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A TRIAL COURT WORKING WITH RULE 1100

MERN A B. MARSHALL†
JOSEPH H. REITER‡

I. INTRODUCTION

THE CONCEPT OF SPEEDY TRIAL has been an integral part of the Anglo-American system of criminal justice for seven centuries." During all but the past decade, however, little or no attention has been paid to fixing the concept's boundaries. "Speedy trial" has been one of those convenient, weasel-word concepts capable of being expanded and contracted like an accordion.

Under the influence of a computer-oriented society, an attempt to quantify this hoary right has been made.

Shucking the usual, passive case by case judicial posture, the Pennsylvania Supreme Court in 1973 reached out aggressively with its rule making power and, through its promulgation of rule 1100 of the Pennsylvania Rules of Criminal Procedure,2 dictated the number of days within which a case is to be tried and under what circumstances that number of days may be enlarged.

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1. See notes 3 & 4 and accompanying text infra.
2. Pennsylvania Rule of Criminal Procedure 1100 provides:
   (a)(1) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1973 but before July 1, 1974 shall commence no later than two hundred seventy (270) days from the date on which the complaint is filed.
   (2) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1974 shall commence no later than one hundred eighty (180) days from the date on which the complaint is filed.
   (b) For the purpose of this Rule, trial shall be deemed to commence on the date the trial judge calls the case to trial.
   (c) At any time prior to the expiration of the period for commencement of trial, the attorney for the Commonwealth may apply to the court for an order extending the time for commencement of trial. A copy of such application shall be served upon the defendant through his attorney, if any, and the defendant shall also have the right to be heard thereon. Such application shall be granted only if trial cannot be commenced within the prescribed period despite due diligence by the Commonwealth. Any order granting such application shall specify the date or period within which trial shall be commenced.
   (d) In determining the period for commencement of trial, there shall be excluded therefrom such period of delay at any stage of the proceedings as results from:
      (1) the unavailability of the defendant or his attorney;

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This article is an examination of the mischief that led to the need for the rule's promulgation, the meaning of the rule, and where the rule has led the criminal justice system in Pennsylvania during the four years of the rule's existence.

II. GENESIS OF RULE 1100, PROMPT TRIAL

The genesis of the right to a speedy trial can be found in the earliest English law. In 1214, the Magna Carta provided for the right to a speedy trial. Specifically, it said, "We will sell to no man, we will not deny or defer to any man either justice or right." Three a year the jails were emptied and the prisoners confined were either tried and convicted or freed from custody. This did not necessarily mean that defendant was acquitted of the charges, but he had to be released from custody.

Five centuries after the Magna Carta, the colonists of the United States, instituting an independent form of government, included a speedy trial provision in the sixth amendment to the Constitution. From that point until the last decade, various assaults were made on the problem of providing a speedy trial to an accused. Several states passed statutes to implement the constitutional mandate; some provided that an accused must be discharged from custody if he failed to make bail and was not brought to trial within a certain period after arrest or indictment. It was required generally that the

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(2) any continuance in excess of thirty (30) days granted at the request of the defendant or his attorney, provided that only the period beyond the thirtieth (30th) day shall be so excluded.

(e)(1) When a trial court has granted a new trial and no appeal has been perfected, a new trial shall commence within one hundred and twenty (120) days after the date of the order granting a new trial.

(2) When an appellate court has granted a new trial, or has affirmed an order of a trial court granting a new trial, the new trial shall commence within one hundred and twenty (120) days after the appellate court remands the record to the trial court. The date of remand shall be the date as it appears in the appellate court docket.

(f) At any time before trial, the defendant or his attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this Rule has been violated. A copy of such application shall be served upon the attorney for the Commonwealth, who shall also have the right to be heard thereon. Any order granting such application shall dismiss the charges with prejudice and discharge the defendant.

(g) Nothing in this Rule shall be construed to modify any time limit contained in any statute of limitation.
accused make a demand for speedy trial in order to avail himself of the provisions of the right. In only a few jurisdictions did the statutes provide a complete discharge from all prosecution upon a violation of speedy trial rights.

Since the mid-1960's, there has been a gradual, but significant, change occurring with respect to quantifying the constitutional right to a speedy trial. In 1966, the United States Supreme Court, in United States v. Ewell, recognized that speedy trial rights might interfere with other due process rights of the accused and might seriously impinge on society's efforts to protect itself. The Court seemed aware of the problem but was reluctant to take any drastic action to resolve the situation. The Supreme Court in Klopfer v. North Carolina, again recognizing the problem, announced that the speedy trial right is "one of the most basic rights preserved by our Constitution." The Court further amplified the problem in Dickey v. Florida wherein Justice Brennan expressed concern that such a fundamental right as speedy trial had so little definition and that its scope raised so many questions.

The problem continued to be ventilated by the Supreme Court in its decisions United States v. Marion, Barker v. Wingo, and Strunk v. United States. Through these cases, the Court began

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11. Id. at 226. In Klopfer, the defendant contended that an entry of a nolle prosequi with leave order would deprive him of his constitutional right to a speedy trial. Id. at 218. The Supreme Court agreed, stating that such an order would violate the purposes of the sixth amendment guarantee of a speedy trial. Id. at 221-22.

12. 398 U.S. 30 (1970). In Dickey, seven years elapsed between the time the defendant was charged with armed robbery and the time at which he was brought to trial. Id. The defendant, although incarcerated, was available for prosecution at all times. Id. at 36. The Supreme Court held that, absent a tenable reason for such delay, the defendant's sixth amendment rights were violated and that the judgment against the defendant must be vacated. Id. at 38.

13. Id. at 40-41 (Brennan, J., concurring).


defining the constitutional requirements of speedy trial. *Marion* set the commencement of the right to speedy trial at the time a complaint is filed or the person is arrested, *i.e.*, when the suspect has become an "accused." 17 *Barker* laid down the fundamental factors to be weighed in determining whether there had been a violation of the right. These factors are the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. 18 The *Barker* Court indicated that until there was some delay which, because of length, is presumptively prejudicial, there is no need to examine and balance the other factors. 19 A theme that was to become the bulwark of the Pennsylvania rule 1100 decision was enunciated in *Barker*: "A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." 20 Nevertheless, the Court indicated that a failure by the defendant to assert his right would make it difficult for him to prove he was denied a speedy trial. 21 *Barker* was a first, definitive attempt to outline the scope of the right of speedy trial, but it still did not give a precise time frame within which the right had to be asserted and after which a violation of the right would occur. *Strunk* directed the dismissal of charges as the sanction for violation of the right. 22

In 1972, the Pennsylvania Supreme Court, in *Commonwealth v. Hamilton*, 23 found the tests enumerated in *Barker* 24 and the then "two-term rule" 25 totally inadequate to meet the speedy trial problems 26 and enunciated the outlines of what was to become rule 1100, 27 a flexible rule with objective certainty. 28 With such a rule, the *Hamilton* court felt, there would be less confusion over what constitutes prejudicial delay and better planning could be arranged by court administrators as well as attorneys for prosecution and defense. 29 In addition, the rule would apply to all defendants — not only to incarcerated defendants — as the old two-term rule did. 30 Not

17. 404 U.S. at 320.
18. 407 U.S. at 530.
19. Id.
20. Id. at 527 (footnotes omitted). See notes 99 & 139 and accompanying text infra.
24. See text accompanying notes 18–21 supra.
25. PA. STAT. ANN. tit. 19, § 781 (Purdon 1964). The two-term rule provided, *inter alia*, for a defendant's discharge if not brought to trial within two terms of the court. Id.
26. 449 Pa. at 305–09, 297 A.2d at 131–33.
27. Id. at 308–09, 297 A.2d at 132–33. For the text of rule 1100, see note 2 supra.
28. 449 Pa. at 308–09, 297 A.2d at 132–33.
29. Id. at 308, 297 A.2d at 132.
the least of the court's considerations was the benefit to society of swifter justice. The *Hamilton* court was suggesting the imposition of a strict duty on all parties to the justice system. Henceforth the courts would have to arrange their affairs to accommodate the trials within a specific time period, the prosecutors could no longer exercise dilatory tactics to gain an advantage, and a defendant would go to trial, whether he asked to do so or not.

On June 8, 1973, the Pennsylvania Supreme Court exercised its supervisory and rulemaking power, under the Pennsylvania Constitution and promulgated Rule 1100 of the Pennsylvania Rules of Criminal Procedure. This rule provides a specific time period within which a defendant must be tried after he has been "charged" with a crime. This delineates the heretofore vague concept of "speedy trial" and insures, through the sanction of dismissal of charges, that those involved in the criminal justice system provide the means for compliance.

**III. Phantom Fear**

An early and widely felt fear was that the criminal case backlog was so great that rule 1100 would have the effect of a general amnesty and dump criminals back onto the streets. The fear has proved baseless.

A very simple statistical survey of the experience in the Philadelphia Court of Common Pleas indicates that of the 11,246 cases which were disposed of by the court during 1974, a total of 24 cases were dismissed on the basis of a violation of rule 1100. In 1975, only 146 cases were dismissed as a result of violations of rule 1100.

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30. Id. at 304-09, 297 A.2d at 130-33 (by implication). See note 25 supra.
31. 449 Pa. at 306-08, 297 A.2d at 131-33.
32. Id. at 308, 297 A.2d at 133. The court noted that "a mandatory time requirement will act as a stimulant to those entrusted with the responsibility of managing court calendars." Id. at 542, 246 A.2d at 433.
34. The rule was clearly designed to eliminate situations like the one that occurred in Commonwealth v. DiPasquale, 361 Pa. 536, 246 A.2d 430 (1968). In *DiPasquale*, the defendant was kept in jail during six continuances while the prosecutor kept to himself the fact that he had no evidence. Id. at 538, 246 A.2d at 431. The court stated that, under these circumstances, a granting of a dismissal or a nolle prosequi would violate the defendant's speedy trial rights. Id. at 542, 246 A.2d at 433.
35. Article 5 of the Pennsylvania Constitution provides, in pertinent part: "The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts." Pa. Const. art. 5, § 10(c).
36. Order of the Pennsylvania Supreme Court rescinding old rule of criminal procedure 1100 and adopting new rule 1100 in lieu thereof (June 8, 1973).
37. For the text of rule 1100, see note 2 supra.
38. See id.
39. These statistics were obtained from the Administrative Office of the Philadelphia Court of Common Pleas. These figures do not include cases where dismissal had been denied and appeals taken on the question.
1100 out of the 9,464 cases disposed.\textsuperscript{40} The year 1976 showed a similar result wherein 141 cases were dismissed under the provisions of rule 1100 out of 10,236 cases disposed during the entire year.\textsuperscript{41} In 1977, only 90 cases had been dismissed under rule 1100, out of 8,739 cases disposed of by the court.\textsuperscript{42} Statistically, rule 1100 strictures upon the criminal justice system in Philadelphia have clearly not been devastating to the operations of the court from an administrative viewpoint.\textsuperscript{43} Significantly, 1977 shows a sharp decline in the numbers of cases being dropped out of the system under rule 1100.\textsuperscript{44}

It is also important to review briefly the types of cases not determined on the merits due to their removal from the system by operation of rule 1100. The 1974, 1975, 1976 and 1977 charges that were dismissed were as follows:

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<td>Murder</td>
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<td>Embezzlement/Fraud</td>
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<td>Receiving Stolen Property</td>
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<td>Forgery.Counterfeiting</td>
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<td>Rape, Attempted Rape, Statutory Rape, Indecent Assault</td>
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<td>Trespassing</td>
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<td>Offenses Against the Public Morals/Policy</td>
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<td>Totals</td>
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\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} See Table 1 infra; text accompanying notes 39-42 supra.
\textsuperscript{44} See text accompanying note 42 supra.
These statistics demonstrate that the efforts to obtain a speedy
trial have been successful to an overwhelming degree.\textsuperscript{45} It is also
significant that for those offenses involving crimes against the
person, \textit{i.e.}, murder, rape, robbery and assault, the number of
dismissals in 1977 is almost \textit{de minimus}. Through the efforts of the
courts and the prosecutors, the favorable results obtained have
alleviated the fears of early prognosticators that large numbers of
serious cases would go untried and dangerous people would be
placed back onto the street without a determination of guilt or
innocence. Even though rule 1100 has provided a viable method for
dealing with speedy trial problems, there remain some significant
difficulties which need remedy.

\textbf{IV. THE COUNTDOWN}

At first blush, it would appear that rule 1100 was a trial judge's
dream. If the judge could count to 270 before July 1, 1974, and only
count to 180 after July 1, 1974, the speedy trial problems which had
plagued the court would disappear.\textsuperscript{46} However, nothing in the law is
so simple that a mere counting system could resolve such an elusive
right as that of "speedy trial" and resolve it to the benefit of both the
individual defendant and society's interest in the prompt disposition
of criminal cases. Problems arose in the implementation of the rule
in the courtroom setting almost immediately. The initial question
was the point from which the rule commences to run — when do you
start the count?

The most obvious provision of rule 1100 is that a trial shall
commence within 270 days from the date on which a written
complaint is filed after June 30, 1973 and before July 1, 1974, and
within 180 days for all complaints filed on July 1, 1974 or
thereafter.\textsuperscript{47}

The rule applies to trials in a court case “in which a written
complaint” is filed.\textsuperscript{48} However, not every case starts with the filing
of a written complaint. A sight arrest may precede a filing of written
charges; perhaps not by much time, but a calendar day's difference
between 11:50 P.M. and 12:10 A.M. requires a determination of the
start-up date. Conversely, a written complaint may be filed and the
defendant not arrested until weeks, months, or even years later. The

\begin{flushright}
\textsuperscript{45} See notes 39–44 and accompanying text \textit{supra}.
\textsuperscript{46} See PA. R. CRIM. P. 1100(a)(1), (2). For the text of these sections of the rule, see
note 2 \textit{supra}.
\textsuperscript{47} PA. R. CRIM. P. 1100(a)(1), (2). See note 2 \textit{supra}. The rule was to be prospective
\textsuperscript{48} PA. R. CRIM. P. 1100(a)(1).
\end{flushright}
threshold question in these cases is whether to commence the time period on the date of the filing of written complaint, as the section would seem to direct, or on the date of the arrest of the person charged. The Pennsylvania Superior Court has reasoned that rule 1100 means what it says, and that it is the complaint which triggers the start.49

Other jurisdictions use different commencement signposts. In Illinois, the speedy trial time runs 120 days from date of arrest.50 In California, the period in which trial must commence is forty-five days after arraignment.51 Louisiana has held that the date of indictment is the "institution of prosecution" from which trial periods are to be measured.52 One commentator has observed:

Generally, courts have considered four points in the criminal process at which the guarantee [to a speedy trial] might begin: (1) when the alleged crime is committed; (2) when the government decides to prosecute and has enough evidence to proceed against an individual; (3) when a defendant is arrested; and (4) when he is formally charged with a crime, either by indictment or information.53

The Pennsylvania rule,54 commencing from the filing of charges against the individual would fall within the second option listed above. It gives an individual protection against pretrial delay55 much earlier than the Louisiana rule which, by defining indictment as the "institution of prosecution," provides no protection during the period between arrest and indictment.56 Rule 1100 prevents overlong pretrial incarceration and the concomitant impairment of defense

54. See note 2 supra.
55. Rule 1100 does not, however, provide a defendant with any protection against delay in the period before arrest. This protection is, of course, afforded by the general statute of limitations on all crimes. See Hoffa v. United States, 385 U.S. 293 (1966), where the Supreme Court observed that there is no constitutional right to be arrested. Id. at 310. Preprosecution delay generally is controlled only by the appropriate statute of limitations. United States v. Feinberg, 383 F.2d 60, 64 (2d Cir. 1967). However, some courts, on a case-by-case basis, have dismissed prosecutions where preprosecution delay cheated the defendant of his ability to reconstruct the happenings of the particular day on which the crime was committed. Ross v. United States, 349 F.2d 210, 215 (D.C. Cir. 1965) (seven month delay between alleged sale of narcotics and swearing out of complaint held unreasonably prejudicial to defendant).
56. See note 52 supra.
preparation. At the same time, it provides for a reasonably speedy conclusion to the matter, so that society’s interest in finality of the case is protected.

Pennsylvania uses as a trigger for the countdown the “filing of a written complaint”; however, this point is not always clear. For example, in Commonwealth v. Mumich, the Pennsylvania Superior Court ruled that the time period commences to run upon the filing of a proper complaint, not a defective one that has been dismissed. Mumich, a close reading of the case discloses, had failed to object to the dismissal of the first complaint. The majority in Mumich felt that the defendant’s lack of objection to the dismissal was tantamount to an agreement to an extension of the rule 1100 run date. A well-reasoned dissent in that case states that, had Mumich done so and demanded amendment to the original complaint, rather than acquiescing in the dismissal, the period would have been calculated from date of first complaint.

In Commonwealth v. Silver, the superior court dealt with a case that did not begin as a result of the filing of a written complaint as prescribed in the initial phrase of rule 1100(a). A special investigating grand jury had returned a presentment, i.e., a recommendation for prosecution, which was subsequently submitted.
to an indicting grand jury. The court held that the presentment issued by the investigating grand jury did not start the prompt trial clock running but that the submission of the presentment to the indicting grand jury did. Since Philadelphia has elected to abolish indicting grand juries, presumably there the clock will start upon the filing of informations by the prosecution after a presentment is filed by an investigating grand jury.

Another countdown problem that confronts a calendar judge with some frequency occurs when a defendant has initially been discharged at a preliminary hearing as the result of a successful challenge and is later rearrested on the same charges. In some discharge situations, the defendant has actively and successfully sought the dismissal of charges because of insufficient evidence. In the intervening time, the prosecution may develop additional evidence and rearrest the defendant. The question a court must resolve is whether to count from the initial complaint or to start anew when the charges are lodged again. This situation is far different from those cases in which the commonwealth withdraws a prosecution — nolle prosequi — only to attempt to reinstate the same prosecution. Both this withdrawal and the reinstatement must be

Some characteristics of the grand jury system in Pennsylvania have been explained thusly:

Grand juries are generally referred to as either being indicting or investigating. Of the investigating grand juries, there are two types: (1) an indicting grand jury which is charged by the court to undertake an investigation; or (2) a grand jury specifically summoned to serve for the purpose of investigation only. Segal, Spivack & Costilo, Obtaining a Grand Jury Investigation in Pennsylvania, 35 Temp. L.Q. 73, 77 n.32a (1961), citing Bell, The Several Modes of Instituting Criminal Proceedings in Pennsylvania, 13 Pa. Dist. Rep. 815 (1904). See In re Investigation of January 1974 Philadelphia Grand Jury, 458 Pa. 586, 595 n.4, 328 A.2d 485, 489 n.4 (1974); Smith v. Gallagher, 408 Pa. 551, 185 A.2d 135 (1962).

66. 238 Pa. Super. Ct. at 223, 357 A.2d at 613. An indictment is generally drawn by the district attorney and requires the approval of an indicting grand jury. For the changes in this procedure necessitated by the abolition of indicting grand juries in Philadelphia, see note 70 infra. The grand jury examines the evidence in support of the indictment and, if it agrees that the allegations are correct, a true bill will be returned on which the defendant will be tried. See L. Orfield, supra note 65.


68. The last indicting grand juries in Philadelphia sat in December, 1975, after the voters had elected to abolish indicting grand juries in the county, pursuant to the Pennsylvania Constitution. See Pa. Const. art. 1, § 10.

69. An information is a formal written accusation prepared and approved by the district attorney without any grand jury consideration. See L. Orfield, supra note 65.

70. Since the voters of Philadelphia elected to dispense with indicting grand juries, the district attorney has had to act on the recommendations in the presentment and file an information with the court in order that the defendant be formally charged and brought to trial. See id.

71. Discharges most commonly result from defendants' challenges to complaints on the grounds that they are defective or that the prosecution has failed to present a prima facie case at a preliminary hearing.
done with court approval. In these situations, as in Mumich, if the defendant fails to object to the dismissal of charges and demand a speedy trial, the defendant could be considered to have waived his speedy trial rights.

The American Bar Association Project on Standards for Criminal Justice (ABA Standards) includes a section entitled "When time commences to run" which states:

The time for trial should commence running, without demand by the defendant, as follows:

(b) if the charge was dismissed upon motion of the defendant and thereafter the defendant was held to answer or charged with an offense, from the date the defendant was so held to answer or charged, as above . . . .

This would indicate that the preferred method would be to start the clock running at the time of filing of the second charge. A study comparing Pennsylvania law and practice to these ABA Standards, found no comparable provision in Pennsylvania criminal procedure rules, and the comment to that study recommended promulgation of such a rule. In this vacuum, most trial courts faced with the problem, wherever possible and out of an abundance of caution, have given a literal reading to rule 1100(a) and started the rule 1100 clock running from the filing of the first complaint. However, a different result would have to follow if the dismissal came close to the time of the run date and a rearrest occurred after the time had already run.

The pragmatic result to counting from the first filing of the complaint will require the prosecution to move swiftly to develop its case and renew the charge. Of course, this approach also may put a burden on the courts to try the case within a very short time after the

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75. ABA Standards, Speedy Trial § 2.1–3 (1968).
76. Id. § 2.2(b).
78. Id. at 10–22.
79. This conclusion is based upon Judge Marshall's experience as calendar judge in the Philadelphia homicide program since October 1976.
second complaint is filed. Since the number of these cases is not very large, a well-organized system ought to be able to accommodate them.

Many courts\(^8\) begin counting anew upon the second filing — an approach that conforms to the ABA Standards.\(^8\) This gives the prosecution an advantage when the defendant was the successful party initially. In effect, the defendant has won the battle and lost the war because the prosecution thereby gains additional time to develop the case and proceed to trial. An amendment to the rule is in order which could balance competing interests, giving guidance to the courts in the resolution of a starting date for the countdown.

V. "DUE DILIGENCE"

A corollary problem to the question of the commencement date under rule 1100 is the mandate of section (c) of the rule that due diligence is required on the part of the commonwealth to bring the case to trial within the prescribed time and that no application for extending the time for commencement of the trial should be granted without a demonstration that such diligence has been exercised.\(^8\)

Three different situations demand "due diligence" by the commonwealth. The first occurs when the charges are lodged but no apprehension of the suspect has been made; the second occurs between the arrest and the prosecution's readiness for trial within the time period, and the third, the due diligence exercised by the courts in calling the case for trial.

A. Diligent Apprehension of the Suspect

It is conceivable that 180 days could run before an accused is apprehended. The issue is whether "due diligence" has been exercised on the part of the law enforcement officials to apprehend the accused so as to permit an extension of the period. A recently decided case, Commonwealth v. Flores,\(^8\) sheds some light on the issue. Flores was apprehended by police five days after the written complaint was filed.\(^8\) The court explicitly held that the rule 1100 time period begins to run upon the filing of the complaint and not from the date of the arrest.\(^8\) The court added that the inability of the

\(^{81}\) For the text of pertinent provisions of the ABA Standards, see text accompanying notes 75 & 76 supra.
\(^{82}\) PA. R. CRIM. P. 1100(c). For the text of rule 1100, see note 2 supra.
\(^{84}\) Id. at ---, 371 A.2d at 1368.
\(^{85}\) Id. at ---, 371 A.2d at 1372-73.
police to locate and arrest the accused can amount to defendant unavailability under rule 1100(d)(1). The foreseeable difficulty with the Flores ruling will be in measuring how much effort will be required by law enforcement and court personnel to locate a missing suspect after charges are lodged to satisfy the due diligence standard of rule 1100(c), thus permitting a court to find that the defendant was, indeed, unavailable within the meaning of rule 1100(d)(1).

In this regard, the Pennsylvania Supreme Court, in Commonwealth v. Mitchell, has placed on the commonwealth the burden of proving, by a preponderance of the evidence, the unavailability of a defendant or his attorney and that due diligence was exercised in attempting to apprehend or locate the defendant. In Mitchell, the prosecution contended that the defendant had, for a period of time, avoided arrest despite diligent police effort. After examining the information available to the police and the history of attempts to locate the defendant, the court agreed only reasonable efforts had to be made. The court felt it should not be required to second-guess police efforts to locate accused persons.

At about the same time as Mitchell, the Pennsylvania Superior Court decided Commonwealth v. Martofel, where the court found the police had obviously not used every conceivable method to ascertain the defendant's whereabouts. The police had made numerous checks at the defendant's last known residence and his last known place of employment. They learned that the defendant had asked for money in order to leave town. This, the court said, was reasonable effort sufficient to rule that the defendant had been unavailable under rule 1100(d)(1). But the question still remains; how much will be enough police activity to meet the due diligence requirement?

In order to avoid future difficulties under Mitchell and Martofel, fugitive cases in the homicide calendar room in Philadelphia are

86. Id. at __, 371 A.2d at 1372. For the text of rule 1100(d)(1), see note 2 supra. Under this section of the rule, the period of a defendant's or his attorney's unavailability is excluded from the 180 day count. Pa. R. Crim. P. 1100(d)(1). See text accompanying notes 139-58 infra.
87. Pa. R. Crim. P. 1100(c). For the text of rule 1100(c), see note 2 supra.
88. See notes 139-58 and accompanying text infra.
90. Id. at 564, 372 A.2d at 831.
91. Id. at 563-64, 372 A.2d at 831.
92. Id. at 566, 372 A.2d at 832.
94. Id. at ___, 375 A.2d at 61.
95. Id. at ___, 375 A.2d at 60-61.
96. Id. at ___, 375 A.2d at 61.
97. Id. at ___, 375 A.2d at 61. See note 86 supra. For the text of rule 1100(d)(1), see note 2 supra.
listed every sixty days, and reports are required, on the record, by those charged with the responsibility of locating missing defendants. These reports on the activities to locate the missing defendant during the period insure a record from which due diligence can later be judged, while at the same time prodding into action those charged with the responsibility for apprehending the missing individual.

B. *Due Diligence By The Commonwealth*

It is the responsibility of the prosecution to bring an accused to trial within 180 days. In balancing the speedy trial demands against the need for adequate trial preparation, section (c) of rule 1100 affords some flexibility. However, a commonwealth application for additional time under this section can only be granted after the commonwealth has demonstrated that, despite "due diligence" on its part, an extension of time is necessary. Notwithstanding section (c)’s rather clear language, two distinct problems have arisen under it. First, what is "due diligence" and second, who is the commonwealth?

Due diligence should consist of a reasonably earnest and steady effort by the prosecution to get its case to trial. The appellate courts have not yet fully defined the phrase. In *Commonwealth v. Mayfield,* the Pennsylvania Supreme Court set forth a rather strict standard by saying that due diligence requires the exercise of the "highest standards of professional responsibility." Precisely what the highest standards are can only be determined on a case by case basis. As vague as that definition may be, the one thing that is clear is that the Pennsylvania Supreme Court is insisting that close to every effort be made to bring the case to trial within 180 days, in conformance with the purpose of the rule.

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98. This procedure was instituted by verbal order of Judge Marshall.
100. Rule 1100(c) states:
At any time prior to the expiration of the period for commencement of trial, the attorney for the Commonwealth may apply to the court for an order extending the time for commencement of trial. A copy of such application shall be served upon the defendant through his attorney, if any, and the defendant shall also have the right to be heard thereon. Such application shall be granted only if trial cannot be commenced within the prescribed period despite due diligence by the Commonwealth. Any order granting such application shall specify the date or period within which trial shall be commenced.

PA. R. CRIM. P. 1100(c) (emphasis added).
101. See text accompanying notes 89–97 supra.
103. 469 Pa. at 222, 364 A.2d at 1349.
This attitude was highlighted in Commonwealth v. Martin. Martin had a complaint lodged against him in Lycoming County at a time when he was incarcerated in Bradford County, a fact known to the Lycoming prosecutor. No effort was made to bring him into Lycoming County for four months. Upon a motion to extend under rule 1100(c), the commonwealth claimed that the defendant had been “unavailable” while in Bradford County. The court did not agree and held that the prosecution should have made early efforts to have Martin brought into the jurisdiction. Measured by the high standards of Mayfield it is apparent that the prosecutor did not meet his professional responsibility when he failed to move for Martin’s return.

The highest degree of professional responsibility does not require clairvoyance, however, as is illustrated by the almost farcical factual situation in Commonwealth v. Clark. Clark was on bail awaiting trial when, unbeknown to the prosecution, he was arrested on a second unrelated charge and committed to the county jail. At the time the initial case was called for trial, the prosecutor advised the court that Clark was a fugitive, even though, at that very time, he was residing in the prosecutor’s county jail. The court sent the case back for a further hearing, noting that the mere fact that a defendant was in jail within the county at the time his case was called does not mean he was “available.” As the court said, he could have been hiding himself in some crevice of the system, and failure to find him under those circumstances would not violate the “highest degree of professional responsibility” standard.

A case close to Clark is Commonwealth v. Woodson. In Woodson, the defendant was in the county jail at the same time the

105. Id. at 410-11, 371 A.2d at 904.
106. Id. at 411, 371 A.2d at 904.
107. Five days before the expiration of the 180 day period, the commonwealth filed for an extension. Id. at 409, 371 A.2d at 903-04. The commonwealth claimed it could not locate the defendant and could not try him, if found, until ten days after arraignment. Id. at 409, 371 A.2d at 904, citing PA. R. CRIM. P. 317(b). Defendant refused to waive ten day arraignment rule. 246 Pa. Super. Ct. at 410., 371 A.2d at 904. The court granted the commonwealth an extension. Id. Defendant was convicted and appealed to the superior court. Id. The superior court reversed the lower court and discharged the appellant, Id. at 412, 371 A.2d at 905.
110. Id. at ___, 374 A.2d at 1381.
111. Id.
112. Id. at ___, 374 A.2d at 1382. On remand, the question for determination is when did the prosecutor become aware of the defendant’s whereabouts. Id. Once the prosecutor becomes aware of defendant’s location, the defendant cannot be said to be “unavailable.” Id.
prosecutor was reporting him as a fugitive to the court. In Woodson, however, unlike Clark, the court found that the failure on the part of the prosecutor to know this was attributable to “internal disarray” of the prosecutor’s office and thus the prosecutor’s ignorance was not grounds for an extension.

From the cases already decided, it does appear clear that the appellate courts will require those responsible to utilize available technology, e.g., fingerprint checks, N.C.I.C., and computerized criminal extracts. A failure to do so would be exercising less than the “highest degree of professional responsibility” and, consequently, would not be “due diligence.”

A more vexing question than what constitutes due diligence is who is the “Commonwealth?” Historically, moving a case to trial has been within the control of the district attorney. Logically then, rule 1100, whose main thrust is expediting cases to trial, should be directed to the prosecution; the “Commonwealth” referred to in rule 1100(c) was obviously intended to mean the prosecution. Two early decisions by the Pennsylvania Superior Court put the identity of the “Commonwealth” in issue. In Commonwealth v. Shelton, the prosecutor did not move for an extension before the time period prescribed by rule 1100 had elapsed. The case had not been scheduled for trial within the period because the trial court could not resolve pretrial motions fast enough. Because the delay was not attributable to the prosecution, the trial court reasoned that it was excludable time, denied the defendant’s motion to dismiss, and permitted interlocutory appeal. The Pennsylvania Superior Court, possibly feeling that a loophole in rule 1100 was beginning to develop, observed that it made no difference whether the delay was occasioned because of the prosecutor or because of the judiciary. So long as the delay was not of the defendant’s making, the court reasoned that he was entitled to a dismissal if not brought to trial.

114. Id. at __, 375 A.2d at 376.
115. Id. at __, 375 A.2d at 375.
116. The National Crime Information Center (N.C.I.C.) is a data bank which cooperates with all police departments throughout the country, storing and providing information on fugitives, stolen vehicles and other identifiable property.
118. PA. R. CRIM. P. 1100(c). For the text of this section, see note 2 supra.
121. Id. at 202, 361 A.2d at 877. The 270 day limit was applicable in Shelton under rule 1100(a)(1) since the written complaint was filed on January 3, 1974. Id. at 198, 361 A.2d at 874. For the text of rule 1100(a)(1), see note 2 supra.
122. See id. at 199–200, 361 A.2d at 875.
123. Id. at 207, 361 A.2d at 879.
within the prescribed period. Clearly, the court viewed the term "Commonwealth" in a broad sense to include the judiciary. *Shelton* was appealed to the Pennsylvania Supreme Court.  

Paralleling *Shelton* was the case of *Commonwealth v. Mayfield*. In *Mayfield*, the prosecutor had asked for an extension prior to the expiration of the rule 1100 run date. The reason for his request was the court administrator’s inability to schedule trial within the 180 day period. Before the extension request was heard, 180 days had elapsed and defendant filed a motion to dismiss. The trial court granted an extension to the prosecution and denied the defendant’s motion. Enlarging upon its previous *Shelton* ruling, the Pennsylvania Superior Court reversed the trial court and held that not only was judicial delay not excludable time, but it could not even be the basis for a timely extension request.  

*Mayfield*, too, was appealed to the Pennsylvania Supreme Court, which handed down its decisions on both *Shelton* and *Mayfield* on the same day. The two supreme court decisions have to be read together. When this is done, they provide the following instructions to the trial courts:

1. Judicial delay is not excludable from the rule 1100 period.  
2. Although not excludable, judicial delay can be the basis for a motion to extend the run date, if filed within the rule 1100 period.  
3. From *Mayfield* on, for judicial delay to be the basis of an extension, there must be a showing on the record that the delay was justified.

Even before *Mayfield* and *Shelton* were decided by the supreme court, it was apparent that it was the trial court’s responsibility to control the criminal calendar. The Pennsylvania Superior Court, in *Commonwealth v. Coleman*, made it abundantly clear that the
trial court is obliged to change its procedures to comply with the requirements of rule 1100.135

In Philadelphia, the responsibility has been accepted and substantial administrative personnel, computer equipment and programming have been committed to the task of following cases from their inception. The homicide calendar judge hears all rule 1100 matters dealing with homicide cases. Other judges hear such motions on all other criminal cases. An estimate of time for handling of these matters in Philadelphia alone is sixty to seventy-five judicial hours per week.136 By the results indicated in the statistics set forth earlier,137 the hours are well spent.

What constitutes “Commonwealth” in relation to the speedy trial problems is obviously an evolving concept. Judicial delay, initially believed to be outside the purview of the sanctions imposed by the rule, has now been moved into the orbit of the rule.138 As long as the delay is not on the part of the defendant himself, delay by any other component of government inures to the defendant’s benefit.

VI. UNAVAILABILITY OF THE DEFENDANT OR HIS ATTORNEY

The appellate courts have been extremely consistent in maintaining that a defendant has no duty to bring himself to trial;139 moving the case to trial is the function of the prosecutor and the court.140 Nevertheless, rule 1100 recognizes that there are situations where, despite the diligent efforts of the prosecutor and the court, there can be no prompt trial because the defendant is unavailable.141

Where the defendant or his attorney is unavailable, there is no need to move for an extension of the 180 day period. The time of

135. Id. at 454, 361 A.2d at 872.
136. This estimate is based on the assignment of judicial manpower necessary to handle rule 1100 matters in the homicide felony-jury and felony-nonjury program in Philadelphia.
137. See Table 1 and text accompanying notes 39-42 supra.
138. See text accompanying notes 131-33 supra.
140. See notes 99 & 117 and accompanying text supra.
141. Rule 1100(d) states:

In determining the period for commencement of trial, there shall be excluded therefrom such period of delay at any stage of the proceedings as results from:

(1) the unavailability of the defendant or his attorney; (2) any continuance in excess of thirty (30) days granted at the request of the defendant or his attorney, provided that only the period beyond the thirtieth (30th) day shall be so excluded.

unavailability is excluded ipso facto from the computation. Be this as it may, this portion of the rule has spawned its share of cases dealing with what constitutes unavailability.

Clearly, flight to avoid prosecution is a form of unavailability. This is not to suggest that the commonwealth need not exercise diligence in trying to apprehend the fugitive. Likewise, a defendant or his counsel is considered unavailable if either is engaged in another trial at the time the case is called for trial. The unavailability of a codefendant or his counsel does not provide an excludable period of time unless there is affirmative evidence on the record that the defendant or his attorney agreed to the delay. The reason for this is that the right to speedy trial is a personal one and the commonwealth could sever the cases for trial. Although the time during which the codefendant is unavailable is not excludable, it can be the basis for an extension.

Interestingly enough, “no counsel” is not equivalent to “unavailable counsel.” This is so because it is a court function to see that the defendant has counsel when he is unable to obtain counsel in his own behalf. Although no case has arisen on this specific point, the failure of a financially able defendant to hire counsel should not be construed as “unavailable counsel” for rule 1100 purposes. Even in that situation, the court would presumably be under a duty to appoint counsel to keep the defendant from frustrating the speedy trial mandate.

An infrequent but difficult problem for a trial judge under rule 1100 is unavailability because of incompetency. Incompetency of the

144. See notes 83-116 and accompanying text supra.
148. See cases cited note 145 supra.
151. Courts obviously have the power to appoint counsel or even additional counsel. That power is not dependent upon the indigency of the defendant. Although it is an open question, there may be a duty to appoint counsel where a defendant’s speedy trial right might otherwise be frustrated. Cf. Faretta v. California, 422 U.S. 806, 834 n.46 (1975).
defendant has raised an anomalous situation — while on one hand, he must be given a speedy trial, so long as he is incompetent he can be given no trial at all.\footnote{152}

Subject to the limiting provisions of the Mental Health and Procedures Act,\footnote{153} all that the system can do is wait until such time as the defendant becomes competent to stand trial. After a suggestion of incompetency, the court may order an examination of the defendant and, after a hearing resulting in a finding that defendant is incompetent, have the defendant committed to an appropriate facility for treatment.\footnote{154} A fifteen year delay has withstood a speedy trial attack under these circumstances.\footnote{155}

An area of some concern to the trial judge is the interim period between the suggestion of defendant’s incompetency and its official determination. This period encompasses the initial suggestion of incompetency, a study of the individual, and an evidentiary hearing.\footnote{156} It is not unusual for this series of events to take ninety days or more before there is a resolution of the competency question. Since the defendant has not been declared incompetent during these procedures, the speedy trial time period continues to run. If he is ultimately declared incompetent, the rule 1100 problem is avoided since he was obviously unavailable \textit{ab initio}. If the court finds him competent, a real rule 1100 problem exists since the rule makes no provision for excluding the examination period.\footnote{157}

The ABA Standards, on the other hand, enumerate as one of the excludable periods of time delay resulting from proceedings concerning examination and hearing on competency as well as any period of actual incompetency.\footnote{158} This portion of the ABA Standards would be preferable to rule 1100 from the viewpoint of calendar administration. It would obviate the motions and hearings for extensions of the rule 1100 run date in these instances.

\footnotesize{


155. \textit{Id.} In McQuaid, the court found that a 15 year delay, due to defendant’s incompetency, did not violate the defendant’s right to a speedy trial. \textit{Id.} at 518–22, 347 A.2d at 475–77.


157. See \textsc{Pa. R. Crim. P.} 1100(d). For the text of rule 1100(d), see note 2 supra.

158. See ABA Standards, \textit{Speedy Trial} § 2.3(a) (1968).}
In light of the experience with the unavailability exclusion, it behooves the prosecution to request a timely extension in any questionable case, rather than simply relying on an automatic exclusion.

VII. NEW TRIALS

It is, of course, entirely logical that less time be given to effecting the commencement of a retrial than the trial. After all, both sides have tried the case on a previous occasion. Consequently, the rule directs that where a new trial has been ordered, it shall commence within 120 days, rather than 180 days, after the remand.159

As clear as the language is, a mechanical difficulty in applying the rule has developed. The trial court is generally unaware of the remand date as recorded on the appellate court docket until the file is physically returned to the trial court. Experience has shown that this can take as long as several weeks. This weak link effectively robs the criminal justice system of whatever time it takes to transmit the files. It further shortens an already shortened period. Even though the resultant delay is attributable to the lack of administrative efficiency, it is an unanswered question whether the failure to prod the administrative personnel of the appellate court to return the files to the trial court with dispatch is a lack of due diligence on the part of the commonwealth. In light of Mayfield and Shelton, however, it may be that administrative delay cannot be the basis for a motion to extend the time period.160

A simple solution would be an amendment to the rule setting as the commencement of the period the date on which the file is returned to the trial court rather than the date of the remand by the appellate court. This solution, however, would have the effect of taking some of the pressure off the criminal justice system to move with dispatch at every level. The Pennsylvania Supreme Court has shown a reluctance to alleviate any of this pressure and seems to be committed to the management principle of letting the workload push the people.161

Even in situations where the trial court itself grants a new trial,162 there is time slippage because of the mechanical difficulties of file transfers and effecting notice of the granting of the new trial.

159. PA. R. CRIM. P. 1100(e). For the text of rule 1100(e), see note 2 supra.
160. For a discussion of Shelton and Mayfield, see notes 121-25 & 126-29 and accompanying text supra.
161. See id.
162. In Philadelphia, mistrials are treated as the equivalent of trials granted by the trial court for rule 1100 purposes and the retrial period is set for 120 days.
In those jurisdictions where the original trial judge would hear the case again, there is no problem of commencement of the retrial period. The judge knows when he granted the new trial and can easily begin the count. However, where the case is to be reassigned through a calendar room or other administrative entity, it may be weeks before information is received concerning the granting of the new trial.

To expect rule 1100 to make some accommodation for what can only be described as inadequate intra-office communication would be expecting too much. Lack of such accommodation means that the prosecution and the court must be extremely alert in their case management of retrials.

VIII. CONTINUANCES BY DEFENDANTS

Time is, of course, critical to defense trial preparation. Cases vary in complexity and more problems arise in some than others. To accommodate these preparation contingencies, rule 1100(d)(2) allows that the 180 day period will not include "any continuance in excess of thirty (30) days granted at the request of the defendant or his attorney, provided that only the period beyond the thirtieth (30th) day shall be so excluded."163

There is nothing in either the rule 1100 provisions or case law to suggest that the continuances referred to in subsection (d)(2) can be had without defendant first showing some good cause. Even with this prologue, it is still difficult to discern the rationale behind the "free" thirty-day continuance. Until this year, most trial courts accumulated continuances sought by the defense. Each thirty-day continuance awarded defendant was to be free in the sense that, as long as the continuance was thirty days or less, the run date was not automatically extended.167

Thus, under Shields, the earlier example of three continuances of

164. This conclusion is based on Judge Marshall's experience as calendar judge since October 1976.
166. Id. at ___ n.2, 371 A.2d at 1334 n.2.
fifteen days each would result in no excludable time. The rule 1100 clock would continue to run during the full term of each of the three continuances. Shields, therefore, makes it incumbent upon the prosecution to ask for an extension of the time period where the defendant’s thirty-day continuances bring the prospective trial date dangerously close to the run date. That motion, as is true of all prosecution requests for extension, must be made within the run date.\textsuperscript{168} There is no provision for the granting of an extension on “nunc pro tunc” applications.\textsuperscript{169}

Other jurisdictions have no “free thirty-day continuance” for the defendant. Ohio provides as excludable periods “any continuance granted on the accused’s own motion and the period of any reasonable continuance granted other than upon the accused’s own motion.”\textsuperscript{170} Similarly, the federal rule for speedy trials provides that all continuances sought by the defense are excludable from the time period of the rule.\textsuperscript{171} These jurisdictions, unlike Pennsylvania, are in conformity with the ABA Standards relating to speedy trial which make no provision for such a “free” thirty-day continuance.\textsuperscript{172}

While such a liberal excludable time period provision, as in the ABA Standards, could circumvent the intent of the prompt trial rule and interfere with the court’s ability to control the movement of case loads, such a provision does reduce the motion and application activity necessary each time the run date is sought to be extended. Assuming that all continuances are reasonable or they would not be granted, the ABA Standards treat the prosecution and the defense more equally.

Even though this free continuance section of rule 1100 is an enigma and its rationale has never been articulated, it does serve as a further demonstration of the determination of the Pennsylvania Supreme Court that trials be held within the period prescribed by rule 1100.

IX. Conclusion

There is no need to question the theorem that justice delayed is justice denied. By the same token, hasty justice is not a preferred alternative to delayed justice.\textsuperscript{173} Rule 1100 is an attempt to expedite


\textsuperscript{170} Ohio Rev. Code Ann. § 2945.72(H) (Page 1975).


\textsuperscript{172} See ABA Standards, Speedy Trial §2.3(c) (1968).

\textsuperscript{173} For a discussion of court congestion and possible solutions, see Comisky, Declare an End to Judicial Quotas, 36 Fed. B.J. 30 (1977).
the processing of criminal cases but not at the expense of discouraging the exercising of considered and deliberate judgment by prosecutors, defense attorneys and the courts.

The fact that the rule still has some rough edges and is not as finely honed as the Rule in Shelley's Case is understandable. Rule 1100 has been held to the judicial whetstone for a short time only. During this short time, however, the rule has proven itself prophylactic in that it 1) insures against prosecutor's opting for the political expediency of summary punishment — by keeping an accused in jail or under the stress of unresolved criminal charges — rather than facing the embarrassment of a sure acquittal;\textsuperscript{174} and 2) impedes the defendant from thumbing his nose at society with an endless stream of continuances.

The rule, without question, has placed more responsibility for criminal calendar management on the trial courts than they have heretofore had; however, statistics and experience demonstrate that the responsibility has not been misplaced.

\textsuperscript{174} For a discussion of the facts of Commonwealth v. DiPasquale, 431 Pa. 536, 246 A.2d 430 (1968), disclosing prosecutorial tactics, see note 34 \textit{supra}. 