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Speedy Trial for Convicts: A Reexamination of the Demand Rule

Max Cohen

SPEEDY TRIAL FOR CONVICTS: A REEXAMINATION OF THE DEMAND RULE

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INTRODUCTION

[A]nd when a robber or murderer or thief . . . has been arrested . . . let the sheriffs send word to the nearest justice . . . that they have arrested such men . . . and let the sheriffs bring them before justices.[1]

In the halycon time of a 19th century agrarian economy, marked by a comparatively sparse population and very limited mobility, the constitutional guarantee of the Sixth Amendment right to a speedy and public trial was easily satisfied. Only since the advent of a highly industrialized society providing facile and speedy transportation to all areas of the country, accompanied by a surging crime rate, has the problem become acute.

The armed robber who commits a crime in Indiana, if he is not immediately apprehended in hot pursuit, may quickly work his way through Kentucky, Tennessee or several other states. In the interval between the original crime and ultimate capture, several states and multiple robberies may have intervened. When an investigation discloses the other offenses, the jurisdiction in which the robber has been apprehended is usually deluged with fugitive warrants and detainers.

Generally, the jurisdiction where the defendant was arrested will not surrender the defendant to another jurisdiction unless the crime committed in the other state is of a more aggravated and serious nature. In most instances, the defendant is then tried, convicted, sentenced and committed in the arresting state. The detainers follow him to the institution and grow yellow with age while the defendant serves out his term. The presence of the detainer in most jurisdictions precludes parole or clemency, and the defendant is required to serve the maximum term.[2]

When the defendant is finally released, in most instances, several years later, he is greeted by a law enforcement officer who transports him to another jurisdiction to stand trial on the now ancient charge. His plea for discharge for delay in trial based upon the violation of his Sixth

* Member of the Indiana Bar.

1. Assize of Clarendon (1166), 2 ENGLISH HISTORICAL DOCUMENTS 408 (1953).
2. Note, *Detainers and the Correctional Process,* 1966 WASH. U.L.Q. 417.

Amendment right to a speedy trial is summarily denied because he has waived that right for failure to make "demand" for a speedy trial.[3]

In the light of several recent decisions by the United States Supreme Court, the viability of the so-called "demand" rule is open to serious question.

Right to a Speedy Trial

Determinative Factors

It should be initially noted that the "demand" rule was never pronounced by the United States Supreme Court. The Court has dealt with this question on very few occasions, and then only parenthetically. In *Beaver v. Haubert*,[4] the petitioner had been indicted in two different jurisdictions. The Supreme Court rejected petitioner's claim that he must be first tried on the indictment first filed, stating:

> The right of a speedy trial is necessarily relative. It is inconsistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.[5]

On two other occasions, the Court has stated: "The delay must not be purposeful or oppressive"[6] and "[t]he essential ingredient is orderly expedition and not mere speed."[7]

While the issue had, until recently, received scant attention from the United States Supreme Court, it has been the subject of increasing litigation in the lower federal courts.

The case most often cited to determine what factors are to be considered in a claim of denial of a speedy trial is *Simmons v. United States*.[8]

In *Simmons*, the defendant was under a state court commitment while a federal charge of unlawful sale of narcotics was pending against him. The four factors the Second Circuit Court of Appeals deemed significant in considering the claim were 1) the length of the delay, 2) the reason for the delay, 3) prejudice to the defendant and 4) waiver, if any, by the defendant. The court of appeals in affirming the conviction did not reach the question of waiver, finding that the delay was not unreasonable since the defendant had, at most, ten or eleven months remaining to be served under the state court commitment.

3. United States v. Lustman, 258 F.2d 475 (2d Cir. 1957).
4. 198 U.S. 77 (1904).
5. *Id.* at 87.
6. Pollard v. United States, 352 U.S. 354, 361 (1957).
7. Smith v. United States, 360 U.S. 1, 10 (1959).
8. 338 F.2d 804 (2d Cir. 1964).

Right to Speedy Trial and the Demand Rule

In *Taylor v. United States*,[9] imprisonment in another institution was held not to constitute justification in and of itself to excuse a protracted delay in trial. It appears, however, that in *Taylor*, the defendant did not even know that he was under indictment and was therefore excused from making demand.[10] The great majority of the cases, however, have required that a defendant asserting the constitutional guarantee must make a demand for trial. Thus, a four and one-half year delay between arrest and return of the indictment has been upheld, due to defendant's failure to made the demand.[11]

A few instances have been noted which ameliorate the harsh standard imposed by the "demand" rule;[12] and recently there has been a marked trend in the courts to note with increasing disfavor the delay in bringing incarcerated prisoners to trial. Thus, in *United States v. Banks*,[13] where there was a delay of ten months while the defendant was in state custody a few miles away, the court observed:

> We cannot justify the District Attorney's inactivity during the ten-month interval between the indictment and Banks' release from state confinement. In appraising the right to a speedy trial, we are required to look at the possible prejudice the defendant has suffered, as well as to the length of the delay and the reason for it. The delay was not so long as to make a prima facie showing of prejudice . . . he suffered no detriment from it.[14]

Basis of the Right to a Speedy Trial

Perhaps a legitimate inquiry is why our judiciary need even be concerned with a convict's right to a speedy trial. It has often been ob-

9. 238 F.2d 259 (2d Cir. 1956). The federal indictment was dismissed against the defendant, whose trial had been delayed six years because of his imprisonment in New York.

10. Where there has been an unusually long delay, the problem of waiver is not even considered. Williams v. New York, 250 F. 19 (D.C. Cir. 1957); *accord*, United States v. Parrot, 248 F. Supp. 196 (D.D.C. 1965). In the *Williams* case there was a seven year delay in bringing the defendant to trial. Even though the delay had been occassioned by the incompetency of the defendant to stand trial, prejudice was presumed. The burden was placed upon the government to show that the accused suffered no serious perjudice beyond that which ensued from ordinary and inevitable delay.

11. Mathias v. United States, 374 F.2d 312 (D.C. Cir. 1967). *Accord*, United States v. Maxwell, 383 F.2d 437 (2d Cir. 1967); United States *ex rel* Moses v. Kipp, 232 F.2d 147 (7th Cir. 1956); Chinn v. United States, 228 F.2d 151 (4th Cir. 1955).

12. *See, e.g.*, United States v. Chase, 135 F. Supp. 230 (N.D. Ill. 1955) (defendant was powerless to assert his right because of imprisonment, ignorance and lack of legal advice).

13. 370 F.2d 131 (4th Cir. 1966).

14. *Id.* at 144-45.

served by many courts that the convict has no legitimate cause for complaint for delay in trial since it is his own misconduct which has been the primary cause for delay. A more enlightened and humane penal system, however, has recognized one incontrovertible fact—that eventually most convicts are released from penal institutions and must return to society. Most modern penologists agree that an unusually long term of confinement makes the convict socially unadaptable and more likely to commit another crime upon release from the institution. His behavior patterns have become "institutionalized": the long removal from society renders him incapable, for the most part, of projecting himself into the main stream of community living. The deleterious effect of the detainer is threefold. First, it eliminates the possibility that the convict may receive a sentence which would run concurrently with the one he is now serving.[15] Secondly, his sentence is "flattened out": he becomes ineligible for early parole and is deprived of privileges accorded other inmates in the same institution.[16] Finally, the knowledge that the detainer is present seriously hampers attempts to rehabilitate the convict. He is understandably anxious about the prospect of being taken into custody at the conclusion of his present sentence.[17]

Not until the Supreme Court decision in *Klopfer v. North Carolina,*[18] did the Sixth Amendment right to a speedy trial achieve equal stature and dignity with the other guarantees embodied in the Bill of Rights.

In *Klopfer,* the petitioner, a university professor, had been charged with criminal trespass arising out of a civil rights demonstration. The trial resulted in a deadlocked jury. The cause was continued twice over objection of the petitioner; and again over objection, the prosecutor's motion to take a nolle prosequi with leave to reinstate at a future date, was granted. The Supreme Court held that this procedure sanctioned by the North Carolina courts violated the petitioner's right to a speedy trial. What is most significant about the holding in *Klopfer,* however, is that the Court incorporated the Sixth Amendment right to a speedy trial under the "due process clause" of the Fourteenth Amendment, thus making the Sixth Amendment right to a speedy trial applicable to all of the states.

15. Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial,* 35 U. CIN. L. REV. 179 (1966).

16. Evans v. Mitchell, 200 Kan. 290, 436 P.2d 408 (1968) (holding that Kansas was under no duty to bring to trial a convict serving a fifteen year sentence in a Washington prison although the pendency of the Kansas charge prevented any possibility of clemency or pardon in Washington and made it impossible for the prisoner to take part in rehabilitation programs or to become a trustee).

17. Bennett, *The Last Full Ounce,* 23 FED. PROBATION 20 (1959).

18. 386 U.S. 213 (1967).

Klopfer, therefore, establishes a minimum standard to which all jurisdictions must adhere in satisfying the right to a speedy trial. The decision in *Klopfer* was foreshadowed by the decision in *United States v. Ewell*.[19] Although the defendants' claim that their right to a speedy trial had been contravened[20] was rejected, the Court observed that the existence of the right was designed "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[21]

WAIVER

With the holding in *Klopfer* that the right to a speedy trial is "one of the most basic rights reserved by our Constitution,"[22] the doctrine that the right is waived by failure to make demand is now untenable. Waiver of fundamental constitutional rights is not presumed, and the courts indulge every reasonable presumption against such waiver.[23] Decisions by the Supreme Court in other constitutionally protected areas have consistently rejected the waiver contention.

Thus in *Miranda v. Arizona*,[24] the Supreme Court, in conjunction with its holding in regard to protection of a suspect's rights during custodial interrogation,[25] also set forth important pronouncements regarding waiver. The Court held that although the defendant may waive these rights, the waiver must be made voluntarily, knowingly and intelligently.

Again, in *Mapp v. Ohio*,[26] which held that the exclusionary rule was required by the Fourth Amendment, the Court recognized the necessity for a knowledgeable waiver, stating, "[T]o hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[27]

Recently, the *Miranda* test has also been applied to a search and seizure case.[28]

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19. 383 U.S. 116 (1966).

20. The defendants had been convicted on a narcotics charge. Their convictions were subsequently set aside. The government reindicted the defendants but added three counts. The Supreme Court held that the passage of nineteen months under these circumstances did not constitute a violation of the guarantee to a speedy trial.

21. 383 U.S. at 120.

22. 383 U.S. at 126.

23. Johnson v. Zerbst, 304 U.S. 458 (1938) (accused cannot be found to have waived his right to counsel at trial unless he actually knew of that right).

24. 384 U.S. 436 (1966).

25. Prosecution may not use statements unless defendant has been warned: 1) of his right to remain silent; 2) that any statement he does make may be used as evidence against him; and 3) that he has a right to counsel, either retained or appointed.

26. 367 U.S. 643 (1961).

27. *Id.* at 656.

28. United States v. Nikrosch, 367 F.2d 740 (7th Cir. 1967) (a suspect cannot effectively consent to a search unless he is first advised of his rights under the

Right to Counsel

Waiver presupposes the knowledge of a right and an intelligent and knowing determination to forfeit that right.[29] If the burden is now upon the government to demonstrate a waiver of rights guaranteed by the Fifth Amendment privilege against self-incrimination, is there any valid reason why the government should not be required to assume that burden where the Sixth Amendment right to a speedy trial is involved? In this connection, can it be said that there is ever an intelligent and knowing waiver of the constitutional right to a speedy trial unless 1) the defendant is advised of that right and 2) he is immediately provided with counsel who may properly advise him as to whether he should assert the right and the manner in which it should be asserted. The right to counsel at every stage of the proceedings is no longer open to question.[30] The Supreme Court has extended that right to post-conviction proceedings.[31] It is submitted that the right to counsel to a person already in custody is no less significant or meaningful than the right to counsel of a person who is being subjected to custodial interrogation. The need for guidance and the instruction of counsel for the prisoner already in custody and serving a jail term and who may also be subject to further prosecution in another jurisdiction is even more imperative. The consequences which may result to the prisoner not having been provided counsel in this situation are equally pernicious.

Illustrative of the judicial trend in this area is the recently decided case of *United States v. Reed.*[32] There the district court held that a resident of the District of Columbia who was indicted on an auto theft charge while serving a prison sentence in Maryland, was entitled to discharge because of a twenty-six month delay after his indictment. The delay in prosecution was due to the carelessness of the government and the Maryland authorities who had misplaced the detainer filed against the defendant while he was imprisoned in Maryland. In dismissing the indictment, Judge Youngdahl held that there could be no waiver of the right to a speedy trial where the defendant had no knowledge of the pending charge or *where he was powerless to assert his right because of*

Fourth Amendment). *Contra,* State v. Forney, 150 N.W.2d 915 (Neb. 1967). In the *Forney* case, the Nebraska Supreme Court refused to extend the *Miranda* test to the Fourth Amendment, although recognizing the Fourth Amendment right to be "fully as important and imperative as the guarantees provided by the Fifth Amendment and as basic to a free society." 150 N.W.2d at 917.

29. Johnson v. Zerbst, 304 U.S. 458 (1938).
30. Gideon v. Wainwright, 372 U.S. 355 (1963).
31. Lane v. Brown, 372 U.S. 477 (1963).
32. 285 F. Supp. 738 (D.D.C. 1968).

imprisonment, ignorance and lack of legal advice.[33] The desirability and the necessity of providing counsel immediately was noted by the District Judge.

American Bar Association Recommendations

The American Bar Association has recently adopted a report which would obviate most of the problems now prevalent in this area.[34] The procedure encompassed in that report would require a prosecutor to promptly undertake to obtain the presence of the prisoner for trial or cause a detainer to be filed with the official having custody of the prisoner and request him to so advise the prisoner. That official must also advise the prisoner of his right to demand trial. If the prisoner does demand trial, this fact is communicated to the prosecuting attorney who must then promptly seek to obtain the presence of the prisoner for trial. While the adoption of that procedure would certainly be a step forward, it avoids the basic question of the necessity of providing the prisoner counsel at the time the detainer is filed.

It is no real protection of a prisoner's right to have a warden perfunctorily advise him that he has a right to demand trial if neither the warden nor the prisoner is aware of the legal consequences which would result from the failure to make such a demand. The procedure recommended by the ABA Project on Standards for Criminal Justice[35] would lodge the protection of a fundamental constitutional right in the tender hands of the police. The history of the administration of criminal justice has time and again clearly demonstrated that policemen are vocationally inept to fulfill this trust. It would be a far more salutory practice to require that immediately upon the filing of the detainer, the prisoner be advised of his right to counsel and that counsel be provided him, if he so elects, in the jurisdiction in which he is detained. The warden advising him of his right to counsel should be required to submit to the prisoner a form of waiver similar to the type now being used in the *Miranda* situations.

Perhaps the most significant departure from the harshness of the demand rule is set forth in *Pitts v. State of North Carolina*,[36] where the claim of denial of the Sixth Amendment right to a speedy trial was upheld in a post-conviction habeas corpus proceeding brought under 28 U.S.C. section 2254. In *Pitts*, the petitioner, while imprisoned in South Carolina,

33. *Id.* at 741 (emphasis added).
34. ABA Project on Standards for Criminal Justice, Report on Standards Relating to Speedy Trial, § 3.1 (1968).
35. *Id.*
36. 395 F.2d 182 (4th Cir. 1968).

was charged with armed robbery in North Carolina and a detainer was lodged against him at the South Carolina prison. Because the detainer was filed, he was required to serve almost sixteen years of a twenty-one year sentence. He was returned to North Carolina, tried and convicted on the armed robbery charge. At no time prior to trial did his counsel raise the speedy trial issue. In rejecting the claim that the petitioner had waived his right, the court of appeals cited with approval the ABA Projects on Standards for Criminal Justice and observed that this procedure had not been followed. The court of appeals concluded that

> [s]ince this ingredient of basic fairness was excluded by keeping the prisoner in ignorance of his right to demand a trial, we will not hold that he has waived his fundamental right to a speedy trial by failing to seek an immediate hearing seven years after the prosecution had initiated proceedings against him.[37]

What is particularly interesting about the holding in *Pitts*, however, is that while the court relied heavily upon Section 3.1 of the ABA Project on Standards for Criminal Justice, it ignored Section 4.1, Consequences of Denial of Speedy Trial, which provides in part

> [that] failure of the defendant or his counsel to move for discharge prior to trial or entry of a plea of guilty should constitute waiver of the right to speedy trial.[38]

The only reasonable explanation for this oversight is that the court was so appalled by the basic unfairness of the proceeding and the inadequacy of the petitioner's trial counsel in failing to assert this contention, that it was determined to accord the petitioner substantial justice.

The Supreme Court has in this Term held that a federal prisoner facing a state criminal charge is entitled, on demand for speedy trial, to action by the state directed toward obtaining his release from federal custody for the purpose of undergoing trial by the state which has lodged a detainer against him.[39] The opinion of the Court in *Smith*, however, leaves unresolved the ultimate question whether the state (in this case, Texas) must dismiss the criminal proceedings against the petitioner. Interestingly enough, many of the state courts have refused to invoke the demand rule and have upheld the claim of denial of the right to speedy trial where the prosecutor has made no reasonable effort to extradite

37. *Id.* at 188.
38. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, REPORT ON STANDARDS RELATING TO SPEEDY TRIAL, § 4.1 (1968).
39. Smith v. Hooey, 37 U.S.L.W. 3077 (B.N.A. 1969).

prisoners held in another state.[40]

CONCLUSION

The demand rule was evolved in an era antecedent to what has been described as the continuing revolution in criminal law. It is now in direct conflict with two other constitutional principles. The doctrine of waiver by failure to make demand flies in the face of the "admonition of the Supreme Court that courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and that we do not presume acquiescence in the loss of fundamental rights."[41]

To require a semi-literate convict to exercise a knowing and intelligent awareness of his constitutional rights under the Sixth Amendment to a speedy trial is patently absurd and bluntly unrealistic. One might equally justify the admission of a custodially-induced confession by asserting that the defendant should know he has a right not to make such a confession where the fourfold *Miranda* warning has not been given. The demand rule is equally in conflict with the right to counsel at every stage in the criminal proceedings.[42]

Now that the Supreme Court has unequivocally held that the right to a speedy trial is one of the most basic rights preserved by our Constitution,[43] the demand rule has outlived whatever usefulness it may have had—continued adherence to it effectively emasculates that right.

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40. *See* People v. Winfrey, 20 N.Y.S. 2d. 138, 228 N.E.2d 808 (1967); People v. Bryarly, 23 Ill. 2d 313, 178 N.E.2d 326 (1961).
41. Taylor v. United States, 238 F.2d 259, 261 (D.C. Cir. 1956).
42. Gideon v. Wainwright, 372 U.S. 477 (1963).
43. Klopfer v. North Carolina, 386 U.S. 213 (1967).