THE RIGHTS OF THE ACCUSED UNDER THE SIXTH AMENDMENT

Trials, Presentation of Evidence, and Confrontation

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ABOUT THE AUTHORS

David K. Duncan (co-author) is a United States Magistrate Judge sitting in Phoenix. He is chair of the Ninth Circuit's Magistrate Judges Executive Board and has been a member of that Circuit's Magistrate Judges Education Committee. Prior to joining the District Court in 2001, he was an Assistant United States Attorney. Before government service, he was a partner in the Phoenix firms of Osborn Maledon, P.A., and Meyer, Hendricks, Victor, Osborn & Maledon, P.C. He attended Brown University and the University of Arizona. He obtained his J.D., with high distinction, from the University of Arizona, where he was an editor of the Arizona Law Review and a member of The Order of the Coif. He served as a law clerk to the Hon. William D. Browning, U.S. District Judge in Tucson.

Paul Marcus (co-author and editor) is the Haynes Professor of Law at the College of William and Mary. Formerly the law dean at the University of Arizona, his teaching and research interests are in the criminal justice, comparative law, and intellectual property areas. He has spoken to numerous judicial, bar, and university groups in the U.S., and has taught and lectured in several other nations. He is a graduate of the UCLA School of Law. Prior to going into teaching, Professor Marcus clerked on the United States Court of Appeals for the District of Columbia, and practiced law in Los Angeles. He is the author of several books in the criminal justice area and has written numerous articles in the field as well. Professor Marcus regularly serves as a consultant in on-going criminal prosecutions.

Tommy Miller (co-author) is a United States Magistrate Judge for the Eastern District of Virginia. He is also an adjunct professor of law at the College of William and Mary, teaching both criminal and civil courses. Judge Miller served on the Advisory Committee on Criminal Rules and participated in the restyling of the Federal Rules of Criminal Procedure. He has spoken to many judicial and bar groups and was a member of the Federal Judicial Center's Magistrate Judge Education Committee. Prior to becoming a judge, he was the Deputy Chief of the Criminal Division for the U.S. Attorney's Office in the Eastern District of Virginia. He graduated from the College of William and Mary Law School.

Joëlle Anne Moreno (co-author) is a Professor of Law and the Associate Dean for Faculty Research & Development at Florida International University. A former federal prosecutor at the United States Department of Justice, her work focuses on the constitutional constraints on the police (including the future of the Confrontation Clause) and the misuse of pseudoscientific evidence by courts (including childhood vaccine claims and specious defenses to child abuse cases). She has presented her work to judges, academics, and practitioners at numerous legal, medical, and scientific conferences around the world. Professor Moreno is a graduate of the University of Pennsylvania Law School and Swarthmore College, and perhaps most importantly to a native New Yorker, Stuyvesant High School.

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—Joëlle Moreno

PREFACE

The Sixth Amendment to the United States Constitution deserves a book devoted to those key provisions which impact mightily on defendants in criminal prosecutions.[1] This was the conclusion of the ABA board members and editors who approached the four of us to write that book. We come from different backgrounds (private practice of law, former prosecutors, academics, jurists) and from different parts of the nation. The four of us, however, were in agreement that such a book was necessary and could provide a genuine service to judges, academics, and lawyers working in the field. In the almost two years needed to complete this work, we became increasingly convinced of the value of our project as we explored the wide range of essential criminal justice topics that fall within the scope of the Sixth Amendment:

> **The Right to a Speedy Trial** requires the practitioner to look at history—both colonial and English—to comprehend the significance and evolution of this right throughout our time as an independent nation. To fully understand the scope and application of the speedy trial right, one must also examine the overlapping state and federal statutory schemes, the reach of the constitutional provision, and the state and federal rules of criminal procedure. The United States Supreme Court has weighed in on the defendant's right to a speedy trial in a number of major decisions, including the leading case of *Barker v. Wingo*. While the Justices have focused primarily on the language and meaning of the Sixth Amendment, analyses from other courts include consideration of the Due Process Clause as well as a number of statutes of limitation.

1. A book about the Sixth Amendment will almost immediately conjure up visions of the Right to Counsel, and *Gideon v. Wainwright*. Quite properly so, as the counsel right is a vital component of the amendment and has occupied lawyers and judges for over five decades. As any criminal justice professional knows, however, it is not the only essential protection provided to the accused by the Sixth Amendment. The right to counsel has such a rich and complex history that it merits its own book and, therefore, this book does not include *Gideon* and the right to counsel.

The Right to a Public Trial occupies a central role in our long-standing effort to ensure fairness in the criminal justice system and the process of charging and trying a criminal defendant. If the government wishes to convict any citizen of a crime, it must do so in the open, allowing all to view the process of the prosecution. Yet, for much of our history it was not clear who held this right. Did it belong to the public, to the media, or to the accused? Chapter two of the book answers those questions. It also addresses the complicated issues surrounding the closure of trial proceedings and the related determination of which rules govern the closure of pretrial proceedings.

The Right to a Jury Trial has significant historical roots both in our country and in England. We have always viewed the right to be tried before one's peers as essential to our system of criminal justice. Still, numerous questions have arisen as to the application of this right. The distinction between petty and non-petty offenses remains important today, as do issues surrounding the deadlocked jury, the size and composition of juries, and the application of the right to non-traditional criminal matters such as juvenile proceedings and deportation actions. *Apprendi v. New Jersey* and it successor decisions have recognized the right in new areas, such as sentencing. In the context of jury composition, the Supreme Court's *Batson* decision has led to a wealth of litigation designed to eliminate the use of peremptory challenges for forbidden, discriminatory purposes.

The Place of Prosecution provision is the only section specifically mentioned twice in the Constitution. On its face, the right might seem fairly obvious. The defendant can only be tried where she lives, or where she committed her offense. In practice, however, the problems created by this provision—and their myriad solutions—are far from obvious. A variety of issues may arise when the government seeks to establish venue, or when the defendant attempts to change venue. The Supreme Court has also decided a number of important cases involving change of venue claims based on undue pre-trial publicity including the famous decision in *Sheppard v. Maxwell*. Practice matters that complicate the constitutional analysis include the application of the Federal Rules of Criminal Procedure, waiver by the defendant, and determinations involving multiple jurisdiction crimes.

The Right to be Informed of the Nature and Cause of the Accusations encompasses a range of significant and complex practical and constitutional concerns. The prosecutor must initially determine which accusatory instrument is required and appropriate. Does he move forward with an indictment, an information, or a complaint? Especially in state prosecutions, the answer may not be obvious, as numerous state statutes and state constitutional provisions may be applicable. Serious questions also can be raised with the involvement of the grand jury. Moreover, numerous practice issues are implicated including: waiver of rights, sufficiency of the indictment, claims of duplicity or multiplicity, and requests for bills of particulars.

The Confrontation Clause has been an important component of criminal trials throughout our legal history, but the United States Supreme Court paid little in depth attention to it until fairly recently. Over the past five decades, the Court has incorporated the right against the states, emphasized the importance of effective cross examination by the accused, and explored the complexities of multi-defendant trials and co-defendant confessions. However, only very recently have the Justices focused on the language of the provision and its history to determine the admissibility of out-of-court statements made by prosecution-sponsored witnesses and expert witnesses and the forfeiture of the right. The Confrontation Clause has been the most robust area of new Sixth Amendment jurisprudence and the recent developments articulated by the Court in: *Williams v. Illinois, Bullcoming v. New Mexico, Michigan v. Bryant, Giles v. California, Melendez-Diaz v. Massachusetts, Davis v. Washington,* and *Crawford v. Washington,* are all discussed in depth.

The Compulsory Process Clause guarantees the defendant's right to obtain witnesses on his behalf. The history of compulsory process reveals a dramatic shift in the way this provision is viewed over the centuries, resulting in far greater protections for the accused. Still, the most important action of the Supreme Court remains the decisive opinion written 200 years ago by Chief Justice John Marshall in the prosecution of Aaron Burr. Modern disputes generally focus on interference with the right by the prosecution, the application of the right as to confidential informants, and the role of use immunity.

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CHAPTER 1

The Right to a Speedy Trial

I. Historical Basis

The right to a speedy trial developed from English law. The colonies adopted the speedy trial right in their charters and other fundamental documents.[1] In *Klopfer v. North Carolina*, Chief Justice Warren succinctly traced the maturity of the right[2] from the Assize of Clarendon (1166) through the Magna Carta (1215).[3] Using Sir Edward Coke's analysis of the English speedy trial right, he equated the delay of a trial to a denial of justice.[4] "The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution."[5]

By the time the Supreme Court decided *Klopfer* in 1967, all fifty states provided speedy trial protection for their citizens.[6] Thus, the *Klopfer* Court held that the Sixth Amendment[7] right to a speedy trial was incorporated through the Fourteenth Amendment,[8] and applied

1. Klopfer v. North Carolina, 386 U.S. 213, 225–26 & nn.15–21 (1967).

2. *Id.* at 226.

3. "We will sell to no man, we will not deny or defer to any man either justice or right." *Id.* at 223 (quoting the Magna Carta).

4. *Id.* at 224.

5. *Id.*

6. *Id.*

7. "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[.]" U.S. CONST. amend. VI.

8. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1.

in full force to the states.[9] Since the vast majority of criminal cases are prosecuted in the state systems, speedy trial violations will most likely occur in state, not federal, court.[10]

II. Constitutional Speedy Trial Issues

The Sixth Amendment provides that "[i]n 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[.]"[11] The Supreme Court has applied the constitutional requirement of a "speedy trial" differently depending on the stage of the proceedings when the delay occurred.

A. Delay in Charging or Arresting the Defendant

1. Process Applies

In 1971, shortly after the speedy trial right was incorporated to apply to the states, in *United States v. Marion*[12] the Court determined that the Sixth Amendment right to a speedy trial did not apply before a defendant was charged or arrested.[13] The defendants in *Marion* filed motions to dismiss the indictment because a delay of three years between the government's discovery of the crime and the indictment violated their Sixth Amendment speedy trial right and Fifth Amendment[14] due process rights.[15] The district court dismissed the indictment based on the government's failure to speedily prosecute.[16]

9. *Klopfer*, 386 U.S. at 222–23. In earlier cases, the Court held that the other provisions of the Sixth Amendment—the right to counsel and the right of confrontation—were incorporated through the Fourteenth Amendment. Seeing the right to a speedy trial just as "fundamental" as the other two rights, Chief Justice Warren concluded that the right to a speedy trial should likewise be incorporated. *See* HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 175 (2006).

10. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 STATISTICAL TABLES (rev. Nov. 22, 2010), tbl. 11.6 (in 2006, 1,132,290 state felony convictions in contrast with 72,983 federal felony convictions).

11. U.S. CONST. amend. VI.

12. 404 U.S. 307 (1971).

13. *Id.* at 313.

14. "No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend V.

15. HERMAN, *supra* note 9, at 187; MISNER, SPEEDY TRIAL FEDERAL AND STATE PRACTICE 13 (1983).

16. *Marion*, 404 U.S. at 310.