

Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions

Many persons serving sentences in one jurisdiction may face criminal liability for acts which they are alleged to have committed in another jurisdiction.¹ Current law often permits the second jurisdiction to delay the trial of such convicts² until they are released. The delay, which may amount to many years,³ creates the same disadvantages for the convict which the sixth amendment right to a speedy trial⁴ was designed to avoid, and then some. It prejudices his defense in the eventual trial; it leaves him subject to the anxiety of a threatened prosecution, and thus hinders any effects at rehabilitation; it may, if the incarcerating jurisdiction is notified of the pending charge, lead to confinement under maximum security, denial of trusty status, and loss of eligibility for parole; finally, it costs the convict his chance to serve the two sentences concurrently.

The right to a speedy trial has until now been of little help to convicts facing a pending charge in another jurisdiction. But the recent decision of the Supreme Court in *Klopfer v. North Carolina*⁵ gives new

1. There are no available figures for the proportion of convicts who have charges pending against them in other jurisdictions. The best estimates are derived from the number of convicts who have detainers filed against them. (For a discussion of detainers and their consequences, see p. 771 *infra*.) A high proportion of detainers are backed by criminal charges. Heyns, *The Detainer in a State Correctional System*, FEDERAL PROBATION, July-September, 1945, at 13, 15. As of 1964, 3,500 federal convicts (15 per cent of all federal convicts) had one or more detainers filed against them. Letter from Ira Kirschbaum, Office of the Legal Counsel, United States Bureau of Prisons, January 20, 1967, on file in Yale Law Journal office. The proportion in the federal penitentiaries, where the more serious offenders are imprisoned, runs as high as 30 per cent. Bennett, *The Last Full Ounce*, FEDERAL PROBATION, June, 1959, at 21 [hereinafter cited as Bennett]. High proportions also exist for at least some of the states. COUNCIL ON STATE GOVERNMENTS, MEETING ON THE AGREEMENT ON DETAINERS, August 28, 1966, at 2 [hereinafter cited as MEETING ON AGREEMENT].

2. "Convict" is used in this Note to indicate a person who has been convicted and is serving a sentence rather than one who is jailed awaiting formal charge or trial.

3. *E.g.*, *Wzesinki v. Amos*, 143 F. Supp. 585 (N.D. Ind. 1956) (defendant, who had been a convict in Indiana, held not to have been denied a speedy trial when he was brought to trial in 1956 on a 1948 federal indictment).

4. Besides the sixth amendment in the United States Constitution, the right to a speedy trial is guaranteed in varying degrees by 43 state constitutions and by statutes or court decisions in the remaining states. Numerous statutes implement the right in detail in all these states. Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 RUTGERS L. REV. 828 n.2 (1964). Rule 48(b) of the Federal Rules of Criminal Procedure is often said to implement this sixth amendment right. *See, e.g.*, *United States v. Palermo*, 27 F.R.D. 393 (S.D.N.Y. 1961). However, Rule 48(b) is not coextensive with the sixth amendment. *See, e.g.*, *Mann v. United States*, 304 F.2d 394 (D.C. Cir.), *cert. denied*, 371 U.S. 896 (1962) (court allowed re-indictment of the defendant on a charge which had been dismissed under Rule 48(b), saying it would not have allowed re-indictment if there had been a violation of the constitutional right to a speedy trial).

5. 386 U.S. 213 (1967). *See* p. 769 *infra*.

promise of solutions to the problem of the pending charge. Beyond the problem of the pending charge is the problem of the delayed charge—the case in which the second jurisdiction delays even bringing a charge against the convict until his sentence has run.⁶ The new emphasis on the right to speedy trial also suggests limitations upon this kind of delay.

I. The Convict and the Right to a Speedy Trial

Though securely rooted in history,⁷ the right to a speedy trial has until recently been assigned second-class status. Courts have emphasized the relativity, rather than the importance, of the right.⁸ In the words of an oft-quoted dictum: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. . . . It does not preclude the rights of public justice."⁹ Courts have generally been as solicitous in accepting prosecutors' excuses for delay, as they have been strict in requiring defendants to prove that delays caused actual prejudice to their defense.¹⁰ Waiver doctrines have forced defendants to demand a speedy trial or find that they have lost the right to one, imposing upon them the unpleasant dilemma of either accepting harmful delay or endangering their hopes that the prosecutor might drop the charges against them.¹¹

6. See pp. 780-83 *infra*.

7. The historical antecedents of this right are the commission of jail delivery and the 1679 English Habeas Corpus Act, 31 Car. II, ch. 2 (1679). *United States v. Provoe*, 17 F.R.D. 183, 196-97 (D. Md. 1955).

8. See F. HELLER, *THE SIXTH AMENDMENT* 61 (1951).

9. *Beavers v. Haubert*, 198 U.S. 77, 87 (1905).

10. *E.g.*, *State v. O'Leary*, 25 N.J. 104, 135 A.2d 321 (1957) (conviction for second-degree murder affirmed because defendant failed to show how his defense was prejudiced by delay; trial had been delayed 22 years). See Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1591-92 (1965).

11. It is easy for the individual to discover that he has waived his right to a speedy trial. Most jurisdictions hold that unless the accused demands a speedy trial, he has waived his right. *E.g.*, *United States v. Lustman*, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958) (five-year delay found unreasonable, but no dismissal since defendant had not properly asserted his right to a speedy trial). The type of demand required under this "demand doctrine" varies. Typically the courts require that "a demand for trial, resistance to postponement, or some effort to secure a speedy trial on the part of the accused, should be shown to entitle him to a discharge on the grounds of delay." *State v. Lamphere*, 20 S.D. 98, 102, 104 N.W. 1038, 1040 (1905). There are some exceptions to this doctrine which mitigate its harshness for convicts in another jurisdiction. *E.g.*, *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956) (no waiver if the convict does not know of the pending charge). Yet these exceptions do not exempt all convicts from the requirement that they must demand speedy trial or waive their right. As a result, the burden of going forward is shifted from the prosecuting jurisdiction to the convict.

A rapidly growing number of jurisdictions now place the burden of bringing the accused promptly to trial on the accusing jurisdiction, not on the accused. *E.g.*, *People v. Prosser*, 309 N.Y. 353, 130 N.E.2d 891 (1955). The courts reason that it was the govern-

In *Klopfert v. North Carolina*¹² the Supreme Court signalled a new judicial attitude toward the right to a speedy trial. The specific holding in *Klopfert* advances the rights of convicts facing pending charges in other jurisdictions in two ways. First, the decision incorporates the right to a speedy trial under the due process clause of the fourteenth amendment, thus applying it to the states.¹³ Second, it undermines the tradition that the right applies only where the defendant can show the delay has prejudiced the presentation of his case, and affirms—with an enthusiasm missing in past decisions—the right's traditional limitations on all unnecessary and oppressive delay.¹⁴

The right to a speedy trial has three recognized purposes.¹⁵ The first, often stressed to the exclusion of the other two,¹⁶ is to prevent delay from hampering the defense as evidence and witnesses disappear, memories fade, and events lose their perspective.¹⁷ The convict's defense is particularly vulnerable to delay since his imprisonment limits his ability to keep contact with witnesses and to pursue investigation.¹⁸

Second, the right to speedy trial attempts to minimize the anxiety which prosecutors may impose on defendants by public accusation. The

ment which brought the charge in the first place and which has ample powers to bring the charge to trial. This burden on the accusing jurisdiction has been held to extend to convicts in another jurisdiction who have made no demand for trial.

12. 386 U.S. 213 (1967). *Klopfert* had been indicted on a North Carolina criminal trespass charge arising out of a civil rights demonstration. After his trial ended in a mistrial, the case was postponed for two terms. The trial court, over *Klopfert's* objection, then granted the prosecutor's motion for a "nolle prosequi with leave," a procedural device unique to North Carolina whereby the accused is discharged from custody but remains subject to prosecution at any time in the future at the discretion of the prosecutor.

The United States Supreme Court held, that by indefinitely postponing prosecution on the indictment over petitioner's objection and without stated justification, the state denied *Klopfert* the right of speedy trial guaranteed to him by the sixth and fourteenth amendments. Chief Justice Warren wrote for himself and six other Justices. Justice Stewart concurred in the result without an opinion. Justice Harlan accepted the result, but rejected the implicit "incorporation" doctrine.

13. *Id.* at 222-23.

14. *Id. passim.* At no place in the opinion does Chief Justice Warren refer to any factor caused by the delay which might prejudice *Klopfert's* defense. Nor do the circumstances of the case suggest any prejudice which might occur. Rather, the finding that the delay denies *Klopfert* his right to a speedy trial stems solely from the oppression caused by the prosecutor's power to delay trial and the anxiety and concern associated with public accusation.

On the importance of the right involved, compare the qualified statement of *Beavers v. Haubert*, 198 U.S. 77 (1905), p. 768 *supra*, with the declaration that "[T]he right to a speedy trial . . . is one of the most basic rights preserved by our Constitution." *Klopfert v. North Carolina*, 386 U.S. 213, 226 (1967).

15. *United States v. Ewell*, 383 U.S. 116, 120 (1966); *People v. Prosser*, 309 N.Y. 353, 356, 130 N.E.2d 891, 894 (1955).

16. *E.g.*, *State v. O'Leary*, 25 N.J. 104, 135 A.2d 321 (1957) (22-year delay not denial of right to a speedy trial where defendant had failed to show prejudice). *See generally* Note, *supra* note 10, at 1592-97.

17. *See* cases cited note 15 *supra*.

18. *E.g.*, *Taylor v. United States*, 238 F.2d 259, 262 (D.C. Cir. 1956); *United States v. Provoe*, 17 F.R.D. 183, 203 (D. Md. 1955).

Supreme Court re-emphasized this purpose in *Klopfer*, finding a denial of the right on the ground that delaying trial was oppressive, rather than on any finding of prejudice to the defendant.¹⁹ The convict may arguably suffer less than other citizens from the anxiety of public accusation,²⁰ but for him the tangible consequences of accusation, in terms of his treatment while in prison, may well be greater.²¹ In addition, pending charges reduce the prisoner's incentive to rehabilitate himself, since he can look forward only to delivery to the other jurisdiction for trial, not to release, when his present sentence ends.²²

Finally, the right to speedy trial protects the accused from prolonged imprisonment on an untried charge.²³ While the convict in another jurisdiction is already imprisoned for some other crime, delaying his trial on the pending charge may have results similar to imprisonment on an untried accusation.²⁴ Jurisdictions commonly make agreements which permit sentences handed down by both to be served concurrently in one.²⁵ Yet the convict loses the benefit of such agreements when the trial in the second jurisdiction is delayed.²⁶ In contrast, a defendant charged with separate offenses in a single jurisdiction retains the right to a speedy trial on the second charge when convicted of the first,²⁷ and often receives concurrent sentences if he is convicted of both.²⁸

19. See note 14 *supra*.

20. See *Koenig v. Willingham*, 324 F.2d 62, 64 (6th Cir. 1963), *cert. denied*, 376 U.S. 958 (1964).

21. The accusation usually is accompanied by a detainer with all its burdens. See TAN 29-32 *infra*. Even if there is no detainer, pending charges may adversely influence the convict's treatment at the hands of the correctional authorities.

22. Bennett 21; REPORT OF CALIFORNIA ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE, 22 ASSEMBLY INTERIM COMMITTEE REPORTS, No. 3, at 158-59 (1963).

23. Cases cited note 15 *supra*.

24. See *Barker v. Municipal Court*, 64 Cal. 2d 806, 813, 415 P.2d 809, 814, 51 Cal. Rptr. 921, 926 (1966). This similarity only goes so far. Given the presumption of innocence, imprisonment on a pending charge is a more serious constitutional concern than imprisonment on a sentence imposed after trial and conviction.

25. For a person convicted of federal charges, the Attorney General has power to incarcerate him in a state prison where his sentence can run concurrently with an existing state sentence. 18 U.S.C. § 4082(b) (Supp. II 1965-66). This discretion is used by the Attorney General. Bennett 21. See *Goodwin v. Looney*, 250 F.2d 72 (10th Cir. 1957). States may allow the person to serve his state sentence concurrently in the federal correctional facility. See Bennett 21.

For a person convicted of charges in more than one state, most jurisdictions allow concurrent sentencing. *E.g.*, *In re Patterson*, 64 Cal. 2d 357, 361-62, 411 P.2d 897, 899-900, 49 Cal. Rptr. 801, 803-04 (1966). Some states are now signatories to out-of-state incarceration agreements, such as the New England Corrections Compact. MEETING ON AGREEMENT 4.

26. While the judge who is sentencing the convict on the charge which had been delayed may take the earlier sentence into account, his latitude to reduce the later sentence is limited where conviction for the offense carries a minimum sentence. S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 119-20 (1963).

27. *E.g.*, *Frankel v. Woodrough*, 7 F.2d 796, 798 (8th Cir. 1925); *Jacobson v. Winter*, 91 Idaho 11, 14-16, 415 P.2d 297, 299-300 (1966).

28. See S. RUBIN, *supra* note 26, at 415-16.

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A convict's sentence can be further lengthened and made more severe when a jurisdiction with charges pending against him files a detainer—a warrant notifying the incarcerating authorities of the pending charge, and requesting notice to the accusing jurisdiction of the prisoner's date of release.²⁹ While detainers impose no legal obligation on the incarcerating jurisdiction, they are usually honored.³⁰ The effect often is that the convict is confined under maximum security and loses prison privileges.³¹ He may be ineligible for parole.³²

II. Present Law

A. Majority Rule

When one jurisdiction has brought charges against a person serving a sentence in another jurisdiction, many courts still adhere to the once unanimous rule that the first jurisdiction need make no attempt to try the convict promptly.³³ Prosecutors normally take advantage of the rule to delay trial until the convict has served his sentence in the other jurisdiction.³⁴

Supporters of the majority rule urge a number of justifications for this exception to the normal principle requiring prompt trial. First, they cite the well settled rule that one jurisdiction cannot compel another to release a convict for trial.³⁵ Given this rule, they argue that a "sovereign" (the requesting jurisdiction) should not be forced to request what need not be granted to it (temporary custody of the defendant), thus opening itself up to the "insult" of refusal.³⁶

While such notions of sovereign dignity are anachronistic, the argument may have had some practical basis in the past when extradition

29. See *United States v. Candelaria*, 131 F. Supp. 797, 802-05 (S.D. Cal. 1955), for an excellent discussion of detainers and their evils. Cf. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION 167 (1959) [hereinafter cited as SUGGESTED LEGISLATION].

30. Note, *Detainers and the Correctional Process*, 1966 WASH. U.L.Q. 417, 418-19.

31. *Id.*; Donnelly, *The Connecticut Board of Parole*, 32 CONN. B.J. 26, 45-48 (1958) [hereinafter cited as Donnelly]; see *United States ex rel. Giovengo v. Maroney*, 194 F. Supp. 154, 156 (W.D. Pa. 1961).

32. Some jurisdictions no longer treat detainers as an automatic bar to parole. They might seek to have the filing jurisdiction withdraw the detainer or will parole the convict to the detainer. Bennett 21-22.

33. See, e.g., *Ruip v. Commonwealth*, 415 S.W.2d 372 (Ky. 1967); *Dreadfulwater v. State*, 415 P.2d 493 (Okla. Crim. 1966); *Cooper v. Texas*, 400 S.W.2d 890 (Tex. 1966).

34. See TAN 43-47 *infra*.

35. For state demand on Federal Government, see, e.g., *Abelman v. Booth*, 62 U.S. (21 How.) 506 (1858). For federal demand on state, see, e.g., *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1845). For state demand on state, see, e.g., *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860).

36. See, e.g., *Cooper v. Texas*, 400 S.W.2d 890, 892 (Tex. 1966).

was at best a tricky affair. Extradition procedures were complicated,³⁷ and it was often held that a state permanently waived jurisdiction over a convict whom it released into the custody of another state.³⁸ However, the Uniform Criminal Extradition Act, now in force in all but six states, today provides for a safe and simple extradition procedure between states.³⁹ Statutory and case law has similarly simplified the process of granting temporary custody between state and federal jurisdictions.⁴⁰ These procedural reforms leave little force in an argument which elevates the small danger of a rebuff of one sovereign by another above the concrete evils which can result from denial of a speedy trial.

Courts have also justified delayed trial of convicts in other jurisdictions on the ground that these convicts have fled the accusing jurisdiction, and hence waived their right to speedy trial.⁴¹ In the case of convicts arrested and convicted on a federal charge without ever leaving the accusing state, the argument rests on a patent fiction. But even where the convict has in fact fled to avoid prosecution and been convicted of another crime elsewhere, there seems little reason to hold this a perpetual waiver of his sixth amendment right, since the accusing jurisdiction can obtain custody simply and efficiently through statutory procedures.⁴²

Apart from conceptualism and lingering fictions, the true reasons for delaying trial of convicts in other jurisdictions are punishment, convenience, and cost. Punitive motives often predominate. One prosecutor wrote that a convict could "sit and rot in prison" rather than be brought promptly to trial in the prosecutor's jurisdiction.⁴³ Presumably

37. See COUNCIL OF STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL 10 (1955).

38. See, e.g., *In re Jones*, 154 Kan. 589, 121 P.2d 219 (1942); see also 4 N.Y.L.J. 242 (1958).

39. Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U. CHI. L. REV. 535, 549 (1964); see COUNCIL OF STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL 128-57 (1966).

40. For trying federal convicts on state charges, 18 U.S.C. § 4085(a) (1964) gives the Attorney General statutory authority to surrender the convicts temporarily. The usual procedure, however, is for the Federal Government to maintain custody but produce the convict for trial. United States Bureau of Prisons, Conditions Governing the Production of a United States Prisoner Upon a Writ of Habeas Corpus Issuing Out of a State Court, April 19, 1966. See, e.g., *Norman v. State*, 54 Del. 359, 177 A.2d 347 (1962). To ease transportation problems, the Federal Government will customarily transfer the convict to the federal correctional facility nearest to the place of trial. Cf. *Barker v. Municipal Court*, 64 Cal. 2d 806, 815, 415 P.2d 809, 815, 51 Cal. Rptr. 921, 927 (1966).

For trying state convicts on federal charges, see Comment, *supra* note 39, at 541-44.

41. E.g., *Dreadfulwater v. State*, 415 P.2d 493 (Okla. Crim. 1966).

42. See notes 39-40 *supra*; see also SUGGESTED LEGISLATION 81-90, which gives the Agreement on Detainers discussed pp. 774-75 *infra*.

43. *Barker v. Municipal Court*, 64 Cal. 2d 806, 815, 415 P.2d 809, 815, 51 Cal. Rptr. 921, 927 (1966).

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most prosecutors are not so callous, but many prosecutors are doubtless little troubled by the realization that delay causes anxiety, makes the convict's eventual defense more difficult, and eliminates the possibility of concurrent sentences. Many detainers are apparently filed for punitive reasons; they are withdrawn shortly before the convict's release, having served their purpose by curtailing prison privileges and preventing parole.⁴⁴ Satisfaction of the punitive impulse is, of course, no justification for permitting prosecutors to delay trials of convicts in other jurisdictions.

In addition to satisfying the retributive urge, delaying the trials of convicts in other jurisdictions is convenient for overworked prosecutors who welcome the chance to postpone some cases on a typically crowded docket.⁴⁵ Yet docket-lightening considerations do not override the right to a speedy trial of other defendants;⁴⁶ there seems no good reason why it should relieve prosecutors of the obligation to try convicts in other jurisdictions promptly.

Finally, the majority rule is rationalized on the grounds that securing temporary custody of the defendant and transporting him to and from trial costs money.⁴⁷ Extending the right of speedy trial to convicts in other jurisdictions would force the accusing jurisdiction to spend this money or drop the charges.

The costs of temporary extradition usually are not substantial, however,⁴⁸ and the accusing jurisdiction will face many of the same costs if it brings the convict to trial *after* his sentence in the other jurisdiction has run. Moreover, if the convict can serve his sentences concurrently, the total cost of his imprisonment and rehabilitation will often be much smaller. Even aside from this possibility, however, recognition of the right of speedy trial will certainly cost less than the enforcement of other rights, such as the right to counsel,⁴⁹ which can no longer be distinguished as more "basic" after *Klopfer*.⁵⁰

44. Donnelly 47; cf. Bennett 2.

45. Note, *supra* note 30, at 418.

46. See, e.g., Norton v. Superior Court, 100 Ariz. 65, 411 P.2d 170 (1966) (dismissed case on statutory grounds, but expressly recognized that statute implements the constitutional right). See generally sources cited note 66 *infra*.

47. See, e.g., Dreadfulwater v. State, 415 P.2d 493 (Okla. Crim. 1966).

48. Cf. State *ex rel.* Fredenberg v. Byrne, 20 Wis. 2d 504, 512, 123 N.W.2d 305, 309 (1963). Improved procedures have minimized administrative costs. See p. 772 *supra*. When jurisdictions are close together, transportation costs will be insubstantial. There has been a suggestion for the convict to serve his second sentence first, thus reducing transportation costs. MEETING ON AGREEMENT 2-3.

49. See generally Gideon v. Wainwright, 372 U.S. 335 (1963); Miranda v. Arizona, 384 U.S. 436 (1966).

50. "[T]he right to a speedy trial . . . is one of the most basic rights preserved by our Constitution." 386 U.S. at 226.

B. *Minority Rule*

In response to arguments for extending the right to speedy trial to convicts in other jurisdictions, a growing number of courts require the accusing jurisdiction to use reasonable means to obtain temporary custody of the convict against whom it has charges pending.⁵¹ The rule's serious flaw is its provision that the refusal of the incarcerating jurisdiction to yield the convict is a valid ground for delaying trial until his sentence has ended.⁵² Such refusals are not uncommon.⁵³ The incarcerating jurisdiction may fear that the convict will not be returned after trial or that he will escape.⁵⁴ Or the jurisdiction may refuse when the convict is serving a life term, overlooking the fact that his sentence may later be upset or commuted, so that he might have to face trial after a long delay.⁵⁵

The minority rule encourages these refusals. Since the incarcerating jurisdiction knows that the accusing jurisdiction can always try the convict later, it feels little incentive to shoulder the administrative burdens and risk of escape involved in rendition. Further, authorities in the incarcerating jurisdiction know that a requesting prosecutor, in spite of his exercise of the "reasonable diligence" required by the courts, shares their willingness to delay trial.⁵⁶

C. *The Agreement on Detainers*

The major legislative response to the problem of speedy trials for defendants serving sentences in other jurisdictions is the Agreement on Detainers,⁵⁷ promulgated in 1957 and since then adopted by 20 states.⁵⁸

51. *E.g.*, *People v. Bryarly*, 23 Ill. 2d 313, 178 N.E.2d 326 (1961); *Commonwealth v. McGrath*, 348 Mass. 748, 205 N.E.2d 710 (1965); *Barker v. Municipal Court*, 64 Cal. 2d 806, 415 P.2d 809, 51 Cal. Rptr. 921 (1966).

52. *See cases cited note 51 supra.*

53. For common reasons for refusal, see the text *infra*. Sometimes the reason is not clear. *E.g.*, *People v. South*, 122 Cal. App. 505, 508-09, 10 P.2d 109, 111 (1932) (no denial of right to speedy trial when federal authorities refused to grant temporary custody; accused was indicted for murder by California, but was serving a 10-year federal sentence); *Kirby v. Warden of the Md. Penitentiary*, 214 Md. 600, 133 A.2d 421 (1957) (similar unexplained refusal by federal authorities).

54. S. RUBIN, *supra* note 26, at 421.

55. *E.g.*, *Wzesinski v. Amos*, 143 F. Supp. 585 (N.D. Ind. 1956) (no denial of speedy trial when defendant brought to trial in 1956 on 1948 federal indictment).

56. *See pp. 772-73 supra* for prosecutor's motives.

57. SUGGESTED LEGISLATION 81-90.

58. California, Connecticut, Hawaii, Iowa, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, and South Carolina. MEETING ON AGREEMENT I. Minnesota, Rhode Island, Utah, Vermont, and Washington. Council of State Governments, Tally Sheet No. 12: Compact Developments in the States, October 1, 1967.

The Agreement provides that, once the charging state has filed a detainer with the incarcerating state, the convict may demand a trial; the charging state must normally bring him to trial within 180 days after receiving his demand or face dismissal of the charges with prejudice; finally, the incarcerating state agrees to deliver the convict for trial.⁵⁹ The Agreement provides procedures for the defendant's demand, and his delivery by the incarcerating jurisdiction, all designed to ensure trial within a very short time.⁶⁰ The generally successful experience under the Agreement demonstrates that such procedures are workable.⁶¹

The Agreement falls short in two ways of being a comprehensive guarantee of the right to a speedy trial.⁶² First, 30 states and the federal government have not enacted it,⁶³ and its procedures are effective only when both the accusing and the incarcerating jurisdictions are signatories.⁶⁴ Second, it applies only when a detainer has been filed.⁶⁵ The primary emphasis of the proponents of the Agreement was on the anti-rehabilitative effect of long-standing detainees, not on the other purposes of the right to speedy trial—protection of the defendant against prejudice of his defense, the anxiety of a pending charge, and extended incarceration. A prosecutor wishing to circumvent the requirements of the Agreement can do so by waiting until the prisoner is about to be released before filing the detainer.

59. Articles III & V, SUGGESTED LEGISLATION 84-87.

60. *Id.* The Agreement also provides for the case of the accusing jurisdiction requesting custody of the defendant. Here there is a 30-day period during which the Governor of the imprisoning state may disapprove the request. Once the requesting jurisdiction obtains custody of the convict he must be brought to trial within 120 days. Article IV, SUGGESTED LEGISLATION 86-87. See the extensive discussion of forms and administrative procedures under the Agreement in COUNCIL OF STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL 91-116 (1966).

61. MEETING ON AGREEMENT *passim*.

62. The lack of clear sanctions against the negligence of the correctional authorities in the incarcerating jurisdiction also limits the comprehensiveness of the Agreement. If these authorities fail to inform the convict of the detainer and his rights under the Agreement or fail to forward promptly the convict's demand for trial to the accusing jurisdiction, the Agreement does not make clear what, if any, sanctions are available. Compare *State v. West*, 79 N.J. Super. 379, 191 A.2d 758 (1963) with *People v. Esposito*, 37 Misc. 2d 386, 238 N.Y.S.2d 460 (Queens County Ct. 1960).

63. This inaction is in spite of well-publicized efforts prior to promulgation of the Agreement, e.g., COUNCIL OF STATE GOVERNMENTS, SENTENCING AND RELEASE OF PERSONS ACCUSED OF MULTIPLE OFFENSES (1955), and the subsequent lapse of over 10 years. The opposition of prosecutors is apparently a major factor in this lack of acceptance. Bennett 23. The Federal Government, which files a substantial proportion of the detainees, shows little inclination to become a signatory. At the request of the Administration, Representative Emanuel Celler, Chairman of the House Judiciary Committee, introduced the Agreement as a proposed bill. H.R. 8365, 88th Cong., 1st Sess. (1963). No action was taken. Letter from Representative Celler, November 9, 1967, on file in *Yale Law Journal* office.

64. E.g., *Zimmerman v. Superior Court*, 248 Cal. App. 2d 56, 56 Cal. Rptr. 226 (1967).

65. Articles III(a) and IV(a), SUGGESTED LEGISLATION 84-86.

III. Proposed Limitations on Post-Charge Delay

As revitalized in *Klopfer*, the right to a speedy trial suggests minimum limitations on the power of a jurisdiction to delay the trial of an out-of-jurisdiction convict against whom it has formal charges pending. Limitations on the power to delay formal charges against these convicts are suggested later.

First, the period allowed between the time the individual begins serving his sentence in the incarcerating jurisdiction and the beginning of his trial in the accusing jurisdiction should be no longer than the period which the sixth amendment would allow between charge and trial for a defendant held in the accusing jurisdiction. Second, refusal by the incarcerating jurisdiction to grant custody of the defendant should not be grounds for permitting the accusing jurisdiction to try him after his sentence has run, if the period of delay would otherwise be constitutionally impermissible. Finally, doctrines of waiver of the right to a speedy trial should be brought into line with the body of modern waiver law.

A. *Beginning and Length of the Period of Delay*

The first suggestion responds to two questions: when should the right to a speedy trial commence, and how long a delay is allowable. In the normal situation, where the accused is within the accusing jurisdiction, the right to a speedy trial runs from the date of the arrest⁶⁶ or formal charge.⁶⁷ Where the accused is held for trial by another jurisdiction, this rule should be modified to recognize the legitimate interests of that jurisdiction. It would be unreasonable for the first or accusing jurisdiction to expect temporary custody of the defendant while the second jurisdiction, which holds the accused, is completing the process of trial and sentencing, thereby meeting its duty to try the accused promptly. Even after sentencing, the defendant may be free on bail pending appeal and may need to remain in the second jurisdiction to consult with his lawyer. Thus it seems reasonable to measure the accused's right to a speedy trial in the first juris-

66. See Note, *The Right to a Speedy Trial*, 57 COLUM. L. REV. 846 (1957); Note, *supra* note 10, at 1587. Since arrest on another charge by another jurisdiction does not constitute arrest on the pending charge, the formal charge is the only traditional starting point applicable to the convict.

67. By formal charge is meant an indictment, information, or complaint. Not all jurisdictions accept the complaint as the starting point for the right; some require an information or indictment. For complaint, see, e.g., *Rost v. Municipal Court*, 184 Cal. App. 2d 507, 7 Cal. Rptr. 869 (1960). Even a detainer warrant has been declared the starting point. *People v. Winfrey*, 20 N.Y.2d 138, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967).

diction from the date he begins serving his sentence in the second or incarcerating jurisdiction.⁶⁸

The accusing jurisdiction may on occasion argue that its duty to try the accused promptly should commence at a later date, claiming that it had no notice of the defendant's whereabouts when he began serving his sentence. However, the extensive national system of reporting wanted persons and convicts gives the jurisdiction access to knowledge of convicts' whereabouts.⁶⁹ A flat rule that the jurisdiction has constructive notice at the time the accused begins serving his sentence would properly put the burden of improving this system on the jurisdictions which have the power to modify it. If the right to speedy trial began only when the accusing jurisdiction had actual notice, the defendant would face the almost impossible task of refuting the state's claim that it had no knowledge of his whereabouts.

As for the allowable period of pre-trial delay, other commentators have already discussed the factors which should determine this period in the normal case of an individual imprisoned in the accusing jurisdiction.⁷⁰ For this Note, the only further question is whether the fact that the accused is a convict in another jurisdiction is itself a relevant factor which might shorten or lengthen the permissible period.⁷¹ It

68. If the individual, before becoming a convict, had been indicted while he was in the accusing jurisdiction and was available for trial for a period before leaving that jurisdiction, that period might also be counted in determining whether there was undue delay. However, the harms to the individual might often be less severe during this period. See pp. 769-71. On the other hand, to include any of the period during which the convict was outside the jurisdiction and not a prisoner or could not be apprehended by reasonable means would encourage flight.

69. Letter from New York Attorney General's office, November 28, 1967, on file in *Yale Law Journal* office. Law enforcement agencies widely publish their "wanted persons" lists. Correctional facilities circulate reports on those who are serving sentences. These agencies have access to the FBI's centralized system which daily collects and checks thousands of fingerprints. §3 FBI LAW ENFORCEMENT BULLETIN, NO. 7, at 3 (1964). The great number of detainers filed against convicts by other jurisdictions attests to the effectiveness of this reporting system. See note 1 *supra*.

70. Courts consider whether the delay was reasonable in light of all the circumstances. This vague measure is clarified somewhat by case law which has delineated the circumstances which are valid reasons for delay. A constitutional violation is seldom found unless the delay lasts over a year. See sources cited note 66 *supra*.

The permissible delay should become shorter, given the recent re-emphasis of the importance of the right and *all* its purposes, not just preventing prejudice to the accused's defense. *Klopfer v. North Carolina*, 386 U.S. 213 (1967). Further, courts in the past could usually dismiss when there were shorter delays on grounds of the speedy trial statutes, which usually allow delay of 180 days or less. See, e.g., CAL. PENAL CODE § 1382 (West Supp. 1967) (if not in custody, 60 days after indictment or information). See also Note, *supra* note 4, at 837-41. Since these statutes generally do not apply to convicts in other jurisdictions, the courts will not be able to rely on this intermediate ground and will be more likely to employ the constitutional right.

71. The courts upholding the minority rule fail to agree on a starting point for measuring delay, if they have considered the problem at all. Some look to the time when the accused's whereabouts become known. See, e.g., *People v. Bryarly*, 23 Ill. 2d 313, 318, 178 N.E.2d 326, 329 (1961). One court even includes the period the accused was awaiting dis-

should be expected that the delay allowed will often be shorter, since, as has been noted before, the consequences of delay for the convict in another jurisdiction are often more severe than those suffered by other individuals whose trials are delayed.⁷²

The arguments for allowing additional delay for convicts in other jurisdictions should, with one exception, be rejected. As argued above, the costs of securing custody,⁷³ the convenience of the prosecutor,⁷⁴ and lack of notice of the convict's whereabouts⁷⁵ do not justify such delay. Nor should the fact that paperwork and logistics take time be a reason for additional delay. This is a mechanical process which, under modern statutory procedures, should take a few months at most.⁷⁶ It can be accomplished during the period already allowed for preparation of the prosecution and court calendar delay.⁷⁷

In one situation, courts should perhaps be more lenient in allowing pre-trial delay than they would be in the case of a defendant within the accusing jurisdiction. Where the defendant's sentence has only a short time to run, a judge should hesitate to dismiss⁷⁸ a charge because a prosecutor waited the few extra months until the end of the sentence to request extradition, especially if the distance between the jurisdictions is great and the delay did not unduly prejudice or burden the defendant.⁷⁹

B. *Refusal and Waiver*

The second suggestion strengthens the current minority rule by eliminating the incarcerating jurisdiction's refusal to surrender the defendant as a valid excuse for a delayed trial.⁸⁰ Such a rule will pro-

position of charges in the other jurisdiction. *People v. Piscitello*, 7 N.Y.2d 387, 165 N.E.2d 849, 198 N.Y.S.2d 273 (1960).

72. See pp. 769-71 *supra*.

73. See p. 773 *supra*.

74. See p. 773 *supra*.

75. See p. 777 *supra*.

76. See p. 772 *supra*. *Lucas v. United States*, 363 F.2d 500 (9th Cir. 1966), provides an example of the rapidity of present procedures of extradition. Over his objection which forced a hearing, defendant was extradited in one month.

77. See note 70 *supra*.

78. Dismissal, the sanction recommended here, is the usual sanction against violation of the constitutional right of speedy trial. Note, *supra* note 66, at 859. Further, this dismissal should act as a bar to future prosecutions for the same offense. This is also the usual sanction and cogent arguments have been raised in its support. If the prosecutor could re-charge the convict, he would be able easily to circumvent the right and would have no incentive to try the convict promptly. See sources cited note 66 *supra*; *Mann v. United States*, 304 F.2d 394, 397 (D.C. Cir. 1962) (dictum).

79. Cf. *United States v. Simmons*, 338 F.2d 804, 807-08 (2d Cir. 1964).

80. See p. 774 *supra*.

vide an incentive for the incarcerating jurisdiction to yield temporary custody of the defendant. Refusal will no longer mean simply a delayed trial in the requesting jurisdiction; it will mean dismissal of the charges. A refusing jurisdiction will have to fear retaliatory refusals in the future by the requesting jurisdiction. In non-convict situations, jurisdictions are deterred from exercising their privilege to deny requests for extradition by this same fear of retaliation.⁸¹

There remains at least the possibility that an incarcerating jurisdiction might refuse to grant temporary custody of a convict even when dismissal of the charge is the result. If the convict is one whom the incarcerating jurisdiction would refuse to extradite even after he was released, the accusing jurisdiction will suffer no additional loss by the earlier refusal, and the convict will be relieved of the threat of a future trial earlier.⁸² If the incarcerating jurisdiction would extradite the convict upon release but is unwilling to yield custody while he is serving his sentence, its reasons for refusing the request must arise from the administrative burdens of granting temporary custody. Given the simple procedures now available for temporary extradition,⁸³ allowing such minor administrative burdens to override the convict's interest in a speedy trial does not seem reasonable. If the incarcerating jurisdiction's refusal unfairly disregards the interests of the accusing jurisdiction, the solution lies in reform of the statutory or constitutional law of interstate rendition, not in thwarting the defendant's rights.

Finally, archaic doctrines which hold that convicts waive their right to speedy trial unless they affirmatively oppose the prosecutor's delay⁸⁴ should be abandoned. These doctrines run squarely against the contemporary law for waiver of constitutional rights.⁸⁵ Waiver should be found only where the convict intentionally abandons the right with a full understanding of the implications of his decision.⁸⁶

81. See generally Note, *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 YALE L.J. 97 (1956).

82. *Id. passim*, for examples of refusals to extradite non-convicts.

83. See p. 772 *supra*.

84. See note 11 *supra*.

85. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (sixth amendment right to counsel): "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights." *Fay v. Noia*, 372 U.S. 391 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).

86. See sources cited note 85 *supra*.

IV. Pre-Charge Delay⁸⁷

Even if the proposals sketched above are implemented as constitutional requirements, the right to a speedy trial of a convict alleged to have committed a crime in another jurisdiction will be insecure. These proposals, in line with the traditional law⁸⁸ of speedy trial, regulate only delay between charge and trial. A prosecutor wishing to delay trial can evade the proposed rules by not bringing charges against the convict until shortly before the end of his sentence.⁸⁹ Statutes of limitations provide no protection against this practice; convicts in other jurisdictions are universally held to be "fugitives" from the accusing jurisdiction, a status which tolls statutes of limitations.⁹⁰

Traditionally, courts have held that statutes of limitations are the "exclusive" protection against pre-charge (and, its functional equivalent, pre-arrest) delay; the right to speedy trial has nothing to do with it.⁹¹ Yet a delay in filing charges often involves the very harms which

87. This section deals with delay before the initial charge. It also includes delay between the initial charge and a related charge which might be brought later if the initial charge is dismissed or upset (by direct or collateral attack). See note 94 *infra*.

It does not include the situation where the defendant is re-charged for the same offense after an indictment has been dismissed. To the extent that courts allow re-charging at all, they treat the proceedings as a totality, considering the whole period after the initial charge as the post-charge period. *E.g.*, *United States v. Ewell*, 383 U.S. 116, 120-21 (1966); see sources cited note 66 *supra*.

88. See p. 776 *supra*. The Agreement on Detainers provides no protection in the pre-charge period; it covers only detainers "based on untried indictments, informations, or complaints." SUGGESTED LEGISLATION 84. See generally Note, *Justice Overdue: Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95 (1952).

89. Delaying charges against convicts in other jurisdictions as a tactic to delay trial was not necessary before the minority rule. However, as jurisdictions adopt the minority rule (or enact the Agreement on Detainers), prosecutors will presumably resort to this tactic. See cases cited note 112 *infra*.

90. *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956). Intent in leaving the jurisdiction is held to be unimportant. It is argued that the person who leaves the jurisdiction is harder to locate and is unavailable for questioning. The reasoning is hard to accept for all convicts in another jurisdiction. They are usually located very easily. When they are in a federal prison within the very state that will charge them, or are in a nearby state, it strains credibility to say they are unavailable for questioning. *Cf.* 104 U. PA. L. REV. 1111 (1956). Yet, even if the applicable statute of limitations were extended to these convicts, the protection offered would be scanty. The statutes of limitations allow long delays for some crimes and often have no limits for the more serious offenses. Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630 (1954). Moreover, these statutes are expressions of legislative policy, changeable at will by the legislature. See, *e.g.*, *Chase Securities v. Donaldson*, 325 U.S. 304, 314 (1945). There is no reason they need be the standard in ruling upon constitutional claims. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court rejected the suggestion that it should withhold decision until state legislatures and advisory bodies dealt with the problems by rule-making: "[T]he issues presented are of constitutional dimensions and must be determined by the courts." *Id.* at 490. Their purpose is to set a cut-off date after which prosecution is barred; they do not have to excuse failure to prosecute at an earlier date.

91. *E.g.*, *Harlow v. United States*, 301 F.2d 361 (5th Cir.), *cert. denied*, 371 U.S. 814

the right seeks to avoid. Like the convict who has been charged, the convict who expects to be charged may suffer anxiety which discourages rehabilitation, be prejudiced in his defense, and lose the chance of obtaining a concurrent sentence. A detainer may be filed against him, but correctional authorities usually give less weight to detainers unbacked by formal charges.⁹² If the convict does not expect to be charged, he of course suffers no anxiety. But he still loses the possibility of concurrent sentencing and he is especially prejudiced in preparing his defense, since he has no reason to fix in his memory the events surrounding the alleged offense or to secure witnesses while their whereabouts are still known.⁹³

Some courts, including the Supreme Court in *United States v. Ewell*,⁹⁴ have recognized the harmful effects of pre-charge delay and have either held or implied that constitutional provisions as well as the statutes of limitations check the power of prosecutors to postpone the arrest or charging of suspects indefinitely. Some of these courts find this limitation in the right to a speedy trial.⁹⁵ In *Taylor v. United States*, the District of Columbia Court of Appeals considered pre-charge as well as post-charge delay in finding a violation of the right to a speedy

(1962); *United States v. Panczko*, 367 F.2d 737 (7th Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

92. See Bennett 20-21.

93. See Judge Wright's concurring opinion in *Nickens v. United States*, 323 F.2d 808, 812 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 905 (1964).

94. 383 U.S. 116 (1966). When the two defendants succeeded through collateral attack in getting their original convictions vacated, the Federal Government promptly reindicted them. The new indictments contained three counts, one being the same as the initial charge against the defendants, another for a related but lesser offense. The district court, holding that the defendants had been denied their right to a speedy trial, dismissed the indictments. The Supreme Court reversed.

In considering whether delay in bringing the related charge was a violation of the right to a speedy trial, the Supreme Court treated the delay as pre-charge delay and, in doing so, did *not* say the right was inapplicable. Rather the Court noted that the applicable statute of limitations was the "primary" guaranty against state criminal charges, *id.* at 122, a sharp contrast to earlier decisions of federal courts of appeals that the statutes of limitations "exclusively" controlled. *E.g.*, *Harlow v. United States*, 301 F.2d 361, 366 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962). Further, the Court proceeded to evaluate the pre-charge delay by the traditional speedy trial standards of whether the delay was "prejudicial and oppressive." 383 U.S. at 122. Thus, while the Court found no violation of the right to speedy trial, it clearly implied that the right applies to the pre-charge period.

95. See, *e.g.*, *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956) (discussed p. 782 *infra*); *United States v. Burke*, 224 F. Supp. 41 (D.D.C. 1963) (indictment dismissed; delay was measured from the offense).

See also *Lucas v. United States*, 363 F.2d 500, 502 (9th Cir. 1966) (dictum that right may apply in special circumstances to earlier period than formal accusation); *United States v. Rivera*, 346 F.2d 942 (2d Cir. 1965) (implied that right might be applicable to the pre-charge period); *United States v. Parrott*, 248 F. Supp. 196 (D.D.C. 1965) (indictment dismissed under Rule 48(b) for unreasonable delay between offense and trial; court indicates dismissal could have been on grounds that the defendant's right to a speedy trial had been violated).

trial of a defendant who had been a convict in another jurisdiction during most of the period.⁹⁶

While the D.C. Court of Appeals has subsequently limited the implications of *Taylor*,⁹⁷ it now employs the due process clause to limit pre-charge delay.⁹⁸ In narcotics cases based on the evidence of undercover agents, the court has dismissed charges resting on a single sale of drugs months before the arrest, when the arrest was delayed to protect the undercover agent's cover, and where the passage of time might have destroyed evidence useful to the defendant or blurred his memory.⁹⁹

The right to a speedy trial seems a more appropriate vehicle than the due process clause to curb the abuses of pre-charge or pre-arrest delay. The due process clause focuses on the single element of prejudice to the defendant's case caused by lapse of time, while the speedy trial provision allows considerations of the other factors which may make delay oppressive, factors particularly relevant in the case of convicts in another jurisdiction.¹⁰⁰

96. 238 F.2d 259 (D.C. Cir. 1956) (5½ years delay between offense and trial, including more than three years' pre-indictment delay).

97. See *Nickens v. United States*, 323 F.2d 808, 810 nn.1-2 (D.C. Cir. 1963), cert. denied, 379 U.S. 905 (1964).

98. See, e.g., *Ross v. United States*, 349 F.2d 210, 215 (D.C. Cir. 1965) (seven-month delay between offense and arrest); *Woody v. United States*, 370 F.2d 214 (D.C. Cir. 1966) (four-month delay). See generally 80 HARV. L. REV. 1361 (1967); Note, *Constitutional Limits on Pre-Arrest Delay*, 51 IOWA L. REV. 670 (1966).

Why the Court of Appeals for the District of Columbia switched to the due process clause and now uses it as the doctrinal basis for limiting pre-charge delay is not clear. See generally *Nickens v. United States*, 323 F.2d 808, 810 nn.1-2 (D.C. Cir. 1963), cert. denied, 379 U.S. 905 (1964). Precedent is apparently a major factor. The right to a speedy trial is burdened with extensive precedent holding the right inapplicable to the pre-charge period. See p. 776 *supra*. On the other hand, precedent for using the due process clause was favorable, including a comfortably old English case, *The Queen v. Robbins*, 1 Cox Crim. Cas. 114 (Somerset Winter Assizes 1844). Further, due process is traditionally quite flexible and applications of it in other areas provide helpful analogies.

Courts in some states and federal circuits blur these two constitutional provisions. *United States v. Harbin*, 377 F.2d 78, 79-80 (4th Cir. 1967), amply illustrates this point. The defendant in that case claimed that a five-month delay between his alleged offense and a warrant for his arrest was denial of his right to a speedy trial. The court recognized that there was a constitutional question at stake, analogized the question of delay to situations where there was delay after the prosecution had been initiated (*i.e.*, speedy trial right?) and then cited and considered extensively *Ross* and *Woody*, which were decided solely on due process grounds.

Some courts have openly confessed this fuzziness and justified it by saying there is little analytical difference between the two provisions. See, e.g., *People v. Winfrey*, 20 N.Y.2d 138, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967).

99. See the District of Columbia Circuit cases cited note 98 *supra*.

100. Presumably, due process analysis would not find unreasonable an extended delay where the evidence against the convict is very strong and of a permanent nature, even though the anxiety stemming from the delay severely hampers the convict's rehabilitation and a detainer filed against him causes his prison privileges and chances of parole to be curtailed. Such situations as the above would be frequently encountered. Prejudice caused by delay would be hard to establish, for example, where the convict had made an ex-

Courts which have refused to apply the sixth amendment or similar state provisions to pre-charge and pre-arrest delay have relied heavily on the specious syllogism that the Constitution guarantees the right to a speedy trial only to "the accused," and that a suspect is not "the accused" until charges have been brought against him.¹⁰¹ This argument, however, is vitiated by such cases as *Escobedo v. Illinois*,¹⁰² where the Supreme Court has refused to read "the accused" in any such narrow sense; while Mr. Justice Stewart still finds indictment the triggering point for certain constitutional rights,¹⁰³ the majority of the Court has refused to create any such arbitrary watershed in applying the Bill of Rights.

Given the functional similarity of pre- and post-charge delay and the demise of the conceptual argument based upon the time of accusation, the D.C. Court of Appeals appears to have reasoned correctly in the *Taylor* case: the right of speedy trial should apply to the period before charge as well as the period after.

V. Proposed Limitations on Pre-Charge Delay

The conclusion that the sixth amendment applies to pre-charge delay is the beginning rather than the end of the search for standards to enforce it. Different factors might condition the right for convicts in the pre-charge period than apply in the post-charge context. The state may have interests at stake in pre-charge delay which are more substantial than those advanced, and rejected above, to justify delay between charge and trial. The state may delay charge to facilitate its gathering of evidence against the person to be charged, to facilitate apprehension of his suspected confederates in crime, or to protect undercover agents on whose reports the charge may be based.¹⁰⁴

tensive confession of the offense, where he has been convicted after long trial for an offense which arose from the same event as would be the basis for future charges, or where the offense is one such as income tax evasion or embezzlement in which the evidence is mostly based on written transactions rather than identity of suspects.

101. See, e.g., *People v. Jordan*, 45 Cal. 2d 697, 708, 290 P.2d 484, 491 (1955).

102. 378 U.S. 478, 485 (1964).

103. *Id.* at 493-94.

104. Some might further argue that the jurisdiction ought to be allowed additional delay for bringing related charges when the initial charges against a defendant are dismissed or conviction on them is upset (by direct or collateral attack). This argument is unacceptable; the jurisdiction could have brought all the charges initially. The Supreme Court in *United States v. Ewell*, 383 U.S. 116 (1966), implicitly recognized the lack of any special arguments for delay in such cases. The Court applied traditional speedy-trial analysis and asked whether the defendants had been prejudiced and oppressed by the 19-month delay between the original arrest and the second indictment. *Id.* at 122-23. *Accord*, *United States v. Burke*, 224 F. Supp. 41, 46 (D.D.C. 1963) (court dismissed second

A. *The Quantum of Evidence*

The first interest, that in gathering evidence against the accused,¹⁰⁵ will rarely conflict with the convict's interest in a speedy trial. The convict's interest in being charged and speedily tried by the accusing jurisdiction does not accrue until he has begun to serve his sentence in the incarcerating jurisdiction.¹⁰⁶ Between the commission of the first crime and the beginning of the sentence for the second crime must ensue arrest, pre-trial procedure, trial and sentencing—a process which often takes several months.¹⁰⁷ And yet typically the evidence for a crime is gathered within hours or at most days after the crime is detected,¹⁰⁸ thus the accusing jurisdiction will rarely have the excuse that it is still collecting evidence needed to convict the person of the first crime by the time the suspect begins his sentence in the incarcerating jurisdiction.

But the rare case will occur. Sometimes crimes are not detected until long after they are committed; sometimes the crime is detected early, but the police do not focus on a suspect until much later; and occasionally a Porfiry Petróvitch will have his suspect without having the goods on him. In such instances the prosecutor will argue that he cannot charge the suspect before the sentence in the other jurisdiction begins, either because he cannot establish probable cause or, though there is probable cause, because he needs more evidence to convict—evidence which might be lost if he tipped his hand by bringing charges. In cases such as this, determining the time when the accusing jurisdiction's duty to try promptly should begin is difficult. It is clear that it should not begin before the prosecutor has sufficient evidence to support charges against the suspect; a defendant should not be able

indictment on speedy trial grounds when prosecutor dismissed first indictment to gain a supposed advantage with the second indictment for a related offense). *Contra*, *Sanchez v. United States*, 341 F.2d 225, 229 (9th Cir. 1965).

Rather than representing any valid interest, delay in this situation smacks of oppressive action by the government. The defendant who successfully escapes initial charges is being harassed with new charges. *Cf.* Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 286-92 (1965). Where the conviction has been upset, the jurisdiction is discouraging the exercise of the defendant's statutory right to seek review of criminal convictions. *Ewell v. United States*, 383 U.S. 116, 128 (1966) (dissenting opinion of Fortas, J.).

105. Courts sometimes allow the prosecutor additional delay to gather evidence in the post-charge period. *See, e.g.*, *Harlow v. United States*, 301 F.2d 361, 367 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962) (2-year fruitless search for information about defendants' Swiss bank accounts held not unreasonable delay). *See generally* sources cited note 66 *supra*.

106. *See* pp. 776-77 *supra*.

107. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 80-90 (1967).

108. *See, e.g.*, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY 7-19, 88-106 (1967); Note, *Interrogations in New Haven*, 76 YALE L.J. 1519, 1597-99 (1967).

to take advantage of his deceptiveness or luck in avoiding detection to claim delay. Even if probable cause exists, the Supreme Court has recently ruled that the police have no duty to arrest a suspect when they have mere probable cause—they have a legitimate interest in gathering evidence for trial before they make an arrest (or a formal charge—the functional equivalent of an arrest in the case of a convict in another jurisdiction).¹⁰⁹

The next stopping point, and perhaps the most reasonable one, is the time at which the police have enough evidence to give reasonable assurance of conviction.¹¹⁰ Delay in bringing charges after this point, unless the other justifying circumstances are present, can reasonably be deemed to be in bad faith—calculated to avoid the constitutional duty to give the defendant a speedy trial. The standard is necessarily a vague one, and provides only a starting point for judicial evaluation. But its vagueness should inflict no substantial harm on the deterrent effect of law enforcement, since the need to apply it should arise only in rare cases. Its open texture has certain advantages in giving courts considerable latitude to look into the underlying issue—the good faith of the law enforcement agencies.¹¹¹

Allocation of the burden of proof is important in applying such a standard. It would be onerous to make the defendant affirmatively prove the amount of evidence the police had in their possession at different times in the course of the investigation. Thus in cases which present a prima facie claim of unconstitutional delay—a substantial period between the offense and the bringing of charges—the state should bear the burden of showing that essential evidence was gathered shortly before the charges were brought. Probably any material

109. *United States v. Hoffa*, 385 U.S. 293, 309-10 (1966).

110. "A prosecution should not go forward unless there is sufficient evidence against the accused to promise a conviction, thus justifying the governmental expense and the defendant's distress." M. PAULSEN & S. KADISH, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 917 (1962).

111. Besides looking to the delay after the police obtain sufficient evidence, the courts might on occasion inquire whether the jurisdiction made a reasonably prompt effort to secure the evidence. Purposeful or negligent delay should weigh heavily for a finding that speedy trial has been denied the convict. For instance, a cessation or marked slowdown in investigatory efforts, especially after the authorities knew that the suspect was a convict in another jurisdiction, would suggest the jurisdiction was abusing its claim of necessity for securing evidence. Negligence might be found where there are departures from the general investigatory procedures of the law enforcement agency. Even the general procedures might be questioned if viable alternatives exist which substantially reduce the time needed to secure the evidence.

Instances of bad faith investigatory delay should be rare since the police traditionally seek to "clear" their cases as quickly as possible. It is after the police obtain sufficient evidence and turn the case over to the prosecutor that delaying tactics become more likely.

evidence gathered at that time should be presumptively considered "essential," with the burden then shifting to the defendant to show that the prosecutor already had sufficient evidence to convict.¹¹²

B. *Protecting Undercover Agents and Catching Confederates*

In some cases, law enforcement agencies will have enough evidence against a convict in another jurisdiction to assure his conviction, but will seek to delay charging him on the grounds that bringing charges would "blow" the cover of an undercover agent,¹¹³ or would reduce the state's chances of collecting evidence against the defendant's suspected confederates. These cases present the most difficult conflict between the convict's right to a speedy trial and the jurisdiction's legitimate interests in law enforcement. Again, they are likely to be relatively rare cases. They can arise only where the investigation of a conspiracy runs beyond the time it takes the incarcerating jurisdiction to arrest, try, and convict the accused,¹¹⁴ or where an informer or agent in the accusing jurisdiction retains his usefulness through a similar period.

112. Two recent cases reflect the improvement provided by this analysis over past treatment of the problem of pre-charge delay. In *Terlikowski v. United States*, 379 F.2d 501 (8th Cir. 1967), a post office had been burglarized and the two defendants were promptly charged and convicted by Minnesota for armed robbery. It was only after a delay of two years that the federal government brought three counts arising out of the same robbery against the defendants. The trial came five months later. In answer to the defendants' claim that they had suffered because of the pre-charge delay, the court limited its analysis to whether the defendants' defense had been prejudiced, ignoring the other interests of the convicts which the right to speedy trial seeks to protect. Further, the court accepted the prosecution's interest in delay as justified by noting that the prosecution had continued its investigation and unearthed new evidence. But, given that the state had convicted the defendants on a charge similar to the Federal Government's charges, was the additional investigation necessary? The Federal Government did initially include a conspiracy charge involving other defendants which Minnesota might not have done in its earlier charge. But did this require more investigation? And, even if additional investigation were necessary, did these investigations require two years or could they have been completed more quickly? It is not clear whether the proposed analysis would lead to a different result in this case, but it clearly would better consider the valid interests involved.

This analysis would provide a clear-cut answer in *State v. Duffy*, 24 Conn. Supp. 308, 190 A.2d 243 (Super. Ct. 1963). There, the defendant had been serving a two-year sentence in a federal correctional institution in Connecticut. The day of his release he was formally charged and arrested by state authorities on charges of auto theft and escape from a state jail. Both the offenses and the suspect's whereabouts were known to the state authorities during his prison term. The state offenses were ones which did not require delay in order to secure additional evidence nor to protect undercover agents nor to continue a wide-ranging investigation. Yet, rather than bring the defendant to trial promptly, the state prosecutor let him sit in the federal institution. This absence of any valid state interest in delaying prosecution, combined with the defendant's valid interests in a speedy trial, provided a compelling case for finding a denial of the defendant's right to a speedy trial. The court never got started. It relied on precedent to hold that the right only extended from the time of formal accusation.

113. Using the more limited due process analysis, the Court of Appeals for the District of Columbia has been actively considering pre-charge delay in this area. See p. 782 *supra*.

114. See p. 784 *supra*.

And even then the right will not have accrued unless the police in the accusing jurisdiction had enough evidence to convict by the time the accused began serving his sentence in the incarcerating jurisdiction.

The first part of the proposed test is similar to that recommended in the situation where the police are still gathering evidence against the particular accused person in question. Where a substantial gap exists between the time of the offense and the time the accusing jurisdiction brings the defendant to trial, that jurisdiction bears the burden of showing the necessity for the delay. The problem is to determine when a delay is necessary in the informer or confederate situation.

No clear rule seems appropriate to the situation. On the one hand, it would undervalue the interest in a speedy trial for the defendant if the police could justify any delay, no matter how prejudicial or oppressive, whenever it could show that bringing charges *might* threaten the usefulness of an agent or informer, however unimportant, or *might* tip their hand to some putative confederate of the defendant, however tenuous their belief that such a confederate exists. On the other hand, forcing law enforcement agencies to drop all chance to prosecute a convict in another jurisdiction whenever the exigencies of protecting important informers or continuing investigations requires delay in charging him, even where the delay is neither prejudicial nor particularly oppressive, would take insufficient account of the practical requirements of law enforcement.¹¹⁵

What is proposed, with reluctance, is a balancing test.¹¹⁶ On the jurisdiction's side, the court could consider the seriousness of the charge against the defendant, the essentiality of the informer or agent being protected,¹¹⁷ the dangerousness of the suspected conspiracy, the strength of the state's suspicion that such a conspiracy exists, and the actual threat to the investigation of the ring if the defendant imprisoned in another jurisdiction were charged promptly. On the defen-

115. See generally sources cited note 98 *supra*.

116. This is essentially the test the District of Columbia Court of Appeals employs, though its due process analysis does not consider all the interests of the convict which analysis on speedy trial grounds would. See p. 782 *supra*. Examining all the circumstances is the essential test for determining whether there has been denial of a defendant's right to a speedy trial. See Note, *The Right to a Speedy Criminal Trial*, 57 *COLUM. L. REV.* 846-52 (1957); *United States v. Burke*, 224 F. Supp. 41 (D.D.C. 1963) (pre-charge delay included in determining the defendant's right had been violated).

117. For instance, the police might be able to use more undercover agents so that the identity of a single agent need not be protected for as long. Cf. *Ross v. United States*, 349 F.2d 210, 212-13 (D.C. Cir. 1965).

dant's side, the court should take account of the prejudice to him which is likely to flow from the delayed trial as well as the oppressiveness of the delay in the particular case. The court must then strike a balance between the conflicting interests to determine whether the charges against the convict should be dismissed or not.