . . in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."[163] Since courts had interpreted this rule in an "erratic way," it similarly provided little definitive guidance.[164] Indeed, "in passing the Speedy Trial Act, Congress specifically determined that neither the previous decisions of the Supreme Court nor the implementation of rule 50(b) of the Federal Rules of Criminal Procedure had provided the courts with adequate guidance on the speedy trial question."[165]

The concern with the need to address both growing crime and inadequate sixth amendment protections for criminal defendants was shared by the American Bar Association, which developed the Standards Related to Speedy Trial.[166] The standards sought to en-

157 *Id.*

158 *Id.* at 523.

159 *Id.*

160 For discussions of the inadequacies of the Federal Rules of Criminal Procedure and the *Barker* balancing test as a means of furthering speedy trials, see Note, *supra* note 144, at 141-44 and Note, *Criminal Law—Federal System Adopts Specific Parameters for the Constitutional Right to a Speedy Trial—Speedy Trial Act of 1974*, 10 U. RICH. L. REV. 449, 450 (1976) [hereinafter *Specific Parameters*].

161 FED. R. CRIM. P. 50(b).

162 Note, *supra* note 144, at 141-42.

163 FED. R. CRIM. P. 48(b).

164 Note, *supra* note 144, at 143.

165 Steinberg, *supra* note 138, at 230 (citing H.R. REP. NO. 1508, 93d Cong., 2d Sess. 11, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7404-05).

166 A.B.A. STANDARDS RELATING TO SPEEDY TRIAL (Approved Draft, 1968).

sure: (1) the defendant's personal interest in a speedy trial, including the preservation of the means of presenting his or her defense, avoiding long periods of incarceration before trial or conditional release, and long periods of "anxiety and public suspicion arising out of the accusation"; and (2) the public's interest in "proving the charge" and avoiding "an extended period of pretrial freedom by the defendant during which time he may flee, commit other crimes, or intimidate witnesses."[167] The standards provided only for dismissals with prejudice.[168]

The first congressional bill advocating the speedy trial as a response to increasing crime was the Pretrial Crime Reduction Act, introduced by Representative Abner Mikva in November, 1969.[169] This bill, based in large part on the American Bar Association Standards, similarly provided exclusively for dismissals with prejudice.[170] It also provided for a sixty day period during which defendants charged with violent crimes could be brought to trial, and a 120 day period for those charged with other offenses.[171] Its principal aim was to " 'avoid[] the repugnant, and probably unconstitutional, alternative of preventive detention' " that the Nixon administration favored as a means of reducing the number of crimes committed by defendants released on bail.[172] A number of bills had previously been introduced which would have permitted such detention in the case of defendants charged with "dangerous" crimes.[173]

A "Speedy Trial Act" bill was introduced into the Senate in June, 1970, by Senator Sam Ervin, Jr., a key sponsor of the Bail Reform Act of 1966 and an opponent of preventive detention.[174] Senator Ervin's bill, like Representative Mikva's, was offered as an alternative to preventive detention, and stressed both crime reduction and sixth amendment rights. Senator Ervin's original bill provided for dismissals with prejudice except in cases where the delay was due to the fault of the defendant or defense counsel.[175]

Neither the Mikva nor the original Ervin bill survived, but the

167 *Id.* at Commentary to § 1.1, *reprinted in* A. PARTRIDGE, SUPRA note 65, at 12.

168 A.B.A. STANDARDS RELATING TO SPEEDY TRIAL § 4.1.

169 115 CONG. REC. 34334-36 (1969).

170 *See id.* at 34336.

171 *See id.*

172 *See id.* at 34335. The *Barker* court also voiced its opposition to pretrial detention, stating that it "contributes to the overcrowding and generally deplorable state of [local jails]"; jeopardizes the chances of successful rehabilitation; may lead to violent rioting; and is very costly. *Barker*, 407 U.S. at 520-21.

173 A. PARTRIDGE, *supra* note 65, at 13.

174 S. 895, 92d Cong., 1st Sess., 117 CONG. REC. 3405-09 (1971).

175 *See* 117 CONG. REC. at 3409.

Ervin bill was reintroduced in 1973.[176] The 1972 Senate subcommittee bill omitted the reference to "fault" and barred the reprosecution of any offenses "based on the same conduct or arising from the same criminal episode" as the dismissed offense.[177] This sanction met harsh criticism from both members of Congress and the Department of Justice.[178]

By 1974, the Senate had agreed to compromise; its committee bill that year provided for dismissal without prejudice.[179] Prosecution, however, could "only be reinstituted if the court . . . finds . . . compelling evidence that the delay was caused by exceptional circumstances which the government and the court could not have foreseen or avoided."[180] Senator Ervin himself admitted that even within the Senate, opposition to the provision allowing only dismissals with prejudice was so intense that it would have made passage of the bill impossible.[181] The 1974 House subcommittee bill, however, provided only for dismissal with prejudice.[182]

The Department of Justice reiterated its dissatisfaction, and finally indicated that it would support the bill if it provided the district court with the discretion to dismiss cases either with or without prejudice.[183] Congress ultimately acknowledged that the President would likely use a pocket veto to prevent the bill's passage unless Congress compromised with the Department of Justice.[184] Representative Cohen thus hurriedly introduced a bill incorporating the current version of the dismissal sanction.[185] This compromise bill, amended on the floor of the House, passed both houses of Congress[186] and was signed into law by President Ford on January 3,

[176] S. 754, 93 Cong., 1st Sess., 119 CONG. REC. 3263-68 (1973).
[177] *Id.* at 3265.
[178] In the Department's view, the

> mandatory dismissal of criminal cases can only serve to injure the public by releasing persons charged with crime. . . . This injures the public not only because the person may pose a danger to the public welfare, but also because it undermines the public's confidence in the criminal justice system to see persons charged with crime released without trial.

Letter from Elliot L. Richardson to Sen. Sam J. Ervin, Jr. (Oct. 11, 1973), *reprinted in* Hansen & Reed, *The Speedy Trial Act of 1974 in Constitutional Perspective*, 47 MISS. L.J. 365, 415 (1976)(footnote omitted).
[179] S. 754, 93d Cong., 2d Sess., 120 CONG. REC. 24668 (1974).
[180] *Id.*
[181] *See* Hansen & Reed, *supra* note 178, at 415.
[182] H.R. 17409, 93d Cong., 2d Sess., 120 CONG. REC. 41783 (1974).
[183] Letter from Attorney General William B. Saxbe to Rep. Peter W. Rodino, Jr. (Dec. 13, 1974), *reprinted in* 120 CONG. REC. 41619-20 (1974). *See* A. PARTRIDGE, *supra* note 65, at 16-18.
[184] A. PARTRIDGE, *supra* note 65, at 17-18.
[185] H.R. 17409, 93d Cong., 2d Sess., 120 CONG. REC. 41793-94 (1974).
[186] *See* United States v. Taylor, 108 S. Ct. 2413, 2418 (1988).

1975.[187] The dismissal sanction ultimately went into effect on July 1, 1980.[188]

Because the current version of the dismissal sanction, which includes the balancing test factors, was hurriedly amended and passed, it had "no antecedents in earlier versions of the bill, and no substantial guidance [was] to be found in the history made on the House floor."[189] It is not surprising, therefore, that courts interpreted the balancing test factors with little or no more consistency than they had under the *Barker* doctrine or the Federal Rules of Criminal Procedure.[190] *Taylor*, by providing a framework in which cases arising under the dismissal sanction might be more uniformly decided by the courts, furthers a primary goal of the Act.

B. THE BALANCING TEST FACTORS

Before *Taylor*, some controversy had existed among the district courts and circuit courts of appeals as to how to interpret the balancing test factors identified, whether explicitly or implicitly, in the dismissal sanction.[191] Commentators have repeatedly termed the dismissal sanction "unclear"[192] and "ambiguous."[193] To some extent, the degree to which courts had given adequate consideration to the dual aims of the Act, crime control and the effective implementation of the sixth amendment speedy trial right, determined their interpretation of the balancing test factors. This section will explore the various interpretations courts have given to the balanc-

[187] A. PARTRIDGE, *supra* note 65, at 18.
[188] 18 U.S.C. § 3163(c) (1982).
[189] A. PARTRIDGE, *supra* note 65, at 33.
[190] This is not to imply that the Speedy Trial Act precludes review under a strict sixth amendment analysis pursuant to the *Barker* balancing test. § 3173 of the Act explicitly states that "[n]o provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution." 18 U.S.C. § 3173 (1982). For example, if a defendant can prove that he was severely prejudiced by a delay shorter than the time limits specified in the Act, he could conceivably assert a successful claim based on the sixth amendment. *See* 120 CONG. REC. 41777 (1974) (exchange between Rep. Wiggins and Rep. Cohen), *reprinted in* A. PARTRIDGE, *supra* note 65, at 258. Because outcomes under the *Barker* analysis and the Speedy Trial Act may vary, commentators have urged defense counsel to seek dismissal under both theories. *See* Russ & Mandelkern, *The Speedy Trial Act of 1974: A Trap for the Unwary Practitioner*, 2 NAT'L J. CRIM. DEF. 1, 32 (1976).
[191] *See supra* note 7 and accompanying text.
[192] La Fave and Israel stated that the " 'with or without prejudice' provision, the result of an amendment on the floor of the House, is not only anticlimatic [sic] [in view of the years of effort that went into developing a uniform, definitive remedy] but also very unclear." W. LA FAVE & J. ISRAEL, CRIMINAL PROCEDURE § 18.3, at 694 (1985) (quoting 18 U.S.C. § 3162(a)(2) (1982)).
[193] Note, *Specific Parameters*, *supra* note 160, at 457 n.53.

ing test factors and address the arguments advanced in favor of each.

1. The Seriousness of the Offense

The seriousness of the offense committed has in and of itself not proved to be a controversial factor among courts applying the dismissal sanction of the Act. The courts are in general agreement as to which offenses should be termed "serious" for purposes of the Act.[194] The Supreme Court in *Taylor* agreed with the district court and Ninth Circuit that Taylor's alleged offenses, conspiracy to possess cocaine and possession of cocaine with intent to distribute, were "serious" crimes.[195] Courts have uniformly termed narcotics offenses "serious" in discussing this factor.[196] In almost all cases involving narcotics, courts have held the gravity of the offense to be a significant factor leading them to determine that the case should be dismissed without prejudice.[197]

Although not articulated by the Supreme Court in *Taylor*, which examined this factor on its own merits, many courts have weighed the seriousness of the defendant's offense against that of the Speedy

[194] *See infra* notes 196-97 and accompanying text.

[195] United States v. Taylor, 108 S. Ct. 2413, 2420 (1988).

[196] *See* United States v. May, 819 F 2d 531, 534 (5th Cir. 1987)(five counts of possession with intent to distribute controlled substances); United States v. Stayton, 791 F.2d 17, 21 (2d Cir. 1986)(trafficking in 200 kg. of phenylacetone to be used in methamphetamine manufacture); United States v. Simmons, 786 F.2d 479, 485 (2d Cir. 1986)(several counts involving a "relatively small quantity" of substances); United States v. Phillips, 775 F.2d 1454, 1456 (11th Cir. 1985)(several offenses involving marijuana importation); United States v. Brown, 770 F.2d 241, 244 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986)(distribution and conspiracy to distribute four ounces of cocaine with a wholesale value of $10,000); United States v. Russo, 741 F.2d 1264, 1267 (11th Cir. 1984)(several offenses involving methaqualone); United States v. Carreon, 626 F.2d 528, 533 (7th Cir. 1980)(one count of conspiracy to distribute heroin and seven counts of heroin distribution); United States v. Veillette, 654 F.Supp. 1260, 1263 (D. Me. 1987)(possession of 280 grams of cocaine with intent to distribute); United States v. Green, 582 F. Supp. 265, 267 (D. Colo. 1984)(one count of distribution of a schedule II drug); United States v. Angelini, 553 F. Supp. 367, 370 (D.Mass.), *vacated and remanded*, 678 F.2d 380 (1st Cir. 1982)(possession and distribution of methaqualone was "serious," but the factor was "neutral" because the government's proof was predicated only on fragments of seven Quaalude tablets valued at approximately $4).

[197] *But see Stayton*, 791 F.2d at 21 (the court held that a delay of 23 months between voir dire and the swearing of the jury outweighed the seriousness of the offense); *Russo*, 741 F.2d at 1267-68 (a delay of several months in bringing the defendant to trial outweighed the seriousness of the offense); United States v. Iaquinta, 515 F. Supp. 708, 710 (N.D.W. Va. 1981), *rev'd on other grounds*, 674 F.2d 260 (4th Cir. 1982) (Neither mentioning the Act's crime reduction rationale nor explaining the balancing test factors, the court dismissed the case with prejudice, stating that the Act was "designed to implement and enforce the Sixth Amendment right to a speedy trial and to ensure uniformity of the same throughout the nation.").

Trial Act violation.[198] When a court has deemed a crime "not serious," cases have consistently resulted in dismissals with prejudice.[199]

It is noteworthy that the Court did not articulate a standard that a number of courts have used to assess the seriousness of the offense: that the length of the sentence for an offense is a valid indication of its gravity.[200] One commentator has cautioned against such practices, stating that "inconsistency on the legislature's part between length of the sentence and severity of the crime has been aptly demonstrated."[201] The Court, in holding that a narcotics offense was serious, implicitly rejected another standard for measuring the gravity of the offense: whether it was "violent."[202] Indeed, "non-violent crimes, particularly those that have massive social im-

[198] *See, e.g.*, *May*, 819 F.2d at 534 (dismissal without prejudice); *Russo*, 741 F.2d at 1267 (dismissal with prejudice); *Carreon*, 626 F.2d at 533 (dismissal without prejudice).

[199] Other cases involving "serious" offenses include: United States v. Fountain, 840 F.2d 509, 512 (7th Cir.), *cert. denied*, 109 S. Ct. 533 (1988) (being an accomplice to murder); United States v. Kramer, 827 F.2d 1174, 1176-77 (8th Cir. 1987) (bank record fraud amounting to almost one million dollars); United States v. Peeples, 811 F.2d 849, 851 (5th Cir. 1987)(attempt to defraud an investor of more than $500,000); United States v. Salgado-Hernandez, 790 F.2d 1265, 1267-68 (5th Cir), *cert. denied*, 479 U.S. 964 (1986) (transporting illegal aliens); United States v. Janik, 723 F.2d 537, 546 (7th Cir. 1983)(possession of unregistered guns); United States v. Hawthorne, 705 F.2d 258, 260 (7th Cir. 1983)(possession of stolen government checks); *Veillette*, 654 F. Supp. at 1262 (possession of unregistered firearm silencer); *Green*, 582 F. Supp. at 265 (illegally selling food stamps worth $2,500).

Offenses that courts have not deemed sufficiently serious for purposes of the Act include: mail theft of a ring, United States v. Caparella, 716 F.2d 976, 980 (2d Cir. 1983); mail theft of a check, United States v. Jervey, 630 F. Supp. 695, 698 (S.D.N.Y. 1986); and credit card fraud amounting to $1,000, United States v. Koch, 438 F. Supp. 307, 310 (S.D.N.Y.), *aff'd*, 563 F.2d 49 (2d Cir.), *cert. denied*, 736 U.S. 946, *aff'd*, 598 F.2d 610 (2d Cir. 1977). *See also* United States v. Bilotta, 645 F. Supp. 369 (E.D.N.Y. 1986), *aff'd*, 835 F.2d 1430 (2d Cir. 1987), in which the court stated that if conspiracy to export military and espionage equipment to Libya and the U.S.S.R. was in fact "serious," the government would not have waited 18 months to indict the defendant. *Id.* at 373. What the court likely meant was that it did not consider the offense as serious as the government's violation of the Act, a standard used by many courts in assessing the seriousness of the offense. *See supra* note 198 for courts articulating this standard.

[200] *See, e.g.*, *Salgado-Hernandez*, 790 F.2d at 1268 (in which the Court stated that "as an objective measure, possible imprisonment for fifty-five years is some indication that the offense is serious.").

[201] Steinberg, *Dismissal With or Without Prejudice Under the Speedy Trial Act: A Proposed Interpretation*, 68 J. CRIM. L. & CRIMINOLOGY 1, 9 n.79 (1977)(referring to a former California statute that set the sentence for second indecent exposure conviction at one year to life).

[202] *Taylor*, 108 S. Ct. at 2420. *See Caparella*, 716 F.2d at 980 ("absent exascerbating circumstances such as violence," postal theft was not a serious crime); *Jervey*, 630 F. Supp. at 698 (citing *Caparella* in a case involving postal theft). Nine years earlier, however, the same judge that decided *Jervey* had stated that if the defendant had been "the Heroin Tycoon of the East Bronx," he might have dismissed the case without prejudice. *Koch*, 438 F. Supp. at 310. This indicates that these courts would perhaps have been

plications, also may be considered serious in nature," for example, a corporate executive "criminally polluting public waters."[203]

2. *The Facts and Circumstances Leading to the Dismissal*

The second factor guiding courts in their application of the dismissal sanction is the facts and circumstances leading to the dismissal.[204] This factor relates to the role played by the government and, where applicable, the defendant in causing the delay resulting in the violation of the Act. The courts have differed significantly in interpreting this factor, especially in their judgments as to what types of government conduct should be factored into the balancing test.

a. The Nature of the Government's Violation of the Act

The *Taylor* majority stated that "a truly neglectful attitude on the part of the government reasonably could be factored against it" in the balancing test.[205] Such an attitude might have been demonstrated by a "pattern of neglect by the local United States Attorney" or by evidence of "bad faith."[206] As the *Taylor* case demonstrates, however, "bad faith" is in many respects a subjective standard that courts can interpret differently. Justice Stevens, for example, stated that the "characterization of such a violation as 'lackadaisical' appears understated," implying that he believed the USMS to have acted in bad faith.[207] In contrast, the majority held that a mere "isolated unwitting violation" such as that in *Taylor* was insufficient to tip the balance in favor of dismissal with prejudice.[208]

Whether "unwitting" violations should be weighed against the government in determining how to dismiss cases under the Act has been controversial among the courts. Some courts have held that negligence or inadvertence on the part of the government should indeed be factored into the balancing test. One court, for example,

more careful about their choice of terminology if serious but non-violent narcotics offenses had in fact been at issue.

[203] Steinberg, *supra* note 201, at 9.

[204] 18 U.S.C. § 3162(a)(2) (1982).

[205] *Taylor*, 108 S. Ct. at 2420.

[206] *Id.*

[207] *Id.* at 2426 (Stevens, J., dissenting). Although the dissent stated that "the important issue is . . . whether the Service acted carelessly or without regard for respondent's interest in seeing justice administered swiftly," it believed that this was a factual determination that only the district court was in a position to make. *Id.* Acting without thinking about the defendant's interests, however, is not in bad faith in the same way that consciously or maliciously trying to prejudice him to further some motive would be. The dissent appears to adopt the former sense of bad faith, and the majority the latter. *See id.* at 2420-21; *id.* at 2426 (Stevens, J., dissenting).

[208] *Id.* at 2421.

held that although the government's failure to file a timely indictment "did not spring from any evil motive . . . when a defense motion . . . is late, the government is quick to point [that] out. . . . Meeting established time limitations is important and lack of attention or dilatoriness in observing them should not be encouraged by courts viewing such neglect tolerantly."[209]

Another court rejected the government's argument that "its recalcitrance was neither intentional, nor designed to secure any tactical advantage."[210] The government claimed that it had misunderstood the implications of the new Act, and had not realized that it had violated it when it delayed several months in bringing the defendant to trial.[211] The court argued that "the mere lack of improper motive is not a sufficient excuse," and that "[s]ome affirmative justification must be demonstrated to warrant a dismissal without prejudice" where the seriousness of the crime was balanced by the idea that dismissals without prejudice "frustrat[e] the Act's mandate of swift prosecution."[212] The court stated, however, that "mere negligence or inadvertence" would not necessarily call for dismissal without prejudice if, for example, the crime was very serious and the unexcused delay minimal.[213]

Other courts have argued the reverse, reasoning that because unintentional, inadvertent acts resulting in violations are not deterrable, the sanction of dismissal with prejudice would serve no useful purpose.[214] This view, however, contradicts much of the traditional rationale behind imposing liability for negligence: that holding per-

[209] United States v. Caparella, 716 F.2d 976, 980 (2d Cir. 1983).

[210] United States v. Russo, 741 F.2d 1264, 1267 (11th Cir. 1984).

[211] *Id.*

[212] *Id.*

[213] *Id. See also* United States v. Salgado-Hernandez, 790 F.2d. 1265, 1268 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986)(stating in dicta that oversight cannot "always excuse a failure to meet the Act's deadlines," as where the government frequently fails to comply or has failed to comply "more than once with respect to the same defendant."); United States v. Graham, 538 F.2d 260, 266 (9th Cir. 1976)(stating in dicta that under the Act, "the government should be aware that negligent conduct in bringing an accused to trial will not be tolerated.").

[214] *See* United States v. Hawthorne, 705 F.2d 258, 261 (7th Cir. 1983)(because a clerical miscalculation, resulting in a violation, was unintentional and not designed to gain a "tactical advantage," it should not factor in the balancing test); United States v. Bittle, 699 F.2d 1201, 1208 (D.C. Cir. 1983)("the government's exceeding the time limit was unintentional" and "unlikely to recur."); United States v. Carreon, 626 F.2d 528, 533 (7th Cir. 1980)(finding no evidence that the government's failure to file a timely petition for hearing was intentional and likely to recur); United States v. Green, 582 F. Supp. 265, 267 (D. Colo. 1984)(in which it did "not appear that the delay was intentional or willful," but was simply "the result of inattention.").

sons liable for careless behavior encourages them to take greater care.

Taylor is problematic in that the "lackadaisical" conduct of the USMS, while not stemming from an evil motive, was indeed intentional and hence deterrable. The Court, however, by terming the violation "unwitting," placed it in the same category as unconscious clerical errors resulting in delays, a type of error that courts have often excluded from the balancing test.[215] Although it did not intend to disadvantage Taylor by postponing his departure from California, the USMS indeed sought to benefit, in terms of cost-efficiency, from the delay.[216]

While the proper balancing of all the factors warrants dismissing *Taylor* without prejudice, it arguably defeats a central purpose of the Act to give no consideration at all to intentional violations, which the Act aims to prevent. Perhaps the better view is that violations committed in good faith should be factored into the test, but given less weight than bad faith violations. This could make a difference in the outcome of cases on the margin, for example, in which the offense involved is less serious than Taylor's.

Taylor leaves unanswered the question of how to address situations in which the court itself, and not the prosecuting attorney, is the cause of the delay.[217] The language of the statute does not delineate the range of violations that should be considered in balancing the factors, and courts are divided on the issue. Some courts have reasoned that because court oversights are not the target of the Act, they are not relevant.[218] Other courts, in contrast, have drawn

[215] *Taylor*, 108 S. Ct. at 2421.

[216] *Id.* at 2416. In United States v. Jervey, 630 F. Supp. 698 (S.D.N.Y. 1986), the court took a different approach. The court found that the government had made a good faith attempt to transport the defendant prisoner in a timely manner, but nevertheless failed to do so within the Act's time limits. *Id.* at 695. Judge Brieant

> recognize[d] the reality of federal prisoner transportation. Under existing conditions, three weeks for this trip [was] neither unusual nor unexpected. The prison bus, which usually takes a circuitous route like that of a tramp steamer, need not run through the night. . . . Congress did not intend that prisoners and their custodians travel on the regularly scheduled airlines as a customary means of travel.

Id. at 697. No matter how unfeasible compliance with the Act may have been, however, Judge Brieant held that under the Act, "[s]uch ordinary institutionalized delay [was] not an excuse," and dismissed the case with prejudice. *Id.* at 697-98. Nonetheless, he urged Congress to either amend the "silly" § 3161(h)(1)(H), which excludes from speedy trial time only ten days for the transportation of prisoners, or appropriate funds sufficient to ensure expeditious travel. *Id.* at 698.

[217] 18 U.S.C. § 3174(a)(b) (1982) permits that the running of the "speedy trial clock" to be suspended in the case of overcrowded court dockets, provided the chief district judge properly petitions the judicial council of the circuit.

[218] *See* United States v. Kramer, 827 F.2d 1174, 1178 (8th Cir. 1987)(not weighing the delay caused by unavailability of trial judge); United States v. Phillips, 775 F.2d 1454,

no distinction between the roles of the court and the prosecutor in causing the delay.[219] These courts have reasoned that the effect on the defendant is the same regardless of the cause of the violation.

Taylor drew no distinction between the USMS and the prosecuting attorneys when it stated that if the USMS had acted in bad faith or had been responsible for repeated violations, the balance "would clearly have [been] altered."[220] Because the USMS is even less subject to the prosecutor's control than are court personnel, *Taylor*, by implication, appears to support the view that delays resulting from negligence in the court system should factor into the balancing test if they are frequent or in bad faith. One commentator has agreed that delays caused by the court's "deliberate or negligent misconduct" are "impermissible" and should weigh in favor of dismissal with prejudice.[221]

b. The Role of the Defense in Contributing to the Violation

Taylor was largely responsible for the events culminating in the Speedy Trial Act violation. Although the dismissal was predicated on the fact that a sufficient number of non-excludable days had elapsed after Taylor was located and the speedy trial clock began to run, it is also true that if not for his initial flight from Washington, the government would have tried him within the limits imposed by the Act. Judge Poole, dissenting in the Ninth Circuit, noted the "iron[y] that the statutory scheme which would have assured [Taylor's] orderly trial in November 1984, is resorted to, five months later, as the reason for 'springing' him to freedom and conferring

1456 (11th Cir. 1985)(government "twice filed reports alerting the trial court of the speedy trial deadline, [but] [t]he case was simply not reached on the trial docket, a matter within the primary responsibility of the court."); United States v. Veillette, 654 F.Supp. 1260, 1264 (D. Me. 1987) (negligence on the part of trial court personnel *would* be a factor, but delay caused by the Clerk of the Supreme Court or court of appeals, or the Solicitor General's office, was not). *Kramer* and *Phillips* are difficult to reconcile with 18 U.S.C. § 3174 (a)(b) (1982), which specifies the procedures that district judges must follow when court dockets are overcrowded. If the court is negligent in failing to abide by these procedures, but this negligence is not weighed in the balancing test, the defendant alone is burdened, and the intent of the Act is grossly contradicted.

[219] *See* United States v. Stayton, 791 F.2d 17, 20 (2d Cir. 1986)(reasoning that " 'the Act controls the conduct of the parties and the court itself during criminal pre-trial proceedings. Not only must the court police the behavior of the prosecutor and the defense counsel, it must also police itself' " (quoting United States v. Pringle, 751 F.2d 419, 429 (1st Cir. 1984)); United States v. Angelini, 553 F. Supp. 367, 370 (D. Mass.), *vacated and remanded*, 678 F.2d 380 (1st Cir. 1982)(stating that "even if the lapse were solely the responsibility of the court, violation of the Act and defendant's rights would be no less clear").

[220] *Taylor*, 108 S. Ct. at 2421.

[221] Steinberg, *supra* note 201, at 9.

upon him complete absolution from further prosecution."[222] Justice White evidently deemed Taylor's conduct the most important factor leading him to concur separately in the majority's decision to dismiss the case without prejudice.[223]

One commentator has agreed that "it seems unnecessary to ignore completely the defendant's responsibility for the delay, particularly where such delay is intentional and without any justification."[224] Representative Cohen's remarks during the final House debates demonstrate an intent to "prevent defendants from taking advantage of their own 'deliberate stalling' to seek dismissal under the Act."[225] Under this reasoning, the district court, Ninth Circuit, and the dissent in *Taylor* were mistaken in not taking Taylor's behavior into account.[226]

Taylor is the first reported case decided under the Act to involve a fugitive defendant whose actions affirmatively contributed to a violation of the Act's time limits.[227] The more typical situation involves a defendant or defense counsel who simply fails to take steps to avoid the delay.[228] This is a virtual prerequisite for asserting a successful sixth amendment speedy trial claim.[229] The *Barker* Court stressed its "reluctan[ce] . . . to rule that a defendant was denied this

[222] United States v. Taylor, 821 F.2d 1377, 1387 (9th Cir. 1987)(Poole, J., dissenting), *rev'd*, 108 S.Ct. 2413 (1988).

[223] *Taylor*, 108 S. Ct. at 2423 (White, J., concurring).

[224] Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 707 (1976).

[225] Frase, *supra* note 224, at 707, *citing* 120 CONG. REC. 41777 (1974) (remarks of Rep. Cohen).

[226] Even the Ninth Circuit was aware of the problem of defendants becoming fugitives shortly before the running of the speedy trial clock. United States v. Taylor, 821 F.2d at 1381. The court went so far as to conclude that "the trial court may certainly take into account the defendant's culpable absence in deciding whether any resulting dismissal for violation of the [Act] should be with or without prejudice." *Id.* at 1383. Nonetheless, for unexplained reasons, the court did not apply this reasoning to the case before it.

[227] One such case arising under FED. R. CRIM. P. 48(b) resulted in dismissal with prejudice. The defendant in that case had escaped from jail and was charged with this offense, but remained a prisoner for more than one year without being arraigned. United States v. McLemore, 447 F. Supp. 1229, 1232 (E.D. Mich. 1978).

[228] *See* United States v. Janik, 723 F.2d 537, 546 (7th Cir. 1983)("defendant never manifested any desire to see the proceeding moved along any faster"); United States v. Carreon, 626 F.2d 528, 534 (7th Cir. 1980)(defendant failed to assert his right to a speedy trial); United States v. Veillette, 654 F. Supp. 1260, 1264 (D. Me. 1987)(the court weighed against the defendant the fact that he had requested continuances giving rise to excludable delays and may have had notice of the Supreme Court's denial of a *certiorari* petition that restarted the speedy trial clock, where a hearing had been set for the time such decision issued).

[229] Barker v. Wingo, 407 U.S. 514, 531-32 (1972). The Court "emphasize[d] that failure to assert the right will make it difficult for a defendant to prove that [he] was denied a speedy trial". *Id.* at 532.

constitutional right on a record that strongly indicates . . . that [he] did not want a speedy trial."[230]

It may well further the purposes of the Act to weigh deliberate attempts by the defendant to stall. When one considers the third factor of the balancing test, the impact of the decision on the administration of the Act and on justice,[231] it is clear that justice would be adversely affected if the defendant who is largely responsible for engineering the delay is not penalized for his or her actions. However, the defendant's mere failure to expedite the case, which might well be to his or her disadvantage or stem from mere ignorance, should not be weighed as heavily as affirmative moves for unjustifiable delay. As the *Barker* Court noted, the "ultimate responsibility" for government or court negligence resulting in delays "must rest with the government," not the defendant.[232] Indeed, *Barker*'s ruling "place[d] the primary burden on the courts and the prosecutors to assure that cases are brought to trial."[233]

3. *The Impact of the Decision on the Administration of the Act and Justice*

The third factor that courts must consider in applying the dismissal sanction is the impact of the decision on the administration of the Act and on justice.[234] Courts' and commentators' discussions of this factor have focused on the general policy question of determining which remedy best responds to the aims of the Act. The arguments of the courts refusing to recognize a presumption in favor of dismissals without prejudice are self-evident, as they are motivated by obvious concerns regarding crime control.[235] The arguments supporting a presumption in favor of dismissals with prejudice, which the Supreme Court rejected in *Taylor*, are more complex.

Those who support a presumption in favor of dismissals with prejudice generally focus on the interests of the defendant. Commentators have reasoned that "[s]ince the Supreme Court has held that the only remedy for a violation of the sixth amendment right is dismissal *with prejudice*, Congress [in the Speedy Trial Act] has failed to give adequate protection to the defendant whose right to a

[230] *Id.* at 536.

[231] 18 U.S.C. § 3162(a)(2) (1982).

[232] *Barker*, 407 U.S. at 531.

[233] *Id.* at 529.

[234] 18 U.S.C. § 3162(a)(2) (1982).

[235] For example, courts have weighed the "public interest in speedy trials" under this factor, focusing on justice and the policy of the Act from the viewpoint of society. United States v. Veillette, 654 F. Supp. 1260, 1265 (D. Me. 1987).

speedy trial . . . has been violated."[236] It is more difficult, however, to obtain dismissal under a sixth amendment theory than under the Speedy Trial Act. The *Barker* test, for example, requires the defendant to show actual prejudice and to have asserted his right to a speedy trial.[237] The Act is more lenient in allowing dismissals, even dismissals with prejudice, when these factors have not been satisfied. As long as the time limits imposed by the Act have been exceeded, it is mandatory for the case to be dismissed upon the motion of the defendant. In the cases decided under the Act, defendants have not generally attempted to prevail on sixth amendment theories in the alternative,[238] which perhaps indicates a lack of confidence in their ability to satisfy the *Barker* test.

Other commentators have decried the dismissal sanction as a "serious flaw," because "[n]ot only will the defendant be subjected to further depletion of his financial resources and curtailment of his liberty, the process of subsequent reindictment and retrial will perpetuate the delay condemned by the Act."[239] If the charge is dismissed without prejudice, the defendant may be rearrested or reindicted and "the time periods of the Act would begin over again without any compensation for the delay that had already occurred."[240] Dismissals without prejudice may in fact prove more prejudicial to the defendant than a delay in trial, for "[r]eindictment may necessitate retaining new counsel and duplication of legal and investigative efforts, all at increased monetary and psychological cost to the defendant."[241]

It has also been argued that permitting cases to be dismissed and reopened not only defeats the purpose of the Act by creating further delay, but provides no incentive for government attorneys to indict and try cases within the time limits.[242] Moreover, "the need to reindict large numbers of defendants would significantly add to the workload and expense of the grand jury system," a concern that

236 Russ & Mandelkern, *supra* note 190, at 27. *See* Strunk v. United States, 412 U.S. 434, 440 (1973).

237 *Barker*, 407 U.S. at 530.

238 *See, e.g.*, United States v. Taylor, 108 S. Ct. 2413 (1988).

239 Hansen & Reed, *supra* note 178, at 416.

240 Russ & Mandelkern, *supra* note 190, at 27. This concern has motivated some courts to state that violations of the Act should be weighed heavily against the government if they occur "more than once with respect to the same defendant." United States v. Salgado-Hernandez, 790 F.2d 1265, 1268 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986).

241 Russ & Mandelkern, *supra* note 190, at 27-28.

242 *Id.* at 27. On the other hand, if a defendant knows that his or her case could be dismissed without prejudice, there would be an incentive to avoid deliberately stalling and perpetuating delay, a significant concern of the Act's sponsors, and to play his or her part in seeing that the proceeding moves on schedule.

at one point prompted the House Judiciary Committee to restore the mandatory dismissal with prejudice sanction.[243]

A minority of courts have joined these commentators in criticizing the concept of dismissal without prejudice as an ineffective sanction. One court cited the legislative history of the 1979 Amendments to the Act, which postponed the effective date of the dismissal sanction until 1980, for the proposition that "[w]hile the act does permit dismissal without prejudice, extensive use of this procedure could undermine the effectiveness of the act and prejudice defendants, and the committee intends and expects that use of the dismissal without prejudice will be the exception and not the rule."[244] The court believed that "[a]ny other position would render the Act self-contradictory. A defendant would find it more advantageous if an indictment were not dismissed . . . than if the indictment were dismissed without prejudice, thus granting the government a reprieve of the full statutory time limit, should it decide to reindict."[245]

The courts, however, have largely rejected this reasoning. The majority of courts are in general agreement with *Taylor* and reason that because the Act was the result of compromise with the Department of Justice, neither remedy is preferred.[246] The *Taylor* majority pointed out that dismissal with prejudice is not a "toothless sanction."[247] The statute of limitations might bar reprosecution,[248] or the government might opt against reprosecution because of the burdens involved.[249] Another court has added that the grand jury may

243 Frase, *supra* note 224, at 708 (citing H.R. REP. No. 1508, 93d Cong., 2d Sess. 37, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7430).

244 United States v. Angelini, 553 F. Supp. 367, 370 (D.Mass.), *vacated and remanded*, 678 F.2d 380 (1st Cir. 1982)(citing H.R. REP. No. 390, 96th Cong., 1st Sess. 8-9, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 812-13). Importantly, the 1979 House Reports, while fully recognizing that crime control was a major force motivating the Act, focused exclusively on procedural modifications. In this context, it becomes apparent that the statement quoted in *Angelini* presupposes an optimal procedural system. As the product of intensive examination of the substantive issues, the 1974 history is clearly authoritative on the presumption issue.

245 *Angelini*, 553 F. Supp. at 370 (footnote omitted). *See also* United States v. Iaquinta, 515 F. Supp. 708, 712 (N.D.W. Va. 1981), *rev'd on other grounds*, 674 F.2d 260 (4th Cir. 1982)(erroneously tracing the legislative history no further than the A.B.A. Standards).

246 *See, e.g.*, United States v. Russo, 741 F.2d 1264, 1266-67 (11th Cir. 1984); United States v. Caparella, 716 F.2d 976, 979 (2d Cir. 1983).

247 United States v. Taylor, 108 S. Ct. 2413, 2422 (1988).

248 *See* United States v. Veillette, 654 F. Supp. 1260, 1264-65 (D. Me. 1987)(one charge barred after dismissal).

249 *Taylor*, 108 S. Ct. at 2422. In contrast, Hansen & Reed, *supra* note 178, at 416, contend that society's interest in safeguards against many cases being dismissed with prejudice is sufficiently taken into account by the § 3161(h) provisions excluding certain periods of delay from the speedy trial clock.

refuse to reindict, the defendant may be acquitted at trial, and the ultimate sentence may be shorter than the one he or she would have originally received.[250]

The Court in *Taylor* admitted that dismissal with prejudice is the sanction more likely to induce future compliance with the Act.[251] It nevertheless rejected the reasoning set forth in a set of cases dismissed with prejudice largely in order to uphold the Act's effectiveness.[252] After *Taylor*, courts will have to take special care to explain the basis of their decisions to dismiss cases with prejudice by carefully weighing the balancing test factors in order to avoid reversal. Otherwise it may be countered that their decisions simply aimed to provide a "meaningful" remedy for the violation.

It should be noted that it might be inaccurate to state that neither remedy is presumptively preferred. At least for serious crimes, there appears to be a presumption in favor of dismissals without prejudice, which defendants can overcome only by a showing that the government's violation of the Act was severe.

4. *Actual Prejudice to the Defendant*

The *Taylor* court, after reviewing the legislative history of the Act, held that the issue of prejudice to the defendant, caused by the delay, was intended by Congress to be one of the "other" factors that courts must consider in deciding on a remedy for a violation of the Speedy Trial Act.[253] The Court believed that the drafters avoided explicit mention of this issue in the statutory text "for fear that district courts would treat a lack of prejudice to the defendant as dispositive."[254]

Justice Scalia opposed the majority's reliance on legislative history to establish this point, stating that it was "so utterly clear from the text" of the Act that recourse to the history was unjustified.[255] There is some merit to Justice Scalia's point that when the text of a statute is plain, resorting to isolated statements from the legislative history might distort Congress' ultimate intent.[256] Provided that statements from the legislative history are carefully viewed (and reviewed) in context, however, there is little reason to fear that the Act's intent could be thwarted.[257]

In this case, moreover, it is debatable whether the language and intent of the Act are as obvious as Justice Scalia believed them to be. Clearly, the majority believed otherwise.[258] For one thing, it is difficult to understand what the phrase "among othe[r]"[259] factors should include without having a grasp of the background of the Act and the purposes it aims to achieve. The legislative history is the obvious place to turn for such guidance.

The statutory text, for example, nowhere explicitly states that the Act was designed in part to implement the defendant's sixth amendment speedy trial right. Only with this knowledge does it become apparent that if a defendant is prejudiced, he or she should stand a better chance of success in obtaining a dismissal with prejudice; for if an Act seeks to implement a constitutional requirement, its provisions cannot fall short of it.[260] When a defendant is actually prejudiced by the delay, therefore, this factor should be weighed in favor of dismissal with prejudice.

Courts remain, however, confronted with the issue of whether the *lack* of prejudice should weigh *against* the defendant. Before *Taylor*, courts did not uniformly agree on this issue.[261] It is conceivable that courts could either (i) view the prejudice issue as weighing both in favor of dismissal with prejudice if the defendant was prejudiced and against it if he or she was not; or (ii) view only the presence of prejudice as significant in terms of the balancing test, the lack of prejudice being irrelevant. The latter view appears to

250 United States v. Brown, 770 F.2d 241, 243 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986).

251 *Taylor*, 108 S. Ct. at 2422.

252 *See* United States v. Jervey, 630 F. Supp. 695, 698 (S.D.N.Y. 1986)(it would be a meaningless "charade" to simply dismiss the case without prejudice); United States v. Koch, 438 F. Supp. 307, 310 (S.D.N.Y. 1977)(it would be "empty form" to dismiss without prejudice and allow the prosecutor to "file a new indictment a half hour later."). Judge Brieant, who decided both cases, however, had found that the crimes involved were not serious. *But see* United States v. Janik, 723 F.2d 537, 546 (7th Cir. 1983)(district court had dismissed a serious case with prejudice because the defendant might be worse off if reindicted; Seventh Circuit reversed and remanded, despite considerable skepticism about the merits of the dismissal sanction, because to do otherwise would be to ignore the intent of the statute). *See also* United States v. Fountain, 840 F.2d 509, 513 (7th Cir.), *cert. denied*, 109 S. Ct. 533 (1988)(although court was "dismayed" at the conduct of United States Attorney's office, this was held an insufficient basis on which to dismiss the case without prejudice).

253 108 S. Ct. at 2418.

254 *Id.* (citing 120 CONG. REC. 41795 (remarks of Representative Cohen)).

255 108 S. Ct. at 2423 (Scalia, J., concurring in part). *See supra* notes 112-119 and accompanying text.

256 108 S. Ct. at 2423-24.

257 *But see* United States v. Angelini, 553 F. Supp. 367 (D. Mass), *vacated and remanded*, 678 F.2d 380 (1st Cir. 1982) in which, improperly, only part of the legislative history was used to illustrate a proposition.

258 *Taylor*, 108 S. Ct. at 2418 n.7.

259 18 U.S.C. § 3162(a)(2) (1982).

260 Under sixth amendment actions, actual prejudice to the defendant is a factor weighing in favor of dismissal. Barker v. Wingo, 407 U.S. 514, 532-33 (1972).

261 *See infra* notes 262-71 and accompanying text.

have been the understanding of the lower courts in *Taylor*. This reasoning has been set forth more explicitly:

> While courts have stated that a showing of prejudice to the defendant may be properly considered in finding that a dismissal should be with prejudice, to interpret the defendant's failure to demonstrate prejudice as mandating a dismissal without prejudice overemphasizes the probative value of this factor. The defendant's burden under the Act is only to present proof supporting the motion for dismissal itself.[262]

The majority in *Taylor*, in contrast, spoke both of the "presence or absence of prejudice to the defendant."[263] While the majority acknowledged Representative Cohen's concern that the lack of prejudice should not be dispositive, it indicated that it should be taken into account in decisions regarding the dismissal sanction.[264]

Courts considering the issue of prejudice to the defendant have examined whether the defense was impaired,[265] and the "closely related" issue of the length of delay.[266] The Court in *Taylor* expressly held that a brief delay such as the respondent's, amounting to fourteen days in all, should weigh in favor of dismissal without prejudice.[267] Although no standard exists for determining whether a delay is long or short (the Act, in a sense, presupposes that any delay beyond its limits is long), a period of several months appears to be roughly at the dividing line.[268]

Courts have also considered whether the defendant was free or incarcerated during the delay.[269] The Supreme Court agreed that this was an important consideration, noting that since Taylor was

[262] United States v. Kramer, 827 F.2d 1174, 1179-80 (8th Cir. 1987) (Lay, C.J., dissenting)(citations omitted).

[263] *Taylor*, 108 S. Ct. at 2418 n.7.

[264] *Id.* at 2418.

[265] *See* United States v. Bilotta, 645 F. Supp. 369, 373 (E.D.N.Y. 1986), *aff'd*, 835 F.2d 1430 (2d Cir. 1987)(dismissed with prejudice because during the delay, tensions between the United States and Libya had intensified so much that the defendant, accused of conspiring to sell military equipment to that country, stood a diminished chance of having a fair trial).

[266] *Taylor*, 108 S. Ct. at 2421

[267] *Id.* at 2422.

[268] *See* United States v. Stayton, 791 F.2d 19, 22 (2d Cir. 1986)(delay of 23 months was an "enormity"); United States v. Brown, 770 F.2d 241, 245 (1st Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986)(35-day delay "not exorbitant"); United States v. Russo, 741 F.2d 1264, 1267 (11th Cir. 1984)(delay of more than 70 days was an "extensive postponement" [that] "certainly militate[d] toward" dismissal with prejudice); United States v. Janik, 723 F.2d 537, 546 (7th Cir. 1983)(delay of two years would ordinarily present a "strong case" for dismissal with prejudice); United States v. Carreon, 626 F.2d 528, 534 (7th Cir. 1980)(delay of one year "significant" but "not extreme").

[269] *See, e.g.*, United States v. Melguizo, 824 F.2d 370, 372 (5th Cir. 1987)(defendant was free on bond for all but two weeks of a "short" several month delay); United States v. May, 819 F.2d 531, 534 (5th Cir. 1987)(defendant was free on bail).

already being held on the bench warrant, no "additional restrictions or burdens on his liberty" ensued.[270] Prior to *Taylor*, this had not been a uniform position: some courts had deemed the question of whether the defendant was free or imprisoned irrelevant.[271] This view finds support in the idea that delay, by its very nature, is prejudicial. Trial preparation can be generally hampered, as by the death and fading memories of witnesses.[272] Moreover, "prolonged delay may subject an accused to an emotional stress . . . from uncertainties in the prospect of facing public trial."[273] Now, however, courts will have to view actual prejudice to the defendant more objectively.

5. *Factors That Should Not Be Considered In The Balancing Test*

The *Taylor* majority, in sharp disagreement with the dissent, believed that it would have been improper for the district court to dismiss the case with prejudice in order to send a strong message to the government to comply with the Act in the future, while giving Taylor a harsh sentence on the failure to appear charge to "wrap up the 'equities' in a single package."[274] Taylor received a five-year sentence on the failure to appear charge, while his original co-defendant had received only a three-year sentence on the narcotics charges.[275] This issue had not arisen in previous cases interpreting the dismissal sanction.

The majority's conclusion, however, is sound. It would have indeed constituted "unbridled discretion"[276] to assume what the outcome would have been if the respondent had been fairly tried. The dissent correctly noted that the failure to appear statute authorizes sentencing according to the severity of the offense with which

[270] *Taylor*, 108 S. Ct. at 2422.

[271] *See, e.g.*, *Russo*, 741 F.2d at 1267.

[272] It may be questioned, however, whether the Act, or even the sixth amendment itself, serves to adequately protect defendants against this harm. As the Supreme Court has noted:

> [o]n its face, the protection of the Amendment is activated only when a criminal prosecution has begun . . . . These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.

United States v. Marion, 404 U.S. 307, 313 (1971). The Court noted that courts of appeals deciding cases involving only pre-indictment delay have never reversed a conviction or dismissed an indictment, and declined to do so itself. *Id.* at 315. The defendant's only safeguard against such delay is the applicable statute of limitations. *Id.* at 315 n.8.

[273] Strunk v. United States, 412 U.S. 434, 439 (1973).

[274] *Taylor*, 108 S. Ct. at 2420 and n.9. There was no evidence, however, that the district judge had in fact done this.

[275] *See supra* notes 123-127 and accompanying text.

[276] *Taylor*, 108 S. Ct. at 2420 n.9.

the defendant is charged.[277] Defendants in these cases have been found guilty of failing to appear and, like Taylor, should be sentenced for it. Yet, the length of the sentence should correspond to the severity of the underlying offense, or to the circumstances of the failure to appear, and not to the judge's guess as to the defendant's guilt regarding the underlying offense. The dissent set dangerous precedent when it stated its willingness "to consider the strong possibility of conviction" only because no "even moderately complicated issues" were involved.[278]

Another factor that courts should not consider in determining how to dismiss cases under the Act concerns the ability of the prosecution to reinstate its case after dismissal, which was not at issue in *Taylor*. Dismissing cases without prejudice in order to allow the prosecution to promptly reinstate its case would provide "little incentive for the government to comply when it first arrested or indicted an accused."[279] Moreover, such a practice could prove highly prejudicial to the defendant, defeating the purposes of the Act.

C. STANDARD OF REVIEW

The principal contention of the dissent was its sharp disagreement with the majority's conclusion that the district judge had abused her discretion in dismissing *Taylor* with prejudice.[280] Indeed, the conflict over the amount of deference that reviewing courts should give to the findings of trial judges is prevalent throughout the law.

Commentators have recognized the danger that discretionary rulings, such as those made pursuant to the dismissal sanction, may be inconsistent, arbitrary and "different in different men."[281] A lack of faith in the idea that a "sole judge on the lowest rung of the judicial ladder [can be] given unreviewable power" has led to a mistrust in deferring to trial court discretion.[282] Appellate review has thus been promoted as a safeguard against the possibility of abuse of discretion,[283] especially in cases such as *Taylor*, where the "appellate court has as much before it as the trial judge did" in terms of facts.[284]

[277] *Id.* at 2425 (Stevens, J., dissenting).
[278] *Id.* at 2420 n.9.
[279] Steinberg, *supra* note 201, at 13-14.
[280] *Taylor*, 108 S. Ct. at 2424-27 (Stevens, J., dissenting).
[281] Burrows, *Statutes and Judicial Discretion*, 7 N.Z.U. L. REV. 1, 11 (1976).
[282] Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 660 (1971).
[283] Burrows, *supra* note 281, at 11.
[284] Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 184 (1975).

Indeed, the most persuasive argument advanced in favor of deferring to trial judges' discretion is that the trial judge often has a "feel of the case"[285] because of "the superiority of his nether position."[286] This is the principal idea advanced by the dissent in *Taylor*.[287]

It is clear that this argument is most suitable when *factual* findings are at issue.[288] In *Taylor*, however, it does not appear that the district court had access to any facts that were not also available to the Supreme Court. Both sides submitted lengthy briefs. Moreover, none of the factual findings were disputed by either side. In *Taylor*, only the interpretation and legal effects of the stipulated facts were in question. *Taylor*, therefore, was precisely the sort of case that was appropriate for appellate review. The majority concluded that the district court had made not an erroneous determination of fact, but legal errors.[289] It has long been established that the rule precluding review of discretionary holdings does not apply where errors of *law*, or mixed questions of fact and law as in *Taylor*, are at issue.[290]

In *Taylor*, the Court determined that the district court had given insufficient weight to a relevant consideration, Taylor's fault in causing the delay, and too much weight to irrelevant considerations, such as the "unwitting" violation of the USMS.[291] Moreover, it believed that the district court, by employing dismissal with prejudice as a vehicle to teach the government a lesson, had adopted a principle that was inconsistent with the policy of the Act.[292] Indeed, one commentator has specifically stated that when a "statute conferring . . . discretion lays down . . . principles on which it is to be exercised, a judge who fails to apply those principles is wrong. So is one who applies a principle which is inconsistent with the policy or provisions

[285] Id. (quoting Noonan v. Cunard Steamship Co., 375 F.2d 69, 71 (2d Cir. 1967)(Friendly, J.)).
[286] Rosenberg, *supra* note 282, at 663.
[287] *Taylor*, 108 S. Ct. at 2424-25 (Stevens, J., dissenting).
[288] The primary case used in support of it is Atchison, Topeka & Santa Fe Ry. v. Barrett, 246 F.2d 846 (9th Cir. 1957). The case involved a trial judge's determination that the plaintiff's "twitching" of the head, sustained after an accident at work, was genuine. *Id.* at 849. The trial judge's discretion was "based on facts or circumstances that are critical to the decision and that the record imperfectly convey[ed]." *See* Rosenberg, *supra* note 282, at 664.
[289] *Taylor*, 108 S. Ct. at 2419-20 ("A judgment that must be arrived at by considering and applying statutory criteria . . . constitutes the application of law to fact and requires the reviewing court to undertake more substantive scrutiny to ensure that [it] is supported in terms of the factors identified in the statute.").
[290] *See* Bogardus v. Comm'r of Internal Revenue, 302 U.S. 34, 39 (1937).
[291] *Taylor*, 108 S. Ct. at 2423.
[292] *Id.*

of the statute."[293] Moreover, "the court's discretion will be upset if it is apparent that no weight, or insufficient weight, has been given to relevant considerations, or if weight has been given to irrelevant considerations."[294]

As one commentator has persuasively explained, the dismissal sanction's balancing test should be treated as a question of law, justifying appellate review of the exercise of judicial discretion.[295] With respect to both the seriousness of the offense and the facts and circumstances leading to the dismissal, the reviewing court has the same information before it as the trial court; it has only to assess the facts in terms of the Act, which is a question of law.[296] The final factor, the impact of the decision on the administration of the Act and justice, obviously involves an interpretative issue as well.[297]

What makes *Taylor* especially problematic is that there is disagreement as to how to interpret the balancing test factors, and which factors are "relevant" for purposes of the Act. For example, the question of whether sanctions should be used as a method of encouraging future compliance is a factor that may or may not be relevant depending on one's understanding of the policies underlying the Act, that is, whether the defendant's or society's interests are considered most important. When, as here, the relevant considerations are open to debate, the abuse of discretion issue becomes considerably more complex.

The majority contended that the trial court failed to sufficiently "explicate its reasons for dismissing [*Taylor*] with prejudice."[298]

[293] Burrows, *supra* note 281, at 12.

[294] *Id.* at 13.

[295] *See* Steinberg, *supra* note 201, at 4.

[296] *Id.* It might be argued that the majority improperly strayed into the range of factual findings when it stated that it saw no basis for the district court to have concluded that the USMS' conduct was "lackadaisical," and that its "unwitting violation" was not in bad faith. *See Taylor*, 108 S. Ct. at 2420-21, 2423. To the district court, bad faith appears to have meant a conscious disregard for the time limits imposed by the Act, while the Supreme Court seemed to use the term to refer to a malicious motive. Yet, the question of how a purposeful 14-day delay designed not to harm the defendant but to achieve efficiency, which was a stipulated fact, should weigh against the other balancing test factors clearly calls for legal judgment.

[297] Steinberg, *supra* note 201, at 4. Thus,

> the crucial inquiries are whether the appellate court is situated in as good a position as the lower court to resolve the issues raised and whether the trial court's findings concern the effect or impact of certain events rather than disputed facts and witness credibility. Since both of these questions must be answered in the affirmative, the appellate court is "free from . . . the 'clearly erroneous' rule," and may therefore draw its own conclusions.

Id. (citing Kiwi Coders Corp. v. Acro Tool and Die Works, 250 F.2d 562, 568 (7th Cir. 1957)(citation omitted)).

[298] *Taylor*, 108 S. Ct. at 2420.

One commentator has observed that it is essential for trial judges to fully explain the basis of their discretionary decisions to permit meaningful evaluation on appeal.[299] This reasoning clearly applies to certain cases that have arisen under the statute, in which trial courts have simply stated that they weighed the factors and, providing no explanation at all, dismissed the case one way or the other.[300]

In *Taylor*, however, the trial judge indeed set forth an explanation, based on which the Supreme Court felt confident to deduce the ultimate rationale on which she had dismissed the case with prejudice. It is difficult to imagine what more the trial judge could have said if she indeed believed that although the crime was serious, the government's conduct was inexcusable and dismissal with prejudice was the best way to avoid recurrences of it. The Court may have validly believed that this constituted an abuse of discretion. Yet its dwelling on the district court's inadequate explanation appears unwarranted, and unnecessary to reach its conclusion.

One court has taken the position that "[t]he Act's multi-factored standard for deciding whether dismissals shall be with or without prejudice invites an exercise of judicial discretion and thereby implies a limited scope of review."[301] Thus, after a reviewing court sets forth the proper interpretations and weight to be accorded to the balancing test factors, it should remand the case to the district court.[302] It may be argued, however, that under this approach, the reviewing court in essence dictates the result the district court must reach, denying it actual discretion.

The dissent pointed out that *Taylor* will most likely encourage district courts to avoid reversal by adopting a consistent practice of dismissing cases without prejudice.[303] This fear appears unfounded: appellate courts have indeed reversed cases in favor of dismissal with prejudice on the basis of abuse of discretion. In fact, the majority seemed to take special care to avoid criticizing the decisions of any other courts. It even cited with approval, for particular propositions, cases which were dismissed with prejudice.[304] The

[299] Rosenberg, *supra* note 282, at 665-66.

[300] *See* United States v. Iaquinta, 515 F. Supp. 708 (N.D.W. Va. 1981), *rev'd on other grounds*, 674 F.2d 260 (4th Cir. 1982). In *Iaquinta*, the court's entire explanation of its decision went as follows: "Here, defendants have timely moved to dismiss the indictments for violation of 3161(b). After considering the factors enumerated in the statute, the Court must conclude that there has been a violation of the Act and that the mandated sanction is dismissal with prejudice." *Id.* at 712.

[301] United States v. Janik, 723 F.2d 537, 547 (7th Cir. 1983).

[302] *See id.*

[303] *Taylor*, 108 S. Ct. at 2426 (Stevens, J., dissenting).

[304] United States v. Russo, 741 F.2d 1264 (11th Cir. 1984)(reversing a district court

Court also explicitly stated that its decision might well have been different had the USMS repeatedly violated the Act or acted in bad faith, as it defined it, towards Taylor.[305] Moreover, the facts in *Taylor* do not easily lend themselves to strict precedential adherence: cases in which defendants largely contributed to the delayed trial are rare, and future cases will usually be distinguishable on the facts. Thus, although *Taylor* may have narrowed the range of appropriate contexts for dismissals with prejudice, considerable flexibility remains available to courts, provided they adhere to the policies underlying the Act.

V. Conclusion

Taylor narrowed the range of cases which can properly be dismissed with prejudice under the dismissal sanction of the Speedy Trial Act. The Court clarified ambiguities in the Act that had divided the lower courts, potentially resulting in unequal treatment for different defendants. The increased uniformity that will develop among decisions arising under the Act satisfies one of its major motivations.

Taylor also serves as a reminder to courts that although they may disagree with the methods the Act employs to fulfill its aims, they are not authorized to misapply the dismissal sanction to achieve more efficient results. *Taylor* is faithful to both aims underlying the Act in that it interprets the dismissal sanction's balancing test factors so as to respond to society's as well as the defendant's interests in a speedy trial.

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decision to dismiss a case involving narcotics offenses without prejudice); United States v. Caparella, 716 F.2d 976 (2d Cir. 1983)(reversing a district court's decision to dismiss a case involving mail theft without prejudice).

305 *Taylor*, 108 S. Ct. at 2420-21.