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The Burden of Time: Government Negligence in Pandemic Planning as a Catalyst for Reinvigorating the Sixth Amendment Speedy Trial Right

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THE BURDEN OF TIME: GOVERNMENT NEGLIGENCE IN PANDEMIC PLANNING AS A CATALYST FOR REINVIGORATING THE SIXTH AMENDMENT SPEEDY TRIAL RIGHT

SARA HILDEBRAND* AND ASHLEY CORDERO**

ABSTRACT

In March 2020, due to public safety concerns posed by the virulent COVID-19 virus, many of this country's courthouse doors closed to the public. Court closure was not novel—courthouses have closed on numerous occasions in our country's history due to fires and natural disasters. An avian flu pandemic scare in the mid-aughts prompted the federal government and national state court organizations to release guidelines, urging courts to plan for continued operations during a pandemic, should one arise. Despite these warnings, many courts found themselves without a plan for continued operations when the COVID-19 pandemic began to rage. Even during a pandemic, courts bear a responsibility to honor the constitutional rights of those with cases before them, including the Sixth Amendment right to a speedy trial. Courts' failure to plan to safely hold in-person jury trials during this pandemic forced shut-downs, which led to trial backlogs. Hundreds of thousands of criminally accused people languished in or out of pretrial detention for years, with the stress and anxiety of a criminal accusation hanging over their heads, while they awaited their jury trial.

Under currently controlling precedent, pretrial delay caused by a court's negligent disregard of reasonably foreseeable circumstances is

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weighed only slightly against the government. What is worse, the burden placed on claimants to establish actual prejudice to their ability to present a trial defense makes it nearly impossible to prevail on a Sixth Amendment speedy trial claim. Extended pretrial delays occasioned by courts' pandemic planning failures brings to light weaknesses in the analytical framework related to Sixth Amendment speedy trial claims and emphasizes the need to reinvigorate that right. This Article seeks to revive a decades-long scholarly conversation about the need to inject meaningfulness in the Sixth Amendment Speedy Trial Clause through a jurisprudence that serves the original aims of the speedy trial right and suggests a novel framework for doing so.

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INTRODUCTION

IN early February 2020, Mr. Davis¹ joined thousands of others near the steps of the Colorado State Capitol to protest anti-Black police violence. Mr. Davis was among many protesters who refused a police order to leave the capitol steps and were arrested and charged with obstructing a peace officer, a misdemeanor in Colorado's state courts.² The next day, Mr. Davis appeared before a county court judge for an arraignment on that charge. The court mentioned that Mr. Davis had a constitutional right to a speedy trial but failed to elucidate its contours.

After this advisement, Mr. Davis learned that he had two options: he could accept a pre-trial plea offer from the government or set his case for trial. Accepting of a plea offer would have required him to plead guilty to a crime he believed he did not commit, to which he was fundamentally and staunchly opposed. At his next court appearance, Mr. Davis entered a not guilty plea and set his case for a jury trial on June 15, 2020. Little did Mr. Davis know, the COVID-19 pandemic would bring life as he knew it—and proceedings in his case—to a screeching halt.

In March 2020, due to public safety concerns posed by the virulent COVID-19 virus, many of this country's courthouse doors closed to the public. Court closure was not novel—courthouses have closed on numerous occasions in our country's history due to fires and natural disasters such as floods caused by hurricanes. Moreover, an avian flu pandemic scare in the mid-aughts prompted the federal government and national state court organizations to release guidelines urging courts to plan for continued operations during a pandemic, should one arise. Despite these warnings and detailed guidance, many courts found themselves with no plan for continued in-person jury trials when extreme safety precautions were necessitated by the COVID-19 pandemic. However, even during a pandemic, courts bear a responsibility to honor the constitutional rights of those with cases before them, including the Sixth Amendment right to a speedy trial.

Due to its planning failures, the Court in which Mr. Davis's case was pending halted in-person jury trials entirely for a time and did not resume in-person jury trials until the summer of 2021. This period without jury trials caused a significant backlog on the court's jury trial calendar. As a result, Mr. Davis's misdemeanor case did not go to trial in December 2021, over twenty-one months after he was arrested.

The long months waiting for a case resolution during the pandemic caused Mr. Davis great strife. He had to appear in court on six different occasions, only to have his trial continued each time due to pandemic-

1. Mr. Davis is a fictional character similarly situated to many criminally accused people who find themselves stuck in a type of purgatory in the pretrial period due to delays caused by court negligence in relation to the COVID-19 pandemic.

2. See COLO. REV. STAT. § 18-8-104(1)(a) (2021).

related backlogs; each time he went to court, he missed work, and in total lost out on twenty-four hours of pay. His boss censured him for these absences and threatened to fire him for additional absences. Without his job, Mr. Davis cannot support himself and his family; as the family's only breadwinner, there is great pressure on him to have a means of support. Despite his repeated demands of the court that his trial be held as quickly as possible, Mr. Davis continues to live with the stress and anxiety of a criminal accusation and all that comes with having a pending criminal case.

Colorado law says a "speedy trial" in county court is a trial held within six months of entry of a not guilty plea.³ But for two reasons, Mr. Davis, whose trial went to trial over twenty-one months after he entered a not guilty plea, would likely not succeed on a Sixth Amendment speedy trial claim. First, the government's negligence in its failure to plan for continued in-person jury trials would barely be considered in a reviewing court's analysis. Second, Mr. Davis would have difficulty proving that his trial defense was actually prejudiced by the long pretrial delay.

The Speedy Trial Clause rooted in the Sixth Amendment was originally intended to hold the government accountable for overreach in its failure to timely bring cases to trial and to facilitate accurate determinations of guilt or innocence at trial. This Article argues that over time, United States Supreme Court jurisprudence has eroded the Sixth Amendment right to a speedy trial such that today the Speedy Trial Clause does not serve as a meaningful check on government overreach or government negligence. To restore the Constitutional speedy trial right, this Article argues that after a claimant establishes that a pretrial delay was presumptively prejudicial to his right to mount a trial defense, the burden should shift to the government to prove that it did not violate the accused's speedy trial right under the current factors articulated in *Barker v. Wingo*.⁴ It also argues that under the *Barker* factor related to reason(s) for pretrial delay, courts should more heavily weigh government negligence such as negligent failure to plan for continued court operations during a pandemic on balance with the other *Barker* factors.

Part I examines the historical purposes of the Constitutional speedy trial right and the individual and institutional interests served by the Speedy Trial Clause. Part II relies on the historical backdrop set forth in Part I to critique the United States Supreme Court's current analytical framework, first laid out in *Barker*. This Part also unpacks the particularly pronounced shortfalls of the current burden scheme, under which government negligence causing lengthy pretrial delay does not significantly factor into Speedy Trial claim outcomes. Based on these critiques, Part III

3. *Id.* § 18-1-405.

4. 407 U.S. 514, 530–31 (1972) (the four *Barker* factors are length of pretrial delay, the reason(s) for pretrial delay, the defendant's pretrial assertion of their right to a speedy trial, and prejudice to the defendant due to pretrial delay).

argues that to breathe life into the Speedy Trial Clause, after an accused demonstrates they were presumptively prejudiced by lengthy pretrial delay, the burden should shift to the government to prove that the accused's speedy trial right was not violated under the *Barker* factors. It also argues that courts should more heavily weigh government negligence that causes presumptive pretrial prejudice when weighing the *Barker* factors.

I. HISTORICAL UNDERPINNINGS OF THE SIXTH AMENDMENT SPEEDY TRIAL CLAUSE

The speedy trial right was originally intended to protect a person from prolonged de facto punishment—extended accusations that limit their liberty and besmirch their good name—before they have had a full and fair chance to defend against the accusations. The right was additionally intended to ensure that the accuracy of trial outcomes would not be undermined by the government holding the accused in extended pretrial detention such that key exculpatory evidence is lost. The Framers included the speedy trial right in the Sixth Amendment nearly by default, based on a longstanding history tracing back to the twelfth century.⁵

The Assize of Clarendon, a series of criminal procedure ordinances that King Henry of England promulgated in 1166, included the first historical reference to a speedy trial.⁶ A plain reading of the relevant portion reveals concern about unavailability of Justices to travel “quickly enough” to a jurisdiction in which an accused had been detained by law enforcement.⁷ To address this concern, English nobles promulgated procedures were promulgated which required law enforcement to notify the court of an arrest and to then bring the accused and men to “bear record” before the court as directed by the Justices so they could “do their law.”⁸

The Magna Carta, a 1215 charter between King John of England and nobles, was the first enforceable limitation on the king's power.⁹ In fact,

5. See *Speedy Trial*, 68 J. CRIM. L. & CRIMINOLOGY 543, 543 (1977).

6. In pertinent part, the Assize of Clarendon reads:

And when a robber or murderer or thief, or harbourers of them, shall be taken on the aforesaid oath, if the Justices shall not be about to come *quickly enough* into that county where they have been taken, the sheriffs shall send word to the nearest Justice through some intelligent man, that they have taken such men; and the Justices shall send back word to the sheriffs where they wish those men to be brought before them: and the sheriffs shall bring them before the Justices. And with them they shall bring, from the hundred or township where they were taken, two lawful men to bear record on the part of the county and hundred as to why they were taken; and there, before the Justice, they shall do their law.

ASSIZE OF CLARENDON ¶ 4 (1166) (emphasis added), <https://avalon.law.yale.edu/medieval/assizecl.asp> [<https://perma.cc/5Q5L-PS3T>].

7. *Id.*

8. *Id.*

9. See Claire Brey & Julian Harrison, *Magna Carta: An Introduction*, BRIT. LIBR. (July 28, 2014), <https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction> [<https://perma.cc/MAX6-M7HT>]. The Magna Carta established that no

the Magna Carta imposed several limitations upon the government that made way into the United States Constitution.¹⁰ Namely, it prohibited government seizure of private property without consent, allowed imprisonment only by the lawful judgment of one's equals, and asserted, "To none will we sell or deny of delay right or justice."¹¹ This language is the most often cited as being the direct descendent of the Sixth Amendment's speedy trial guarantee.¹²

As the Constitutional Framers contemplated the liberties to which people of this Nation were to be entitled, they were enamored with the writings of Sir Edward Coke, an English jurist during the Elizabethan and Jacobian eras.¹³ The Framers adopted many of Sir Coke's ideas and codified them the Bill of Rights, including the right to a speedy trial.¹⁴

man, even the king, was exempt from the law, and it therefore became a symbol of liberty for the people. 2 HENRY DE BRACTON, BRACTON ON LAWS AND CUSTOMS OF ENGLAND 33 (Samuel E. Thorne trans. 1968) ("The king . . . [is] under the law, because law makes the king[.]"); Joshua Rozenberg, *Magna Carta in the Modern Age*, BRIT. LIBR. (Mar. 13, 2015), <https://www.bl.uk/magna-carta/articles/magna-carta-in-the-modern-age> [<https://perma.cc/NJ7Q-X47R>]. However, in practice, the Magna Carta was a tool for the property-owning elite to maintain wealth and the status quo through limiting the King's power. See *Magna Carta*, NAT'L ARCHIVES (Apr. 26, 2019), <https://www.archives.gov/exhibits/featured-documents/magna-carta> [<https://perma.cc/2KDR-R5VQ>]; Mariel Synan, *What Is the Magna Carta*, HISTORY (Aug. 31, 2018), <https://www.history.com/news/what-is-the-magna-carta> [<https://perma.cc/8TT7-DZ8M>].

10. Breyer & Harrison, *supra* note 9.

11. *Magna Carta Translation*, NAT'L ARCHIVES & RECORDS ADMIN. <https://www.archives.gov/files/press/press-kits/magna-carta/magna-carta-translation.pdf> [<https://perma.cc/QX5U-WA2D>] (last visited Mar. 7, 2022).

12. *Amdt6.2.1.1 Right to a Speedy Trial: Historical Background, Constitution Annotated*, CONST. ANN., https://constitution.congress.gov/browse/essay/amdt6_2_1_1/ [permalink unavailable] (last visited Nov. 19, 2021).

13. See M.E. Bradford, *The Best Constitution in Existence: The Influence of the British Example on the Framers of Our Fundamental Law*, 27 BYU STUD. 51, 53 (1987). In the *Second Part of the Institutes of Lawes of England*, Sir Edward Coke wrote "[t]hat no man be taken or imprisoned but *per legum terrae*, that is, by Common Law, Statute Law or Custome of England . . . unlesse it be by lawfull judgement, that is, verdict of his equals (that is, men of his own condition) or by the Law of the Land (that is, to speak it once for all) by the due course" EDWARD COKE, *Second Part of the Institutes of Lawes of England*, in 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE VOL. 2 849 (Steve Sheppard ed., Indianapolis Liberty Fund 2003) (footnotes omitted). This language constitutes the most widely accepted declaration of our most fundamental guarantees. See generally *id.* It was Sir Edward Coke who advocated for codification of the Magna Carta's guarantee of speedy relief of justice. See 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE VOL. 1 (Steve Sheppard ed., Indianapolis: Liberty Fund 2003) [hereinafter COKE VOL. 1]. To Sir Edward Coke, to delay trial was to delay justice; he wrote of this principle consistently. See *id.* In 1628, Sir Coke spoke to the House of Commons, where he advocated for the right to limit the "long and unjust detainment of men in prison." Linda S. Popofsky, *Habeus Corpus and "Liberty of the Subject": Legal Arguments for the Petition of Right in the Parliament of 1628*, 41 HISTORIAN 257, 265 (1979).

14. For example, the Virginia Declaration of Rights, promulgated in 1776, served as the template for the Declaration of Independence and many other states' Bills of Rights. *The Virginia Declaration of Rights*, NAT'L ARCHIVES (Sept. 29, 2016),

Before the United States Congress ratified the Bill of many states promulgated their own bills of rights. Some Federalists considered the federal Bill of Rights unnecessary.¹⁵ They recognized the importance of individual liberties but believed the right enumerated in the Bill of Rights were already secured and enjoyed by the people, and that including them in the Constitution would be a mere formality.¹⁶ Anti-federalists wanted to add the Bill of Rights to limit the federal government's powers and enshrine the rights of the people.¹⁷

This belief, that individual liberties were inherent rights that had been handed down from their ancestors and need not be articulated in the law, in fact, colonists generally shared the belief that individual liberties were inherent rights that had been handed down from their ancestors and did not need to be articulated in the law.¹⁸ Specifically, the belief was

<https://www.archives.gov/founding-docs/virginia-declaration-of-rights> [https://perma.cc/K764-UX3G]; see also DEL. CONST. art. I, § 7; MD. CONST., Declaration of Rights, art. 19; PA. CONST., Declaration of Rights, art. I § 9. The Virginia Declaration includes the first codification in the United States of the right to a speedy trial. See John Vile, *Virginia Declaration of Rights*, *The First Amendment Encyclopedia* <https://www.mtsu.edu/first-amendment/article/878/virginia-declaration-of-rights> [https://perma.cc/BGC9-MXKM] (last visited Mar. 3, 2022). Similarly, the Massachusetts Constitution of 1780 stated that “every subject of the commonwealth ought to” obtain justice “promptly and without delay.” MASS. CONST. part I art. XI.

15. NATIONAL ARCHIVES—CENTER FOR LEGISLATIVE ARCHIVES, *Go Inside the First Congress, in CONGRESS CREATES THE BILL OF RIGHTS* 9, https://www.archives.gov/files/legislative/resources/bill-of-rights/CCBR_IIA.pdf [https://perma.cc/LTN4-PFTK] (last visited Mar. 3, 2022) [hereinafter CONGRESS CREATES]. Madison wrote, “the encroachments on particular rights, and those safeguards *which they have been long accustomed to* have interposed between them and the magistrate who exercised the sovereign power: nor ought *we to consider them safe*, while a great number of our fellow-citizens think these securities necessary.” James Madison, *Representative James Madison Argues for a Bill of Rights* (June 8, 1789) in TEACHING AM. HIST. <https://teachingamericanhistory.org/library/document/speech-on-amendments-to-the-constitution/> [https://perma.cc/83N3-MXR2] (emphasis added).

16. CONGRESS CREATES, *supra* note 15, at 9.

17. *Id.* at 13.

18. While exploring the historian debate as to the nuanced origins of the American Revolution is outside the scope of this Article, the authors contend that the Framers’ believed that Parliament violated their inherited rights; economic and ideological arguments support this contention. For leading scholars on both of these viewpoints see, e.g., CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913) (for economic argument); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 43 (1967) (for ideological argument); see generally GERALD HORNE, *THE COUNTER-REVOLUTION OF 1776: SLAVE RESISTANCE AND THE ORIGINS OF THE UNITED STATES OF AMERICA* (2014) (for a third perspective that the real revolutionary ideology emerged from the slave resistance in the colonies); THE FEDERALIST NO. 40 (James Madison); Matthew Shaw, *Early America and Magna Carta*, BRIT. LIBR. (Mar. 13, 2015), <https://www.bl.uk/magna-carta/articles/early-america-and-magna-carta> [https://perma.cc/Q4KE-6BWD]. Many American colonialists viewed themselves as subjects of the English crown who should enjoy rights secured by God and Parliament. See Shaw, *supra*; see also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[T]hat they are endowed by their Creator.”). The Magna Carta, which was borne of grievances of property-owning white men, against what they believed to

founded on the notion that the king and government were only granted power by the people under the law, which is promulgated by the people.¹⁹ As one historian described the American Revolution, “The Americans saw themselves as very conservative rebels They were trying to preserve their constitutional rights, not to overthrow a government.”²⁰

In the end, the states ratified the Bill of Rights to emphasize the importance of “guard[ing] society against the oppression of its rulers” and to limit the power of the federal government “to pursue its enemies.”²¹ Although the speedy trial right was included in the Bill of Rights without opposition, there was little discussion among the Framers about its practical meaning or what recourse an individual would have for a violation of that right. Accordingly, courts are left with little guidance from its drafters on the meaning of the Speedy Trial Clause.²²

For centuries, courts have endeavored to delineate the meaning of the words in that Clause. In 1880, the Supreme Court of then-territory Montana held that the government violated a man’s Sixth Amendment

be a tyrannical form of government oppression for infringing on what they believed to be their inherent rights, was seen as higher than the law of any King. See Shaw, *supra* (“[The Declaration of Independence] listed a set of rights due to them, by dint of their birth and English heritage[.]”); THE DECLARATION OF INDEPENDENCE, *supra* (“[T]hat they are endowed by their Creator.”); see also Anthony Iaccarino, *The Founding Fathers and Slavery*, BRITANNICA, <https://www.britannica.com/topic/The-Founding-Fathers-and-Slavery-1269536> [<https://perma.cc/EFX3-6P3S>]; Dave Roos, *How Did Magna Carta Influence the U.S. Constitution*, HISTORY (Sept. 30, 2019), <https://www.history.com/news/magna-carta-influence-us-constitution-bill-of-rights> [<https://perma.cc/3TTK-BTX9>] (discussing the colonialists’ reverence for the Magna Carta and its symbolism of inherited rights).

19. See COKE VOL. 1, *supra* note 13, at 102.

20. Roos, *supra* note 18 (internal quotation marks omitted) (quoting John Kaminski). James Madison conveyed this argument in the Federalist No. 40: “The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation.” THE FEDERALIST NO. 40, *supra* note 18.

21. See THE FEDERALIST NO. 51 (James Madison):

Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.

Id.; see also Madison, *supra* note 15; George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 179 (2001) (“[T]he goal of making it as difficult as possible for the new federal government to pursue its enemies.”). The authors of this Article acknowledge that similar to the Magna Carta, the Bill of Rights only applied to white men at the time. And as such, when Madison refers to rights already enjoyed by the people, he is referring only to a select group of people. See Madison, *supra* note 15.

22. Early state supreme courts expressed this confusion: “[b]ut what is to be understood by a *speedy trial* is the embarrassing question now to be determined.” United States v. Fox, 3 Mont. 512, 517 (1880) (internal quotation marks omitted) (quoting *Ex parte Stanley*, 4 Nev. 114, 116 (1868)).

speedy trial right.²³ Noting the dearth of cases involving a claimed violation of that right, the *Fox* court looked to the common law for guidance on its contours.²⁴ “[W]hether in prison or on bail,” an accused person “has the right to demand diligence on the part of the [government]” so they “may speedily know whether he is to be convicted or acquitted.”²⁵ The *Fox* court asserted, “the law will not tolerate any neglect or laches on the part of the prosecution in bringing a defendant to trial[,]” especially where the “person charged with crime is in prison demanding a trial, and sufficient time has elapsed since the finding of the indictment, to enable the prosecution, in the exercise of reasonable diligence, to be ready for trial.”²⁶ Accordingly, “after the lapse of a reasonable time in which to get ready, [a party seeking a trial continuance] must first relieve themselves from any neglect or laches before they can ask for a postponement of the trial.”²⁷ Where a party cannot establish their exercise of reasonable diligence, “the opposite party may insist upon a trial, even though such trial must necessarily result in the acquittal of a person charged with crime.”²⁸ Based on common law, the court noted:

By the common law the jails are cleared twice in each year in order to secure to the prisoners therein confined a speedy trial, and if by the neglect of the prosecution to prepare for trial they

23. The *Fox* court asserted:

The prosecution was guilty of laches and a neglect of duty, in so failing and refusing to prosecute, and such failure was a denial to the defendant of his constitutional right to a speedy trial. The government of the United States cannot cast a man into prison and then fold its arms and refuse to prosecute.

Fox, 3 Mont. at 519–20.

24. *Id.* at 517. In *Fox*:

[A] whole term of court passed without any attempt or effort whatever on the part of the prosecution to bring the case to a trial. The indictments were found at the November term, 1879, and two trials were had at that term, which resulted in mistrials. At the ensuing March term the prosecution failed and neglected to bring the cases to trial, and made no effort whatever in that direction. The government entirely failed to provide any means for paying the expenses of serving process, and entirely neglected and refused to procure the attendance of witnesses on the part of the prosecution. It did no more than as though these indictments had not been pending against the defendant.

Id. at 519. The *Fox* court noted that in another case, *Ex parte Stanley*, the court discussed *speedy trial* in the following terms:

[Speedy trial does not] mean a trial immediately upon the presentation of the indictment or the arrest upon it. It simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a reasonable time for preparation.

Id. at 517–18 (quoting *Ex parte Stanley*, 4 Nev. at 116).

25. *Id.* at 517.

26. *Id.*

27. *Id.*

28. *Id.*

are imprisoned for a longer period than the law contemplates, this would be the denial of a speedy trial.²⁹

Because the case was not tried within the term and the prosecution could not “relieve themselves from any neglect or laches” or establish its exercise of reasonable diligence to secure a trial continuance, the court found a speedy trial violation and discharged the petitioner from prison.³⁰

In the 1905 case,³¹ the United States Supreme Court first considered a case involving a claimed Sixth Amendment speedy trial right violation. The *Beavers* opinion simply affirmed that the Sixth Amendment speedy trial guarantee is not governed by absolute parameters, is “necessarily relative,” and “depends upon circumstances.”³² The Court would go nearly seventy years before it articulated a test for courts to employ when considering claimed federal constitutional speedy trial violations.

In 1972, the Court in *Barker v. Wingo*³³ adopted a balancing test that courts employ today when analyzing Sixth Amendment speedy trial claims. Before unpacking courts’ analyses under the *Barker* factors, it is useful to articulate the individual and institutional interests that have been deemed relevant to analysis under those factors.³⁴

A. *Individual Interests Protected by the Speedy Trial Clause*

As the Court discussed the evolution of speedy trial jurisprudence it has articulated individual interests protected by this right. The Court in *Doggett v. United States*³⁵ asserted that the Sixth Amendment speedy trial right significantly protects a criminal defendant’s interest in fair adjudication.³⁶ The *Doggett* Court’s concern with fairness was related to the accuracy (or lack thereof) of trial determinations after a period of extraordinary pretrial delay.³⁷

Oppressive pretrial incarceration is an evil against which the Speedy Trial Clause seeks to protect. Pretrial detention infringes on freedom in the most restrictive way possible during a time when an accused is entitled to the presumption of innocence, the “bedrock[,] axiomatic and elementary principle whose enforcement lies at the foundation of the administra-

29. *Id.* at 516.

30. *Id.* at 517, 519–20.

31. 198 U.S. 77 (1905).

32. *Id.* at 87.

33. 407 U.S. 514 (1972).

34. *Id.*

35. 505 U.S. 647 (1992).

36. *See id.* at 654. The *Doggett* Court expressed concern about the “costs of going forward with a trial whose probative accuracy the passage of time has begun by degrees to throw into question.” *Id.* at 656 (citing *United States v. Loud Hawk*, 474 U.S. 302, 315–17 (1986)).

37. *See id.* One could also interpret “fair adjudication” to include freedom from other evils against which the Constitutional speedy trial right was designed to protect. *Id.* at 559 (Thomas, J., dissenting).

tion of our criminal law.”³⁸ In the Magna Carta, the speedy trial right “was equated with prevention of lengthy pretrial detention.”³⁹ First, this is an evil against which the speedy trial right protects because being jailed during the pretrial period can stymie an accused’s ability to cooperate with their counsel and conduct investigation in their case, both of which are often necessary components of preparing an effective trial defense.⁴⁰ However, courts today tend to weigh lengthy pretrial detention in a defendant’s favor only if its effects were demonstrably, particularly harsh or if the period of pretrial detention was particularly protracted.⁴¹

38. *Betterman v. Montana*, 578 U.S. 437, 442 (2016) (alteration in original) (quoting *Reed v. Ross*, 468 U.S. 1, 4 (1984)).

39. R.F. Dublikar, *The Right To A Speedy Trial: Ohio Follows the Trend*, 43 U. CIN. L. 610, 611 (1974) (internal citations omitted). The United States Constitution’s Framers left few records related to the reasons for inclusion of the speedy trial right in the Bill of Rights. *See id.* at 611 n.14 (“Some American patriots thought the right of speedy trial and other similar rights were so clearly a part of our ‘liberty’ that no Bill of Rights was necessary.” (citing *United States v. Provo*, 17 F.R.D. 183, 196 (D. Md. 1955))).

40. *See Barker v. Wingo*, 407 U.S. 514, 518, 533 (1972) (“[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”).

41. In *United States v. Williams*, for example, a defendant was held in custody for over 400 days awaiting trial. *United States v. Williams*, 557 F.3d 943, 949 (8th Cir. 2009). During that time, he was concerned that he would be recognized as a cooperating witness, which would place him and his family at risk. *Id.* The court noted that “[a]nxiety and concern of the accused are undoubtedly present to some degree in every case. However, that alone does not establish prejudice where . . . the defendant neither asserts nor shows that the delay weighed particularly heavily on him in specific circumstances.” *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Morris v. Wyrick*, 516 F.2d 1387, 1391 (8th Cir. 1975)). In another case, the Wyoming Supreme Court noted:

[T]he kinds of prejudice produced by long delays may be substantial even if the defendant’s ability to defend himself is not impaired. The defendant’s social relations, freedom of movement, and anxiety of public accusation are seriously affected when the delay is prolonged. These effects are precisely the kinds of prejudice that would be difficult for a defendant to demonstrate if he had the burden of proving prejudice.

Berry v. State, 93 P.3d 222, 237 (Wyo. 2004) (quoting *Caton v. State*, 709 P.2d 1260, 1266 (Wyo. 1985)). The court also noted that lengthy pretrial delay may:

[S]eriously interfere with the defendant’s liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty.

Id. (alteration in original) (citing *Moore v. Arizona*, 414 U.S. 25, 26–27 (1973)). In *Berry*, the defendant was held in custody pretrial for nearly two years. *Id.* The court weighed heavily in Mr. Berry’s favor that his extended incarceration necessarily impacted his employment opportunities, financial resources and association. *Id.* It should be noted that if the incarceration is not attributable to the present charge or is due to the defendant’s own acts, then the pretrial incarceration simply is not a factor in establishing prejudice. *See State v. Murchison*, 541 N.W.2d 435 (N.D. 1995); *see also United States v. Williams*, 753 F.3d 626, 634 (6th Cir. 2014)

The speedy trial right is also designed to protect the accused against anxiety and public scorn. Concern with anxiety and public scorn, like pretrial incarceration, is related to the presumption of innocence—it is incongruous with that presumption for an accused person who wishes for their charge to be promptly resolved at trial to suffer a lengthy period of public scorn and suspicion of guilt.⁴² However, the emotional effects caused by public criminal accusation have only weighed meaningfully in a claimant's favor during a lengthy pretrial delay where that accusation has led to public scorn or humiliation, loss of employment, or has had a chilling effect on the exercise of the accused's First Amendment rights.⁴³

Courts' analyses around the prejudice occasioned by pretrial anxiety and scorn turns not on the presence of anxiety or other emotional ills during the pretrial period, but on whether the subjective effect of anxiety on a specific defendant was unduly grievous.⁴⁴ According to Supreme

("[E]ven if he had not been in federal custody, he would have remained in state prison for most, if not all, of that time, due to his conviction for violating probation."); *United States v. McGhee*, 532 F.3d 733, 740 (8th Cir. 2008) (detailing how defendant's release was revoked because he failed drug test and lied under oath, and thus "[a]ny prejudice from pretrial incarceration was attributable to McGhee's own acts"); *Smith v. Commonwealth*, 361 S.W.3d 908, 918 (Ky. 2012) (detailing how for over nineteen months of twenty-month incarceration, defendant had "only himself to blame" because of his violation of conditions of his bond).

42. See John C. Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 ALA. L. REV. 265, 272 (1972).

43. See *Barker*, 407 U.S. at 533 (noting that an accused is "disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility"); see also *Klopfers v. North Carolina*, 386 U.S. 213, 221 (1967).

44. See, e.g., *Griggs v. State*, 367 P.3d 1108, 1131 (Wyo. 2016) (determining defendant's incarceration for all of 411 days delay until trial did not establish prejudice, as defendant "makes no showing that his troubles were more serious than the typical defendant awaiting trial"); *United States v. Black*, 918 F.3d 243, 248–49 (2d Cir. 2019) (stressing that defendants "suffered anxiety occasioned by the government's nearly three-year deliberation over whether to argue that they should be sentenced to death" even where a defendant was also serving a jail sentence in a state case at the time of his pretrial incarceration on the federal case). In *State v. Thomas*, a defendant was in custody for twenty-six months before trial and claimed that his pretrial incarceration had caused him to suffer from depression and to lose his ability to work and survive on the streets, and had diminished his social skills so that he might not be able to assist in his own defense. *State v. Thomas*, 376 P.3d 184, 191 (N.M. 2016). The court asserted, "Because the effects of pretrial incarceration are experienced by every jailed defendant awaiting trial, we weigh this factor in the defendant's favor only where the pretrial incarceration or the anxiety suffered is 'undue.'" *Id.* Because the defendant failed to make argument or point to evidence that indicated that he was unable to assist in his own defense or that he was impaired in his defense in any demonstrable manner, the court refused to weigh this factor in Mr. Thomas's favor. *Id.* Alternatively, in *United States v. Tigano*, a defendant was deemed to have been severely prejudiced by nearly seven years of pretrial incarceration because of the anxiety he suffered during the pretrial delay. *United States v. Tigano*, 880 F.3d 602, 618 (2d Cir. 2018). The length of delay before Mr. Tigano's trial was "egregiously oppressive" according to the Second Circuit. *Id.* In relation to pretrial detention, the court asserted, "[i]n addition to the sheer passage of time, his confinement in local jails makes those years particularly oppressive." *Id.* Importantly, the *Barker* Court

Court jurisprudence, anxiety caused by public accusation can be suffered by an accused in a constitutionally meaningful way whether in or out of custody. For example, in *United States v. Dreyer*,⁴⁵ an out-of-custody, criminally accused woman suffered “an unacceptable degree of damage” due to the inordinate two-and-a-half-year pretrial delay that was mostly caused by the government.⁴⁶ During the pretrial period, she “experienced severe mental disturbance[,]” including “feelings of helplessness, anxiety, depression[,] and isolation” which “continued to worsen despite continuing intensive therapy and trials of antidepressant medication.”⁴⁷ Her “anxiety and depression culminated in a suicide attempt” for which she was hospitalized.⁴⁸ Her “psychiatrist concluded that ‘the events of the last two years have created such pathological stress in this young woman over such a long time that she now has a deeply disturbed personality pattern.’”⁴⁹

Finally, the Speedy Trial Clause is intended “to limit the possibilities that long delay will impair the ability of an accused to defend [themselves].”⁵⁰ There are three main categories of issues often raised in relation to an accused’s ability to mount a defense. First, a defense can be hampered due to witness unavailability caused by death or disappearance.⁵¹ Second, pretrial delay can also lead to loss or deterioration of documentary or other physical evidence.⁵² Finally, fading witness memories due to the passage of time can dilute the efficacy of a trial defense, and the passage of time may weaken the accused’s ability to recall material facts or names of witnesses that would have supported their alibi or other defense.⁵³ This is exacerbated when an individual is detained in a jurisdiction other than where their case is to be tried. Their defense is further hampered by distance in their ability to prepare a trial defense due to the difficulties in

noted that “[m]ost jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.” *Barker*, 407 U.S. at 532–33.

45. 533 F.2d 112 (3d Cir. 1976).

46. *Id.* at 116.

47. *Id.* (internal quotation marks omitted) (quoting letter from defendant’s psychiatrist).

48. *Id.*

49. *Id.* (quoting letter from defendant’s psychiatrist).

50. *United States v. Ewell*, 383 U.S. 116, 120 (1966) (emphasis added).

51. Unavailability of an accused’s lawyer due to lengthy pretrial delay was also deemed prejudicial in *United States v. Mann*, where the lawyer had special knowledge about the case that could not be replicated by another attorney. *United States v. Mann*, 291 F. Supp. 268, 273 (S.D.N.Y. 1968). In yet another case, the court held that the unavailability of an expert witness whose testimony would have been unique constitutes prejudice, notwithstanding the availability of other experts.” *United States v. Parrott*, 248 F. Supp. 196, 205 (D.D.C. 1965).

52. *See Tynan v. United States*, 376 F.2d 761, 763 (D.C. Cir. 1967); *see also Williams v. United States*, 250 F.2d 19, 22–23 (D.C. Cir. 1957) (determining a seven-year delay made it impossible to ascertain by psychiatric examination whether the defendant was legally insane at the time of the alleged offense).

53. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972); *see also United States v. Marion*, 404 U.S. 307, 321 (1971).

communicating with witnesses and attorneys and other challenges due to lack of proximity to the place of an alleged crime.⁵⁴

B. *Institutional Interests Protected by the Speedy Trial Clause*

While the Sixth Amendment Speedy Trial Clause clearly protects individual interests, it does not preclude broader “rights of public justice.”⁵⁵ In *United States v. Lovasco*,⁵⁶ the Supreme Court granted certiorari after the United States District Court for the Eastern District of Missouri dismissed an indictment based on a claimed due process violation caused by preindictment delay.⁵⁷ While *Lovasco* discussed the due process clause and not the speedy trial right, it is worth considering here because the *Lovasco* Court’s analysis centered around the institutional interests at play in the resolution of criminal cases, and because there are parallels between the analyses underlying the due process claim raised and Sixth Amendment speedy trial claims. In determining whether the claimant’s due process rights had been violated, the *Lovasco* Court considered whether the prosecution’s preindictment delay to further investigate violated “‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’ . . . and which define ‘the community’s sense of fair play and decency[.]’”⁵⁸

Relevant in the speedy trial context, the *Lovasco* Court asserted that a prosecutor abides by elementary standards of fair play and decency when they “refuse[] to seek indictments until [they are] completely satisfied that [they] should prosecute and will be able promptly to establish guilt beyond a reasonable doubt.”⁵⁹

The *Lovasco* Court held that “to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.”⁶⁰ In the Court’s view, “investigative delay is fundamentally unlike delay undertaken

54. *Smith v. Hooley*, 393 U.S. 374, 379–80 (1969).

55. *Ewell*, 383 U.S. at 120 (internal quotation marks omitted) (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).

56. 431 U.S. 783 (1977).

57. The Sixth Amendment right to a speedy trial does not attach until a person is formally charged. *Id.* at 788–89 (citing *Marion*, 404 U.S. at 320).

58. *Id.* at 790 (citations omitted). For a discussion on why the distinction between a federal speedy trial violation and Fourteenth Amendment due process claim for a violation of the right to a speedy trial, see Thomas III, *supra* note 21, at 163. The *Lovasco* Court asserted that statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide the primary guarantee against the state bringing overly stale criminal charges. *Lovasco*, 431 U.S. at 789. It noted, however, that statutes of limitations do not fully define defendants’ rights with respect to events occurring prior to indictment—that the due process clause has a limited role to play in protecting against oppressive delay. *Id.*

59. *Lovasco*, 431 U.S. at 795.

60. *Id.* at 796.

by the Government solely 'to gain tactical advantage over the accused[]' precisely because investigative delay is not so one-sided."⁶¹

In arriving at its holding, the Court first considered whether the Due Process Clause requires the government to file criminal charges immediately after it acquires sufficient evidence to establish probable cause. The Court held the Due Process Clause does not so require this because imposing that deadline as a constitutional obligation would "have a deleterious effect both upon the rights of the accused⁶² and upon the ability of society to protect itself."⁶³ In the speedy trial context, the Court has expressed faith that an effective prosecution may have a general deterrence effect on future commission of crimes.⁶⁴ In rejecting the requirement to charge upon development of probable cause, the Court also cited an institutional interest in affording law enforcement opportunity to fully exploit potentially fruitful sources of information in its investigative efforts prior to bringing charges.⁶⁵

The *Lovasco* Court then considered whether the Due Process Clause requires the government to charge a suspect after it has acquired sufficient evidence to prove a criminal charge beyond a reasonable doubt, even if it has not completed its investigation related to the entire criminal transaction.⁶⁶ The Court also declined to impose that requirement. First, citing society's interest in bringing lawbreakers to justice, the Court asserted, "[i]n some instances, an immediate arrest or indictment would impair the prosecutor's ability to continue his investigation" and potentially pursue other indictments based upon that investigation.⁶⁷ Even in cases where the prosecution is able to obtain additional indictments despite bringing initial charges prior to completion of an investigation, the Court said this would result in "multiple trials involving a single set of facts[.]" which would place "needless burdens on defendants, law enforcement of-

61. *Id.* at 795 (citation omitted) (quoting *Marion*, 404 U.S. at 324). The *Lovasco* Court recalled that "[i]n *Marion* [it] noted with approval that a 'tactical' delay would violate the Due Process Clause." *Id.* at 795 n.17. The Court also noted that the prosecution in *Lovasco* conceded that "[a] due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense[.]" *Id.*

62. Requiring charging immediately after establishment of probable cause would increase the chances of unwarranted prosecutions and would add to the time a defendant stands accused but untried.

63. *Id.* (footnote added) (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)). The *Lovasco* Court did not elaborate on what it meant in relation to society's interest in protecting itself but cited *Ewell* for this proposition and did not elaborate. However, the Court in *Barker* provided context for the fear underlying this interest: the fear that an individual guilty of a "serious" crime could go free. *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

64. See *Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J. concurring).

65. *Lovasco*, 431 U.S. at 791-92.

66. *Id.* at 792-93.

67. *Id.* at 793.

ficials, and courts.”⁶⁸ Moreover, requiring indictments before the government completes an investigation would require prosecutors to resolve “doubtful cases in favor of early (and possibly unwarranted) prosecutions”⁶⁹ Finally, the Court concluded that requiring charging immediately upon acquisition of sufficient evidence to prove guilt is not constitutionally required. In addition to the strength of its evidence and ability to prove guilt at trial, a decision to file criminal charges involves the government’s consideration of whether prosecution of the case would “be in the public interest.”⁷⁰

In other cases, the Court has expressed concern that individuals released on pretrial bond for lengthy periods may have the opportunity to commit additional crimes, which it predicts increases the public safety risk.⁷¹ Also related to public safety is the Court’s fear that an individual who is “guilty of a serious crime will go free, without ever being tried[,]” which underlies the Court’s reservation in granting the “drastic” remedy of dismissal on a speedy trial claim.⁷² According to the Court, the Speedy Trial Clause “protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error”⁷³

Some individual interests overlap with institutional interests. Namely, the individual interest against prolonged pretrial detention also overlaps with the societal interest in limiting government expenditures associated with pretrial detention.⁷⁴ In 1972, when the Court initially expressed concern with the cost of pretrial detention, it cost taxpayers roughly three to nine United States dollars per person per day;⁷⁵ as of 2018, detaining a person in jail cost the government about eighty-five dollars per person per day, for an annual total of about \$140 billion per year.⁷⁶ Further, the Court has acknowledged social science research which shows that prolonged pretrial detention inhibits efficacy of rehabilitative efforts, an interest in which society is invested.⁷⁷ Finally, the Court has identified that the

68. *Id.*

69. *Id.* The Court noted the potential of the government later discovering fruitful evidence that would have been essential to prosecution.

70. *Id.* at 794.

71. *Barker v. Wingo*, 407 U.S. 514, 519–20 (1972); *see also Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J. concurring).

72. *Strunk v. United States*, 412 U.S. 434, 438–39 (1973) (internal quotation marks omitted) (quoting *Barker*, 407 U.S. at 522).

73. *United States v. Ewell*, 383 U.S. 116, 121 (1966).

74. *Barker*, 407 U.S. at 520–21.

75. *Id.*

76. *Total Cost of Pretrial Detention Estimated at up to \$140 Billion Annually*, PRISON LEGAL NEWS (Jan. 31, 2018), <https://www.prisonlegalnews.org/news/2018/jan/31/total-cost-pretrial-detention-estimated-140-billion-annually/> [https://perma.cc/9QRD-R3DU].

77. *See Smith v. Hoey*, 393 U.S. 374, 379 (1969) (showing anxiety and depression leaves little inclination toward self-improvement); *see also Barker*, 407 U.S. at 520–21 (identifying rehabilitation as a pretrial interest assumes individual guilt

individual interest against pretrial detention and against scorn and humiliation as a result of public accusation are intertwined with an individual's ability to be a productive member of society and contribute to the national economy.⁷⁸ The individual interest of presenting a full defense is hindered by prolonged pretrial detention and is intrinsically intertwined with society's interest in fair administration of justice.⁷⁹

II. BALANCING INDIVIDUAL AND INSTITUTIONAL INTERESTS: *BARKER V. WINGO*

We now turn to the *Barker* test, which endeavors to breathe life into the Speedy Trial Clause in part by balancing individual interests with institutional interests. In *Barker*, the Court adopted a four-factor balancing test under which the conduct of the prosecution during the pretrial period is compared with that of the accused during that period, and institutional interests are weighed against individual interests.⁸⁰

To trigger judicial review under a Sixth Amendment speedy trial claim, a claimant must establish that their ability to mount an adequate trial defense was presumptively prejudiced due to pretrial delay.⁸¹ If they establish presumptive prejudice, courts consider the "*Barker* factors:" (1) the length of delay; (2) whether the accused was actually prejudiced by the pretrial delay in one or more relevant ways, along with the type and extent of any such prejudice;⁸² (3) the reason for the pretrial delay;⁸³ and (4) whether the accused asserted their right to a speedy trial during the pretrial period.⁸⁴

Under these four factors, an accused bears the burden of proving that their Sixth Amendment speedy trial right was violated. No single factor is

rather than innocence, a notion contrary to the U.S. criminal justice system as a whole). However, prolonged detention does have a tangible economic effect on the accused's subsequent earning potential (given these low rates of employment, annual wage earnings of all defendants are also low, with initially detained defendants making \$5,224 in reported earnings compared to \$7,911 for initially released defendants). Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 214 (2018).

78. *Barker*, 407 U.S. at 521, 532 (indicating loss of wages and job loss affect the individual, the family, and society).

79. *Id.* at 533.

80. *See id.* at 530 (detailing the balancing test).

81. *Id.* ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.").

82. *Id.* at 532–33.

83. *Id.* at 531.

84. *Id.* at 531–32. While a fundamental right is not easily acquiesced, the *Barker* Court declined to impose a demand-waiver rule absolving the defendant of the responsibility to assert that right. *Id.* How much this assertion or lack thereof affects the analysis will be case-dependent. *Id.* at 533.

outcome-determinative, and each of the *Barker* factors is considered in relation to the others, as described below.⁸⁵

A. *An Initial Hurdle: Proof of Presumptive Prejudice*

The Sixth Amendment's speedy trial right attaches upon arrest or formal accusation.⁸⁶ Accordingly, the length of pretrial delay is the period between arrest or formal accusation and trial. Typically, any period of pretrial delay caused by a defendant is excluded in a calculation of the period of pretrial delay considered by a reviewing court.

Courts accept some pretrial delay as "both inevitable and wholly justifiable;"⁸⁷ the United States Supreme Court declared that the "essential ingredient [under the Speedy Trial Clause] is orderly expedition and not mere speed."⁸⁸ The state "may need time to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down."⁸⁹ An accused also requires a period of time to prepare their trial defense.

An accused who claims a violation of their Sixth Amendment speedy trial right bears the burden of proving that the length of pretrial delay in their case crossed the line from ordinary to presumptively prejudicial to their ability to mount an adequate trial defense.⁹⁰ There is no bright-line

85. *See id.* at 533 ("We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together . . .").

86. *See* *United States v. Marion*, 404 U.S. 307, 321 (1971). However, there are some circumstances under which a defendant's liberty may be sufficiently restrained that a pre-arrest, pre-indictment period could "count" in a pretrial delay calculation. *See* *Dickey v. Florida*, 398 U.S. 30, 40 (1970) (Brennan, J. concurring) (asserting that he and Justice Marshall, who joined the concurrence, did not read the majority opinion as "deciding that in post-*Klopfer* cases . . . [a] defendant can challenge only delay occurring after his arrest . . ."). A determination about the length of pretrial delay "necessitates a functional analysis . . . in the particular context of the case[.]" *Barker*, 407 U.S. at 522. Where there is substantial delay between an alleged offense and trial, a defendant may have a claim that his right to due process was violated, calling for dismissal of the charge, if the defendant shows that the delay "caused substantial prejudice to [the accused's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *Marion*, 404 U.S. at 324.

87. *Doggett v. United States*, 505 U.S. 647, 656 (1992) (asserting some delay is inevitable and wholly justifiable because the government may need time during the pretrial period to collect and subpoena witnesses, to oppose a defendant's pretrial motions, or to track down a defendant, should they attempt to flee from prosecution); *see also* *Dickey*, 398 U.S. at 38 (asserting that some delays are inevitable due to crowded dockets, lack of judges or lawyers or other factors).

88. *United States v. Ewell*, 383 U.S. 116, 120 (1966) (quoting *Smith v. United States*, 360 U.S. 1, 10 (1959)).

89. *Doggett*, 505 U.S. at 656.

90. So long as a defendant has not caused the delay or diluted their claim due to failure to assert the right to speedy trial, the responsibility to bring a defendant's case to trial in a speedy fashion rests solely with the court and prosecution. *See, e.g.,* *United States v. Black*, 918 F.3d 243, 253–54 (2d. Cir. 2019) (asserting that the

rule as to when pretrial delay becomes presumptively prejudicial,⁹¹ but in the United States Supreme Court's calculus, a delay "approach[ing] one year" fits that bill.⁹² Whether the length of pretrial delay is deemed presumptively prejudicial may turn on the reason for the delay, the seriousness of the charges, and complexity of the charged offense(s).⁹³ The *Barker* Court gave little guidance on how case complexity or seriousness of charges affects presumptive prejudice; it asserted only "the delay that can be tolerated for an ordinary street crime is *considerably* less than for a serious, complex conspiracy charge."⁹⁴

court and the government owe an "affirmative obligation" to criminal defendants and to the public to bring matters to trial promptly).

91. There is no bright line rule pronouncing a violation at the point a statistically greater probability of actual prejudice arises; rather, *Barker* established a balancing test, in which the conduct of both the prosecution and the defendant are weighed, but some courts have implied that a delay of over a year is presumptively prejudicial per se. See *Smith v. United States*, 418 F.2d 1120, 1121–22 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 936 (1969); *United States v. Bandy*, 269 F. Supp. 969, 970 (D.N.D. 1967); *Hinton v. United States*, 424 F.2d 876, 880 (D.C. Cir. 1969) (a delay of more than a year raises a speedy trial claim of prima facie merit).

92. *Doggett*, 505 U.S. at 652 n.1; see also *United States v. Claxton*, 766 F.3d 280, 294 (3d Cir. 2014) (finding a delay of fourteen months to be presumptively prejudicial); *United States v. Young*, 657 F.3d 408, 414 (6th Cir. 2011) (stating a delay of "more than one year" is presumptively prejudicial); *United States v. Mendoza*, 530 F.3d 758 (9th Cir. 2008); *State v. Cahill*, 61 A.3d 1278, 1285 (N.J. 2013) (noting "once the delay exceeds one year[,] it is presumptively prejudicial"); *State v. Zmayefski*, 836 A.2d 191 (R.I. 2003); *State v. Goss*, 777 P.2d 781 (Kan. 1989) (delay "a little over a year . . . is not clearly presumptively prejudicial . . . and hence there is no necessity for inquiry into the other factors . . ."); *People v. Williams*, 716 N.W.2d 208 (Mich. 2006) ("Following a delay of eighteen months or more, prejudice is presumed . . ."); *Ortiz v. State*, 326 P.3d 883 (Wyo. 2014) (finding a delay of 500 days is presumptively prejudicial); *Jones v. State*, 217 A.2d 367 (Md. 1966) (eight-month delay of trial was unreasonable where the defendant made repeated demands for trial and the prosecution was ready but would not bring the defendant's case to trial). The *Barker* Court asserted that the right to a speedy trial is "amorphous" and not easily susceptible to formalistic rules. *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

93. See *Barker*, 407 U.S. at 531. Pretrial trial delay becomes problematic, according to the *Barker* Court, when a defendant's ability to present evidence at trial is adversely affected due to pretrial delay. *Id.* at 534.

94. *Barker*, 407 U.S. at 531 (emphasis added). According to Merriam Webster's online dictionary, the word "considerably" means (1) "significant[;]" and (2) "large in extent or degree[.]" *Considerable*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/considerably> [<https://perma.cc/2Q4W-47SW>] (last visited July 7, 2021). See, e.g., U.S. CONST. AMEND. XI; *People v. Valera*, 65 N.Y.S. 3d 652 (N.Y. Crim. Ct. 2017) (finding delay of 100 days in prosecution for driving while intoxicated and driving while ability impaired was presumptively prejudicial, but did not violate defendants constitutional speedy trial rights, even if first three adjournment were occasioned by erroneous adjournments for conversion, since underlying charges carried sentence of up to one year, defendant was at liberty for duration of case, and there was no showing that defendant's ability to defend was prejudiced by delay); *Smith v. Mabry*, 564 F.2d 249, 251–52 (8th Cir. 1977) (finding that a ten-month delay was sufficient to trigger *Barker* inquiry on burglary and grand larceny of a pharmacy); *United States v. Simmons*, 536 F.2d 827, 831 (9th Cir. 1976) (holding six-month delay was sufficient on

In some courts, the needed delay is shorter than a year,⁹⁵ and in others, a delay of longer than a year is necessary for a finding of presumptive prejudice.⁹⁶ After a claimant establishes presumptive prejudice, courts consider the four *Barker* factors.⁹⁷ The *Barker* Court refused to adopt a “demand/waiver” rule, meaning that a claimant who fails to assert their speedy trial right during the pretrial period does not waive their Sixth Amendment right to a speedy trial, but may weigh against the accused in the balance of the other factors.⁹⁸

Length of pretrial delay is another *Barker* factor.⁹⁹ Courts’ consideration of pretrial delay length often intersects with their consideration of whether a claimant suffered actual prejudice. Accordingly, these factors are both discussed in the next section.

B. *Length of Delay and Actual Prejudice*

Because the Speedy Trial Clause was not principally intended to prevent prejudice to the criminally accused and because pretrial delay may prejudice the prosecution as much as it does an accused, establishment of presumptively prejudicial pretrial delay is insufficient to carry a speedy

a charge of forging and uttering a U.S. Treasury check in violation of federal law); *State v. Ballinger*, 520 P.2d 294, 296 (Ariz. 1974) (determining almost eleven-month delay was sufficient on charge of sale of heroin); *People v. Hughes*, 38 Cal. App. 32 670 (Cal. Ct. App. 1974) (finding eight-month delay was sufficient on assault with deadly weapon charge and attempted robbery while using a firearm charge); *State v. Brown*, 375 A.2d 1024, 1027–28 (Conn. 1977) (concluding nine-month delay is sufficient on charge of robbery in the second degree); *State v. Almeida*, 509 P.2d 549, 552–53 (Haw. 1973) (seven-month delay was sufficient on the following charges: possession of narcotic drug, possession of harmful drug, and possession of narcotic drug with intent to sell the same); *Commonwealth v. Cooke*, 341 N.E.2d 907, 908 (Mass. App. Ct. 1976) (determining eleven-month delay was sufficient on armed robbery and possession of a shotgun without firearm registration card); *State v. Corarito*, 268 N.W.2d 79, 80 (Minn. 1978) (finding six-month delay is sufficient on aggravated sodomy and aggravated robbery charges); *Green v. State*, 250 N.W.2d 305, 307 (Wis. 1977) (holding almost twelve-month delay was sufficient on two counts of armed robbery).

95. *See, e.g.*, *State v. Taylor*, 869 N.W.2d 1 (Minn. 2015) (sixty days from the date of the demand for a speedy trial); *Claiborne v. State*, 176 So. 3d 769, 775 (Miss. 2015) (asserting that more than 270 days of pretrial delay was presumptively prejudicial); *State v. Spearman*, 283 P.3d 272 (N.M. 2012) (noting a delay of trial of one year is presumptively prejudicial in simple cases, fifteen months in intermediate cases, and eighteen months in complex cases).

96. *See, e.g.*, *Humphrey v. State*, 185 P.3d 1236 (Wyo. 2008) (asserting a 561-day delay did not raise a presumption of prejudice); *State v. Johnson*, 900 So.2d 482 (Ala. Crim. App. 2004) (holding that twenty-eight months from arrest to hearing on motion to dismiss was insufficient to make showing of presumptive prejudice).

97. *Barker*, 407 U.S. at 530–31.

98. *Id.*

99. *Id.*

trial claim under the Sixth Amendment.¹⁰⁰ However, an accused does not always have to show actual prejudice to prevail on a speedy trial claim.

The *Barker* Court expressly rejected the notion that a showing of actual prejudice is required to establish a Sixth Amendment speedy trial violation in all cases, the Court has required such a showing in most cases.¹⁰¹ There is no bright-line rule as to when an accused can succeed on a Speedy Trial Claim without showing actual prejudice.¹⁰² As the length of pretrial delay extends beyond the presumptively prejudicial period, the likelihood of prejudice to a defendant's ability to mount an adequate trial defense also increases. Accordingly, the longer the pretrial delay, the more the length factor gains heft in relation to the weight of the other *Barker* factors.¹⁰³ Importantly for the critique offered in this Article, where government negligence causes presumptively prejudicial pretrial delay, an accused's burden to produce proof of actual prejudice is reduced commensurate with the extent of the delay.¹⁰⁴ This is because "impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'"¹⁰⁵

Besides the Due Process Clause, the Speedy Trial Clause is the only procedural protection in the Bill of Rights designed to ensure reliability of guilt/innocence determinations that (usually) requires claimants to prove

100. *Id.* at 530 (length of delay is to some extent a triggering mechanism under *Barker*); *but see* *Doggett v. United States*, 505 U.S. 647, 655 (1992); *see also* *United States v. MacDonald*, 456 U.S. 1, 7–8 (1982) (speedy trial right not principally intended to prevent prejudice to defendant). The *Loud Hawk* Court stated that pretrial delay is a "two-edged sword," harmful to both the prosecution and defense. *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) (discussing government's difficult burden in criminal case).

101. *See Barker*, 407 U.S. at 521.

102. As stated in *United States v. Bergfeld*:

The first three factors should be used to determine whether the defendant bears the *burden* to put forth specific evidence of prejudice (or whether it is presumed); nothing in *Doggett* endorses the district court's performing the analysis the other way around, i.e., using the absence of specific evidence of prejudice to reduce the weight of the other three factors.

280 F.3d 486, 490 (5th Cir. 2002). As explained in *Burgess v. State*: "[I]f this were not so, the state could sit back and deliberately hold criminal charges against a citizen indefinitely so long as the individual could not point out any specific prejudice[,] which cannot be allowed, as "[e]ven the indisputably guilty defendant has the constitutional right to a speedy trial." 473 So.2d 432, 434 (Miss. 1985); *see also* *Tate v. State*, 382 P.3d 762, 770 (Wyo. 2016) ("[I]f a defendant fails to make a particularized showing of prejudice, the other three factors must weigh heavily in his or her favor" for them to succeed on a Sixth Amendment Speedy Trial claim).

103. *See Doggett*, 505 U.S. at 652.

104. *See id.* at 655–56.

105. *Id.* at 655 (quoting *Barker*, 407 U.S. at 532).

actual prejudice to establish a violation of the right.¹⁰⁶ In a minority of cases, lower courts have shifted the burden to the prosecution to prove that an accused did not suffer actual prejudice or created a rebuttable presumption of actual prejudice where an accused establishes an unreasonable period of pretrial delay.¹⁰⁷

The actual prejudice analysis is organized around three of the individual interests discussed, above. The “demands of criminal justice in the Anglo-American system” protected by the Speedy Trial Clause are: (1) undue and oppressive pretrial incarceration; (2) anxiety and concern accompanying public criminal accusation; and (3) the possibility that long pretrial delay will impair the ability of an accused to defend himself.¹⁰⁸ The last of these is the “most serious” to courts because prejudice to a defendant’s trial defense skews the fairness of the entire system.¹⁰⁹

Most Sixth Amendment speedy trial claims are made after trial; this is so because, before trial, the ways in which and the degree to which delay

106. See Alan Schneider, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 493–94 (1968).

107. See, e.g., *Doggett*, 505 U.S. at 655 (holding a six-year-long pretrial delay caused solely by government negligence was long enough to eliminate the need for proof of particularized prejudice) (“Consideration of prejudice [to accused’s case for speedy trial purposes] is not limited to the specifically demonstrable, and . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim [E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.” (citation omitted)); *United States v. Molina-Solorio*, 577 F.3d 300, 307 (5th Cir. 2009) (“[W]here the first three [*Barker*] factors together weigh heavily in the defendant’s favor, we may conclude that they warrant a presumption of prejudice, relieving the defendant of his burden.”); *United States v. Reynolds*, 231 Fed. Appx. 629 (9th Cir. 2007) (finding that a pretrial delay attributable to government negligence gives rise to a presumption of actual prejudice to the defendant and remanding) (“[A]lthough the [Supreme] Court did not define precisely what type of evidence must be shown to rebut the presumption, it is not enough for the government simply to point to the absence of a particularized showing of actual prejudice by the defendant.” (alterations in original) (quoting *United States v. Shell*, 874 F.2d 1035, 1036 (1992))). In cases of pretrial delay caused by government negligence in the Eleventh Circuit, the defendant maintains the burden of showing actual prejudice, but the requirement to demonstrate actual prejudice decreases as the period of pretrial delay increases.

108. *Smith v. Hooyey*, 393 U.S. 374, 378 (1969) (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

109. *Barker*, 407 U.S. at 532. Where a defendant’s ability to defend himself is hampered by pretrial delay, it affects the integrity of the fact-finding process itself, and thereby undermines the accuracy of any conviction ultimately obtained. Thus, the protection of the defendant from this type of prejudice represents an attempt to maintain minimal standards of fairness and reliability in the criminal process. See *United States v. Brown*, 169 F.3d 344, 351 (6th Cir. 1999) (“Given the extraordinary delay in this case combined with the fact that the delay was attributable to the government’s negligence in pursuing Brown, we conclude that the government did not sufficiently rebut the presumption that its delay did not prejudice Brown’s case.” (citing *United States v. Mundt*, 29 F.3d 233, 236 (6th Cir. 1994))).

has impaired an adequate defense tends to be speculative.¹¹⁰ The last *Barker* factor, discussed below, is the reason for pretrial delay.

C. Reason for Pretrial Delay

Under the current *Barker* framework, the court weighs any reason for pretrial delay against the party that caused the delay.¹¹¹ Where the government causes pretrial delay, the degree to which this factor weighs against the state depends on the level of the government's culpability in the cause of the delay.¹¹² The reviewing court weighs a deliberate delay by the state that hampers an accused person's ability to present a defense most heavily.¹¹³ The court weighs a delay caused by government failure, such as government negligence, overcrowded dockets, and delays caused by court reporters¹¹⁴ less heavily.¹¹⁵ Pretrial delays caused by something outside the government's control, such unavailability of an essential witness, will justify an appropriate delay without being weighed against the government.¹¹⁶ Courts have deemed the following circumstances the type of negligence that should be weighed against the government: prosecutorial workloads,¹¹⁷ change in prosecutorial administration,¹¹⁸ and department of corrections failure to transfer a defendant for court proceedings.¹¹⁹

In his concurrence in *Dickey v. Florida*,¹²⁰ Justice Brennan suggested that courts should take pretrial delay caused by government negligence more seriously under the "reason for the delay" *Barker* factor.¹²¹ According to the concurrence, any government failure, whether purposeful or

110. See *United States v. MacDonald*, 456 U.S. 1, 23 (1982).

111. See *Barker*, 407 U.S. at 531; see also *Doggett*, 505 U.S. at 657 (stating that *Barker* made it clear that "different weights [are to be] assigned to different reasons for delay").

112. See *Barker*, 407 U.S. at 531.

113. See *id.*

114. See *Hoang v. People*, 323 P.3d 780, 790 (Colo. 2014) (causing a delay of three years).

115. *Barker*, 407 U.S. at 531.

116. See *id.* This is presumably not true where the government has not exercised a reasonable degree of diligence to find and secure the witness's presence for trial. See *United States v. Fox*, 3 Mont. 512, 517 (1880).

117. See *State v. Porter*, 705 S.E.2d 636, 641 (Ga. 2011) (asserting that delay resulting from prosecution negligence and workloads are "weighed only lightly, or benignly, against the State").

118. See *Ex parte Stevens*, 499 So.2d 795, 796 (Ala. 1986) (discussing *Barker*).

119. See *People v. Hill*, 691 P.2d 989, 990 (Cal. 1984) (finding speedy trial violation under California state constitution in part because the department of corrections negligently erred in failing to present letters from accused demanding that charges in his case be re-filed for six months).

120. 398 U.S. 30 (1970) (discussing increasing the weight of government negligence in the speedy trial analysis).

121. *Id.* at 48 (Brennan, J., concurring).

negligent, may be constitutionally unjustifiable.¹²² Justice Brennan observed that the only interest protected by the Speedy Trial Clause that is *unaffected* by pretrial delay caused by government negligence is “our common concern to prevent deliberate misuse of the criminal process by public officials.”¹²³ Accordingly, “[a] negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right¹²⁴ as an intentional failure[.]”¹²⁵ Thus, he asserted that a more prudent inquiry under the “cause for the delay” factor may be whether a government-caused delay, even if negligent, reasonably might have been avoided, or whether it was “[]necessary[.]”¹²⁶ In making this necessity determination, Justice Brennan suggested that courts could look to the “intrinsic importance of the reason for the delay” on one hand, and “the length of the delay and its potential for prejudice to interests protected by the speedy-trial safeguard” on the other hand.¹²⁷ According to Justice Brennan, a pretrial delay attributed to a trivial reason could be reasonably avoided no matter the length of the delay, and even “in the interest of realizing an important objective,” a lengthy pretrial delay would be suspect.¹²⁸

Twenty years after *Marion* was decided, the Court in *Doggett* signaled some agreement with the logic from Justice Brennan’s *Marion* concurrence but fell short of adopting his suggested analytical approach related to pretrial delays caused by government negligence.¹²⁹

122. *See id.* at 51 (Brennan, J., concurring) (asserting that “unnecessary” pretrial delay caused by a government actor may be constitutionally unjustifiable, whether intentional or negligent . . .”).

123. *Id.* at 51–52.

124. “[U]nreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including ‘oppressive pretrial incarceration,’ ‘anxiety and concern of the accused,’ and ‘the possibility that the [accused’s] defense will be impaired’ by dimming memories and loss of exculpatory evidence.” *Doggett v. United States*, 505 U.S. 647, 654 (1992) (alteration in original) (first citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972); then citing *Smith v. Hooey*, 393 U.S. 374, 377–79 (1969); and then citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

125. *United States v. Marion*, 404 U.S. 307, 334–35 (1971); *see also* *Ruffin v. State*, 663 S.E.2d 189 (Ga. 2008) (asserting, “[N]egligence ‘falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun.’”).

126. *See Dickey*, 398 U.S. at 52.

127. *Id.*

128. *Id.* (referring to an objective considered important by the government).

129. The *Doggett* Court called upon Justice Brennan’s logic from *Dickey* when it asserted that it “attach[es] great weight to . . . considerations” such as to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down “when balancing them against the costs of going forward with a trial whose probative accuracy the passage of time has begun by degrees to throw into question.” *Doggett*, 505 U.S. at 656 (citing *United States v. Loud Hawk*, 474 U.S. 302, 315–17 (1986)). “[P]ersistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the

In *Doggett*, a petitioner was indicted on February 22, 1980, in relation to an alleged conspiracy to import and distribute cocaine.¹³⁰ The United States Drug Enforcement Administration (DEA) took on responsibility for apprehending that petitioner.¹³¹ In March 1980, police officers unsuccessfully attempted to arrest the petitioner, and were told by his parents that he had left for Colombia four days earlier.¹³² Intending to apprehend the petitioner when he returned to the United States, the DEA officers gave notice of the warrant for his arrest to all United States Customs stations and some law enforcement organizations. It also put the petitioner's name in two computer systems that help law enforcement screen people who enter this country.¹³³ In September 1981, the DEA learned that the petitioner had been arrested in Panama; it did not seek his formal extradition, but rather simply gained informal agreement from Panamanian officials to "expel" the petitioner to the United States after the petitioner's proceedings in that country concluded.¹³⁴ Despite that agreement, Panamanian officials released the petitioner from their custody in 1982, and he went to Colombia for several months before he returned to the United States.¹³⁵ After the petitioner returned to the United States in September 1982, he settled down in Virginia and subsequently married, earned a college degree, found work as a computer operations manager, and lived openly under his own name.¹³⁶ It was not until September 1988, eight-and-a-half years after his indictment, that law enforcement located and arrested him.¹³⁷

At the outset of its opinion, the *Doggett* majority reiterated that the Speedy Trial Clause significantly protects a criminal defendant's interest in fair adjudication.¹³⁸ That Court did not expressly agree with the negligence analysis in Justice Brennan's *Marion* concurrence, but it indicated that in some cases (it seems *Doggett* is one of them) in which "extraordinary [pretrial] delay" is caused by government negligence, relief on a speedy trial claim should be "virtually automatic" as though the delay had

more weight the Government attaches to securing a conviction, the harder it will try to get it." *Id.* at 657.

130. *Id.* at 648.

131. *Id.*

132. *Id.* at 649.

133. *Id.*

134. *Id.*

135. *Id.* The petitioner was released from Panamanian custody and went to Colombia. *Id.* The DEA did not inquire into the petitioner's status in Panama until 1985, when it learned that he had gone to Colombia. *Id.* The DEA failed to follow up with Colombian officials or to check on whether the petitioner had returned to the United States until just before his arrest. *Id.*

136. *Id.*

137. *Id.* at 650.

138. *Id.* at 655. The Court affirmed that absent negligence on the government's part, even an eight-and-a-half-year pretrial delay would not constitute a speedy trial violation unless the petitioner could demonstrate actual, particularized trial prejudice. *Id.* at 657.

been caused by government bad faith, even without requiring a claimant's showing of actual prejudice.¹³⁹ The *Doggett* Court granted the petitioner relief on his Sixth Amendment speedy trial claim, asserting that that the eight-and-a-half year pretrial delay caused by government negligence in arresting the petitioner and bringing his case to trial was sufficiently "extraordinary" and protracted to alleviate the requirement that the claimant show actual prejudice.¹⁴⁰ The *Doggett* Court reasoned, "[O]ur toleration of such negligence varies inversely with its protractedness, . . . [c]ondoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority."¹⁴¹

The Court's grant of relief in *Doggett* is unique—courts very infrequently grant Sixth Amendment speedy trial claims.¹⁴² In many cases, relief is denied because, absent pretrial delay caused by government bad faith or an exorbitantly long pretrial delay caused by government negligence, the fact of government fault in pretrial delay does not weigh significantly in comparison to the other *Barker* factors.¹⁴³ Under the current framework, the existence of an unprecedented event or period like a pandemic does not factor into courts' analysis of whether and the degree to

139. *See id.* at 656–58. The Court asserted that it "generally ha[d] to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.* at 655. The Court went on to explain, "While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him." *Id.* at 657. The degree to which presumptive prejudice weighs in an ultimate determination on a speedy trial claim increases with the length of pretrial delay. *See id.* at 656. The *Doggett* Court offered the following as a guide: "[N]egligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice." *Id.* at 657. In this case, pretrial delay of six years due to government negligence did not require particularized trial prejudice to succeed on a speedy trial claim when the presumptive prejudice suffered by the petitioner was not extenuated by his acquiescence and was not persuasively rebutted by the government. *Id.* at 657–58. The Court noted that "prejudice [under *Barker*] is not limited to the specifically demonstrable . . ." and acknowledged that "impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Id.* at 655. In response to a government argument that the delay could have prejudiced its case as much as the petitioners, the Court asserted, "[T]hough time can tilt the case against either side, one cannot generally be sure which of them it has prejudiced more severely." *Id.* (internal citations omitted).

140. *Id.* at 658.

141. *Id.* at 657 (internal citation omitted).

142. *See, e.g.,* *United States v. Tannehill*, 49 F.3d 1049, 1054 (5th Cir. 1995), *cert. denied*, 516 U.S. 859 (1995); *United States v. Baker*, 63 F.3d 1478, 1497 (9th Cir. 1995), *cert. denied*, 516 U.S. 1097 (1996).

143. *See, e.g.,* *Henderson v. State*, 850 S.E.2d 152, 161 (Ga. 2020); *State v. Lovvorn*, 932 N.W.2d 64, 70 (Neb. 2019); *Williams v. State*, 226 So. 3d 758, 767 (Fla. 2017); *State v. Matthews*, 129 So. 3d 1217, 1219 (La. 2013).

which government-caused pretrial delay should be weighed against the state.

When poor government planning necessitates court closures and those closures result in docket congestion that lengthens the period of pretrial delay in trial-bound criminal cases, courts tend to view the unprecedented event itself as the reason for pretrial delay.¹⁴⁴ They do not consider whether the delay was necessary due to the unprecedented event or could have been avoided or reduced, had the government reasonably planned for continued court operations in the wake of the event.¹⁴⁵ Thanks to recorded history and science that show that the past is likely prologue in relation to events like natural disasters, fires, and even a global pandemic, the government can reasonably foresee the need to plan for continued court operations when faced with reduced staff or the need to account for social distancing requirements due to causes outside its control. As part of courts' duty to honor the constitutional rights of criminally accused people, the failure of court personnel to plan for and minimize the impact of such events is negligent in the best cases, and reckless in the worst. Evidenced in courts across the country during the COVID-19 pandemic, pretrial delays in criminal cases tend to be particularly protracted when caused by government negligence in failure to plan, failure to implement plans for continued operations, or both. Because pretrial delays caused by government negligence penalize many criminally accused people and ". . . simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority[.]"¹⁴⁶ the next Part argues that courts should employ the negligence analysis set forth in Justice Brennan's *Dickey* concurrence and consider the necessity of a pretrial delay in determinations about the extent to which government negligence is counted against the government.

III. PROPOSED FRAMEWORK TO REINVIGORATE THE SIXTH AMENDMENT SPEEDY TRIAL RIGHT

State and federal courts are obligated to honor the constitutional rights of their constituents, including the Sixth Amendment right to a speedy trial in serious criminal cases.¹⁴⁷ To do so, courts have a unique

144. See, e.g., *Ussery v. State*, 596 S.W.3d 277, 286 (Tex. Crim. App. 2019) (finding delays attributed to Hurricane Harvey a valid reason for delay); *State v. Thomas*, 54 So.3d 1, 73 (La. Ct. App. 2010) (stating that the delay was further precipitated by Hurricane Katrina and its aftermath, and requiring some additional showing that the State did more to hinder trial of these defendants); *State v. Ervin*, 9 So. 3d 303, 307 (La. Ct. App. 2009) (delay caused by Hurricane Katrina cannot be attributed to the State).

145. See, e.g., *State v. Ervin*, 9 So. 3d 303, 307 (La. Ct. App. 2009) (delay caused by Hurricane Katrina cannot be attributed to the State).

146. *Doggett*, 505 U.S. at 657.

147. See Daniel D. Stier, Diane Nicks & Gregory J. Cowan, *The Courts, Public Health, and Legal Preparedness*, 97 AM. J. PUB. HEALTH 69 (2007) ("The judicial branch of the US system of government stands as the guardian of civil liberties and

responsibility to continue to hold in-person jury trials in criminal cases, even in times of crisis.¹⁴⁸ In 2007, in response to government concern regarding potential spread of the Avian flu, the Bureau of Justice Assistance assembled “a [t]ask [f]orce to develop a road map for local and state courts to guide their efforts in planning for a pandemic” and issued “Guidelines for Pandemic Emergency Preparedness Planning.”¹⁴⁹ Those guidelines recommend that courts engage in Continuity of Operation Planning (COOP) before the onset of the pandemic during which they anticipate issues and problems likely to arise due to a pandemic and plan to minimize or mitigate the impacts of all such issues.¹⁵⁰ These guidelines specifically direct courts to identify their mission-critical functions including constitutionally and statutorily required functions; to identify the day-to-day functioning challenges likely to arise during a pandemic; and to determine the permissible length of disruption of court operations in light of mission critical functions and legal obligations.¹⁵¹

In an introductory letter to those guidelines, Domingo Herraiz, the Director of the Bureau of Justice Assistance, asserted:

Of critical importance, however, is that local and state justice systems be prepared to respond and to and uphold the rule of law

protector of the rule of law.”). Judges are also obligated to perform judicial duties competently and diligently. MODEL CODE OF JUD. CONDUCT CANON 2.5 (Am. Bar Ass’n 2020). The second canon of the Model Code of Judicial Conduct states, in part:

(A) A judge shall perform judicial and administrative duties, competently and diligently. (B) A judge shall cooperate with other judges and court officials in the administration of court business.

Id.

148. See, e.g., Marla N. Greenstein, *Ethics in Times of Crisis*, 52 JUDGES’ J. 4 (Nov. 1, 2013), https://www.americanbar.org/groups/judicial/publications/judges_journal/2013/fall/ethics_in_times_of_crisis/ [permalink unavailable] (quoting John Ort, who stated, “Keeping our courthouses open and operational in times of crisis is fundamental to maintaining the rule of law and protecting individual rights.” (internal quotation marks omitted)); see also Chief Judge Order 2020-04 Finding Public Health Concerns Due to COVID-19 Preclude the Calling of Jurors for Jury Trials Scheduled Between Now and May 31, 2020, No. 2020-04 (Apr. 17, 2020) (“This Order is issued in full cognizance of the unique responsibility of the courts to continue operations, ensuring equal access to our citizens to the essential functions of the third co-equal branch of their government, even in times of crisis.”).

149. AMERICAN UNIVERSITY & BUREAU OF JUSTICE ASSISTANCE, GUIDELINES FOR PANDEMIC EMERGENCY PREPAREDNESS PLANNING: A ROAD MAP FOR COURTS 1 (Apr. 2007), <https://www.american.edu/spa/jpo/upload/2091-2.pdf> [https://perma.cc/R968-3H4F] [hereinafter ROAD MAP].

150. *Id.* at 3.

151. *Id.* at 9–10. Relevant to this discussion, the guidelines assert that public health requirements may necessitate restriction of court access; in anticipation of these closures, court systems should carefully consider the nature of the potential restrictions and how to ensure the smooth continuance of court proceedings during any needed closures. *Id.* at 11. This may include “televised court proceedings, public access to computerized information systems, and simultaneous court transcription . . .” *Id.*

throughout any crisis, whether natural or manmade. A pandemic, with elements of continued crisis and contagion, would present unique challenges to our justice system, including law enforcement, courts, and corrections.¹⁵²

The guidelines set forth a thorough list of challenges courts are likely to face during a pandemic and suggest methods to minimize the impact of each, while ensuring continuity of essential court operations.¹⁵³ In 2007, the National Center for State Courts (“NCSC”) issued a report that asserted in the face of terrorist attacks, a pandemic, or natural disasters from wildfires to hurricanes, COOP planning is helpful to courts in planning for how to ensure continued operations according to statutory mandates.¹⁵⁴

Before the onset of the COVID-19 pandemic, government entities released guidelines and requirements and passed laws to ensure continued court operations during a public health emergency. For example, in the wake of Hurricane Katrina, the United States Congress passed the Federal Judiciary Emergency Special Sessions Act of 2005, which set forth suggestions that would allow courts to safely hold in-person jury trials during emergency events.¹⁵⁵ Under that law, with an accused’s consent, an in-person jury trial could be held in an emergency jurisdiction other than the place where all or part of an alleged crime occurred to ensure consistent and speedy prosecution.¹⁵⁶ In 2007, the Bureau of Justice Assistance released “Guidelines for Pandemic Emergency Preparedness Planning: A Road Map for Courts,” which covered issues presented by pandemics not addressed in general COOP planning, and suggested solutions to those issues.¹⁵⁷

Most courts, however, were caught off guard by challenges the COVID-19 pandemic posed to continued court operations and found themselves unable to ensure protection of fundamental constitutional rights such as the Sixth Amendment speedy trial right.¹⁵⁸ This unpreparedness forced court closures, during which no in-person jury trials went forward. When courts re-opened, the inefficiencies in normal operations due to their lack of planning created further backlog on in-person crimi-

152. *Id.* at v.

153. *Id.* at 10–14.

154. See *Continuity of Court Operations: Steps for COOP Planning*, NAT’L CTR. FOR STATE CTS., BUREAU OF JUST. ASSISTANCE 2 (Sept. 2007), https://www.ncsc.org/_data/assets/pdf_file/0028/17389/toolkit.pdf [<https://perma.cc/PNV7-KQLU>].

155. Federal Judiciary Emergency Special Sessions Act of 2005, Pub. L. No. 109-63, § 2, 119 Stat. 1993 (2005).

156. *Id.*

157. See generally ROAD MAP, *supra* note 149, at 3, 9–14.

158. See Robert Lewis, *Justice Delayed: Courts Overwhelmed by Pandemic Backlog*, CAPRADIO (Jan. 20, 2021), <https://www.capradio.org/articles/2021/01/20/justice-delayed-courts-overwhelmed-by-pandemic-backlog/> [<https://perma.cc/ST8G-APNX>].

nal trial dockets and lengthened the period of pretrial delay in cases like that of Mr. Davis.

In effect, when an unprecedented event like a pandemic arises, the government experiences a windfall under *Barker* because pretrial delays, even when caused by court closures that resulted from the court's negligent lack of planning, are not necessarily weighed against the government. As Justice Brennan pointed out, accused people like Mr. Davis are prejudiced by pretrial delays caused by government negligence to the same extent they are by delays resulting from government bad faith. Failing to hold the government accountable for lengthy pretrial delays caused by its negligent failure to plan to honor the speedy trial rights of criminally accused people like Mr. Davis undermines the one purpose for which the Speedy Trial Clause was included in the Bill of Rights: protecting against government overreach.

To reinvigorate the Sixth Amendment speedy trial right, government negligence should be weighed under *Barker* and its progeny according to the extent to which the pretrial delay was necessary for community safety. Where a foreseeable event like a pandemic is concerned, courts must plan for and effectively implement plans to safely maintain operations necessary to honor the constitutional rights of people with cases pending before them. Failure to engage in that planning or to effectively implement plans in the face of an event like a pandemic should be considered negligent for purposes of the *Barker* analysis.

In determining the extent to which negligence through lack of planning should be weighed against the government, reviewing courts should consider the extent to which the government deviated from best practices for pandemic planning, such as those set forth in the Bureau of Justice Assistance Guidelines and the NCSC report. Reviewing courts should also consider the extent to which any government failure to follow best practices caused or exacerbated pretrial delay. For example, reviewing courts could consider whether the at-issue court system had a COOP in place before the onset of a unique event like a pandemic, and the extent to which reasonably foreseeable bottlenecks were anticipated and addressed through implementation of the COOP. Failure to plan according to a COOP or address these reasonably foreseeable bottlenecks or both should weigh heavily against the government. The extent to which pretrial delay was exacerbated by the court's failure to plan before that onset should be considered commensurate with the amount of particularized actual prejudice an accused must establish to succeed on a Sixth Amendment speedy trial claim. Courts should weigh this factor against the government, rather than applying a neutral weight in the analysis.

The analytical framework suggested here serves the individual and institutional interests deemed important in Sixth Amendment speedy trial jurisprudence and serves the original aims of the Speedy Trial Clause. As a result of the COVID-19 pandemic, many courts have suspended in-per-

son jury trials indefinitely in lieu of finding a pre-planned workaround to ensure speedy resolution of criminal cases. As a result, accused people are spending protracted periods incarcerated pretrial despite being cloaked with the presumption of innocence.¹⁵⁹ Moreover, being detained in jail during a pandemic presents the commonly considered sources of anxiety, such as loss of income and the shame of public accusation. It also presents unique life or death considerations—with variants of the virus spreading rapidly in public spaces, especially among unvaccinated people, the risk of contracting COVID-19 while in jail is an ever-present threat. Longer periods of pretrial incarceration also undermine the state's interest in rehabilitating guilty people in a timely fashion so they can return to productivity, and increase costs associated with detaining presumptively innocent people.¹⁶⁰ Moreover, court-backlog¹⁶¹ and resulting pretrial delay caused by government negligence can impair defendants' ability to present their defense and can reduce the accuracy of trial outcomes.¹⁶² Finally, for those at liberty on bond during the pretrial period, pretrial delay prolongs the expenses presumptively innocent people accrue during a time when financial strain is widely exacerbated due to the widespread job and wage loss associated with pandemic-mandated business closures. Unnecessarily extended pretrial delays also increase government allocation of financial and personnel resources needed for pretrial supervision and monitoring.

CONCLUSION

It may take years to fully assess the impact of pretrial delays caused by government negligence in courts' failure to plan for a reasonably foreseeable event like the COVID-19 pandemic, but it is clear today that exaggerated pretrial delays were caused by government negligence in failure to plan and implement protocols to continue operations and honor criminally accused people's constitutional rights. Putting the burden of proof on the government serves to check government overreach, one original aim of the Speedy Trial Clause. In order to reinvigorate the promise of

159. Prior to COVID-19, the average wait pretrial was thirty-five days. See Chris W. Surprenant, *COVID-19 and Pretrial Detention*, MERCATUS (Mar. 30, 2020), <https://www.mercatus.org/publications/covid-19-policy-brief-series/covid-19-and-pretrial-detention> [https://perma.cc/VG2H-VF49]. Some courts have responded by releasing low-risk offenders. See Prison Policy Initiative, *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (May 18, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html> [https://perma.cc/2F7S-A5BW].

160. Surprenant, *supra* note 159.

161. Shelly Bradbury, "It's a Double Whammy:" Colorado Courts Facing Unprecedented Backlog Now Hobbled by COVID-19 Budget Cuts, DENVER POST (Dec. 25, 2020, 6:00 AM), <https://www.denverpost.com/2020/12/25/colorado-courts-covid-budget-cuts/> [https://perma.cc/DYX4-HKKF].

162. The Court relies on the phrase "administering and receiving justice" when discussing fairness in the judicial process. *Doggett v. United States*, 505 U.S. 647, 665 (1992). However, it is clear that when the Court uses this language, it is referring to the time the prosecution has to prepare its case. *Id.*

the Speedy Trial Clause, serious, case-by-case determinations of the ways and extent to which government negligence in pandemic planning affected pretrial delays in cases like Mr. Davis's would be a helpful first step.