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MARYLAND'S PROMPT CRIMINAL TRIAL PROVISIONS: *HICKS* AND BEYOND

Harold Douglas Norton†

In 1971, the Maryland General Assembly and court of appeals adopted the prompt trial provisions. It was not until the court's 1979 decision in State v. Hicks, however, that the "teeth" were put into the provisions, by supplying dismissal as the sanction for violation of the defendant's rights under the prompt trial provisions. Since that time, there has been an abundance of litigation in an attempt to clarify the applicability of the provisions and the sanction. In this article, the author presents a practical guide to the Maryland prompt trial provisions, analyzing the provisions and the wealth of recent case law.

Postponement of cases from dates scheduled for trial is one of the major factors contributing to delay in the administration of justice, civil as well as criminal. Courts and court supporting services spend substantial time "spinning their wheels," in rescheduling cases. Available court time is lost. The time of attorneys and witnesses is lost. Witnesses themselves are lost. Those who are not are put in severe inconvenience as well as actual loss, and end up in despair at the frustrations of being involved in the trial of a case in the courts. The very image of the judicial system is in serious jeopardy. Public confidence in the courts as instruments of the people is impaired. Judges and lawyers cannot blame the "system," for they are the people who run that system.

When the Legislature has expressed the will of the people by saying that the date established for the trial of a criminal case shall not be postponed except for extraordinary cause, and has denied all judges but the administrative head of the court authority to exercise even that curtailed power, the message should be loud and clear to the bench, the bar, parties, witnesses, and to the public, that trials must not and will not be postponed for ordinary reasons.¹

I. INTRODUCTION

On June 25, 1979, those words written by Judge Powers rang "loud and clear" as the Court of Appeals of Maryland held, in *State v. Hicks*,² that the Maryland "prompt trial provisions,"³ article 27, section 591 and

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1. *Guarnera v. State*, 20 Md. App. 562, 573-74, 318 A.2d 243, 248-49 (Powers, J.), cert. denied, 272 Md. 742 (1974).

2. 285 Md. 310, 403 A.2d 356 (1979).

3. For the purposes of this article, former Md. R.P. 746 (Supp. 1983), MD. R.P. 4-271,

former Maryland Rule 746 were mandatory.⁴ The *Hicks* court held that when the trial date in a criminal case in the circuit courts is postponed beyond a period of 180 days from the first appearance by the defendant or his counsel,⁵ the charges shall be dismissed with prejudice,⁶ absent a finding of "good cause"⁷ for the postponement by the hearing judge,⁸ or a waiver of the prompt trial penalty by the defendant.⁹

Since the *Hicks* decision, the Maryland appellate courts have been inundated with cases demanding further explanation of the prompt trial provisions and how they are to be applied. This article will outline the parameters of the Maryland prompt trial provisions with an eye toward familiarizing the practitioner with their requirements. It will discuss the analysis employed by the Maryland appellate courts for determining whether the prompt trial provisions have been satisfied, and will point out the pitfalls that may be encountered by both prosecution and defense in their efforts to comply.

II. PROMPT TRIAL IN RETROSPECT

In 1971, the Maryland General Assembly enacted section 591 of article 27, which provided for trial of a criminal defendant within six months of personal appearance or appearance of counsel.¹⁰ Postpone-

and MD. ANN. CODE art. 27, § 591 (Supp. 1984), are referred to collectively as the "prompt trial provisions." By contrast, the federal and state constitutional protections are referred to collectively as the "speedy trial provisions."

4. *State v. Hicks*, 285 Md. 310, 318, 334-35, 403 A.2d 356, 360, 369 (1979). Md. R.P. 746 (Supp. 1983) has been stylistically reworked into MD. R.P. 4-271 without substantive change. See *infra* note 39 (text of rule 4-271).
5. The time period prescribed by the prompt trial provisions stands at 180 days. MD. ANN. CODE art. 27, § 591 (Supp. 1984); Md. R.P. 746a (Supp. 1983); MD. R.P. 4-271(a). See generally *infra* notes 10-46 and accompanying text (evolution of prompt trial requirements); *infra* Section III (mechanics of prompt trial); *infra* Appendix (prompt trial/speedy trial diagram).
6. See *State v. Hicks*, 285 Md. 310, 335, 403 A.2d 356, 369 (1979); see also *State v. Armstrong*, 46 Md. App. 641, 651, 421 A.2d 98, 104 (1980) (state may not reindict defendant for charges previously dismissed for prompt trial violation); Joseph, *Speedy Trial Rights in Application*, 48 FORDHAM L. REV. 611, 611-12 (1980). See generally *infra* Section VI (dismissal penalty).
7. The prompt trial provisions condition postponement of a trial date on "good cause shown" by the requesting party. MD. ANN. CODE art. 27, § 591 (Supp. 1984); Md. R.P. 746b (Supp. 1983); MD. R.P. 4-271(b). See generally *infra* notes 10-30 and accompanying text (evolution of prompt trial requirements); *infra* Section IV(B) (good cause for postponement).
8. MD. ANN. CODE art. 27, § 591 (Supp. 1984); Md. R.P. 746b (Supp. 1983); MD. R.P. 4-271(b). For purposes of this article, the county administrative judge and his designees are referred to collectively as hearing judges. See generally *infra* Section IV(B) (approval of postponement).
9. See *State v. Hicks*, 285 Md. 310, 335, 403 A.2d 356, 369 (1979). See generally *infra* Section V (waiver of prompt trial penalty).
10. The full text of MD. ANN. CODE art. 27, § 591 (1971) read as follows:
 - (a) Within two weeks after the arraignment of a person accused of a criminal offense, or within two weeks after the filing of an appearance of counsel or the appointment of counsel for an accused in any criminal mat-

ments under section 591 were to be made for "extraordinary cause shown" and by the county administrative judge only.¹¹ Soon thereafter, the court of appeals, as authorized by subsection 591(b),¹² adopted former Maryland Rule 740, which incorporated section 591 by reference.¹³ Days later, in *Young v. State*,¹⁴ these two expressions of legislative and judicial policy were held by the court of special appeals to be directory only,¹⁵ because no penalty had been provided for their violation.¹⁶ The court pointed out, however, that the penalty of dismissal is always available to a defendant for a violation of constitutional speedy trial rights and that non-compliance with the state prompt trial provisions is "unquestionably a factor" to be considered in determining if a defendant's rights have been violated.¹⁷ Not until 1977, during its inspired revision of Chapter 700 of the Maryland Rules of Procedure, did the court of appeals enact former Maryland Rule 746 and shorten the time in which a defendant must be brought to trial from six months to 120 days.¹⁸ How-

ter, whichever shall occur first, a judge or other designated official of the Circuit Court or the Criminal Court of Baltimore City in which the matter is pending, shall set a date for the trial of the case, which date shall be not later than six months from the date of the arraignment of the person accused or the appearance or the appointment of counsel for the accused whichever occurs first. The date established for the trial of the matter shall not be postponed except for extraordinary cause shown by the moving party and only with the permission of the administrative judge of the court where the matter is pending.

(b) The judges of the Court of Appeals of Maryland are authorized to establish additional rules of practice and procedure for the implementation of this section in the Criminal Court of Baltimore City and in the various circuit courts throughout the State of Maryland.

11. *Id.* at § 591(a).

12. *Id.* at § 591(b).

13. The rule read that "[t]he date of trial and postponement shall be governed by code, Article 27, section 591," Md. R.P. 740 (1972), and was adopted by the court of appeals on June 1, 1972.

14. 15 Md. App. 707, 292 A.2d 137, *aff'd per curiam*, 266 Md. 438, 294 A.2d 467 (1972).

15. *Id.* at 710, 292 A.2d at 139.

16. *Id.*

17. *Id.* at 710-11, 292 A.2d at 139; *accord* *State v. Mines*, 48 Md. App. 30, 36, 425 A.2d 1044, 1048 (1981); *Wise v. State*, 47 Md. App. 656, 675, 425 A.2d 652, 663, *cert. denied*, 290 Md. 724, *cert. denied*, 454 U.S. 863 (1981); *Wilson v. State*, 44 Md. App. 1, 7, 408 A.2d 102, 106 (1979), *cert. denied*, 286 Md. 755, *cert. denied*, 446 U.S. 921 (1980). "While the rule (and presumably the statute) are considered . . . to be nonconstitutional procedural rules . . . it is apparent from the similarity of purpose and sanction adopted to enforce them, that when considering the length of delay in bringing an accused to trial in the constitutional speedy trial context, the [prompt trial] time factors . . . should not have been—and cannot now—be ignored." *Wilson*, 44 Md. App. at 7, 408 A.2d at 106. *But see Hicks*, 285 Md. at 320, 403 A.2d at 361 (time limits prescribed by prompt trial provisions are not the only "length of delay" measure of defendants' speedy trial rights). *See generally infra* note 37 and accompanying text (availability of speedy trial protection); *infra* Section III (interplay of prompt trial and speedy trial); *infra* Appendix (prompt trial/speedy trial diagram).

18. The original text of former Md. R.P. 746 (1979) read as follows:

ever, because Rule 746 was also viewed as directory, "[t]he result was almost wholesale violations of its provisions."¹⁹

Finally, in *State v. Hicks*,²⁰ the court of appeals "cleared the waters,"²¹ holding the prompt trial provisions mandatory and dismissal of the charges as the appropriate penalty for their violation.²² On motion by the state for reconsideration, the court made it clear that it intended to overrule *Young* and require mandatory dismissal.²³ The court, however, carved out two possible exceptions to the penalty of mandatory dismissal: (1) failure to set the trial date within 30 days of appearance,²⁴ and (2) "where the defendant, either individually or by his attorney, seeks or expressly consents to a trial date in violation of Rule 746."²⁵ The court declared its ruling to be prospective only.²⁶

As noted earlier, "wholesale violations" of the prompt trial provisions under their directory interpretation led the court of appeals to mandate the "draconian sanction" of dismissal.²⁷ Yet the court in *Hicks* left for speculation what type of dismissal is warranted. One commentator concluded that dismissal should be absolute, or at least presumed abso-

a. General Provision.

Within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 723 (Appearance—Provision for or Waiver of Counsel), a trial date shall be set which shall be not later than 120 days after the appearance or waiver of counsel or after the appearance of defendant before the court pursuant to Rule 723 (Appearance—Provision for or Waiver of Counsel).

b. Change of Trial Date.

Upon motion of a party made in writing or in open court and for extraordinary cause shown, the county administrative judge or a judge designated by him may grant a change of trial date.

19. *State v. Mines*, 48 Md. App. 30, 33, 425 A.2d 1044, 1046 (1981).
20. 285 Md. 310, 403 A.2d 356 (1979).
21. *State v. Mines*, 48 Md. App. 30, 33, 425 A.2d 1044, 1047 (1981).
22. *State v. Hicks*, 285 Md. 310, 318, 403 A.2d 356, 360 (1979). "Although, to be precise, *Hicks*' holding referred to the 120-day Rule, the holding has been applied with equal force to the Rule as amended." *Briscoe v. State*, 48 Md. App. 169, 180 n.2, 426 A.2d 415, 421 n.2 (1981). See *supra* note 18 (text of former Md. R.P. 746).
23. *State v. Hicks*, 285 Md. 310, 334-35, 403 A.2d 356, 370 (1979).
24. *Id.* at 335, 403 A.2d at 369. See generally *infra* Section IV (initial setting of a trial date).
25. *State v. Hicks*, 285 Md. 310, 335, 403 A.2d 356, 369 (1979). See generally *infra* Section V (waiver of prompt trial provisions).
26. *State v. Hicks*, 285 Md. 310, 334, 403 A.2d 356, 368-69 (1979). For examples of application of the *Hicks* rule see, e.g., *State v. Mines*, 48 Md. App. 30, 31-35, 425 A.2d 1044, 1047-48 (1980); *Leonard v. State*, 46 Md. App. 631, 634, 421 A.2d 85, 87 (1980), *aff'd per curiam*, 290 Md. 295, 429 A.2d 538 (1981); *Chance v. State*, 45 Md. App. 521, 525, 414 A.2d 535, 536 (1980); *Gasque v. State*, 45 Md. App. 471, 478, 413 A.2d 1351, 1355 (1980); *Leuschner v. State*, 45 Md. App. 323, 357, 413 A.2d 227, 246, *cert. denied*, 288 Md. 739 (1980), *vacated*, 451 U.S. 1014 (1981); *State v. Hiken*, 43 Md. App. 259, 271, 405 A.2d 284, 291 (1979).
27. *Joseph*, *supra* note 6, at 619 (quoting *United States v. Jones*, 524 F.2d 834, 852 (D.C. Cir. 1975)); see *State v. Hicks*, 285 Md. 310, 334, 403 A.2d 356, 369 (1979); *State v. Mines*, 48 Md. App. 30, 33, 425 A.2d 1044, 1046 (1981).

lute, as it is with speedy trial violations,²⁸ because “[t]he announced intention of the *Hicks* court to put ‘teeth’ into the [prompt trial provisions] would be rendered largely negatory were the State permitted to recommence prosecution after an illegal delay.”²⁹ This question has been laid to rest by *State v. Armstrong*,³⁰ in which the court of special appeals held that prosecution of charges dismissed for prompt trial violations is impermissible under both prompt and speedy trial analysis.³¹ Charges dismissed for substantive deficiencies, however, may be refiled, causing the 180-day period to begin anew,³² as may be charges that are entered *nolle prosequi*, unless the purpose or effect of such entry is to circumvent prompt trial requirements.³³

Because of the concern expressed by the bench and prosecutorial bar over the cataclysmic effect that *Hicks* might have on the criminal justice system,³⁴ the time period of former Rule 746 was increased to 180 days,³⁵ and the *extraordinary* cause condition was demoted to *good* cause in both the rule³⁶ and statute.³⁷ The rule is presently designated as Rule 4-271

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28. Loker, *The Effect of State v. Hicks on the Scheduling & Postponement of Trials Pursuant to Maryland Rule 746*, 2 MARYLAND PROSECUTOR 29, 30 (1979); see *Strunk v. United States*, 412 U.S. 434, 438-41 (1973).
 29. Loker, *supra* note 28, at 30; see also *State v. Armstrong*, 46 Md. App. 641, 651, 421 A.2d 98, 104 (1980) (defendant may not be retried for charges dismissed for prompt trial violation); Joseph, *supra* note 6, at 641 (authority split on this issue).
 30. 46 Md. App. 641, 421 A.2d 98 (1980).
 31. *Id.* at 651, 421 A.2d at 104; see also *Strunk v. United States*, 412 U.S. 434, 438-41 (1973) (federal Constitution). See generally Joseph, *supra* note 6, at 611-12 (dismissal with prejudice is typical penalty under most state speedy or prompt trial schemes); Rubine, *Speedy Trial Schemes and Criminal Justice Deals*, 57 CORNELL L. REV. 794, 811-12 (1971-72) (dismissal with prejudice necessary to compel compliance with state's duty to try defendant promptly).
 32. *State v. Phillips*, 299 Md. 468, 474 A.2d 512 (1984); Md. R.P. 746 (Supp. 1983); MD. R.P. 4-271(a).
 33. *Curley v. State*, 299 Md. 449, 462, 474 A.2d 502, 508 (1984); *State v. Glenn*, 299 Md. 464, 474 A.2d 509 (1984).
 34. See *State v. Mines*, 48 Md. App. 30, 34, 425 A.2d 1044, 1047 (1981); see also Note, *Criminal Procedure—Maryland Rule 746—Scheduling Criminal Cases for Trial—Maryland Rule 746 Requires That Criminal Charges be Dismissed When State Fails to Bring Case to Trial Within Prescribed Period and Fails to Establish Extraordinary Cause Justifying Postponement*. *State v. Hicks*, 285 Md. 310, 403 A.2d 356 (1979), 9 U. BALT. L. REV. 473, 489-92 (1980) (effect of *Hicks* on judicial system).
 35. Court of Appeals of Md., Rules Order of Nov. 16, 1979, 6 Md. Admin. Reg. 1915 (1979). See generally *State v. Mines*, 48 Md. App. 30, 34, 425 A.2d 1044, 1047 (1981); Note, *supra* note 34, at 490-91.
 36. Court of Appeals of Md., Rules Order of July 3, 1980, 7 Md. Admin. Reg. 1414 (1980). See generally *State v. Mines*, 48 Md. App. 30, 34, 425 A.2d 1044, 1047 (1981) (evolution of prompt trial rule); Note, *supra* note 34, at 492.
 37. Act of May 6, 1980, ch. 378, 1980 Md. Laws 1283. The statutory two week period for scheduling the initial trial date, however, has been pre-empted by the rule. *State v. Hicks*, 285 Md. 310, 318, 403 A.2d 356, 360 (1979). MD. R.P. 4-271 only changes former Md. R.P. 746 (Supp. 1983) stylistically and adds the district court counterpart, MD. DIST. RULE 746, to subsection (c) for organizational purposes. See *infra* note 38 (text of MD. R.P. 4-271). The text of MD. ANN. CODE art. 27, § 591 (Supp. 1984) now reads as follows:
 § 591. Setting date for trial; postponement.

and is virtually identical to former Rule 746.³⁸

In order to understand decisions involving prompt trial issues, the public policy considerations voiced by the court in *Hicks* must be considered. The *Hicks* court was careful to distinguish nonconstitutional prompt trial from constitutional speedy trial, and explained that the state prompt trial provisions were enacted to minimize the societal effects of excessive delay in the criminal justice system rather than the effects of such delay on an individual defendant.³⁹ The court stated that by adopting the rule it intended to "put teeth into a new regulation governing the assignment of criminal cases for trial"⁴⁰ In *Hicks*, the defendant's incarceration in another jurisdiction on the scheduled trial date amounted to extraordinary cause for postponement.⁴¹ The court stated, however, that

in so concluding, we intend no departure from the established law that the mere fact that defendant is incarcerated in another jurisdiction does not relieve the State of its Sixth Amendment obligation to grant the accused his constitutional right to a speedy trial The time limits prescribed by Rule 746 are not, however, *the* measure of the Sixth Amendment right to a speedy trial. While the rule was adopted to facilitate the prompt disposition of criminal cases, it stands on a different legal footing than the Sixth Amendment constitutional right to

(a) Within two weeks after the arraignment of a person accused of a criminal offense, or within two weeks after the filing of an appearance of counsel or the appointment of counsel for an accused in any criminal matter, whichever shall occur first, a judge or other designated official of the circuit court in which the matter is pending, shall set a date for the trial of the case, which date shall be not later than 180 days from the date of the arraignment of the person accused or the appearance or the appointment of counsel for the accused whichever occurs first. The date established for the trial of the matter shall not be postponed except for good cause shown by the moving party and only with the permission of the administrative judge of the court where the matter is pending.

(b) The judges of the Court of Appeals of Maryland are authorized to establish additional rules of practice and procedure for the implementation of this section in the various circuit courts throughout the State of Maryland.

38. Rule 4-271. TRIAL DATE.

(a) Trial Date in Circuit Court.—The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events. On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date.

(b) Change of Trial Date in District Court.—The date for trial in the District Court may be changed on motion of a party and for good cause shown.

39. *State v. Hicks*, 285 Md. 310, 316, 403 A.2d 356, 359 (1979).

40. *Id.* at 318, 403 A.2d at 360.

41. *Id.* at 318-20, 403 A.2d at 360-61.

a speedy trial.⁴²

Thus, although the sixth amendment grants to a defendant a "personal" right to speedy trial,⁴³ "[t]he purpose of [the prompt trial provisions], which require an accused to be tried within [180] days of his or his attorney's appearance [are] to protect society's interest in an effective criminal justice system."⁴⁴ As will be evident throughout this article, it is crucial that practitioners be familiar with the difference between the constitutional speedy trial right and the nonconstitutional prompt trial provisions.⁴⁵

42. *Id.* at 320, 403 A.2d at 361-62 (emphasis added); see Note, *supra* note 34, at 487-89. *But see supra* note 17 and accompanying text (prompt trial period used as gauge of speedy trial delay factor).

43. U.S. CONST. amend. VI (right of "accused" to speedy trial); see *State v. Lattisaw*, 48 Md. App. 20, 29, 425 A.2d 1051, 1056 (speedy trial right is personal), *cert. denied*, 290 Md. 717 (1981).

44. *State v. Hicks*, 285 Md. 310, 321, 403 A.2d 356, 362 (1979) (Davidson, J., dissenting); see, e.g., *Larsen v. State*, 55 Md. App. 135, 142, 461 A.2d 543, 546-67 (1983) (prompt trial provisions promote efficiency), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984); *Carter v. State*, 54 Md. App. 220, 229, 458 A.2d 480, 484 (1983) (good cause where movant exercised diligence and "need to postpone outweighs the detriment to the public interest from delay"), *rev'd on other grounds sub nom. State v. Beard*, 299 Md. 472, 474 A.2d 514 (1984). See generally *infra* Section IV(B) (good cause for postponement).

45. The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." Because this right is viewed as "fundamental," it applies to the several states by operation of the fourteenth amendment. See *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967); see also MD. CONST. art. 21, which reads:

That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defense; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

"[O]pinions of the Supreme Court interpreting the Sixth Amendment right to a speedy trial are 'very persuasive, although not necessarily controlling,' as to the proper construction of Maryland's parallel Article 21 right." *Smith v. State*, 276 Md. 521, 527, 350 A.2d 628, 632 (1976); see also *Erbe v. State*, 276 Md. 541, 545-46, 350 A.2d 640, 642-43 (1976) (discussion of sixth amendment deemed equally applicable to Declaration of Rights, Art. 21 for purposes of decision).

Although there may be many sources of speedy and prompt trial rights, the federal Constitutional right looms over the entire criminal litigation and, when all else fails, "provides ultimate speedy trial protection; irrespective of extraconstitutional, or even state constitutional, protections . . ." *Joseph, supra* note 6, at 642. See generally *infra* Appendix (prompt trial/speedy trial diagram).

Despite its broad reach, the sixth amendment "provides only a minimum standard of protection," as applied, and states are free to provide more protection than the federal right by statute, rule, or common law. See *Joseph, supra* note 6, at 614; *Erbe v. State*, 276 Md. 541, 545-46, 350 A.2d 640, 642-43 (1976) (state court need not always follow the lead of the Supreme Court, but may accord greater individual rights).

The Maryland prompt trial provisions are extraconstitutional in nature, and the *Hicks* majority was quick to point out the mutual exclusivity of speedy trial and

Another source of confusion stems from the use of terms "postponement" and "continuance."⁴⁶ Postponement refers to the rescheduling of the trial date before commencement of the trial; continuance refers to rescheduling within the trial itself. As will be evident throughout this article, this is an important distinction.

III. APPLICABILITY OF THE PROMPT TRIAL PROVISIONS

A proper starting point for determining if the prompt trial provi-

prompt trial rights. *State v. Hicks*, 285 Md. 310, 320, 403 A.2d 356, 361-62 (1979). Therefore, the 180-day period is not the measure of a defendant's speedy trial right, but is more restrictive than the constitutional provision. Note, *supra* note 34, at 488-89. *But see supra* note 17 and accompanying text (180-day period used as benchmark in speedy trial analysis). Similarly, the speedy trial balancing test is not the balancing test for prompt trial. *State v. Green*, 54 Md. App. 260, 264, 458 A.2d 487, 490, *cert. denied*, 296 Md. 60 (1983). Theoretically, a defendant may request postponement for good cause under prompt trial analysis and, in the same breath, demand a speedy trial.

Because the penalty for prompt trial violations is dismissal with prejudice, a finding for the defendant will ordinarily render the constitutional speedy trial issue moot. If, however, there is no prompt trial violation, a separate constitutional speedy trial analysis is required to determine whether the charges should be dismissed. *See, e.g., Farinholt v. State*, 299 Md. 32, 472 A.2d 452 (1984); *State v. Brookins*, 299 Md. 59, 472 A.2d 465 (1984); *Satchell v. State*, 54 Md. App. 333, 458 A.2d 853 (1983), *aff'd*, 299 Md. 42, 472 A.2d 457 (1984); *see also Joseph, supra* note 6, at 616; Note, *supra* note 34, at 487-89 (demarcation between constitutional and extraconstitutional speedy trial rights).

Because, however, the prompt trial provisions may allow postponement of the trial date beyond a period of time that may be constitutionally significant, that the defendant's prompt trial rights have not been violated does not mean that his speedy trial rights have not been abridged. *Farinholt v. State*, 299 Md. 32, 472 A.2d 452 (1984); *Joseph, supra* note 6, at 618; *see Note, supra* note 34, at 487-89. Therefore, the administrative judge or his designee should see that the postponement is not extended for an unconstitutional length of time. *See, e.g., State v. Farinholt*, 54 Md. App. 124, 133 n.5, 458 A.2d 442, 449 n.5, *aff'd*, 299 Md. 32, 472 A.2d 452 (1984); *Carter v. State*, 54 Md. App. 220, 231, 458 A.2d 480, 485 (1983), *rev'd on other grounds sub nom. State v. Beard*, 299 Md. 472, 474 A.2d 514 (1984); *State v. Green*, 54 Md. App. 260, 264, 458 A.2d 487, 490 (1983), *aff'd*, 299 Md. 72, 472 A.2d 472 (1984). *See generally infra* Section IV(C) (approval of postponements).

Like most other states, Maryland has adopted the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), as a guide to determine violations of speedy trial rights. *See, e.g., State v. Hunter*, 16 Md. App. 306, 295 A.2d 779 (1972); *see R. GILBERT & C. MOYLAN, JR., MARYLAND CRIMINAL LAW: PRACTICE AND PROCEDURE* § 42.3 (1983); *see Comment, The Right to a Speedy Trial in Maryland*, 6 U. BALT. L. REV. 47, 54-55 (1976) (balancing test analysis); *Joseph, supra* note 6, at 613 (balancing test analysis and its wide acceptance).

Four factors are to be weighed in this process. They are (1) length of delay; (2) reason for delay; (3) prejudice to the accused; and (4) waiver of speedy trial penalty by the accused. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *see Comment, supra*, at 50-67; *R. GILBERT & C. MOYLAN, JR., supra*, at § 42.3-42.8. Once delay moves the trial date to beyond a constitutionally significant period, both speedy and prompt trial rights may be asserted. *See Note, supra* note 34, at 487-89. *See generally infra* Section VI (motion to dismiss); *infra* Appendix (prompt trial/speedy trial diagram).

46. *See State v. Farinholt*, 54 Md. App. 124, 130-32, 458 A.2d 442, 448 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984).

sions apply to a particular case is Maryland Rule 4-271(a), which exclusively applies the prompt trial provisions to criminal cases being tried in the circuit courts.⁴⁷ Thus, the mandatory dismissal penalty does not apply to cases brought and tried in the District Court of Maryland.⁴⁸ Moreover, when a defendant is first charged in the district court but is later indicted in the circuit court, time spent at the district court level is not part of the 180-day period.⁴⁹

The prompt trial provisions may also be defined by their exceptions.⁵⁰ For example, they do not apply to delay between arrest and initial appearance in the circuit court.⁵¹ Nor do they apply once a trial date is postponed beyond 180 days for good cause shown. Once a trial date is properly postponed beyond that limit, a defendant's rights are protected only by the constitutional speedy trial provisions.⁵² The same is true once trial has begun: "except as limited by statute or rule, a trial court has inherent authority to control its own docket,"⁵³ and the prompt trial provisions do not limit this authority.⁵⁴ Thus, the trial judge may grant a continuance so long as it does not violate the defendant's constitutional

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47. The text of Md. R.P. 4-271 is set out *supra* note 38. It is clear that subsection (a) of the rule does not affect subsection (b), which concerns change of trial date in the district court only, and is a virtual replica of former Maryland District Rule 746. Former Rule 746 refers to Md. R.P. 723 (1983) (appearance), also a circuit court rule. See *Scott v. State*, 49 Md. App. 70, 86, 430 A.2d 615, 623, *cert. denied*, 291 Md. 781 (1981); see also MD. R.P. 4-271 (trial date) (reference to MD. R.P. 4-213 (appearance)).
48. *E.g.*, *Scott v. State*, 49 Md. App. 70, 86, 430 A.2d 615, 623, *cert. denied*, 291 Md. 781 (1981).
49. Where a district court proceeding is terminated and the state seeks an indictment by way of grand jury, "[t]here is no provision for tacking the time between the District Court charge and a subsequent grand jury indictment to the time that begins running under the rule in the Circuit Court." *Pearson v. State*, 53 Md. App. 217, 219-20, 452 A.2d 1252, 1254 (1982). There is a split of authority on this point in other jurisdictions. See *Joseph*, *supra* note 6, at 641. *But cf.* *State v. Armstrong*, 46 Md. App. 641, 651, 421 A.2d 98, 104 (1980) (state may not reindict defendant on charges dismissed under prompt trial provisions).
50. See *State v. Beard*, 299 Md. 472, 474 A.2d 514 (1984).
51. *E.g.*, *Pearson v. State*, 53 Md. App. 217, 219-20, 452 A.2d 1252, 1254 (1982). Such inquiry "would raise difficult problems of proof." *Rubine*, *supra* note 31, at 806 n.58 (quoting ABA Standards § 2.2(a), Comment at 23 (1972)).
52. See, *e.g.*, *State v. Glenn*, 299 Md. 464, 467-68, 474 A.2d 509, 511 (1984); *Farinholt v. State*, 299 Md. 43, 472 A.2d 452 (1984); *State v. Frazier*, 298 Md. 422, 439-40, 463, 470 A.2d 1269, 1278, 1290-91 (1984); *State v. Green*, 54 Md. App. 260, 264-65, 458 A.2d 487, 490 (1983), *aff'd*, 299 Md. 72, 472 A.2d 472 (1984). See generally *supra* note 45 and accompanying text (interplay of prompt trial and speedy trial provisions).
53. *Goins v. State*, 293 Md. 97, 111, 442 A.2d 550, 557 (1982); see, *e.g.*, *Mitchell v. State*, 56 Md. App. 162, 178-80, 467 A.2d 522, 530-31 (1983); *Roberts v. State*, 53 Md. App. 236, 258, 452 A.2d 1271, 1272 (1982); *Guarnera v. State*, 20 Md. App. 562, 573 n.1, 318 A.2d 243, 248 n.1, *cert. denied*, 272 Md. 742 (1974). See generally *Joseph*, *supra* note 6, at 643-44 (contours of "trial" suggested); *infra* note 161 and accompanying text (powers of trial judge in prompt trial context).
54. *Guarnera v. State*, 20 Md. App. 562, 573 n.1, 318 A.2d 243, 248 n.1, *cert. denied*, 272 Md. 742 (1974). See generally *infra* note 161 and accompanying text (powers of trial judge in prompt trial context).

right to speedy trial or to due process,⁵⁵ and any further delay is of concern under prompt trial analysis.⁵⁶ As will be discussed later, although the prompt trial provisions apply to approval of postponement by the hearing judge to a date within the 180-day period,⁵⁷ the dismissal penalty does not, regardless of the existence of good cause.⁵⁸

Because the prompt trial provisions are limited by their own terms, it may be helpful to restate their facial requirements as follows:

- 1) a trial date must be assigned within 30 days from appearance of the defendant or his counsel;⁵⁹
- 2) the trial must be set for a date within 180 days;⁶⁰
- 3) a change of the trial date may be made by the hearing judge for good cause shown.⁶¹

Under *Hicks*, dismissal with prejudice is the appropriate penalty for failure to begin the trial within 180 days without good cause or waiver,⁶² but there is no prompt trial penalty for an initial failure to assign a trial date within 30 days.⁶³ There is no prompt trial penalty for postponement

55. *State v. Temoney*, 45 Md. App. 569, 573, 414 A.2d 240, 242 (1980).

56. *State v. Farinholt*, 54 Md. App. 124, 129, 458 A.2d 442, 446 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984). The speedy trial provisions do, however, apply to such delay. *See, e.g.*, *State v. Brookins*, 299 Md. 59, 472 A.2d 465 (1984); *Farinholt v. State*, 299 Md. 32, 472 A.2d 452 (1984); *State v. Green*, 54 Md. App. 260, 264-65, 458 A.2d 487, 490 (1983), *aff'd*, 299 Md. 72, 472 A.2d 472 (1984). *See generally supra* notes 17 and 45 and accompanying text (interplay of prompt trial and speedy trial).

57. *E.g.*, *Grant v. State*, 299 Md. 47, 52-53, 472 A.2d 459, 462 (1984); *State v. Farinholt*, 54 Md. App. 124, 133, 458 A.2d 442, 448 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984). *See generally infra* Section IV (postponement to date within 180-day period); *infra* Section IV(C) (approval of postponement).

58. *E.g.*, *Grant v. State*, 299 Md. 47, 52-53, 472 A.2d 459, 462 (1984); *State v. Farinholt*, 54 Md. App. 124, 133, 458 A.2d 442, 446, 448 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984). *See infra* note 63 and accompanying text (such delay may have speedy trial implications).

59. MD. ANN. CODE art. 27, § 591(a) (Supp. 1984); Md. R.P. 746(a) (Supp. 1983); MD. R.P. 4-271(a). *See generally infra* Section IV (postponement to date within 180-day period).

60. *Id.*

61. *Id.* *See generally infra* Section IV(B) (good cause for postponement); *infra* Section IV(C) (approval of postponement).

62. *State v. Hicks*, 285 Md. 310, 318, 334-35, 403 A.2d 356, 360, 369 (1979); *see, e.g.*, *State v. Armstrong*, 46 Md. App. 641, 651, 421 A.2d 98, 104 (1980) (state may not reindict defendant on charges previously dismissed for failure to comply with prompt trial provisions). *See generally infra* Section V (waiver of sanction). "Although more modern speedy trial plans differ in details, certain common characteristics can be identified, including the setting of time limits, provisions for extension of the time limits, and sanctions for failure to comply." Rubine, *supra* note 31, at 803.

63. *Grant v. State*, 299 Md. 47, 52-53, 472 A.2d 459, 462 (1984); *State v. Farinholt*, 54 Md. App. 124, 133, 458 A.2d 442, 448, 449 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984); *State v. Green*, 54 Md. App. 260, 261 n.2, 458 A.2d 487, 488 n.2 (1983), *aff'd*, 299 Md. 72, 472 A.2d 472 (1984). "As long as the trial is begun within the 180-day limit, any delay in its commencement is irrelevant for purposes of the [prompt trial] rule." *Farinholt*, 54 Md. App. at 129, 458 A.2d at 446. The speedy

within 180 days regardless of good cause,⁶⁴ and, therefore, such postponement is permissible.

Unlike the constitutional speedy trial right, the prompt trial provisions do not apply to retrial after remand from an appellate court.⁶⁵ Also, where no trial is contemplated by the parties, as in the taking of a plea of guilty, the defendant cannot be heard to complain simply because this was not accomplished within 180 days.⁶⁶ In other words, " 'a plea of guilty, effectively accepted, waives all procedural objections, constitutional or otherwise and all non-jurisdictional defects.' " ⁶⁷

Finally, it should be noted that, while the prompt trial provisions vest the hearing judge with the exclusive power to postpone, "[t]his does not mean that every request for a postponement of the date set for trial in a criminal case must be acted upon by the [hearing] judge."⁶⁸ The trial judge may, in his discretion, *deny* a request for postponement⁶⁹ but he may not *grant* postponement for approval by the hearing judge after the expiration of the 180 day period.⁷⁰

trial provisions, however, do apply, and that delay may be relevant to speedy trial analysis. *Green*, 54 Md. App. at 264-65, 458 A.2d at 490. See generally 9 U. BALT. L. REV. 473, 485-89 (comparison between prompt trial and constitutional speedy trial requirements); *supra* note 45 and accompanying text (interplay of prompt trial and speedy trial); *infra* Section IV (postponement of trial date); *infra* Appendix (prompt trial/speedy trial diagram).

64. See *State v. Hicks*, 285 Md. 310, 335, 403 A.2d 356, 369 (1979); MD. R.P. 4-271(a).

65. *Coleman v. State*, 49 Md. App. 210, 219-20, 431 A.2d 696, 701 (1981); *Donalds v. State*, 49 Md. App. 106, 108-09, 430 A.2d 113, 115, *aff'd per curiam*, 291 Md. 276, 434 A.2d 581 (1981); see *State v. Mines*, 48 Md. App. 30, 38, 425 A.2d 1044, 1049 (1981), wherein the court stated:

[T]he fact of the matter is that Rule 746 and Art. 27, § 591 do not cover this situation. The striking of the guilty plea here may be likened to the grant of a new trial by a trial court or a remand for a new trial by an appellate court. Neither the rule nor the statute prescribes within what period the trial shall be had in such circumstances; it is the first bringing of an accused to trial that is contemplated by both of them.

Id. (dictum); *cf.* *Ward v. State*, 52 Md. App. 63, 77-79, 447 A.2d 872, 877-80 (prompt trial right not violated where trial delayed as a result of defendant's attempts to reverse), *cert. denied*, 294 Md. 546, 451 A.2d 657 (1982); *Collins v. State*, 52 Md. App. 186, 193-95, 447 A.2d 1272, 1277 (1982) (180-day rule does not apply to retrial), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983). The weight of authority is that a defendant's constitutional right to prompt trial is "revived" by a mistrial. Joseph, *supra* note 6, at 633-34.

66. *Briscoe v. State*, 48 Md. App. 169, 183, 426 A.2d 415, 423 (1981); *cf.* MD. CTS. & JUD. PROC. CODE ANN. § 12-302(e) (Repl. Vol. 1984) (appeal following guilty plea by leave of court of special appeals only).

67. *Id.* (quoting *English v. State*, 16 Md. App. 439, 443, 298 A.2d 464, 467 (1973)). See generally *infra* Section V (waiver of prompt trial sanction).

68. *Guarnera v. State*, 20 Md. App. 562, 573 n.1, 318 A.2d 243, 248 n.1, *cert. denied*, 272 Md. 742 (1974). See generally *infra* note 161 (powers of trial judge in prompt trial litigation).

69. *Guarnera v. State*, 20 Md. App. 562, 573 n.1, 318 A.2d 243, 248 n.1, *cert. denied*, 272 Md. 742 (1974). See generally *infra* note 161 (powers of trial judge in prompt trial litigation).

70. *Calhoun v. State*, 299 Md. 1, 472 A.2d 436 (1984). See generally *infra* note 161 (powers of trial judge in prompt trial litigation).

Another consideration is the determination of when the rule takes effect. Revised Maryland Rule 4-271(a) requires that, once a criminal defendant appears in court, alone or through counsel pursuant to Revised Maryland Rule 4-213, the court has 30 days in which to assign a trial date for within 180 days of appearance. This determination may be affected by other factors, such as in a case in which the state enters a *nolle prosequi* and the charges are later reinstated.⁷¹ As a general rule, "separate charging documents have separate lives and exist independent of each other."⁷² But as the court of appeals held in *Curley v. State*,⁷³

[w]hen a circuit court criminal case is nol prossed, and the state later has the same charges refiled, the 180 day period for trial prescribed by [the prompt trial provisions] ordinarily begins to run with the arraignment or first appearance of defense counsel under the second prosecution. If, however, it is shown that the nol pros had the purpose or effect of circumventing the requirements of [the prompt trial provisions], the 180 day period will commence to run with the arraignment or first appearance of counsel under the first prosecution.⁷⁴

The court held that when a case is nol prossed to circumvent the prompt trial provisions, and the second prosecution is instituted after the expiration of the 180-day period for the first prosecution, the time period begins for the second prosecution to run on the same date as it had for the first prosecution.⁷⁵ The period begins to run on commencement of the second prosecution, however, if the case has been nol prossed merely for the purpose of correcting a substantive error in the document.⁷⁶ Along similar lines, when a charging document is dismissed on motion by the defendant for substantive deficiencies, and a new document is filed before the original expiration date, the court has held that the period begins to run on the second prosecution.⁷⁷

IV. POSTPONEMENT OF TRIAL DATE

Any party⁷⁸ seeking to postpone a criminal case in a circuit court to a date either within or beyond the 180-day period must satisfy the following three conditions:⁷⁹ (1) request postponement from the hearing

71. See MD. R.P. 4-247.

72. *State v. Phillips*, 299 Md. 468, 470, 474 A.2d 512, 513 (1984).

73. 299 Md. 449, 474 A.2d 502 (1984).

74. *Id.* at 462, 474 A.2d at 508.

75. *Id.*

76. *State v. Glenn*, 299 Md. 464, 474 A.2d 509 (1984).

77. *State v. Phillips*, 299 Md. 468, 474 A.2d 512 (1984).

78. "The mere use of the word 'party' in [the prompt trial provisions] does not preclude a motion by the court sua sponte as long as the requisite cause and action by the administrative judge are present." *Goins v. State*, 293 Md. 97, 110, 442 A.2d 550, 557 (1982) (decided under former Md. R.P. 746 (Supp. 1983)); see MD. R.P. 4-271 (trial court may move for postponement).

79. These steps were outlined in *Goins v. State*, 293 Md. 97, 112, 442 A.2d 550, 558

judge;⁸⁰ (2) show good cause for the postponement;⁸¹ (3) gain approval of the postponement from the hearing judge.⁸² There is no prompt trial penalty for failure to satisfy these conditions when securing a postponement within the 180-day period.⁸³ Because unjustified delay caused by rescheduling a trial date may cause constitutional speedy trial problems⁸⁴ and prompt trial problems,⁸⁵ every effort should be made to postpone to within a reasonable time, preferably within the 180-day period. Similarly, although the prompt trial provisions do not apply once trial is begun within the 180-day period, any continuance must be justified as an exercise of sound discretion and must withstand constitutional speedy trial scrutiny.⁸⁶ As a caveat, regardless of whether these conditions are satisfied, a defendant may waive his right to the prompt trial penalty personally or through counsel.⁸⁷

A. Request for Postponement of Trial

A request for postponement of the trial date is a form of motion⁸⁸

(1982). See *State v. Farinholt*, 54 Md. App. 124, 129, 134-35, 458 A.2d 442, 446-48, (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984). Although *Goins* speaks of these conditions as necessary to gain postponement *beyond* the 180-day period, the court of special appeals noted in *Farinholt* that “[t]he one seeking postponement [within 180-days] must still comply with section b of the Rule and establish good cause for the postponement before the administrative judge or his designee.” *Farinholt*, 54 Md. App. at 133, 458 A.2d at 448. Logically, it should make no difference since swift and effective justice is the ultimate social and legal goal, and “[o]ne of the purposes of [the prompt trial provisions] is to give the county administrative judge control over the administration of dockets.” *State v. Green*, 54 Md. App. 260, 264, 458 A.2d 487, 490 (1983) (citing *Hicks v. State*, 285 Md. 310, 403 A.2d 356 (1979)), *aff'd*, 299 Md. 72, 472 A.2d 472 (1984).

80. See *infra* Section IV(B) (request for postponement).

81. See *infra* Section IV(B) (good cause for postponement).

82. See *infra* Section IV(B) (approval of postponement).

83. See, e.g., *Grant v. State*, 299 Md. 47, 52-53, 472 A.2d 459, 462 (1984); *State v. Green*, 54 Md. App. 260, 261 n.2, 458 A.2d 487, 488 n.2 (1983), *aff'd*, 299 Md. 72, 472 A.2d 472 (1984). “When postponements are granted from one date within the 180-day period to another date also within the 180-day period, the *Hicks* sanction of dismissal under Rule 746a is inapplicable The dismissal sanction authorized by *Hicks* for a violation of Rule 746 . . . applies only when a postponement causes a trial to be continued to a date beyond the 180-day limit without good cause.” *State v. Farinholt*, 54 Md. App. 124, 133, 458 A.2d 442, 448 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984).

84. See, e.g., *Carter v. State*, 54 Md. App. 220, 232, 458 A.2d 480, 486 (1983), *rev'd on other grounds sub nom. State v. Beard*, 299 Md. 472, 474 A.2d 514 (1984). See generally *supra* notes 17 and 45 and accompanying text (interplay of prompt trial and speedy trial rights).

85. *State v. Frazier*, 298 Md. 422, 446-48, 470 A.2d 1269, 1282-83 (1984); *State v. Brown*, 61 Md. App. 411, 486 A.2d 813 (1985).

86. See *supra* note 83.

87. See *infra* Section V (waiver of prompt trial sanction).

88. Compare Md. R.P. 736(c) (1977) (“other motions” must be “filed”) and Md. R.P. 4-252(b) with Md. R.P. 746(b) (Supp. 1983) (request for postponement may be made “[u]pon motion of a party made in writing or in open court”) and Md. R.P. 4-271(a) (change of trial date on motion of party or court). Clearly, Md. R.P. 746 and Md. R.P. 4-271 are self-governing.

that may be made by the state,⁸⁹ the defendant,⁹⁰ a codefendant,⁹¹ or the trial court.⁹² Although the request may be oral,⁹³ the better practice is to make the request and the reasons therefore in writing⁹⁴ so that they become a part of the record.⁹⁵ Although the request should be express and articulate,⁹⁶ it may be made "by the requesting party's seeking some type of relief which by necessity requires the granting of a postponement

...⁹⁷

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89. *E.g.*, *State v. Hicks*, 285 Md. 310, 319, 403 A.2d 356, 360-61 (1979); *Calhoun v. State*, 52 Md. App. 515, 522, 451 A.2d 146, 149 (1982), *rev'd on other grounds*, 299 Md. 1, 472 A.2d 436 (1984); MD. R.P. 4-271(a).
90. *E.g.*, *Monge v. State*, 55 Md. App. 72, 79-80, 461 A.2d 21, 26 (1983), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984); *State v. Farinholt*, 54 Md. App. 124, 134, 458 A.2d 442, 449 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984); *Meyer v. State*, 49 Md. App. 300, 301, 431 A.2d 738, 740-41, *cert. denied*, 291 Md. 782 (1981).
91. *McFadden v. State*, 299 Md. 55, 58, 472 A.2d 463, 465 (1984) (*per curiam*); *Satchell v. State*, 299 Md. 42, 46, 472 A.2d 457, 459 (1984).
92. *E.g.*, *Morgan v. State*, 299 Md. 480, 488, 474 A.2d 517, 522 (1984); *Goins v. State*, 48 Md. App. 115, 117-18, 425 A.2d 1374, 1378 (1981) (trial date implicitly extended by extension of time to file report), *aff'd*, 293 Md. 97, 442 A.2d 550 (1982); *see* *Howell v. State*, 293 Md. 232, 242, 443 A.2d 103, 108 (1982) (dictum) (trial court could have obtained postponement); *see also* *Goins v. State*, 293 Md. 97, 110, 442 A.2d 550, 557 (1982) (hearing judge may be "party" under prompt trial provisions); MD. R.P. 4-271(a).
93. *See, e.g.*, *Rash v. State*, 299 Md. 68, 71, 472 A.2d 470, 471 (1984); *Pennington v. State*, 299 Md. 23, 28, 472 A.2d 447, 449 (1984); *Carey v. State*, 299 Md. 17, 21, 472 A.2d 444, 446 (1984); *State v. Farinholt*, 54 Md. App. 124, 134, 458 A.2d 442, 449 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984).
94. *See* *State v. Farinholt*, 54 Md. App. 124, 134 n.6, 458 A.2d 442, 449 n.6, *aff'd*, 299 Md. 32, 472 A.2d 452 (1984). Although the prompt trial provisions do not incorporate a demand requirement, a defendant, as an act of good faith, may file a "motion to compel compliance with the 180-day rule." *Pennington v. State*, 53 Md. App. 538, 544, 454 A.2d 879, 882 (1983), *rev'd on other grounds*, 299 Md. 23, 472 A.2d 447 (1984). A motion for speedy trial or for prompt trial without a properly filed motion to dismiss for lack of speedy or prompt trial, however, ordinarily waives appellate review of the speedy or prompt trial issue. *See* MD. R.P. 1085 (1977) (scope of review of court of special appeals); MD. R.P. 885 (1977) (scope of review of court of appeals); *see also* *Pennington v. State*, 53 Md. App. 538, 540 n.1, 454 A.2d 879, 881 n.1 (1983), *rev'd on other grounds*, 299 Md. 23, 472 A.2d 447 (1984) (waiver of speedy trial issue).
95. *See, e.g.*, *Hughes v. State*, 288 Md. 216, 221, 421 A.2d 69, 72 (1980) (record showed sufficient request); *Meyer v. State*, 49 Md. App. 300, 301-02, 431 A.2d 738, 739, *cert. denied*, 291 Md. 782 (1981) (letter expressing dissatisfaction with counsel made part of record). *See generally infra* note 183 and accompanying text (preserving request on record).
96. *State v. Farinholt*, 54 Md. App. 124, 134 n.6, 458 A.2d 442, 449 n.6 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984). *See generally infra* note 183 and accompanying text (preserving request on record).
97. *State v. Farinholt*, 54 Md. App. 124, 134, 458 A.2d 442, 449 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984); *see, e.g.*, *Morgan v. State*, 299 Md. 480, 474 A.2d 517 (1984) (motion to suppress); *Carey v. State*, 299 Md. 17, 472 A.2d 444 (1984) (order for psychiatric examination); *State v. Hicks*, 285 Md. 310, 318-19, 403 A.2d 356, 360-61 (1979) (excusable inability by state to deliver defendant on trial date); *Monge v. State*, 55 Md. App. 72, 79-80, 461 A.2d 21, 26 (1983) (request by defendant for delay in electing mode of trial), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984); *Briscoe v. State*, 48 Md. App. 169, 182-83, 426 A.2d 415, 422-23 (1981) (request for

For example, in *Monge v. State*,⁹⁸ a motion by the defendant for an extension of time "to file an election of court or jury trial until his return from Perkins" was held to amount to "seeking or expressly consenting to a violation of [the prompt trial provisions]."⁹⁹ Similarly, in *State v. Hicks*,¹⁰⁰ the court of appeals held that the prosecutor's representation to the hearing judge that the defendant was incarcerated in another jurisdiction and could not be back in the state for trial until the next month was "tantamount" to having requested a postponement.¹⁰¹ In *Goins v. State*,¹⁰² the trial judge was held to have granted a postponement on his own motion, for the purposes of the prompt trial provisions, when he gave Clifton T. Perkins Hospital extra time in which to evaluate a defendant,¹⁰³ and in *Carey v. State*,¹⁰⁴ an order by the county administrative judge for the defendant's mental exam was held to be a *sua sponte* postponement.¹⁰⁵

B. Good Cause for Postponement

At the heart of the prompt trial provisions lies the condition that postponement of trial date be granted only for good cause shown.¹⁰⁶ According to the court of appeals in *Hicks*, "[d]etermining what constitutes '[good] cause' under [the prompt trial provisions] is, of course, dependent upon the facts and circumstances of each case."¹⁰⁷ Because the prompt provisions were enacted "to protect the societal interest in the prompt trial of criminal cases . . . ,"¹⁰⁸ the term "good cause" is simply a measuring device¹⁰⁹ used to achieve this goal.¹¹⁰

Although the prompt trial provisions remove the discretionary power to postpone from the trial judge and vest it in the hearing judge,¹¹¹ the essential criteria for postponement remain the same.¹¹² What began

removal); *Goins v. State*, 48 Md. App. 115, 121, 425 A.2d 1374, 1378 (1981), *aff'd*, 293 Md. 97, 110-12, 442 A.2d 550, 557-58 (1982) (request of psychiatric hospital for extra time to evaluate defendant). Cf. *infra* Section V (waiver of prompt trial penalty). See generally Joseph, *supra* note 6, at 627-29 (consent/waiver).

98. 55 Md. App. 72, 461 A.2d 21 (1983).

99. *Id.* at 79-80, 461 A.2d at 26.

100. 285 Md. 310, 403 A.2d 356 (1979).

101. *Id.* at 318-19, 403 A.2d at 360-61.

102. 48 Md. App. 115, 425 A.2d 1374 (1981), *aff'd*, 293 Md. 97, 442 A.2d 550 (1982).

103. *Id.* at 121, 425 A.2d at 1378.

104. 299 Md. 17, 472 A.2d 444 (1984).

105. *Id.* at 21-22, 472 A.2d at 447.

106. MD. CODE ANN. art. 27, § 591(a) (Supp. 1984); MD. R.P. 4-271(a); Md. R.P. 746 (Supp. 1983).

107. *State v. Hicks*, 285 Md. 310, 319, 403 A.2d 356, 361 (1979) (footnote omitted).

108. *Carter v. State*, 54 Md. App. 220, 227, 458 A.2d 480, 483 (1983), *rev'd on other grounds sub nom. State v. Beard*, 299 Md. 472, 474 A.2d 514 (1984).

109. *Id.* at 229, 458 A.2d at 484.

110. *Id. passim*; *State v. Hicks*, 285 Md. 310, 315-20, 403 A.2d 356, 359-61 (1979) (extraordinary cause); Note, *supra* note 34, at 477-79 (1980) (extraordinary cause).

111. See MD. R.P. 4-271; Md. R.P. 746 (Supp. 1983); see also *State v. Frazier*, 298 Md. 422, 449-54, 470 A.2d 1269, 1283-86 (1984).

112. *State v. Green*, 54 Md. App. 260, 265, 458 A.2d 487, 490 (good cause), *aff'd*, 299

as a test of "ordinary discretion,"¹¹³ became one of "extraordinary cause,"¹¹⁴ and is now one of "good cause."¹¹⁵ "The change to 'good cause' may affect the balance, but does not change the essential requirement that the need to postpone outweigh the detriment to the public interest."¹¹⁶ The result is a private need/public interest test, which provides that good cause exists "if the moving party, including the court, has exercised reasonable diligence in trying to avoid the need to postpone and the need to postpone outweighs the detriment to the public interest from delay."¹¹⁷ This is essentially a balancing test that must be employed by the hearing judge,¹¹⁸ and generally, the hearing judge may not be overruled by the trial judge¹¹⁹ or an appellate court¹²⁰ absent a clear showing of abuse of discretion.¹²¹

It should be noted that, because the former test was more demanding, those cases decided before the change to good cause that found "extraordinary cause" for postponement will only be persuasive under the new standard.¹²² Similarly, although the 180-day period under prompt trial analysis is not meant to be the measure of the "length of the delay"

- Md. 72, 472 A.2d 472 (1984); *Guarnera v. State*, 20 Md. App. 562, 572-73, 318 A.2d 243, 248 (extraordinary cause), *cert. denied*, 272 Md. 742 (1974). *See generally infra* Section IV(B) (approval of postponement).
113. *See Carter v. State*, 54 Md. App. 220, 227, 458 A.2d 480, 483 (1983), *rev'd on other grounds sub nom. State v. Beard*, 299 Md. 472, 474 A.2d 574 (1984) (prompt trial provisions strip trial judges of discretionary power to postpone).
114. *E.g., State v. Hicks*, 285 Md. 310, 403 A.2d 356 (1979); *Copeland v. State*, 27 Md. App. 397, 340 A.2d 355, *cert. denied*, 276 Md. 740, 750 (1975); *Bethea v. State*, 26 Md. App. 398, 338 A.2d 390 (1975); *Guarnera v. State*, 20 Md. App. 562, 318 A.2d 243, *cert. denied*, 272 Md. 742 (1974). These cases remain persuasive. *See State v. Farinholt*, 54 Md. App. 124, 132 n.4, 458 A.2d 442, 448 n.4 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984). *See generally supra* notes 10-19 and accompanying text (development of prompt trial provisions).
115. MD. ANN. CODE art. 27, § 591 (Supp. 1984); MD. R.P. 4-271(a); Md. R.P. 746(b) (Supp. 1983). *See generally supra* notes 10-19 and accompanying text (development of prompt trial provisions).
116. *Carter v. State*, 54 Md. App. 220, 230, 458 A.2d 480, 485 (1983), *rev'd on other grounds sub nom. State v. Beard*, 299 Md. 472, 474 A.2d 514 (1984).
117. *Carter*, 54 Md. App. at 229, 458 A.2d at 484.
118. *Id.*; *see also Guarnera v. State*, 20 Md. App. 562, 574, 318 A.2d 243, 249 (*pre-Hicks*; delay must be unforeseen and unintentional), *cert. denied*, 272 Md. 742 (1974); *cf. State v. Green*, 54 Md. App. 260, 264, 458 A.2d 487, 490, *aff'd*, 299 Md. 72, 472 A.2d 472 (1984) (speedy trial balancing test inapplicable to prompt trial).
119. *State v. Beard*, 299 Md. 472, 488, 474 A.2d 514, 517 (1984); *State v. Frazier*, 298 Md. 422, 448-54, 470 A.2d 1269, 1283-86 (1984); *State v. Green*, 54 Md. App. 260, 265-67, 458 A.2d 487, 490-91, *aff'd*, 299 Md. 72, 472 A.2d 472 (1984); *see infra* Section IV(B) (approval of postponement).
120. *See State v. Frazier*, 298 Md. 422, 450-52, 470 A.2d 1269, 1284-85 (1984); *State v. Green*, 54 Md. App. 260, 266-67, 458 A.2d 487, 491, *aff'd*, 299 Md. 72, 472 A.2d 472 (1984).
121. *See State v. Beard*, 299 Md. 272, 280, 474 A.2d 514, 517 (1984); *State v. Frazier*, 298 Md. 422, 470 A.2d 1269 (1984); *State v. Green*, 54 Md. App. 260, 266-68, 458 A.2d 487, 490-92, *aff'd*, 299 Md. 72, 472 A.2d 472 (1984).
122. *State v. Farinholt*, 54 Md. App. 124, 132 n.4, 458 A.2d 442, 448 n.4 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984).

factor in constitutional speedy trial litigation,¹²³ the "reason for delay" factor under constitutional speedy trial analysis may be helpful in determining what constitutes good cause in prompt trial litigation.¹²⁴

The Maryland appellate court decisions to date offer some specific but non-definitive examples of good cause shown, and many of these involve pretrial preparation or motions. For example, a delay in receiving an evaluation concerning the defendant's mental health was held to be good cause for postponement.¹²⁵ Although a defendant's need for postponement to secure counsel may be good cause,¹²⁶ timing is extremely important.¹²⁷ Thus, in one case, an eleventh hour request to change counsel was not good cause,¹²⁸ and, in another case, the defendant's insistence, on the date of trial, that appointed counsel was unprepared was not extraordinary cause.¹²⁹ The need by a defendant to visit a sick relative on the day of trial was also found not to constitute good cause.¹³⁰

When a defendant backed out of a plea agreement on the day of trial, stating that he "wanted a jury trial and 'wanted it today,'" there was good cause for the state to seek postponement long enough to summon witnesses and to otherwise prepare for a trial on the merits.¹³¹ Good cause was also found when a late motion for severance was granted at a point when only one defendant could be tried on schedule,¹³² when time was taken up on a pretrial suppression motion,¹³³ and when good cause was found on request for postponement by a codefendant.¹³⁴ Moreover, extraordinary cause may exist where removal is granted and

123. *State v. Hicks*, 285 Md. 310, 320, 403 A.2d 356, 361-62 (1979). *But see supra* note 17 and accompanying text (180 days used as benchmark under speedy trial analysis).

124. *See* R. GILBERT & C. MOYLAN, JR., *MARYLAND CRIMINAL LAW: PRACTICE AND PROCEDURE* § 42.0-48.3 (1983); Comment, *supra* note 45, at 47. In any event, it is best to put on *some* evidence regarding good cause, later to be held ordinary by the hearing judge, than to rely on a silent record. Loker, *supra* note 28, at 32.

125. *Goins v. State*, 48 Md. App. 115, 121, 425 A.2d 1374, 1378 (1981), *aff'd*, 293 Md. 97, 110, 442 A.2d 550, 557 (1982); *see also* *Carey v. State*, 299 Md. 17, 472 A.2d 444 (1984) (order for psychiatric evaluation).

126. *See* *Satchell v. State*, 54 Md. App. 333, 338-40, 458 A.2d 853, 856-57 (1983), *aff'd*, 299 Md. 42, 472 A.2d 457 (1984). *See generally* Joseph, *supra* note 6, at 626 (factors to be considered where delay producing conduct constitutionally protected).

127. *See, e.g., Hughes v. State*, 43 Md. App. 698, 703-04, 407 A.2d 330, 334-35 (1979), *rev'd on other grounds*, 288 Md. 216, 421 A.2d 69 (1980).

128. *Meyer v. State*, 49 Md. App. 300, 304, 431 A.2d 738, 740-41, *cert. denied*, 291 Md. 782 (1981).

129. *State v. Temoney*, 45 Md. App. 569, 572-74, 414 A.2d 240, 241-42 (1980), *rev'd on other grounds*, 290 Md. 251, 429 A.2d 1018 (1981).

130. *Brown v. State*, 50 Md. App. 651, 653-54, 441 A.2d 354, 356 (1982).

131. *State v. Green*, 54 Md. App. 260, 267-68, 458 A.2d 491-92, *aff'd*, 299 Md. 79, 472 A.2d 472 (1984).

132. *Calhoun v. State*, 52 Md. App. 515, 522, 451 A.2d 146, 149-50 (1982), *rev'd on other grounds*, 249 Md. 1, 472 A.2d 436 (1984); *see also* STANDARDS RELATING TO SPEEDY TRIAL, standard 2.3(g) (severance as cause) (approved draft 1968), *re-printed in* Rubine, *supra* note 31, at 810 n.75.

133. *State v. Harris*, 299 Md. 63, 472 A.2d 467 (1984).

134. *McFadden v. State*, 299 Md. 55, 472 A.2d 463 (1984).

the case cannot begin within the 180-day period.¹³⁵

Similar examples of good cause appear in the literature.¹³⁶ For example, the parties involvement in bona fide plea bargaining would be good cause for postponement on behalf of the state.¹³⁷ The same would be true when the defendant fails to comply with valid discovery requests.¹³⁸ Also, because it is within prosecutorial discretion to try one codefendant before the other, good cause would exist to postpone the trial of the codefendant provided that there is good cause for severing the joint trial.¹³⁹ Postponement would also be justified when a defendant is deemed incompetent to stand trial.¹⁴⁰

Another recurring fact pattern concerns the absence of key witnesses or other competent evidence. The criteria for determining whether to postpone trial on this basis, under constitutional speedy trial analysis prior to *State v. Hicks*,¹⁴¹ are identical to those applied under state prompt trial analysis.¹⁴² These criteria are: (1) a reasonable expectation of securing the witness or other evidence within a reasonable time; (2) the competency and materiality of the proffered evidence; (3) the ability to fairly try the case without the evidence; (4) the exercise of reasonable diligence by the moving party prior to the trial date.¹⁴³ The same criteria would apply to a timely request for postponement because of the necessary convalescence of an injured victim or witness¹⁴⁴ or their unavailability due to prescheduled vacation.¹⁴⁵ The unexcused failure of a party to secure the attendance of a material witness, however, would not constitute good cause because the public interest in prompt trial out-

135. *Briscoe v. State*, 48 Md. App. 169, 182-83, 426 A.2d 415, 422 (1981) (dictum).

136. See, e.g., ABA STANDARDS RELATING TO A SPEEDY TRIAL, *supra* note 127, standard 2.3.

137. See *Joseph*, *supra* note 6, at 633.

138. *Id.* at 635.

139. *Id.* at 637.

140. *Id.* at 639; see also ABA STANDARDS RELATING TO A SPEEDY TRIAL, *supra* note 127, standard 2.3(a) (lack of competency as cause).

141. 285 Md. 310, 403 A.2d 356 (1979).

142. Compare *Bolden v. State*, 44 Md. App. 643, 655-56, 410 A.2d 1085, 1093-94 (pre-*Hicks*), cert. denied, 287 Md. 750 (1980) with *State v. Farinholt*, 54 Md. App. 124, 132, 458 A.2d 442, 449 (1983) (post-*Hicks*), *aff'd on other grounds*, 299 Md. 32, 472 A.2d 452 (1984). Note, however, that *Bolden* satisfied the extraordinary cause condition and the *Farinholt* good cause condition. See *supra* text accompanying note 122 (cases finding extraordinary cause remain persuasive).

143. See *State v. Farinholt*, 54 Md. App. 124, 134, 458 A.2d 442, 449 (1983), *aff'd on other grounds*, 299 Md. 32, 472 A.2d 452 (1984); *Bolden v. State*, 44 Md. App. 643, 655, 410 A.2d 1085, 1093-94 (extraordinary cause), cert. denied, 287 Md. 750 (1980); *Bethea v. State*, 26 Md. App. 398, 400, 338 A.2d 390, 392 (1975) (extraordinary cause); see also ABA STANDARDS RELATING TO A SPEEDY TRIAL, *supra* note 127, standard 2.3(d)(i) (absence of material evidence).

144. See *Joseph*, *supra* note 6, at 636, 640.

145. See *State v. Farinholt*, 54 Md. App. 124, 128, 458 A.2d 442, 446 (1983) (vacationing witnesses' absence due to no fault of requesting party constitutes good cause), *aff'd on other grounds*, 299 Md. 32, 472 A.2d 452 (1984).

weighs the need for such postponement.¹⁴⁶ Newly discovered evidence, however, may constitute good cause.¹⁴⁷

Another source of litigation concerns whether the unavailability of judicial resources on the date of trial constitutes good cause for postponement.¹⁴⁸ Because the public interest is key to this issue, a substantial showing is required to support postponement. At first, the court of special appeals was sympathetic only to "unavoidable" delays in the judicial machinery where the reasons were supported by the record.¹⁴⁹ The court of appeals intervened, however, and held in *State v. Fraizer*,¹⁵⁰ that an overcrowded docket situation does not, as a matter of law, preclude a change of trial date and may even justify a lengthy postponement.¹⁵¹ "When the [hearing judge] postpones a case beyond the 180-day deadline because of court unavailability, there is a violation of [the prompt trial provisions] only if it is demonstrated that the change of trial date, or the period of time until a new trial date, represented a clear abuse of discretion."¹⁵² The court cited with approval cases from other jurisdictions that held non-chronic court congestion to be good cause for postpone-

146. See Joseph, *supra* note 6, at 640; see also *supra* text accompanying notes 116-21 (private need/public interest test for good cause under prompt trial provisions).

147. Morgan v. State, 299 Md. 480, 488, 474 A.2d 517, 521-22 (1984).

148. E.g., State v. Frazier, 298 Md. 422 *passim*, 470 A.2d 1269 *passim*, (1984); Larsen v. State, 55 Md. App. 135, 145-49, 461 A.2d 543, 458-60 (1983), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984); State v. Green, 54 Md. App. 260, 268-69, 458 A.2d 487, 492 (1983) (dictum), *aff'd*, 299 Md. 72, 472 A.2d 472 (1984). See generally ABA STANDARDS RELATING TO A SPEEDY TRIAL, *supra* note 127, standard 2.3(b) (lack of judicial resources must be due to exceptional circumstances to be excused); Poulous & Coleman, *Speedy Trial, Slow Implementation: The ABA Standards in Search of a Statehouse*, 28 HASTINGS L.J. 357, 374-76 (1976); Rubine, *supra* note 31, at 810 n.75; Comment, *Speedy Trial & the Congested Trial Calendar*, 1972 UTAH L. REV. 268, 272-74 (1972).

149. Compare Larsen v. State, 55 Md. App. 135, 146-49, 461 A.2d 543, 548-50 (1983) (good cause shown on record), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984) with Carter v. State, 54 Md. App. 220, 232-34, 458 A.2d 480, 486-87 (1983) (record insufficient; good cause finding reversed), *rev'd on other grounds sub nom.* State v. Beard, 299 Md. 472, 474 A.2d 514 (1984). *But cf.* Wilson v. State, 44 Md. App. 1, 12, 408 A.2d 102, 109 (1979) (constitutional speedy trial case in which delay caused by crowded docket charged against state), *cert. denied*, 286 Md. 755, *cert. denied*, 446 U.S. 921 (1980).

150. 298 Md. 422, 470 A.2d 1269 (1984).

151. *Id.* at 461-62, 470 A.2d at 1289-90.

152. *Id.*; see also State v. Beard, 299 Md. 472, 474 A.2d 514 (1984) (dismissal denied on appeal because of failure of defendants to show abuse of discretion by trial judge in postponing beyond 180 days); Mahammitt v. State, 299 Md. 82, 472 A.2d 477 (1984) (remanded to trial court for receipt of evidence on issue of waiver); Harper v. State, 299 Md. 75, 472 A.2d 473 (1984) (no abuse of discretion by trial judge for postponement to 2 days beyond 180-day period due to unavailability of a court); Rash v. State, 299 Md. 68, 472 A.2d 470 (1984) (administrative judge did not abuse discretion by postponing beyond 180-day period because of overcrowded docket); McFadden v. State, 299 Md. 55, 472 A.2d 463 (1984) (no abuse of discretion in requiring defendant to be tried beyond 180-day period when codefendants agreed to postponement and there was good cause not to sever). *But see* State v. Brown, 61 Md. App. 411, 486 A.2d 813 (1985) (dismissal affirmed when case postponed to 173 days beyond 180th day).

ment or delay, while holding chronic court congestion as inexcusable under their respective state statutes or rules of procedure.¹⁵³ The court stated:

The defendants' argument, that overcrowded dockets cannot as a matter of law constitute good cause for the postponement of a criminal case, is illogical. When overcrowded dockets are due in part to shortages of judges, prosecuting attorneys, public defenders, supporting personnel, or facilities, it must be remembered that public resources are not unlimited and there are many competing demands upon public funds. Moreover, even if there were no deficiencies in the number of judges, prosecutors, public defenders, etc., overcrowded docket situations are sometimes inescapable. As earlier explained, the nature of any reasonable scheduling system and the inherent lack of certainty concerning the number of cases which will be fully tried or the length of trials, will on occasions lead to overcrowded dockets.¹⁵⁴

In deciding whether court congestion constitutes good cause, it is the duty of the state and the hearing judge to present as much evidence as possible with the request for postponement, "such as live witnesses and court records, as opposed to mere stipulated proffers or argument."¹⁵⁵ Thus, "[w]here the cause for postponement is the unavailability of a judge, a jury or a courtroom, it might be well in the future for the state to have put into the record actual copies of this trial schedule, along with as much supporting detail as possible indicating the efforts being made by the court and the State's Attorney's Office to comply with [the prompt trial provisions]."¹⁵⁶

Like the early decisions of the Court of Special Appeals of Maryland,¹⁵⁷ some other persuasive commentators place a premium on the interest of the public in prompt and effective trial when the issue is whether lack of judicial resources is good cause for postponement.¹⁵⁸ The American Bar Association Speedy Trial Guidelines are the least sympathetic, however, prescribing postponement for "exceptional circumstances" only, such as "a large scale riot or other mass public

153. *State v. Frazier*, 298 Md. 422, 455-57, 470 A.2d 1269, 1287 (1984).

154. *Id.* at 457, 470 A.2d at 1287.

155. *Loker*, *supra* note 28, at 32.

156. *Larsen v. State*, 55 Md. App. 135, 149, 461 A.2d 543, 550 (1983), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984).

157. *See supra* notes 116-21 and accompanying text (private need/public interest test for good cause under prompt trial provisions).

158. *See ABA STANDARDS RELATING TO A SPEEDY TRIAL*, *supra* note 132, standard 2.3(b) (lack of judicial resources must be due to exceptional circumstances); Comment, *supra* note 148, at 272-74 (lack of judicial resources must be due to exceptional circumstances).

disorder.”¹⁵⁹

From the preceding illustrations, it is apparent that good cause depends “on the facts and circumstances of each case”¹⁶⁰ and turns on the moving party’s need for postponement weighed against the public interest in swift and effective justice.¹⁶¹

C. Approval of Postponement

Once the hearing judge properly exercises the discretionary power vested in him by the prompt trial provisions and postpones the trial date beyond the 180-day limit, or once the trial begins within the 180-day period, the prompt trial provisions are no longer applicable;¹⁶² however, the defendant’s rights are still guaranteed by the constitutional speedy trial provisions.¹⁶³ The trial judge may approve successive postponements beyond the 180-day period, albeit at the risk of offending the constitutional speedy trial guarantee.¹⁶⁴

Once the prompt trial provisions no longer apply, the public interest in swift justice and the sixth amendment require that postponements be granted only for the length of time necessary to alleviate the good cause shown.¹⁶⁵ Thus, “[i]n granting a postponement to a date beyond 180 days, ‘the administrative judge (as well as the prosecutor) is administratively responsible for seeing that a [postponement], even when justified in purpose, is not extended unnecessarily’ for purposes of a *Barker v. Wingo*

159. ABA STANDARDS RELATING TO A SPEEDY TRIAL, *supra* note 132, standard 2.3(b) and accompanying comments.

160. *State v. Hicks*, 285 Md. 310, 319, 403 A.2d 356, 361 (1979).

161. *E.g.*, *State v. Frazier*, 298 Md. 422, 449-63, 470 A.2d 1269, 1283-90 (1984) (non-chronic congestion does not preclude finding of good cause); *Carter v. State*, 54 Md. App. 220, 229-32, 458 A.2d 480, 484-86 (1983) (good cause requires extenuating circumstances and reasonable diligence), *rev’d on other grounds sub nom. State v. Beard*, 299 Md. 472, 474 A.2d 514 (1984) (defense bears burden of proving abuse of discretion in granting good cause postponement); *see also supra* notes 116-21 and accompanying text (private need/public interest test for good cause under prompt trial provisions).

162. *State v. Harris*, 299 Md. 63, 472 A.2d 467 (1984); *Grant v. State*, 299 Md. 47, 472 A.2d 459 (1984); *Farinholt v. State*, 299 Md. 32, 472 A.2d 452 (1984); *State v. Frazier*, 298 Md. 422, 470 A.2d 1269 (1984); *Goins v. State*, 293 Md. 97, 111-12, 442 A.2d 550, 557-58 (1982); *State v. Green*, 54 Md. App. 260, 264-65, 458 A.2d 487, 490 (1983), *aff’d*, 299 Md. 72, 472 A.2d 472 (1984). *See generally supra* note 45; *infra* Appendix (interplay between prompt trial and speedy trial analyses).

163. *See, e.g.*, *State v. Harris*, 299 Md. 63, 472 A.2d 467 (1984); *Grant v. State*, 299 Md. 47, 472 A.2d 459 (1984); *Farinholt v. State*, 299 Md. 32, 472 A.2d 452 (1984); *State v. Frazier*, 298 Md. 422, 470 A.2d 1269 (1984); *State v. Green*, 54 Md. App. 260, 264-65, 458 A.2d 487, 490 (1983), *aff’d*, 299 Md. 72, 472 A.2d 472 (1984). *See generally supra* note 45; *infra* Appendix (interplay between prompt trial and speedy trial analyses).

164. *See State v. Farinholt*, 54 Md. App. 124, 129-30, 458 A.2d 442, 446-47 (1983), *aff’d*, 299 Md. 32, 40-41, 472 A.2d 452, 456 (1984). *See generally supra* note 45 (federal & state constitutional speedy trial rights); *infra* Appendix (interplay between prompt trial and speedy trial analyses).

165. *Farinholt v. State*, 299 Md. 32, 472 A.2d 452 (1984). *See generally supra* note 45 (interplay between prompt trial and speedy trial analyses).

speedy trial analysis."¹⁶⁶ As a result, it is incumbent on the hearing judge to attempt to make postponements to a date within the 180-day period, or to state on the record his reasons for not doing so.¹⁶⁷ In deciding the length of a postponement, the hearing judge should consider the purpose the postponement would serve to the moving party and the public interest in swift justice.¹⁶⁸

It is imperative that a postponement beyond the 180-day period be granted by the county administrative judge or his designee only. As the court of appeals stated in *State v. Frazier*:¹⁶⁹

The major safeguard contemplated by the statute and rule . . . is the requirement that the administrative judge or his designee, rather than any judge, order the postponement. This is a logical safeguard, as it is the administrative judge who is responsible 'for the administration of the court,' who assigns trial judges, who 'supervises the assignment of actions for trial,' who supervises the court personnel involved in the assignment of cases, and who receives reports from such personnel.¹⁷⁰

The court added a cautionary note in *Farinholt v. State*,¹⁷¹ however, that "any procedure adopted by a circuit court consisting of several trial judges, by which *all* trial judges are purportedly authorized to grant postponements for purposes of [the prompt trial provisions], would not comply."¹⁷²

Unlike a motion to dismiss, which will be discussed later, there is no formal or required method to secure postponement.¹⁷³ The Maryland courts, however, "have always required *some* record of proceedings of an administrative nature before they will reverse an exercise of judicial dis-

166. *State v. Farinholt*, 54 Md. App. 124, 133 n.5, 458 A.2d 442, 449 n.5 (1983) (quoting *Chance v. State*, 45 Md. App. 521, 526, 414 A.2d 535, 537 (1980)), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984). *See generally* Joseph, *supra* note 6, at 631 (trial date must not be postponed unnecessarily even when prompt trial sanction is waived); *supra* note 45 (interplay between prompt trial and speedy trial analyses).

167. *Carter v. State*, 54 Md. App. 220, 232, 458 A.2d 480, 486 (1983), *rev'd on other grounds sub nom. State v. Beard*, 299 Md. 472, 474 A.2d 514 (1984). *See generally infra* notes 173-87 and accompanying text (preserving the record).

168. *See Carter v. State*, 54 Md. App. 220, 227, 458 A.2d 480, 484 (1983) (quoting ABA STANDARDS RELATING TO A SPEEDY TRIAL, *supra* note 132, standards 12 and 13), *rev'd on other grounds sub nom. State v. Beard*, 299 Md. 472, 474 A.2d 514 (1984).

169. 298 Md. 422, 470 A.2d 1269 (1984).

170. *Id.* at 453-54, 470 A.2d at 1285 (footnotes omitted).

171. 299 Md. 32, 472 A.2d 452 (1983).

172. *Id.* at 37-38 n.2, 472 A.2d at 454 n.2.

173. *See, e.g., id.* at 32 n.1, 472 A.2d at 453 n.1; *State v. Hicks*, 285 Md. 310, 318-19, 403 A.2d 356, 360-61 (1979); *Goins v. State*, 48 Md. App. 115, 118-19, 425 A.2d 1374, 1376-77 (1981), *aff'd*, 293 Md. 97, 111-12, 442 A.2d 550, 558 (1982). *But see State v. Farinholt*, 54 Md. App. 124, 134 n.6, 458 A.2d 442, 449 n.6 (1983) (request for postponement should be in writing), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984). Approval may also be made *sua sponte* by the hearing judge. *Goins v. State*, 48 Md. App. 115, 118-19, 425 A.2d 1374, 1376-77 (1979), *aff'd*, 293 Md. 97, 442 A.2d 550 (1982).

cretion, and of late more and more clarity and detail is prescribed."¹⁷⁴ Although approval may be granted informally, orders of postponement should be on the record and explicitly state the reasons therefor.¹⁷⁵ Postponements made in chambers should also be recorded stenographically.¹⁷⁶ Counsel should note with caution that a defendant, who may have more personal knowledge of the need for postponement than counsel, may have a nonconstitutional right under the prompt trial provisions to be present during the motions hearing.¹⁷⁷ Postponement may be granted *sua sponte*, without request, hearing, or order of approval.¹⁷⁸ Although the trial judge plays a backstage role under the prompt trial provisions,¹⁷⁹ he may not postpone a trial date beyond the 180-day period subject to later approval by the administrative judge, at least when such approval takes place after the expiration date.¹⁸⁰

As to burden of proof, the prompt trial provisions require that good cause of postponement be *shown*¹⁸¹ by the requesting party, who "bears the burden of demonstrating to the administrative judge or his designee that [the prompt trial] requirements are satisfied."¹⁸² As one commentator has noted, "[e]stablishing an adequate record means producing competent evidence, such as live witnesses and court records, as opposed to mere unstipulated proffers or argument [Counsel] cannot afford to articulate arguments for or against a [postponement] in the judge's chambers, and forget to repeat their performance on the record."¹⁸³

174. *Hughes v. State*, 43 Md. App. 698, 706, 407 A.2d 330, 335 (1979), *rev'd on other grounds*, 288 Md. 216, 421 A.2d 69 (1980).

175. *See State v. Farinholt*, 54 Md. App. 124, 134 n.6, 458 A.2d 442, 449 n.6 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984).

176. *State v. Green*, 54 Md. App. 260, 265 n.5, 458 A.2d 487, 490 n.5, *aff'd*, 299 Md. 72, 472 A.2d 472 (1984). *See generally infra* note 183 and accompanying text (preserving the record).

177. *Hughes v. State*, 288 Md. 216, 227-29, 421 A.2d 69, 75-76 (1980).

178. *Goins v. State*, 293 Md. 97, 110-12, 442 A.2d 550, 557-58 (1982).

179. *State v. Frazier*, 298 Md. 422, 448-54, 470 A.2d 1269, 1283-86 (1984); *see supra* note 161 and accompanying text (powers of trial judge in prompt trial context).

180. *Calhoun v. State*, 299 Md. 1, 472 A.2d 436 (1984).

181. *Carter v. State*, 54 Md. App. 220, 233, 458 A.2d 480, 486 (1983), *rev'd on other grounds sub nom. State v. Beard*, 299 Md. 472, 474 A.2d 514 (1984).

182. *Id.* at 231, 458 A.2d at 485.

183. *Loker, supra* note 28, at 32. A complete record is also important to defense attorneys. Accordingly, the court of special appeals has remarked that

[s]ince what constitutes [good] cause is a question within the limited discretion of an administrative judge to be decided on a case by case basis . . . it is appellant's burden to provide us with a satisfactorily endowed record indicative of an abuse of that discretion.

Hughes v. State, 43 Md. App. 698, 707, 407 A.2d 330, 336 (1979), *rev'd on other grounds*, 288 Md. 216, 421 A.2d 69 (1980). *But see Larsen v. State*, 55 Md. App. 135, 461 A.2d 543 (1983) (postponement due to lack of judicial resources upheld), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984). In *Larsen* the court of special appeals stated that

[w]here the cause for postponement is the unavailability of a judge, a jury or a court room, it might be well in the future for the State to have put into the record actual copies of the trial schedule, along with as much

Finally, it should be noted that the mere failure by a defendant to object to the state's request for postponement does not, as a matter of law, constitute a waiver of prompt trial protection.¹⁸⁴ In some circumstances, however, it may, and therefore, the defendant has a right to be present when and where the issue of postponement is discussed,¹⁸⁵ even though such a hearing is not a "critical stage" requiring his presence.¹⁸⁶

As both defense counsel and prosecuting attorneys have learned, the need to preserve the record for appellate review is crucial.¹⁸⁷ A good example is *Hughes v. State*,¹⁸⁸ in which the defendant appealed his conviction on the ground that he was not present in the administrative judge's chambers during the consideration of his request for postponement. The court of special appeals stated that

[we] are faced with a practical dilemma in the absence of a record of what transpired in [the administrative judge's] chambers. We do not know whether [the administrative judge] declined to have the defendant present for security reasons, or whether his decision was arbitrary. We do not know what considerations were left before his honor in determining whether extraordinary cause existed under the "facts and circumstances of this

supporting detail as possible indicating the efforts being made by the court and the State's Attorney's Office to comply with Maryland Rule 746.

Id. at 149, 461 A.2d at 550. "Appellate courts have always required *some* record of proceedings of an administrative nature before they will reverse an exercise of judicial discretion, and of late more and more clarity and detail is prescribed." *Hughes v. State*, 43 Md. App. 698, 706, 407 A.2d 330, 335 (1979), *rev'd on other grounds*, 288 Md. 216, 421 A.2d 69 (1980). Therefore, even proceedings in the chambers of the administrative judge should be recorded. *State v. Green*, 54 Md. App. 260, 265 n.5, 458 A.2d 487, 490 n.5 (1983), *aff'd*, 299 Md. 72, 472 A.2d 472 (1984). Failure to do so may cause problems on appeal. *See, e.g., Hughes v. State*, 43 Md. App. 698, 702-03, 407 A.2d 330, 334 (1979), *rev'd on other grounds*, 288 Md. 216, 421 A.2d 69 (1980).

In a few cases, however, the court of appeals remanded for full evidentiary hearings under former Md. R.P. 871 (1977) to give the parties the benefit of the court's teachings in *State v. Frazier*, 298 Md. 422, 470 A.2d 1269 (1984) and *Farinholt v. State*, 299 Md. 32, 472 A.2d 452 (1984). *E.g., Mahammitt v. State*, 299 Md. 82, 472 A.2d 477 (1984); *Grant v. State*, 299 Md. 47, 472 A.2d 459 (1984); *Pennington v. State*, 299 Md. 23, 472 A.2d 447 (1984). *See generally infra* Section V(B) (approval of postponement). The court in *Frazier* and *Farinholt* placed a heavy burden of proof upon the party challenging a good cause finding on a motion to dismiss. *See infra* Section VI (motion to dismiss).

184. *See, e.g., Rash v. State*, 299 Md. 68, 70-71, 472 A.2d 470, 471 (1984); *State v. Frazier*, 298 Md. 422, 447 n.17, 470 A.2d 1269, 1282 n.17 (1984); *Borgen v. State*, 58 Md. App. 61, 70, 472 A.2d 114, 118-19 (1984); *Miller v. State*, 53 Md. App. 1, 6, 452 A.2d 180, 183 (1982), *cert. denied*, 295 Md. 302 (1983); *State v. Lattisaw*, 48 Md. App. 20, 27-29, 425 A.2d 1051, 1054-55, *cert. denied*, 290 Md. 717 (1981). *See generally infra* Section V (waiver of prompt trial penalty).

185. *See Hughes v. State*, 288 Md. 216, 228-29, 421 A.2d 69, 75-76 (1980).

186. *Id.* at 224-29, 421 A.2d at 74-76.

187. *See generally supra* note 183 and accompanying text (preserving the record).

188. 43 Md. App. 698, 407 A.2d 330 (1979), *rev'd on other grounds*, 288 Md. 216, 421 A.2d 69 (1980).

case."¹⁸⁹

This decision must be compared with *Larsen v. State*,¹⁹⁰ in which approval of a postponement for lack of judicial resources was upheld because of a carefully developed record that clearly showed good cause.¹⁹¹ Once good cause is found by the hearing judge and the trial date postponed, the party challenging the postponement must show that a finding was an abuse of discretion in a motion to dismiss.¹⁹²

V. WAIVER OF PROMPT TRIAL PENALTY

It is the penalty of dismissal that gives the prompt trial provisions their bite. As a general rule, a defendant's trial must begin within 180 days from appearance;¹⁹³ if it does not, all related charges must be dismissed with prejudice and forever,¹⁹⁴ and the defendant is absolved of his crimes.¹⁹⁵

One question left open in *Hicks* is how and when a defendant may waive his right to the prompt trial penalty. The court in *Hicks* intimated that the waiver should be express, but an express waiver need not be "knowing and intelligent," as required for the relinquishment of constitutional rights.¹⁹⁶ The factual context of the few cases dealing with this issue can be argued to involve both express and implied waiver. For example, prompt trial dismissal is inappropriate where defense counsel inadvertently consents to a trial date beyond the 180-day period.¹⁹⁷ Because, however, there must be good cause shown for the length of the

189. *Id.* at 702-03, 407 A.2d at 334.

190. 55 Md. App. 135, 461 A.2d 543 (1983), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984). *See generally supra* note 183 and accompanying text (preserving the record).

191. *Larsen*, 55 Md. App. at 145-59, 461 A.2d at 548-50. *See generally supra* text accompanying notes 150-60 (lack of judicial resources as good cause).

192. *See, e.g., State v. Frazier*, 298 Md. 422, 452, 470 A.2d 1269, 1285 (1984). *See generally infra* Section VI (motion to dismiss).

193. MD. R.P. 4-271(a); Md. R.P. 746(a) (Supp. 1983); *see State v. Farinholt*, 54 Md. App. 124, 129, 458 A.2d 442, 448 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984).

194. *See State v. Armstrong*, 46 Md. App. 641, 651, 421 A.2d 98, 104 (1980) (state may not reindict defendant on charges previously dismissed due to lack of prompt trial).

195. *E.g., Calhoun v. State*, 299 Md. 1, 6, 472 A.2d 436, 439 (1984); *see Calhoun v. State*, 52 Md. App. 515, 451 A.2d 146 (1983), *rev'd*, 299 Md. 1, 472 A.2d 436 (1984):

[T]he appellant urges that he be absolved of premeditated murder and all other crimes of which he has been found guilty, not because his constitutional rights were violated, not because he was denied a fair trial, not because there was insufficient evidence to sustain the jury's verdict, but solely because the rubrics of a Court rule were not precisely followed.

Id. at 521, 451 A.2d at 149.

196. *State v. Hicks*, 285 Md. 310, 320, 335, 403 A.2d 356, 361-62, 369 (1979); *State v. Lattisaw*, 48 Md. App. 20, 27-29, 425 A.2d 1051, 1054-55, *cert. denied*, 290 Md. 717 (1981). *See generally Joseph, supra* note 6, at 647; *Loker, supra* note 28, at 31.

197. *State v. Lattisaw*, 48 Md. App. 20, 22-23, 27, 425 A.2d 1051, 1053-54, 1055-56, *cert. denied*, 290 Md. 717 (1981); *see also State v. Hicks*, 285 Md. 310, 335, 403 A.2d 356, 369 (1979) (defendant or counsel may waive penalty); *Williams v. State*, 50 Md. App. 255, 267, 437 A.2d 665, 672 (1981) (waiver by agreement of counsel), *cert.*

delay between postponement and trial,¹⁹⁸ request for postponement by a defendant¹⁹⁹ or failure by a defendant to otherwise object to postponement²⁰⁰ does not automatically constitute a waiver of prompt trial penalty. But "when a defendant or his attorney, in the latter portion of the 180-day period, seeks the postponement of a previously assigned trial date, and the newly assigned trial date is beyond 180 days, it could reasonably be concluded that such defendant has sought a trial date in violation of the rule."²⁰¹ Nor is the defendant entitled to dismissal when he attempts to indirectly "gain advantage" through his own dilatory devices.²⁰² Also, if the defendant fails to raise and move for dismissal on prompt²⁰³ or speedy²⁰⁴ trial grounds, appellate review on those issues is precluded.²⁰⁵

denied, 292 Md. 639 (1982); Joseph, *supra* note 6, at 631-32 (waiver by counsel). The Court of Special Appeals of Maryland stated that:

Defense counsel presumably can count to 180 as well as prosecutors; they know when they entered their appearances—when the clock began to tick—and they can figure out when the time under the Rule expires. These were not inexperienced counsel; according to the record, both attorneys had extensive background in the trial of criminal cases and were well aware of both the Rule and the interpretation given to it in *Hicks*. They both agreed to the June 9 date because it was convenient to them and, in the absence of any contrary indication, we assume was acceptable to their clients. It is not necessary for the clerk in the criminal assignment office to inform defense counsel with each telephone call of that which it is their job to know. Nor does it detract in the least from the reality of their consent to a particular trial date, or from the "expressness" of it, that they may be unaware that the date to which they agree is, in fact, beyond the 180-day period. To require dismissal of an indictment in such a case would be tantamount to doing precisely what the Court said was inappropriate—permitting "the defendant to gain advantage from a violation of the rule when he [through counsel] was a party to that violation." (Footnote omitted)

Lattisaw, 48 Md. App. at 28-29, 425 A.2d at 1055-56.

198. *State v. Frazier*, 298 Md. 422, 447-48, 470 A.2d 1269, 1282-83 (1984).
 199. *Pennington v. State*, 299 Md. 23, 28-29, 472 A.2d 447, 450 (1984); *Curley v. State*, 299 Md. 449, 452 n.3, 474 A.2d 502, 504 n.3 (1984).
 200. *State v. Frazier*, 298 Md. 422, 447 n.17, 470 A.2d 1269, 1282 n.17 (1984); *Borgen v. State*, 58 Md. App. 61, 71, 472 A.2d 114, 118-19, *cert. denied*, 300 Md. 483, 479 A.2d 372 (1984).
 201. *Pennington v. State*, 299 Md. 23, 28-29, 472 A.2d 447, 450 (1984) (dictum).
 202. *E.g.*, *Monge v. State*, 55 Md. App. 72, 79-80, 461 A.2d 21, 26-27 (1983), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984); *State v. Lattisaw*, 48 Md. App. 20, 28-29, 425 A.2d 1051, 1055-56, *cert. denied*, 290 Md. 717 (1981). *See generally* Joseph, *supra* note 6, at 624-35 (dilatory tactics).
 203. *See Pennington v. State*, 299 Md. 23, 472 A.2d 447 (1984).
 204. *Pennington v. State*, 53 Md. App. 538, 540 n.1, 454 A.2d 879, 881 n.1 (1983), *rev'd on other grounds*, 299 Md. 23, 472 A.2d 447 (1984); *Collins v. State*, 52 Md. App. 186, 194-95, 447 A.2d 1272, 1277 (1982), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983).
 205. *See* Md. R.P. 885 and 1085 (1977) (appellate review); *see also* *Larsen v. State*, 55 Md. App. 135, 140, 461 A.2d 543, 545 (1983) (prompt trial issues properly raised and preserved for appellate review), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984). *See generally* Joseph, *supra* note 6, at 621 (waiver by failure to move for dismissal); *Loker, supra* note 28, at 31 (waiver for failure to move for dismissal); *infra* Section VI (motion to dismiss under MD. R.P. 4-252).

Other examples of prompt trial waiver deal with pretrial motions by defendants,²⁰⁶ most of which would have also constituted good cause for postponement when requested by the state or the trial judge.²⁰⁷ For example, a defendant's motions for severance²⁰⁸ and for removal²⁰⁹ were both viewed as a waiver of the dismissal penalty because they extended the trial date beyond the 180-day period.²¹⁰ Similarly, a defendant's motion for an extension of time in which to elect the mode of trial he desired "was tantamount to seeking or expressly consenting to a violation of [the prompt trial provisions]."²¹¹ In another case, failure by the defense to object to the state's pretrial motion for postponement based on the availability of new evidence constituted a waiver of the dismissal penalty.²¹² Other examples in the literature include waiver due to flight or unexcused absence of a defendant²¹³ and refusal by a defendant to waive extradition.²¹⁴

On the other hand, the imposition of an insanity defense may not constitute an express waiver to the prompt trial penalty.²¹⁵ Nor does the defendant's insistence on his sixth amendment right to counsel on the

206. For a discussion of where and when a pretrial motion may constitute waiver under prompt trial analysis, see Joseph, *supra* note 6, at 627-29.

207. See *Briscoe v. State*, 48 Md. App. 169, 182-83, 426 A.2d 415, 422-23 (1981) (dictum); see also MD. R.P. 4-271(a) (power of the trial judge to request postponement).

208. *E.g.*, *Calhoun v. State*, 52 Md. App. 515, 522, 451 A.2d 146, 150 (1982), *rev'd on other grounds*, 299 Md. 1, 472 A.2d 436 (1984).

209. *E.g.*, *Briscoe v. State*, 48 Md. App. 169, 182-83, 426 A.2d 415, 422-23 (1981) (dictum).

210. *Calhoun v. State*, 52 Md. App. 515, 521-22, 451 A.2d 146, 148-50, *rev'd on other grounds*, 299 Md. 1, 472 A.2d 436 (1984); *Briscoe v. State*, 48 Md. App. 169, 182-83, 426 A.2d 415, 422-23 (1981).

211. *Monge v. State*, 55 Md. App. 72, 79-80, 461 A.2d 21, 26 (1983), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984).

212. See *Bolden v. State*, 44 Md. App. 643, 656, 410 A.2d 1085, 1093 (dictum), *cert. denied*, 287 Md. 758 (1980); see also *Miller v. State*, 53 Md. App. 1, 6, 452 A.2d 180, 183 (1982) (failure to object), *cert. denied*, 295 Md. 302 (1983); *cf.* *State v. Lattisaw*, 48 Md. App. 20, 21, 27, 425 A.2d 1051, 1053-54, 1055-56 (inadvertent consent to postponement), *cert. denied*, 290 Md. 717 (1981).

213. See Joseph, *supra* note 6, at 624-25.

214. *Id.* at 627. *But cf.* *Harper v. State*, 299 Md. 75, 78, 472 A.2d 473, 475 (1984) (applicability of prompt trial provisions once Interstate Agreement on Detainers is invoked remains undecided).

215. See *Goins v. State*, 293 Md. 97, 108, 442 A.2d 550, 556 (1982). In *Goins*, the court of special appeals found that, although there was a prompt trial provision violation, dismissal was inappropriate because the delay in obtaining a mental health evaluation was for the defendant's benefit. *Id.* at 106-07, 442 A.2d at 555-56. Although the court of appeals affirmed on other grounds, it stated that

[b]eing dilatory in raising an insanity defense obviously is not seeking or expressly consenting to a trial date in violation of § 591 and rule 746. At best, it might arguably constitute an implied consent to a postponement of the trial date, depending on the circumstances. However, in order to avoid such doubts and controversies, *Hicks* carefully limited this exception to the situation where the defendant seeks or expressly consents to a trial date in violation of the rule.

Id. at 108, 442 A.2d at 556.

day of trial waive his prompt trial rights, or his insistence on the right to a prompt trial waive his right to counsel.²¹⁶ Similarly, a defendant who waited 90 days after a postponement to move to dismiss on the day of trial did not waive his right to the prompt trial dismissal penalty.²¹⁷

Although delay beyond the 180-day period due to bona fide plea negotiations would not constitute a waiver by the defendant,²¹⁸ it may constitute good cause for the state to postpone.²¹⁹ The acceptance of a guilty plea, however, "waives all procedural objections, constitutional or otherwise, and all non-jurisdictional defects."²²⁰ Moreover, once a defendant agrees to a plea bargain, "obviat[ing] the need for trial altogether," there is a *de facto* waiver of the prompt trial penalty, even if the plea is not consummated within the 180-day period.²²¹ A *de facto* waiver analysis would apply equally to trial on charges for which the defendant received probation before judgment that he later violated.²²²

There also is some confusion regarding the duty of the state to request postponement when it is difficult to foresee whether a defendant's dilatory conduct will constitute waiver, and there is no reason to believe that he will make a request for postponement.²²³ Because a defendant has no duty to bring himself to trial, the state should request a postponement for good cause²²⁴ and be put in a position to argue, in the event that the defendant moves to dismiss, that the defendant waived the prompt trial penalty.²²⁵ One collateral result of such a strategy is that, as a practical matter, a finding of good cause is more likely to be upheld on appeal²²⁶ than is a finding of waiver²²⁷ or of improper dismissal.²²⁸ If the

216. *Howell v. State*, 293 Md. 232, 443 A.2d 103 (1982).

217. *Larsen v. State*, 55 Md. App. 135, 139, 461 A.2d 543, 545 (1983), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984).

218. *Cf. Joseph*, *supra* note 6, at 633.

219. *See generally supra* Section IV(B) (good cause for postponement).

220. *Briscoe v. State*, 48 Md. App. 169, 183, 426 A.2d 415, 423 (1981) (quoting *English v. State*, 16 Md. App. 439, 443, 298 A.2d 464, 467 (1973)).

221. *Id.* at 182-83, 426 A.2d at 422-23.

222. *See Joseph*, *supra* note 6, at 641.

223. *See, e.g., Howell v. State*, 293 Md. 232, 242, 443 A.2d 103, 108 (1982); *Goins v. State*, 293 Md. 97, 112, 442 A.2d 550, 558 (1982).

224. *See, e.g., Calhoun v. State*, 299 Md. 1, 472 A.2d 436 (1984); *Goins v. State*, 48 Md. App. 115, 120-21, 425 A.2d 1374, 1377-78, *aff'd*, 293 Md. 97, 442 A.2d 550 (1982).

225. "Introduction of common law waiver analysis, with its implicit invitation to result manipulation through fact characterization, not only stimulates litigation, but also substantively detracts from the effectiveness of [prompt trial] statutes and rules." *Joseph*, *supra* note 6, at 647. *See generally infra* note 235 (strategy under Md. R.P. 4-252).

226. *See State v. Beard*, 299 Md. 472, 474 A.2d 514 (1984); *State v. Bonev*, 299 Md. 79, 472 A.2d 476 (1984); *Rash v. State*, 299 Md. 68, 472 A.2d 470 (1984) (*per curiam*); *State v. Brookins*, 299 Md. 59, 472 A.2d 465 (1984) (*per curiam*); *State v. Frazier*, 298 Md. 422, 470 A.2d 1269 (1984).

227. *See supra* note 225 and accompanying text; *see, e.g., State v. Farinholt*, 54 Md. App. 124, 134-35, 458 A.2d 442, 449-50 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984); *Miller v. State*, 53 Md. App. 1, 5-6, 452 A.2d 180, 182-83 (1982), *cert. denied*, 295 Md. 302 (1982).

228. *Compare State v. Armstrong*, 46 Md. App. 641, 421 A.2d 98 (1980) (dismissal of

state knocks the case out of the 180-day period with a postponement for good cause motion, it may only have to deal with the more liberal constitutional speedy trial right, and may argue good cause and prompt and speedy trial waiver against a motion to dismiss. If, on the other hand, the state's postponement request is denied and, as a result, the denial becomes non-reviewable, the state may still argue waiver as a defense to the motion to dismiss. This latter argument, of course, would have been available even if the state had not requested a postponement in the first place.

Similarly, it was not clear at first from the reported decisions whether a defendant has *any* obligation to show good cause when requesting a postponement to beyond the 180-day period, or whether such a request constitutes "seeking" a violation of the prompt trial provisions, resulting in waiver of the penalty as a matter of law.²²⁹ A fair reading of the prompt trial provisions dictates that all involved must show good cause when effecting *any* prompt trial postponement.²³⁰ This reading is

second case brought to circumvent 180-day rule upheld) *with* State v. Farinholt, 54 Md. App. 124, 458 A.2d 442 (1983) (dismissal reversed on showing of waiver), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984) *and* State v. Lattisaw, 48 Md. App. 20, 425 A.2d 1051 (dismissal reversed on showing of waiver), *cert. denied*, 290 Md. 717 (1981); *cf.* Larsen v. State, 55 Md. App. 135, 137-39, 461 A.2d 543, 544-45 (1983), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984) (grant of postponement to allow state to respond to motion to dismiss is within ordinary discretion of court).

229. See State v. Hicks, 285 Md. 310, 335, 403 A.2d 356, 369 (1979). Compare Goins v. State, 48 Md. App. 115, 119-21, 425 A.2d 1374, 1377-78 (1981) (good cause found), *aff'd on other grounds*, 293 Md. 97, 442 A.2d 550 (1982) *with* State v. Lattisaw, 48 Md. App. 20, 27-29, 425 A.2d 1051, 1055-56 (agreement by counsel to trial date beyond 180-day period considered waiver), *cert. denied*, 290 Md. 717 (1981). See also *supra* text accompanying notes 190-91 (waiver where defendant or counsel "seek" postponement).
230. See MD. ANN. CODE art. 27, § 591 (Supp. 1984); Md. R.P. 746 (Supp. 1983); MD. R.P. 4-271; see, e.g., State v. Hicks, 285 Md. 310, 318, 403 A.2d 356, 360 (1979) (prompt trial provisions bind prosecution and defense alike); see also Hughes v. State, 288 Md. 216, 229, 421 A.2d 69, 75-76 (1980) (defendant must show good cause to justify a continuance beyond 180 days); State v. Farinholt, 54 Md. App. 124, 134-35, 458 A.2d 442, 447-49 (1983) (the defendant or the state may request postponement, or the court may raise the issue *sua sponte*), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984); Goins v. State, 48 Md. App. 115, 119, 425 A.2d 1374, 1377 (1981), *aff'd*, 293 Md. 97, 442 A.2d 550 (1982) (defendant or state must show good cause to justify continuance past 180 days). *But see* State v. Hicks, 285 Md. 310, 334, 403 A.2d 356, 369 (1979) (consent to postponement by defendant in violation of prompt trial provisions waives penalty); *but see also* Miller v. State, 53 Md. App. 1, 5-6, 452 A.2d 180, 182-83 (1982) (waiver by failure to object to placement of case on move list), *cert. denied*, 295 Md. 302 (1983); State v. Lattisaw, 48 Md. App. 20, 28, 29, 425 A.2d 1051, 1054, 1055-56 (waiver need not be express), *cert. denied*, 290 Md. 717 (1981). Because the prompt trial provisions were enacted "not solely to implement the defendant's right to a speedy trial, which is already constitutionally protected, but to protect society from the harms of unnecessarily delayed criminal trials," Carter v. State, 54 Md. App. 220, 226, 458 A.2d 480, 483 (1983), *rev'd on other grounds sub nom.* State v. Beard, 299 Md. 472, 474 A.2d 514 (1984), the provisions "hold [defendants'] feet to the fire." Lattisaw, 48 Md. App. at 27, 425 A.2d at 1055, and the better rule is to require them to meet the good cause condition also. *Id.* See generally *supra* Section IV(B) (good cause for postponement).

reinforced by the *Hicks* court's obsession with the public interest in prompt and efficient disposition of criminal cases.²³¹

VI. MOTION TO DISMISS: MARYLAND RULE 4-252

Once a defendant's trial date is improperly postponed beyond the 180-day period, the defendant must file a motion to dismiss that complies with Maryland Rule 4-252.²³² Procedurally, "[i]f a defendant files a timely, written motion to dismiss on the date of trial, it then becomes the option of the State to argue the motion at that time or to request a postponement 'to prepare its justification for whatever is alleged and prayed by the [defendant's] motion to dismiss.'"²³³ Although Maryland Rule 4-252(c) and (d) contemplate a written motion to dismiss filed prior to trial, the court of appeals has held, under former Rule 736, that the trial judge has wide discretion and may entertain a motion made orally on the day of trial.²³⁴

231. *State v. Hicks*, 285 Md. 310, 316-18, 403 A.2d 356, 359-60 (1979); see *State v. Frazier*, 298 Md. 422, 470 A.2d 1269 (1984); *State v. Lattisaw*, 48 Md. App. 20, 27, 425 A.2d 1051, 1055 (dictum), *cert. denied*, 290 Md. 717 (1981).

232. Md. R.P. 4-252(c)-(f) governs motions to dismiss for violations of defendants' rights to prompt trial as well as speedy trial, and reads in pertinent part:

c. Other Motions.—A motion asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time. Any other defense, objection, or request capable of determination before trial without trial of the general issue, shall be raised by motion filed at any time before trial.

d. Content.—A motion filed pursuant to this Rule shall be in writing unless the court otherwise directs, shall state the grounds upon which it is made, and shall set forth the relief sought. A motion alleging an illegal source of information as the basis for probable cause must be supported by precise and specific factual averments. Every motion shall contain or be accompanied by a statement of points and citation of authorities.

e. Response.—A response, if made, shall be filed within 15 days after service of the motion and contain or be accompanied by a statement of points and citation of authorities.

f. Determination.—Motions filed pursuant to this Rule shall be determined before trial and, to the extent practicable, before the day of trial, except that the court may defer until after trial its determination of a motion to dismiss for failure to obtain a speedy trial. If factual issues are involved in determining the motion, the court shall state its findings on the record.

Implicit in this requirement is an opportunity for the state to prepare its opposition within the time limits prescribed by the Rule. *Carey v. State*, 54 Md. App. 448, 449-51, 458 A.2d 90, 91-92 (1983), *aff'd*, 299 Md. 17, 21 n.2, 472 A.2d 444, 446 n.2 (1984). See *infra* text accompanying note 233 (option of state to prepare response within 15 days).

233. *Larsen v. State*, 55 Md. App. 135, 139, 461 A.2d 543, 545 (1983) (quoting *Pennington v. State*, 53 Md. App. 538, 542 (1983), *rev'd on other grounds*, 299 Md. 23, 472 A.2d 447 (1984)), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984); see also *supra* note 232 (state's opportunity to prepare opposition to motion).

234. *Rash v. State*, 299 Md. 68, 71, 472 A.2d 470, 471 (1984); *Pennington v. State*, 299 Md. 23, 28, 472 A.2d 447, 449-50 (1984); *Carey v. State*, 299 Md. 17, 20-21, 472 A.2d 444, 446 (1984); *State v. Frazier*, 298 Md. 422, 436-37 n.11, 470 A.2d 1269, 1277 n.11 (1984).

As to substance, the allegations of the defendant and the response by the state must be articulate and organized and must distinguish between issues of good cause, waiver, and constitutional speedy trial.²³⁵ When dealing with a motion to dismiss for a prompt trial violation, the only relevant postponement is that which caused the trial date to be postponed beyond the 180-day period.²³⁶ This singular focus is important because it differs from the constitutional speedy trial analysis on the total length of delay, and it involves no balancing test or calculations of time chargeable to each party, as does the constitutional provision.²³⁷ Thus, it

235. See Md. R.P. 736(e) (1977); MD. R.P. 4-252(d), (e). In *State v. Lattisaw*, 48 Md. App. 20, 425 A.2d 1051, *cert. denied*, 290 Md. 717 (1981), the court of special appeals described one attempt by the state to oppose a motion to dismiss filed that same morning:

The State defended these motions [to dismiss] on the ground that, by consenting to the trial date of June 9, [defendants], through their counsel, were in part responsible for the violation of the Rule. A precise theory was not clearly articulated. At one point, the State's Attorney seemed to apply the Constitutional balancing test, allocating certain periods of time to the State and other periods to the defense; intermingled with this were suggestions of waiver or the existence of "good cause" for the violation of the [provisions].

Id. at 22-23, 425 A.2d at 1052-53; *cf.* *Calhoun v. State*, 299 Md. 1, 5 n.2, 472 A.2d 436, 438 n.2 (1984) (confusion of prompt trial with constitutional speedy trial by court). As a part of general strategy, defense counsel should file an early demand for a speedy trial, since the defendant's assertion of his constitutional speedy trial right is an important factor in the *Barker v. Wingo* balancing test. See *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972). Although there is no demand requirement under the prompt trial provisions, a defendant may file such a demand. See *Pennington v. State*, 53 Md. App. 538, 544, 454 A.2d 879, 882 (1983), *rev'd on other grounds*, 299 Md. 23, 472 A.2d 447 (1984). The defendant may then move to dismiss on both grounds in order to preserve both issues for possible appellate review. See, e.g., *Grant v. State*, 299 Md. 47, 53 n.3, 472 A.2d 459, 462-63 n.3 (1984); *Larsen v. State*, 55 Md. App. 135, 137, 461 A.2d 543, 544 (1983), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984); *State v. Farinholt*, 54 Md. App. 124, 135-36, 458 A.2d 442, 450 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984). See generally Note, *supra* note 34, at 489-92 (prompt v. speedy trial criteria); *supra* note 183 (preserving the record). Conversely, the state, having received a postponement early on, may then argue both good cause and waiver against a motion to dismiss. See generally *supra* text accompanying notes 224-31 (prompt trial strategy).

236. See, e.g., *Farinholt v. State*, 299 Md. 32, 472 A.2d 452 (1984); *State v. Frazier*, 298 Md. 422, 427-28, 470 A.2d 1269, 1272 (1984).

237. See, e.g., *Satchell v. State*, 299 Md. 42, 45-46, 472 A.2d 457, 458 (1984); *Goins v. State*, 293 Md. 97, 105, 112, 442 A.2d 550, 554, 558 (1982); *Monge v. State*, 55 Md. App. 72, 80, 461 A.2d 21, 27 (1983), *cert. denied*, 298 Md. 708, 473 A.2d 458 (1984); *State v. Green*, 54 Md. App. 260, 264, 458 A.2d 487, 490, *aff'd*, 299 Md. 72, 472 A.2d 472 (1984); *State v. Farinholt*, 54 Md. App. 124, 130, 458 A.2d 442, 447 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984). In *Goins v. State*, 293 Md. 197, 442 A.2d 550 (1982), both the administrative judge and the court of special appeals applied a "balancing test" to determine which side was responsible for the delay and which side benefitted from the delay." *Id.* at 105, 442 A.2d at 554. The court of appeals affirmed, but for different reasons, stating that

[the prompt trial provisions] contain their own mechanism for dealing with a case where the defendant, by some dilatory action, has made it virtually impossible to try a criminal case within the 180-day time limit. That mechanism is a motion, supported by good cause, by the State or the

is incorrect to tally up how much time is to be assessed each side and grant dismissal if the state has delayed over 180 days.²³⁸ Once a trial date is postponed beyond the period for good cause shown, the prompt trial provisions no longer apply, and the defendant's rights are measured only by constitutional speedy trial requirements.²³⁹ The speedy trial issue should also be asserted in the motion to dismiss for decision at trial and to preserve the issue for possible appellate review.²⁴⁰ Finally, denial of a motion to dismiss may only be appealed after final judgment.²⁴¹ If, however, the granting of the motion results in dismissal of the charges the state may appeal immediately.²⁴²

In deciding a motion to dismiss under prompt trial analysis, the trial judge must address three basic issues: (1) whether the trial date has been postponed beyond the 180-day period; and, if so, (2) whether good cause was found by the hearing judge; and, if not, (3) whether the defendant waived his right to the dismissal penalty. As the court of appeals set out in *State v. Fraizer*:²⁴³

Consequently, with regard to the postponement of a criminal trial for good cause, it is the administrative judge's exercise of judgment with which those later reviewing the matter are concerned. Another *nisi prius* judge, ruling on a motion to dismiss for an alleged violation of §591 and Rule 746, has been deprived of the authority to exercise independent judgment concerning good cause for postponement.²⁴⁴ This is not to say that a trial judge has no role when there is a motion to dismiss based upon an asserted violation of §591 and Rule 746. As the *Hicks* and *Goins* cases make clear, a trial judge entertaining such a motion must ordinarily grant it if the case was not tried within 180 days and if the trial was not postponed beyond that deadline in accordance with the statute and rule. But in making this determination, when reviewing a postpone-

court itself for a postponement of the trial date, so long as the motion is granted or approved by the county administrative judge.

Id. at 112, 442 A.2d at 558.

238. See, e.g., *Goins*, 293 Md. at 105, 442 A.2d at 554; *Calhoun v. State*, 299 Md. 1, 472 A.2d 436, 438 (1984); *State v. Green*, 54 Md. App. 260, 264, 458 A.2d 487, 490, *aff'd*, 299 Md. 72, 472 A.2d 472 (1984); *State v. Farinholt*, 54 Md. App. 124, 128, 458 A.2d 442, 446 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984) (improper computation by court).

239. See *supra* note 45 and accompanying text (interplay between prompt and speedy trial rights issue).

240. See, e.g., *State v. Farinholt*, 54 Md. App. 124, 135-36, 458 A.2d 442 (1983), *aff'd*, 299 Md. 32, 472 A.2d 452 (1984); *Pennington v. State*, 53 Md. App. 538, 540 n.1, 454 A.2d 879, 881 n.1 (1983), *rev'd on other grounds*, 299 Md. 23, 472 A.2d 447 (1984); see also *supra* note 235 and accompanying text (prompt trial strategy).

241. MD. CTS. & JUD. PROC. CODE ANN. § 12-301 (Repl. Vol. 1984).

242. See *id.* at § 12-302(i). See generally *Loker*, *supra* note 28, at 31-32 (prompt trial strategy for prosecution).

243. 298 Md. 422, 470 A.2d 1269 (1984).

244. *Id.* at 450, 470 A.2d at 1284.

ment beyond the 180-day deadline ordered by the administrative judge, deference must be accorded the judgment of the administrative judge and those assignment personnel acting under his supervision. We hold, therefore, as follows: with regard to both components of the "good cause" requirement in §591 and Rule 746, the trial judge (as well as an appellate court) shall not find an absence of good cause unless the defendant meets the burden of demonstrating either a clear abuse of discretion or a lack of good cause as a matter of law.²⁴⁵ Finally, the party challenging the discretionary ruling on a motion for a postponement has the burden of demonstrating a clear abuse of discretion.²⁴⁶

VII. CONCLUSION

Under the Maryland prompt trial provisions, a criminal defendant charged in the circuit court must be brought to trial within 180 days of his initial appearance or the charges must be dismissed with prejudice. Two exceptions to this rule are good cause shown for postponement beyond the 180-day period, and waiver of dismissal by defendant or counsel. A distillation of *State v. Hicks*, and the decisions following it, reveal certain mechanics of the provisions with which practitioners must familiarize themselves when handling prompt trial issues. These include applicability of the provisions, setting the initial trial date, postponement of the trial date, the dismissal penalty and waiver thereof, and making or opposing a motion to dismiss. Once these mechanics are understood, the substantive and procedural requirements of the prompt trial provisions may be approached in a more organized manner by both bench and bar.

245. *Id.* at 454, 470 A.2d at 1286.

246. *Id.* at 452, 470 A.2d at 1285.

APPENDIX

Indictment
or
Information
Appearance

Day 30

Day 180

Trial Date

Retrial

Prompt Trial Inapplicable

Speedy Trial Triggered

Prompt Trial Triggered

Prompt Trial Applicable
(Without penalty)

Speedy Trial Applicable

Prompt Trial Applicable
(With penalty if no good
cause or no waiver)
(Without penalty if good
cause or waiver)

Speedy Trial Applicable

Prompt Trial Inapplicable

Speedy Trial Applicable

Prompt Trial Inapplicable

Speedy Trial Applicable

Postponement
by Hearing Judge
for Good Cause Shown

Continuance In
Discretion of Trial Judge

Postponement or Continuance
In Discretion of Trial Judge