# SPEEDY TRIAL
# FEDERAL AND STATE PRACTICE

ROBERT L. MISNER

Contemporary Litigation Series

# SPEEDY TRIAL FEDERAL AND STATE PRACTICE

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# PREFACE

In the Introduction to Parts 1 and 3, I have discussed in some detail the concept of this book. Here it is sufficient to recall the unique quality of the right to a speedy trial as summarized by the Supreme Court in *Barker v. Wingo:*

> The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.

I am indebted to a number of people for their assistance. Dean Alan Matheson provided resources when resources were scarce. Professor Ed Cleary provided the inspiration. My two principal research assistants, Wendy Danielson and Pamela Doak, provided invaluable aid. Kathleen Misner assisted in the proofreading. Finally I would like to thank Karen Ravert and Sandi Mitchell for their tireless secretarial assistance.

For Kathi, Nathan, Rebecca and Sarah

# TABLE OF CONTENTS


| | | Page |
|---|---|---|
| *Dedication* | | v |
| *Preface* | | xi |

PART I

THE SIXTH AMENDMENT IN THE FEDERAL COURTS

| | | |
|---|---|---|
| § 1. | Introduction | 2 |
| § 2. | United States Supreme Court | 3 |
| § 3. | Federal Courts Within the First Circuit | 32 |
| | § 3-1. United States Court of Appeals for the First Circuit | 32 |
| | § 3-2. District Courts Within the First Circuit | 41 |
| § 4. | Federal Courts Within the Second Circuit | 45 |
| | § 4-1. United States Court of Appeals for the Second Circuit | 45 |
| | § 4-2. District Courts Within the Second Circuit | 61 |
| § 5. | Federal Courts Within the Third Circuit | 70 |
| | § 5-1. United States Court of Appeals for the Third Circuit | 70 |
| | § 5-2. District Courts Within the Third Circuit | 74 |
| § 6. | Federal Courts Within the Fourth Circuit | 83 |
| | § 6-1. United States Court of Appeals for the Fourth Circuit | 83 |
| | § 6-2. District Courts Within the Fourth Circuit | 92 |
| § 7. | Federal Courts Within the Fifth Circuit | 96 |
| | § 7-1. United States Court of Appeals for the Fifth Circuit | 96 |
| | § 7-2. District Courts Within the Fifth Circuit | 117 |
| § 8. | Federal Courts Within the Sixth Circuit | 121 |
| | § 8-1. United States Court of Appeals for the Sixth Circuit | 121 |
| | § 8-2. District Courts Within the Sixth Circuit | 130 |
| § 9. | Federal Courts Within the Seventh Circuit | 135 |
| | § 9-1. United States Court of Appeals for the Seventh Circuit | 135 |
| | § 9-2. District Courts Within the Seventh Circuit | 150 |

*Page*

§ 10. Federal Courts Within the Eighth Circuit ..... 155
§ 10-1. United States Court of Appeals for the Eighth Circuit ..... 155
§ 10-2. District Courts Within the Eighth Circuit .. 165
§ 11. Federal Courts Within the Ninth Circuit ..... 172
§ 11-1. United States Court of Appeals for the Ninth Circuit ..... 172
§ 11-2. District Courts Within the Ninth Circuit ... 185
§ 12. Federal Courts Within the Tenth Circuit ..... 187
§ 12-1. United States Court of Appeals for the Tenth Circuit ..... 187
§ 12-2. District Courts Within the Tenth Circuit ... 194
§ 13. Federal Courts Within the Eleventh Circuit ..... 196
§ 14. Federal Courts Within the District of Columbia .... 196
§ 14-1. United States Court of Appeals for the District of Columbia ..... 196
§ 14-2. United States District Court for the District of Columbia ..... 204

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PART II

SPEEDY TRIAL ACT OF 1974

§ 15. Introduction to the Original Act ..... 207
§ 16. The 1979 Amendments ..... 215
§ 17. Analysis of the Act as Amended ..... 217
§ 17-1. 18 U.S.C. § 3161(a) and Commentary ..... 217
§ 17-2. 18 U.S.C. § 3161(b) and Commentary ..... 218
§ 17-3. 18 U.S.C. § 3161(c)(1) and Commentary ... 227
§ 17-4. 18 U.S.C. § 3161(c)(2) and Commentary ... 229
§ 17-4.1. Analysis of the Statutory Language 232
§ 17-4.2. Analysis of the Legislative History 236
§ 17-4.3. Analysis of the Noncongressional Sources ..... 238
§ 17-4.4. Analysis of the Policy Underlying the Amendment ..... 241
§ 17-5. 18 U.S.C. § 3161(d)(1) and Commentary ... 244
§ 17-6. 18 U.S.C. § 3161(d)(2) and Commentary ... 250
§ 17-7. 18 U.S.C. § 3161(e) and Commentary ..... 251
§ 17-8. 18 U.S.C. § 3161(f) and (g) and Commentary 258

*Page*

§ 17-9. 18 U.S.C. § 3161(h)(1)-(7): Automatic Excludable Time Provisions ..... 259
§ 17-9.1. 18 U.S.C. § 3161(h)(1)(A)-(J) and Commentary ..... 260
§ 17-9.2. 18 U.S.C. § 3161(h)(2)-(7) and Commentary ..... 272
§ 17-10. 18 U.S.C. § 3161(h)(8) and Commentary .. 276
§ 17-11. 18 U.S.C. § 3161(i) and Commentary ..... 290
§ 17-12. 18 U.S.C. § 3161(j) and Commentary ..... 292
§ 17-13. 18 U.S.C. § 3162: Sanctions ..... 294
§ 17-14. 18 U.S.C. §§ 3163, 3164 and Commentary 307
§ 17-15. 18 U.S.C. §§ 3165-3171: The Planning Provisions ..... 311
§ 17-16. 18 U.S.C. §§ 3172-3174 and Commentary ... 322
§ 18. Procedural Issues ..... 326
§ 18-1. Waiver ..... 326
§ 18-2. Interlocutory Appeal ..... 327

---

PART III

CONSTITUTIONAL, STATUTORY, AND PROCEDURAL RIGHTS TO A SPEEDY TRIAL IN THE STATES

§ 19. Introduction ..... 330
§ 19-1. Alabama ..... 331
§ 19-2. Alaska ..... 337
§ 19-3. Arizona ..... 345
§ 19-4. Arkansas ..... 362
§ 19-5. California ..... 371
§ 19-6. Colorado ..... 384
§ 19-7. Connecticut ..... 394
§ 19-8. Delaware ..... 399
§ 19-9. District of Columbia ..... 403
§ 19-10. Florida ..... 414
§ 19-11. Georgia ..... 422
§ 19-12. Hawaii ..... 429
§ 19-13. Idaho ..... 434
§ 19-14. Illinois ..... 439
§ 19-15. Indiana ..... 452

*Page*

§ 19-16. Iowa ..... 462
§ 19-17. Kansas ..... 471
§ 19-18. Kentucky ..... 479
§ 19-19. Louisiana ..... 484
§ 19-20. Maine ..... 494
§ 19-21. Maryland ..... 499
§ 19-22. Massachusetts ..... 510
§ 19-23. Michigan ..... 523
§ 19-24. Minnesota ..... 533
§ 19-25. Mississippi ..... 536
§ 19-26. Missouri ..... 538
§ 19-27. Montana ..... 548
§ 19-28. Nebraska ..... 559
§ 19-29. Nevada ..... 564
§ 19-30. New Hampshire ..... 571
§ 19-31. New Jersey ..... 578
§ 19-32. New Mexico ..... 584
§ 19-33. New York ..... 589
§ 19-34. North Carolina ..... 601
§ 19-35. North Dakota ..... 613
§ 19-36. Ohio ..... 616
§ 19-37. Oklahoma ..... 626
§ 19-38. Oregon ..... 634
§ 19-39. Pennsylvania ..... 638
§ 19-40. Rhode Island ..... 648
§ 19-41. South Carolina ..... 655
§ 19-42. South Dakota ..... 658
§ 19-43. Tennessee ..... 661
§ 19-44. Texas ..... 667
§ 19-45. Utah ..... 681
§ 19-46. Vermont ..... 688
§ 19-47. Virginia ..... 693
§ 19-48. Washington ..... 699
§ 19-49. West Virginia ..... 714
§ 19-50. Wisconsin ..... 720
§ 19-51. Wyoming ..... 727

Appendix A. Speedy Trial Act of 1974 As Amended ..... 736
Appendix B. Amended Speedy Trial Act Guidelines (Selected Provisions) ..... 752

*Table of Cases* ..... 783
*Index* ..... 807

# PART I
# THE SIXTH AMENDMENT IN THE FEDERAL COURTS


§ 1. Introduction.
§ 2. United States Supreme Court.
§ 3. Federal Courts Within the First Circuit.
  § 3-1. United States Court of Appeals for the First Circuit.
  § 3-2. District Courts Within the First Circuit.
§ 4. Federal Courts Within the Second Circuit.
  § 4-1. United States Court of Appeals for the Second Circuit.
  § 4-2. District Courts Within the Second Circuit.
§ 5. Federal Courts Within the Third Circuit.
  § 5-1. United States Court of Appeals for the Third Circuit.
  § 5-2. District Courts Within the Third Circuit.
§ 6. Federal Courts Within the Fourth Circuit.
  § 6-1. United States Court of Appeals for the Fourth Circuit.
  § 6-2. District Courts Within the Fourth Circuit.
§ 7. Federal Courts Within the Fifth Circuit.
  § 7-1. United States Court of Appeals for the Fifth Circuit.
  § 7-2. District Courts Within the Fifth Circuit.
§ 8. Federal Courts Within the Sixth Circuit.
  § 8-1. United States Court of Appeals for the Sixth Circuit.
  § 8-2. District Courts Within the Sixth Circuit.
§ 9. Federal Courts Within the Seventh Circuit.
  § 9-1. United States Court of Appeals for the Seventh Circuit.
  § 9-2. District Courts Within the Seventh Circuit.
§ 10. Federal Courts Within the Eighth Circuit.
  § 10-1. United States Court of Appeals for the Eighth Circuit.
  § 10-2. District Courts Within the Eighth Circuit.
§ 11. Federal Courts Within the Ninth Circuit.
  § 11-1. United States Court of Appeals for the Ninth Circuit.
  § 11-2. District Courts Within the Ninth Circuit.
§ 12. Federal Courts Within the Tenth Circuit.
  § 12-1. United States Court of Appeals for the Tenth Circuit.
  § 12-2. District Courts Within the Tenth Circuit.
§ 13. Federal Courts Within the Eleventh Circuit.
§ 14. Federal Courts Within the District of Columbia.
  § 14-1. United States Court of Appeals for the District of Columbia.
  § 14-2. United States District Court for the District of Columbia.

## § 1. Introduction.

Litigation concerning the constitutional right to a speedy trial is highly fact-specific and consequently the text of Parts One and Three makes consistent reference to those factual situations which are continually re-occurring in the case law. The discussion of the case law of each circuit centers on the application of *Barker v. Wingo* by the federal courts of the circuit. Within the discussion one will also find reference to other prompt disposition issues, which are not precisely Sixth Amendment issues, such as preindictment delay, prompt probation and parole revocation hearings, the application of Federal Rules of Criminal Procedure 48(b) and the application of the Interstate Agreement on Detainers to which the United States is a party. In the discussion of *Barker v. Wingo* within the circuits, first one will find procedural questions regarding application of the Sixth Amendment right such as the effect of a guilty plea on a subsequent claim by the defendant of a denial of a speedy trial followed by a discussion of *Barker* broken down into a discussion of each factor: delay, cause of delay, assertion of the right by the defendant, and prejudice. The discussion of prejudice is organized around the three major interests protected by the Sixth Amendment: protection against undue anxiety and concern, protection against pretrial incarceration and protection against impairment of the defense.

Part One begins with a discussion of the Sixth Amendment right to a speedy trial of the Supreme Court cases. All attorneys should begin with the discussion in the Supreme Court and then proceed to discussion within the applicable circuit. If the case law of the appropriate circuit is inadequate, other circuit case law or state case law should be consulted.

The case law within Part One is primarily cases decided after the 1972 decision of *Barker v. Wingo* and before July 1, 1982.

## § 2. United States Supreme Court.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Like many other protections found in the Bill of Rights,[1] the speedy trial provision can be traced to the Magna Carta: "We will sell to no man, we will not deny or defer to any man either justice or right." [2] The most immediate predecessor to the Sixth Amendment speedy trial right was the Virginia Declaration of Rights of 1776, which provided, "In all capital or criminal prosecutions a man hath a right . . . to a speedy trial." [3] But despite the apparent importance of the provision, speedy trial cases have only infrequently reached the Supreme Court.

In *Beavers v. Haubert,*[4] a 1905 Supreme Court case, Beavers argued that he could not be removed from the Eastern District of New York to the District of Columbia as long as there were pending indictments against him in the Eastern District of New York. Beavers based this argument upon his constitutional right to a speedy trial in the Eastern District of New York claiming that the right would be jeopardized if he were first removed to be tried for a separate crime in the District of Columbia.[5] To this argument the Court replied:

> Appellant seems to contend that the right attaches and becomes fixed to the first accusation, and whatever be the demands of public justice they must wait . . . . The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.[6]

The Court in *Beavers v. Haubert* highlighted three aspects of speedy trial litigation that one can find in most speedy trial cases today: first, the constitutional right to a speedy trial is a "relative" right requiring a balance between the interests of the defendant and the interest of society; [7] second, defendant's claim that he wishes a speedy trial is often seen by the court as a ruse to avoid prosecution and actually it is the wish of the defendant not to be tried in a speedy fashion; [8] and, third, in speedy trial litigation the defendant is rarely successful in his claim.[9]

Issues of speedy trial do not again reach the Supreme Court until 1928 and then only faced in dicta. In *Gaines v. Washington,*[10] the defendant complained that his murder trial was not a "public trial" as required by the Sixth Amendment.[11] The defendant argued the then "novel" argument that

> due process of law enacted in the Fourteenth Amendment in cases tried in state courts must be construed as equivalent to the Sixth Amendment in federal trials. The question has not arisen in any case cited to us.[12]

The Court summarily held that "the Sixth Amendment to the Federal Constitution does not apply to the trial of criminal prosecutions by a State." [13]

It is not until 1956, in *Pollard v. United States,*[14] that the Supreme Court is once again faced with a speedy trial issue. However, unlike the usual speedy trial issue questioning the time from arrest or indictment to trial, Pollard complained that the Sixth Amendment speedy trial provision

was violated because of delay in his sentencing.[15] It is ironic that the first "modern" speedy trial case before the Supreme Court raised an issue never again raised in the Supreme Court and only rarely raised subsequently in the lower courts.

Pollard was tried and convicted on September 8, 1952, of embezzling a United States Treasury check. Due to a misunderstanding between the judge and Pollard, Pollard was absent from the courtroom when sentenced. Although not legally sentenced, Pollard learned from state authorities that upon leaving state custody he should report to a federal probation officer. Pollard complied with the advice and reported to the federal probation officer for almost two years. On September 1, 1954, the trial judge issued a bench warrant for Pollard on the basis of the probation officer's report that Pollard had violated his parole terms. On September 21, 1954, Pollard was sentenced on the original 1952 conviction to a prison term of two years.[16]

Pollard argued that the 1954 sentence violated his federal speedy trial right. The Court assumed *arguendo* "that sentence is a part of the trial for purposes of the Sixth Amendment." [17] But in denying relief and affirming Pollard's conviction and sentence the Court noted that "[w]hether delay in completing a prosecution such as here occurred amounts to an unconstitutional deprivation of rights depends upon the circumstances." [18] The Court centered its balancing test on the fact that unlike a number of lower court cases which had found unconstitutional deprivations of the right to a speedy trial, the delay in *Pollard* was not purposeful or oppressive but rather it "was accidental and promptly remedied when discovered." [19]

The four-judge dissent [20] in *Pollard* stated that "[i]t has never been held that the sentence is not part of the 'trial.' " [21] But the dissent stated that it was unnecessary at this time to decide that issue as Pollard's sentence was

clearly in violation of Federal Rule of Criminal Procedure 32(a) which mandated that "sentence shall be imposed without unreasonable delay." [22]

Besides the intriguing question whether the Sixth Amendment right to a speedy trial applies to the time for sentencing, *Pollard v. United States* once more made it clear that the right to a speedy trial was not an absolute and one major factor to be considered in the balancing process was the presence or absence of intentional delay on the part of the Government. For the first time in *Pollard* one receives a clear message from the Court that the balancing test will be influenced by the possibility that the accused will be set free. In refusing relief to Pollard the Court wrote, "Error in the course of a prosecution resulting in conviction calls for the correction of the error, not the release of the accused." [23] Perhaps the presence of a less drastic remedy than freedom for the accused would have caused the five-judge majority to look more favorably upon Pollard's plight.[24]

The Court's balancing-of-interests approach in *Pollard* was used again in *United States v. Ewell.*[25] On December 18, 1962 Ewell pleaded guilty to selling narcotics. On July 17, 1963, the Seventh Circuit, in a case wholly unrelated to Ewell's, held that an indictment for selling narcotics must allege the name of the purchaser. Based upon the Seventh Circuit opinion, Ewell moved to vacate his conviction and the motion was granted on November 6, 1963. Ewell was immediately rearrested and reindicted but the district court granted Ewell's motion to dismiss on the ground that Ewell had been denied his Sixth Amendment right to a speedy trial.[26] Citing to both *Beavers v. Haubert* [27] and *Pollard v. United States,*[28] the court noted that the right to a speedy trial must be balanced against the rights of public justice.[29] In holding that the passage of nineteen months between the original arrest and the second indictment was not a *per se* violation of the Sixth Amendment, the Court, for the first

time, identified various interests which were to be balanced in deciding whether there had been a violation of the Sixth Amendment.

> This guarantee is an important safeguard 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. However, in large measure because of the many procedural safeguards provided an accused the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.[30]

In applying these rather nebulous principles to Ewell, the Court began a process, that culminates in *Barker v. Wingo,*[31] of establishing fairly specific factors which a court is to balance in making its determination whether a defendant's right to a speedy trial has been violated. In *Ewell* the Court first observed that the new indictments were brought well within the applicable statute of limitations.

> Surely appellees could claim no automatic violation of their rights to a speedy trial if there had been no charges or convictions in 1962 but only the § 4704 indictment in 1964. In comparison with that situation, the indictments and convictions of 1962 might well have enhanced appellees' ability to defend themselves, for they were at the very least put on early notice that the Government intended to prosecute them for the specific sales with which they were then and are now charged.[32]

Second, the Court noted that Ewell could not claim any possible prejudice — Ewell mentions "no specific evidence which has actually disappeared or has been lost, no witnesses who are known to have disappeared." [33] Finally the Court noted that the actions of the Government in the delay

were without fault. The delay came from a subsequent ruling in an unrelated case. The good faith of the Government was further evidenced by the fact that in the second indictment Ewell was charged with a less serious crime than he was charged in the first indictment.[34]

In *Klopfer v. North Carolina*,[35] the Supreme Court, for the first time, held that the speedy trial provision of the Sixth Amendment was applicable to the States through the due process of the Fourteenth Amendment [36] and immediately the issue of speedy trial took on greater significance.[37] Klopfer was a Professor of Zoology at Duke University who was arrested for criminal trespass during the course of a civil rights demonstration. The charge of criminal trespass was a misdemeanor. In February, 1964, Klopfer was indicted. During Klopfer's trial the jury failed to reach a verdict and the trial judge declared a mistrial. In March, 1965, the State's solicitor decided to have a *nolle prosequi* with leave entered in the case instead of proceeding directly to a second trial. Under North Carolina Criminal Procedure, the State solicitor, at any time, could decide not to prosecute the case. But at the instigation of the solicitor the case could be restored to the docket. Since the indictment had not been discharged, the statute of limitations remained tolled. When Klopfer was informed of the solicitor's decision to *nol pros* the case, he objected. Although the trial judge indicated he would grant the solicitor's motion to *nol pros* the case, the solicitor decided to file a motion with the court to continue the case to the next court term. The motion was granted.[38]

At the next term of the court, August, 1965, Klopfer's case was not set for trial. When Klopfer objected, the solicitor moved to *nol pros* the case.[39] The motion was granted and Klopfer appealed to the North Carolina Supreme Court. In rejecting Klopfer's appeal, the North Carolina Supreme Court concluded: