WARREN FREEDMAN

The Constitutional Right to a Speedy and Fair Criminal Trial

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Preface

The timely importance of the subject matter of the speedy and the fair criminal trial is attested to by simple reference to today's headlines, not only in the press but in all media, particularly television. The public at large is very familiar with the constitutional right to a speedy and fair criminal trial. The TV medium, in particular, has shown numerous classics written by the great English novelist Charles Dickens who portrayed so vividly the languor of English prison life in the last century. Indeed, modern investigating reporters employed by the media search out those instances where defendants have a long stay in prison while awaiting trial; these same investigators monitor the criminal trials to assure that fair trials are commonplace. In the final analysis, it is the bench and bar that are the vigilantes to assure the criminal defendant his constitutional right to a speedy and fair trial.

The author acknowledges that the time expended in writing this volume was made possible by the understanding of his family: his dear wife Esther, a psychiatric social worker; his son, Dr. Douglas Freedman, an orthodontist; his daughter Miriam, a New York City senior art director for a large advertising agency; and his daughter Debbie Freedman Stiebel of Avon, Connecticut, a renowned primary school teacher, and her husband Michael Stiebel, a practicing attorney.

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Background to the Speedy and the Fair Criminal Trial

1.1 INTRODUCTION

Professor Wilkinson in his 1974 study "Serving Justice" (at page 146) opined that "criminal rights is probably the area of the U.S. Supreme Court's work that is most prone to emotional reaction, either one of sympathy for a disadvantaged suspect or of outrage at the perpetrator of a violent crime." Professor Graham opined in his 1970 study, "The Self-Inflicted Wound" (at page 4), that "history has played cruel jokes before, but few can compare with the coincidence in timing between the rise in crime, violence and racial tension in the United States and the U.S. Supreme Court's campaign to strengthen the rights of criminal suspects against the State." These two opinionative views of the criminal justice system simply point up the necessity for close adherence to the constitutional guarantees concerning the speedy trial and the fair trial.

The Sixth Amendment to the U.S. Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The thrust, as pointed out in United States v. MacDonald,[1] is to minimize the possibility of long incarceration before trial, to reduce impairment of the liberty of the accused while released on bail, and to shorten disruption of life caused by arrest for a criminal matter. The Sixth Amendment also minimizes anxiety accompanying public accusation and limits impairment of the defense

resulting from any long delay.[2] The Sixth Amendment affords criminal defendants the right to trial by an impartial jury drawn from the state and the district in which the defendant allegedly committed the crime.[3]

The Fifth Amendment to the U.S. Constitution, pursuant to its due process clause, provides that "no person shall be . . . deprived of life, liberty, or property without due process of law," and thus protects, for example, defendants against intentional and prejudicial preaccusation delay.[4]

Several federal statutes like the Speedy Trial Act of 1974,[5] the Interstate Agreement on Detainers Act of 1970,[6] and the Federal Rules of Criminal Procedure[7] protect defendants, for example, from undue post-accusation delay.[8]

It should be observed that the right to a speedy trial, while guaranteed by the Sixth Amendment, is made applicable to the states by the Fourteenth Amendment.[9] As expressed by the U.S. Supreme Court in Dickey v. Florida,[10] "the right to a speedy trial is not a theoretical or abstract right, but one rooted in reality in the need to have charges promptly exposed."

The guarantee of the fair trial is also delineated by the Sixth Amendment's insistence upon a public trial and is further enforced under the procedural guarantees of equal protection of the law and of due process of law under the Fourteenth Amendment.[11]

The U.S. Constitution itself also bears upon the issues of speedy and of fair criminal trial; for example, under Article I, Section 8, Congress

> shall have the Power . . . to constitute Tribunals inferior to the supreme court . . . to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations . . . and to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this constitution in the Government of the United States, or in any Department or Officer thereof.

Article III delineates the "judicial power," Article IV describes the Full Faith and Credit that must be given "in each State to the public Acts, Records and judicial Proceedings of every other State," and Section 2 thereof states that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Freedom of the press under the First Amendment also bears heavily

upon the issues of speedy and fair trials, as perhaps evidenced by the recent appellate court decision in New York Times Co. v. Demakos.[12] Here the press brought a proceeding to prohibit the court from excluding the press and the public from the criminal courtroom and to compel the court to release the transcript of any plea proceedings involving the criminal defendant. At the outset of the per curiam opinion the New York Appellate Division, 2nd Dept., found that the trial court's action

"in precluding the public and the press from plea proceedings is improper. . . . The courts have consistently held that the right of the public and press to attend court proceedings, civil and criminal, is guaranteed by the Federal and State Constitutions (US Const, 1st Amend; NY Const, art I, §8; see, Globe Newspapers Co. v. Superior Ct., 457 US 596; Richmond Newspaper v. Virginia, 448 US 555; Gannett Co. v. DePasquale, 443 US 368; Matter of Capital Newspapers Div. of Hearst Corp. v. Moynihan, 71 NY 2d 263; Matter of Westchester Rockland Newspapers v. Leggett, 48 NY 2d 430; Matter of Herald Co. v. Weisenberg, 89 AD 2d 224, affd 59 NY 2d 378; see also, Judiciary Law §4 ["The sittings of every court within this state shall be public, and every citizen may freely attend the same"]). In criminal cases, the right of access has been extended not only to the trial itself, but also to pretrial hearings (see, Press-Enterprise Co. v. Superior Ct., 478 US —, 106 S Ct 2735; Waller v. Georgia, 467 US 39; Matter of Associated Press v. Bell, 70 NY 2d 32), voir dire proceedings (see, Press-Enterprise Co. v. Superior Ct., 464 US 501), and plea proceedings (see, Matter of Hearst Corp. v. Clyne, 50 NY 2d 707).

"In cases dealing with the claim of constitutional right to access to criminal proceedings, the courts have recognized that open-court proceedings serve several purposes.

"First, 'contemporaneous review in the forum of public opinion' (Matter of Oliver, 333 US 257, 270) serves to protect the accused from 'secret inquisitional techniques' and unjust persecution by public officials and 'goes far toward insuring him the fair trial to which he is entitled' (People v. Jelke, 308 NY 56, 62) . . . The public also has an interest in seeing that there is justice for the accuser—the police and the prosecutors who must enforce the law, and the victims of crime who suffer when the law is not enforced with vigor and impartiality. And when justice has been done, public awareness 'serve[s] to instill a sense of public trust in our judicial process' (People v. Hinton, 31 NY 2d 71, 73) by assuring the innocent and impressing the guilty with the power of the rule of law. Justice must not only be done; it must be perceived as being done" (Matter of Westchester Rockland Newspapers v. Leggett, 48 NY 2d 430, 437, supra).

In Press-Enterprise Co. v. Superior Court (464 US 501, 508, supra, quoting from Richmond Newspapers, Inc. v. Virginia, 448 US 555, 570, supra), the Supreme Court also noted that the open trial "has what is sometimes described as a 'community therapeutic value.' " The court further explained:

"Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done . . .

"When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected" (Press-Enterprises Co. v. Superior Court, 464 US 501, 508–509).

This is not to say that a criminal proceeding may never be closed to the public or press. It has been recognized that the right to an open trial may give way in certain instances to other rights or interests, such as an accused's right to a fair trial or the government's interest in avoiding the disclosure of sensitive information. However, closed proceedings must be rare and may only be held for cause shown which clearly and compellingly outweighs the value of openness (see, Waller v. Georgia, 467 US 39, 45, supra; Matter of Westchester Rockland Newspapers v. Leggett, 48 NY 2d 430, 438, supra). The Supreme Court set forth the applicable rule in Press-Enterprise Co. V. Superior Court (464 US 501, 510, supra):

"The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered" (see also, Globe Newspaper Co. v. Superior Ct., 457 US 596, 606–607, supra; Matter of Westchester Rockland Newspapers v. Leggett, supra, at 442).

Prior to deciding whether closure of court proceedings is warranted, the Trial Judge must provide the interested parties with notice and an adequate opportunity to be heard on the issue (see, Matter of Westchester Rockland Newspapers v. Leggett, supra, at 442). Moreover, a court's decision to close a criminal proceeding to the public and the press may not be based upon conclusory assertions but must be supported by specific factual findings (see, Press-Enterprise Co. v. Superior Court, 478 US—, 106 S Ct 2735, 2741–44, supra).

1.2 POWERS OF THE U.S. SUPREME COURT OVER CRIMINAL COURTS

The U.S. Supreme Court's supervisory powers over the federal courts and also state courts is not limited to the enforcement of constitutional guarantees, but encompasses "the duty of establishing and maintaining civilized standards of procedure and evidence."[13] The U.S. Constitution and amendments thereto are designed to curb the power of the federal government, and, in theory, the state courts, which, for example, are free to carry out their own notions of speedy trial, fair trial, or other aspects of criminal justice,[14] the Fourteenth Amendment reasserted the power of the highest court over state courts by its provision that no state could "deprive any person of life, liberty, or property, without due process of law." Thus, the U.S. Supreme Court was vested with responsibility over the caliber of state criminal justice. The Fourteenth Amendment's due process clause expresses a demand for standards of fair procedure perhaps not defined under other amendments.[15]

The due process clause of the Fourteenth Amendment, as enforced particularly by the U.S. Supreme Court, prohibits state courts resorting to methods that violate those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[16]

The highest court has also been responsible for developing a coherent standard for determining when a violation of the U.S. Constitution during a criminal prosecution may constitute "harmless error."[17] It was in 1919 that Congress had codified the "harmless error" rule,[18] but almost fifty years later in Chapman v. California[19] the U.S. Supreme Court held that not all constitutional violations required the automatic reversal of a trial verdict because some errors are "in the setting of a particular case . . . so unimportant and insignificant" that they may be deemed "harmless" beyond a reasonable doubt.[20] Interestingly, the 1967 opinion of the highest court proclaimed that certain rights like the right to counsel,[21] the right to an impartial judge,[22] and the right to be free from coerced confession,[23] could never be treated as "harmless error."[24] In 1986 in Delaware v. Van Arsdall[25] and in Rose v. Clark[26] the court ruled that violations of both the right to cross-examine a testifying witness and the right to instruct properly the jury can constitute "harmless error."[27] Yet in 1973 in Davis v. Alaska[28] the Court had held that a violation of the confrontation req-

uisite was "a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."[29] One writer in the 1983 edition of the *Journal of Criminal Law and Criminology* opined that "the harmless error standards as currently applied in review of criminal trials are eroding the integrity of the criminal justice system."[30]

1.3 HISTORICAL BACKGROUND OF THE SPEEDY TRIAL

The U.S. Supreme Court in Barker v. Wingo[31] traced the origins of speedy trial to the English Assize of Clarendon in 1166,[32] and to the Magna Carta of 1215,[33] and further observed that in the first colonial bill of rights, the Virginia Declaration of Rights of 1776,[34] the right to a speedy trial was set forth. Nine of the earliest states had similar provisions in their constitutions.[35] Today it would appear that every state constitution guarantees its citizens the right to a speedy trial.[36]

Senior Judge Irving R. Kaufman of the Second U.S. Court of Appeals on October 16, 1987, spelled out his views on "the public's right to speedier justice" in the *New York Times*.[37] He pointed out that the "most pressing" problems are "the twin demons of expense and delay":

> Ten years ago the median time for filing suit to the commencement of trial in the Federal district court was less than a year; today it exceeds a year and a half. Simple cases commonly take more than five years from commencement to final disposition, and complex litigation . . . can linger more than a decade. . . . Moreover, the longer a suit continues, the more its costs mount.[38]

Thus, the pragmatics of the scenario are simply that the constitutional rights of speedy and fair criminal trials must surmount the complexities of delay and costs.

NOTES

1. 456 US 1 (1982).
2. See United States v. Marion, 404 US 307 (1971).
3. See Section 8.1 of chapter 8 herein.
4. See Section 4.2 of chapter 4 herein.

5. 18 USC 3161-3174 (1982).
6. 18 USC App 545 (1982).
7. See Section 48(b) of Fed R Crim P (1982).
8. See generally 74 Georgetown L J 685 (1986).
9. See Section 3.1 of chapter 3 herein.
10. 398 US 37 (1970).
11. Infra note 9. See Duncan v. Louisiana, 391 US 145 (1968) at 148, Klopfer v. North Carolina, 386 US 213 (1967).
12. _____AD2d _____, _____NYS2d _____ (app Div 2, May 23, 1988).
13. See McNabb v. United States, 318 US 332 (1943) at 340.
14. See Barron v. Mayor of Baltimore, 7 Pet (US) 243 (1833).
15. Note Justice Frankfurter's concurring opinion in Francis v. Resweber, 329 US 459 (1947) at 468.
16. See Snyder v. Massachusetts, 291 US 97 (1934) at 105.
17. See generally 100 Harv L Rev 100 (1986) at 107 et seq.
18. 28 USC 2111 (1982).
19. 386 US 18 (1967) at 22.
20. See generally 53 Minn L Rev 519 (1969).
21. See Section 7.1 of chapter 7 herein.
22. See chapter 10 herein.
23. Id.
24. Infra note 19 at 23.
25. 106 S Ct 1431 (1986).
26. 106 S Ct 3101 (1986).
27. Infra note 17 at 108.
28. 415 US 308 (1973).
29. Id. at 318.
30. See 74 J Crim L & Crimin 457 (1983) at 470.
31. 407 US 514 (1972).
32. See 2 Eng Histor Doc 408 (1953). Also see Case & Comment (July–August 1986) at 12.
33. See Coke, The Second Part of the Institutes of the Laws of England 45 (Brooke, 5th ed., 1797).
34. See Va Decl of Rights (1776) at §8.
35. Note Del. Const, 1972, Art. 1, §7; MD Declaration of Rights, 1776, Art. XIX; Pa Declaration of Rights, 1776, §8 Mass. Const., 1780, Part 1, Art. XI; New Hampshire Const., 1784, Part 1, Art. XIV. See also Vermont Const. 1786. c 1. Art. XIV; Ky. Const. 1792, Art. XII, §10; Tenn. Const. 179, Art. XI, §9.
36. See Klopfer v. North Carolina, infra note 11.
37. At A38.
38. Id.