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REJECTION OF THE COMPENSATORY REMEDY
WITH RESPECT TO
THE RIGHT TO A SPEEDY TRIAL:
THE CONCLUSION OF THE
MARION-BARKER-STRUNK TRILOGY

by JOHN R. WIDEIKIS*

INTRODUCTION

Although the Sixth Amendment to the Constitution of the United States guarantees the right to a speedy trial in terms absolute and unequivocal,¹ perhaps it is because of the deceptive simplicity of the right itself that federal courts of appeal continue to be presented with numerous cases involving claims that the right has been denied. While the right to a speedy trial is equally applicable to and invoked by the guilty and the innocent, it is only the defendant ultimately found guilty at trial who raises the issue on appeal.

The right to a speedy trial largely developed through various decisions of the federal courts of appeal, for the United States Supreme Court, by its own admission,² has addressed itself to speedy trial issues on few occasions. Of late, however, the Supreme Court has recognized the pressing need for a definitive statement on the nature and scope of the right to a speedy trial. The Court's efforts to set forth the present status of the right culminated in what may be referred to as the *Marion-Barker-Strunk* trilogy.

It is not within the scope of this article to analyze the decisions of *United States v. Marion*³ and *Barker v. Wingo*.⁴ Comment should be made, however, on the general principles contained in and taken from those cases.

MARION AND BARKER

Faced with the problem of resolving the question of when the right to a speedy trial attaches, the Supreme Court in *Marion* held — stating it in a negative fashion — that the right does not attach until such time as one becomes an “accused.”⁵ Whatever prosecutorial delay may have occurred in a pre-accusation set-

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¹ U. S. CONST., amend. VI: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .”

² *Barker v. Wingo*, 407 U.S. 514, 515 (1972).

³ 404 U.S. 307 (1971).

⁴ 407 U.S. 514 (1972).

⁵ 404 U.S. at 313.

ting, the *Marion* Court held that such delay cannot be considered within the context of a Sixth Amendment speedy trial claim.⁶ Pre-accusation delay can only be properly scrutinized and weighed in light of due process standards.⁷

The *Barker* decision derives enormous importance and application in that the opinion sets forth the principal factors to be balanced in determining whether the right to a speedy trial has been denied.⁸ Pointing out that speedy trial issues are to be decided on an ad hoc basis⁹ with full consideration to be given to the unique facts of each particular case, the Supreme Court manifest its approval of the policy that federal courts continue to exercise broad flexibility in determining speedy trial issues. The enunciation of the principal factors to be weighed in analyzing speedy trial issues, while not particularly startling, served to furnish uniform general guidelines to the federal courts.

Within a period of approximately six months,¹⁰ and perhaps in recognition of a need to define the right to a speedy trial, the Supreme Court resolved two broad problem areas with respect to the Sixth Amendment right: the Court established when the right to a speedy trial attached, and it furnished a flexible formula by which issues of denial of the right were to be determined.

There remained one further issue for the Supreme Court to resolve in order to logically complete the speedy trial right trilogy: the Supreme Court would have to determine what remedy should be applied upon a finding that the right to a speedy trial had been denied. The case of *United States v. Strunk*¹¹ provided the vehicle by which the Supreme Court would arrive at the completion of that task.

STRUNK

The decision in *United States v. Strunk*¹² remains significant and warrants attention for two reasons:

First, the decision by the Court of Appeals for the Seventh Circuit represents the first instance in which *any* federal court of appeals, with the single exception of the Court of Appeals for

⁶ [I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
404 U.S. at 320.

⁷ *Id.* at 324.

⁸ 407 U.S. at 530-33.

⁹ *Id.* at 530.

¹⁰ The *Marion* and *Barker* decisions were promulgated on December 20, 1971 and June 22, 1972, respectively.

¹¹ 467 F.2d 969 (7th Cir. 1972).

¹² *Id.*

the District of Columbia,¹³ found a denial of a speedy federal trial. By so finding, the Court of Appeals for the Seventh Circuit dramatically broke from the negative tradition of federal courts of appeal, excepting that of the District of Columbia, which seemingly had held as a matter of unarticulated policy that a denial of a speedy federal trial could not be found on review. An examination of all the cases decided by federal courts of appeal which involved an issue of denial of a speedy federal trial, excepting that of the District of Columbia, reveals that such issues were raised in the various circuits over three hundred times. Until the decision in *United States v. Strunk*,¹⁴ the denial of a speedy federal trial had never been found.

Second, the decision represents what appears to be one of the first applications of the balancing test enunciated in the *Barker* decision by a federal court of appeals. Though *United States v. Strunk*¹⁵ was ultimately reversed by the Supreme Court, the reversal was predicated solely upon the issue of the remedy to redress denial of the right to a speedy trial. It is emphatically clear that the Seventh Circuit decision represents a proper application of the balancing test in *Barker*.

A single issue was framed and presented to the Court of Appeals for the Seventh Circuit:

Was the appellant, a prisoner in the custody of a state jurisdiction at the time of his federal indictment, denied his right to a speedy trial, as guaranteed by the Sixth Amendment to the Constitution of the United States of America, by virtue of a delay of three hundred six days between the return and filing of said federal indictment and the date of appellant's trial, where said delay was in no way attributable, in whole or in part, to the conduct or activities of the appellant or appellant's counsel?¹⁶

Three weeks after oral argument in the Court of Appeals for the Seventh Circuit, the Supreme Court decided the case of *Barker v. Wingo*.¹⁷ In addressing itself to the issue before it, the Court of Appeals for the Seventh Circuit acknowledged that the *Barker* decision was clearly applicable to and controlling of the issue under consideration in *Strunk*.¹⁸ The Court of Appeals concluded that, under the balancing test enunciated in *Barker*,

¹³ See: *United States v. Rucker*, 464 F.2d 823 (D.C. Cir. 1972); *United States v. Dunn*, 459 F.2d 1115 (D.C. Cir. 1972); *Coleman v. United States*, 442 F.2d 150 (D.C. Cir. 1971); *Ward v. United States*, 346 F.2d 423 (D.C. Cir. 1965); *Marshall v. United States*, 337 F.2d 119 (D.C. Cir. 1964); *Williams v. United States*, 250 F.2d 19 (D.C. Cir. 1957); *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956).

¹⁴ 467 F.2d 969 (7th Cir. 1972).

¹⁵ *Id.*

¹⁶ Brief for Appellant in *United States v. Strunk*, 467 F.2d 969 (7th Cir. 1972).

¹⁷ 407 U.S. 514 (1972).

¹⁸ 467 F.2d at 971.

Strunk had been "denied a speedy trial to his prejudice."¹⁹

Having so concluded, the Court of Appeals for the Seventh Circuit was faced with what was at that time a unique finding — a finding that created the problem of having to fashion a proper remedy to correct the constitutional wrong done Strunk. In reflecting upon the remedy to be applied, the Court of Appeals observed:

The remedy for a violation of this constitutional right has traditionally been the dismissal of the indictment or the vacation of the sentence. Perhaps the severity of that remedy has caused courts to be extremely hesitant in finding a failure to afford a speedy trial.²⁰

The observation of the Court of Appeals with respect to the hesitancy of courts to find a denial of a speedy trial, presumably even when one is clearly demonstrated on facts, because of an aversion to the severity of the remedy for the denial of a constitutional right deemed to be "one of the most basic rights preserved by our Constitution,"²¹ stands, if accurate, as a sad commentary and serious indictment of the courts, which hold themselves out and are viewed as guardians of our constitutional liberties and guarantees.

The Court of Appeals for the Seventh Circuit went on to hold:

Be that as it may, we know of no reason why less drastic relief may not be granted in appropriate cases. Here no question is raised about the sufficiency of evidence showing defendant's guilt, and, as we have said, he makes no claim of having been prejudiced in presenting his defense. In these circumstances, the vacation of the sentence and a dismissal of the indictment would seem inappropriate. Rather, we think the proper remedy is to remand the case to the district court with direction to enter an order instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and the date of the arraignment. Fed. R. Crim. P. 35 provides that the district court may correct an illegal sentence at any time. We choose to treat the sentence here imposed as illegal to the extent of the delay we have characterized as unreasonable.²²

One can reasonably speculate about the deliberations engaged in by the Court of Appeals for the Seventh Circuit after it had found the denial of a speedy trial and while it was still faced with the problem of fashioning the remedy to be applied. First, this writer is of the opinion that the act of finding the denial of a speedy trial was a profound manifestation of conscientious judicial valor on the part of the Court of Appeals for the Seventh

¹⁹ *Id.* at 973.

²⁰ *Id.*

²¹ *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967).

²² 467 F.2d 973.

Circuit. The simple solution available to the Court of Appeals was to preserve the negative tradition of federal courts of appeal and find no denial of a speedy trial. But the Court of Appeals refused to compromise its conscience. The tradition of federal courts of appeal in not finding denials of speedy federal trials with such perfect consistency suggests one or more of the following: the facts are always manifestly against defendants; or federal district courts are infallible in their collective judgment with respect to determinations of speedy trial issues; or federal courts of appeal adamantly refuse to find denials of the right because of a fear that the guilty will go free.

Having satisfied its conscience with respect to Strunk's claim that he was denied a speedy federal trial, the Court of Appeals for the Seventh Circuit had yet three other factors to evaluate and consider: Strunk had been tried; he had not been prejudiced in his defense; and in the course of a legally sufficient trial, he had been found guilty as charged. Thus, the Court of Appeals fashioned and applied a remedy which would return to Strunk what the Government had taken away, namely the period of time elapsing between his indictment and arraignment. The remedy molded by the Court of Appeals seemed to appease the protectional needs of both Strunk and society. The Court of Appeals felt that Strunk was entitled to the time he had lost because of the denial of his right to a speedy trial; society was entitled to the conviction of a man who was clearly substantively guilty.

Following the Seventh Circuit's denial of a petition for rehearing solely on the issue of remedy, a petition for a writ of certiorari was filed with the United States Supreme Court. It was hoped that a challenge could be made to the remedy applied by the Court of Appeals for the Seventh Circuit. In view of what was then a newfound interest in the right to a speedy trial on the part of the Supreme Court, the petition for a writ of certiorari was framed in a fashion that invited the Supreme Court to complete the trilogy it had begun with the *Marion* and *Barker* decisions.

Certiorari was granted, and the issue presented to the Supreme Court was as follows:

Whether a court, in reviewing a cause after trial, conviction, and sentence, and finding expressly that a defendant has been denied a speedy trial to his prejudice,

- a. is required, under the principles of the Sixth Amendment to discharge absolutely from his sentence a defendant so denied; or,
- b. is required, under the principles of the Sixth Amendment to the Constitution of the United States, to reverse the con-

viction, vacate the sentence, and dismiss the indictment of a defendant so denied; or,
c. may engage a remedy, consistent with the principles of the Sixth Amendment to the Constitution of the United States, by which a defendant so denied is credited with the period of unreasonable delay, attributed to the prosecution, which originally gave rise to his denial of a speedy trial.²³

With the sole issue of remedy for denial of the right to a speedy trial before the Supreme Court, Chief Justice Warren E. Burger, in writing the unanimous opinion of the Court, recognized that the case presented "a novel and unresolved issue, not controlled by any prior decisions of this Court."²⁴

Although the brief for petitioner Strunk addressed itself solely to the issue of remedy for denial of the right, and while no oral argument was had on the question of whether the Court of Appeals for the Seventh Circuit had made a proper determination and finding of a denial of the right, the Supreme Court made passing reference to the propriety of finding a denial of the Sixth Amendment right. Contrary to the finding of the Court of Appeals, which had expressly held that no part of the post-indictment delay in the case was attributable to Strunk,²⁵ the Supreme Court thought that it was "clear that petitioner was responsible for a large part of the ten-month delay which occurred. . . ."²⁶

However, the Supreme Court was not inclined to entertain the question of whether the determination by the Court of Appeals that Strunk had been denied a speedy trial was an improper finding. Perhaps, recognizing that a delay of three hundred six days between indictment and trial was a relatively short period of delay by speedy trial standards, the Supreme Court simply did not wish to give an affirmative indication that it viewed such a period of delay as likely to give rise to the denial of a speedy trial. In any event, the Supreme Court held that "in the absence of a cross-petition for certiorari, questioning the holding that petitioner was denied a speedy trial, the only question properly before us for review is the propriety of the remedy fashioned by the Court of Appeals."²⁷ The Supreme Court felt compelled to assume that the Government deliberately elected to allow the case to be resolved on the issue of remedy only, in view of the Government's election not to cross-petition on the issue of the

²³ Brief for Petitioner in *Strunk v. United States*, 412 U.S. 434 (1973).

²⁴ 412 U.S. 434, 435.

²⁵ Although the defendant may have contributed to some of the delay in bringing the indictment by considering the invocation of Rule 20, he certainly contributed nothing to the delay thereafter.
467 F.2d at 972.

²⁶ 412 U.S. at 436.

²⁷ *Id.* at 437.

finding of a denial of a speedy trial by the Court of Appeals.²⁸

The Supreme Court also was not inclined to validate the utilization of a compensatory remedy for a denial of the right to a speedy trial, that is, a remedy which credits the sentence imposed with the period of delay attributable to the Government in bringing the accused to trial, even though a compensatory remedy might be construed to be flexible in its application to a given circumstance appearing to warrant its application. As the Supreme Court pointed out, the standards enunciated in *Barker* were 'flexible' standards based on practical considerations."²⁹ Further, the aspect of flexible standards in *Barker* was "directed at the process of determining *whether* a denial of speedy trial had occurred; it did not deal with the remedy for denial of this right."³⁰

The Supreme Court recognized that "[b]y definition, such denial is unlike some of the other guarantees of the Sixth Amendment."³¹ The Court was aware that the unique feature of the right to a speedy trial is that once lost, it is forever lost. Drawing a distinction between the right to a speedy trial and other Sixth Amendment rights, the Supreme Court stated that the "failure to afford a public trial, an impartial jury, notice of charges, or compulsory service can ordinarily be cured by providing those guaranteed rights in a new trial."³²

The nature of the guarantee of the right to a speedy trial is such that it recognizes that "a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial or of receiving a sentence longer than, or consecutive to, the one he is presently serving — uncertainties that a prompt trial removes."³³ The Court added that "the stress from a delayed trial may be less on a prisoner already confined, whose family ties and employment have been interrupted, but other factors such as the prospect of rehabilitation may also be affected adversely."³⁴ Furthermore, while it was aware that an accused who is released pending trial frequently has little interest, if any, in being tried quickly, the Court went on to emphasize that "this, standing alone, does not alter the prosecutor's obligation to see to it that the case is brought on for trial."³⁵ Chief Justice Burger, well noted for his active interest in pro-

²⁸ *Id.*

²⁹ *Id.* at 438.

³⁰ *Id.*

³¹ *Id.* at 438-39.

³² *Id.* at 439.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 439 n. 2.

moting the effective administration of criminal justice, went on to observe:

The desires or convenience of individuals cannot be controlling. The public interest in a broad sense, as well as the constitutional guarantee, command prompt disposition of criminal charges.³⁶

In concluding, the Court clearly pointed out that the dismissal of an indictment because of a denial of the right to a speedy trial can be described as an "unsatisfactorily severe remedy."³⁷ In terms of the practical application of dismissal of the indictment as a remedy, the Court observed that "in practice, 'it means that a defendant who may be guilty of a serious crime will go free, without having been tried.'"³⁸ However, the Court held that such severe remedies are not unique in the application of constitutional standards. Stating the logical extension of the trend that began with the decisions marked by *Marion* and *Barker*, the Court held that dismissal of the indictment must remain "the only possible remedy."³⁹

By examining the mechanics of making a speedy trial claim, the logic of the Court's conclusion followed so forcefully that the task of fashioning an appropriate remedy for the denial of a speedy trial became a less difficult one.

The issue of denial of a speedy trial is crystallized by a defendant's motion to dismiss a charge against him on the ground of denial of the constitutional right to a speedy trial. It is precisely at the time that the defendant makes a motion to dismiss the indictment that the facts to be weighed in the balancing test enunciated in *Barker*⁴⁰ are sealed. For this reason, a retrospective fact analysis must be applied in the determination of the issue, and any consideration given by the trial judge to prospective facts, as likely as they may be, are improper to an examination of whether a defendant has been denied the right. Further, since the motion to dismiss the indictment is properly made after arraignment and before trial, the defendant, pursuant to an entered plea of not guilty, is presumed innocent until proven guilty in accordance with due process of law.

In finding that a defendant has been denied his right to a

³⁶ *Id.*

³⁷ *Id.* at 439.

³⁸ *Id.* The Court was citing to its non-controlling commentary in *Barker*:

The amorphous quality of the right leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy [footnote omitted].

⁴⁰⁷ U.S. at 522.

³⁹ 412 U.S. at 440.

⁴⁰ 407 U.S. at 530-33.

speedy trial, a federal district court, under the balancing test in *Barker*, will necessarily have to conclude:

1. that the length of the delay complained of by the defendant was relatively long in light of the nature of the crime charged;
2. that the delay was not attributable to the defendant, but was attributable to the prosecutor, and the prosecutor could offer no acceptable reason for the delay;
3. that the defendant properly asserted his right and had not waived it; and
4. that the defendant was subjected to some form of recognized speedy trial prejudice.

When a federal court of appeals reviews a district court's denial of a defendant's motion for dismissal of an indictment for want of a speedy trial, the court of appeals must assume a positional perspective identical to that of the district court whose judgment it is reviewing. Like the district court, the federal court of appeals is bound to a retrospective fact analysis of the facts existing at the time the motion to dismiss was originally made. In applying the balancing test, the federal court of appeals must weigh the same facts, and only the same facts, which were available to the district court at the time the district court made its ruling on the motion. It is only in this manner that a federal court of appeals can properly assert that a district court was correct or incorrect in denying a motion to dismiss.

When a federal court of appeals makes the determination that a denial of a speedy trial has occurred, it can only apply the remedy that the district court could have applied in the first instance. A compensatory remedy is clearly beyond the power of a district court. To impose such a remedy, a district court states, in effect: "A denial of the constitutional right to a speedy trial has been found, however, the defendant shall stand trial; in the event he is found guilty, his sentence will be appropriately credited with the period of delay attributable to the Government in bringing the defendant to trial."

In the event that a defendant is acquitted, he is left without a remedy. The absence of a remedy inescapably follows because a district court or the court of appeals which is bound to the positional perspective of the district court cannot credit the trial delay where, because of the acquittal, no sentence is imposed.

CONCLUSION

It seems likely to this writer that the *Marion-Barker-Strunk* trilogy will continue to serve federal courts of appeal for some time. Perhaps the Supreme Court believes that the promulga-

tion of the trilogy will preclude the necessity for the Court to rule on speedy trial issues for the present. Federal courts of appeal, as well as district courts, are well reminded by *Strunk* of what the finding of a denial of speedy trial represents — an unpleasant reminder that the Government, while fully able to try a defendant, permitted that opportunity to be squandered.

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