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Notes: Sixth Amendment Right to a Speedy Trial — Delay of over Two Years between Initial Arrest and Trial Not Prejudicial to Defendant's Right to a Fair and Speedy Trial. State v. Bailey, 319 Md. 392, 572 A.2d 544, cert. denied, 498 U.S. 841 (1990)

Joseph W. Rasnic
University of Baltimore School of Law

SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL - DELAY OF OVER TWO YEARS BETWEEN INITIAL ARREST AND TRIAL NOT PREJUDICIAL TO DEFENDANT'S RIGHT TO A FAIR AND SPEEDY TRIAL. *State v. Bailey*, 319 Md. 392, 572 A.2d 544, *cert. denied*, 498 U.S. 841 (1990).

I. INTRODUCTION

In *State v. Bailey*,[1] the Court of Appeals of Maryland, in a split decision, affirmed a drug conviction handed down over two years after the defendant's initial arrest. In a liberal application of existing precedent, the court reasoned that "the peculiar circumstances of this case . . . were sufficient to outweigh . . . any prejudice, actual and presumed, arising from the length of the delay."[2] In light of *Bailey*, this Casenote will examine how defendants in Maryland will have to provide convincing evidence of actual prejudice if they are to be successful when challenging convictions on grounds of pre-trial delay.

II. BACKGROUND

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."[3] Similar language appears in article 21 of the Maryland Constitution,[4] and statutory protections

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1. 319 Md. 392, 572 A.2d 544, *cert. denied*, 498 U.S. 841 (1990).
2. *Id.* at 419, 572 A.2d at 557.
3. U.S. CONST. amend. VI.
4. Article 21 of the Maryland Constitution provides:

> 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 defence; 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.

MD. CONST. art. 21.

are provided under both federal[5] and state law.[6] The Supreme Court has stated that this is a fundamental right[7] imposed on the states by the Due Process Clause of the Fourteenth Amendment.[8]

The Due Process Clause itself provides additional protection of an accused's right to a fair trial[9] and is frequently invoked as an alternative remedy when pre-trial delays are involved.[10] Defendants

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5. Federal protections are provided in the Speedy Trial Act which states: "In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall . . . set the case for trial on a day certain . . . so as to assure a speedy trial." Speedy Trial Act, 18 U.S.C. § 3161(a) (1990).
6. *See* MD. ANN. CODE art. 27, § 591 (1992), which provides:
   (a) The date for trial of a criminal matter in a circuit court:
      (1) Shall be set within 30 days after the earlier of:
         (i) The appearance of counsel; or
         (ii) The first appearance of the defendant before the circuit court, as provided in the Maryland Rules; and
      (2) May not be later than 180 days after the earlier of those events.
   (b) On motion of a party or on the court's initiative and for good cause shown, a county administrative judge or a designee of that judge may grant a change of the circuit court trial date.
   (c) The Court of Appeals may adopt additional rules of practice and procedure for the implementation of this section in circuit courts.

   See also CAL. PENAL CODE § 1382 (West 1990) (court must order dismissal if there is no indictment within 15 days or trial does not commence in a Superior Court within 60 days); ILL. ANN. STAT. ch. 38, para. 103-5 (Smith-Hurd 1980 & Supp. 1992) (every person in custody shall be tried within 120 days; if out on bail or recognizance, within 160 days); NEV. REV. STAT. ANN. § 178.556 (Michie 1992) (court may dismiss complaint if no indictment filed within 15 days; trial must occur within 60 days of the indictment); VA. CODE ANN. § 19.2-243 (Michie 1990) (where general district court finds probable cause of a felony, case will be discharged if no trial is commenced within five months, or nine months if defendant is not held in custody).
7. Barker v. Wingo, 407 U.S. 514, 515 & n.2 (1972) (quoting Klopfer v. North Carolina, 386 U.S. 213, 223 (1967)).
8. *Barker*, 470 U.S. at 515; *see also Klopfer*, 386 U.S. at 222-23 (relying on holding in Pointer v. Texas, 380 U.S. 400 (1965), that Sixth Amendment protections apply to the States by virtue of the Fourteenth Amendment).
9. The due process provisions of the Constitution are especially important protections against pre-indictment delay. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").
10. *See* United States v. Marion, 404 U.S. 307, 324 (1971) (invoking Fifth Amendment Due Process Clause where delay of three years between indictment and alleged illegal activity substantially prejudiced appellee's right to a fair trial); *see also* United States v. MacDonald, 456 U.S. 1, 7 (1982) (stating that undue delay after charges are dismissed may be examined under the Due Process Clause); Klopfer v. North Carolina, 386 U.S. 213, 226-27 (1967) (Harlan, J., concurring) (stating preference to decide case by relying on Due Process Clause of the Fourteenth Amendment rather than on the speedy trial provision of the Sixth Amendment).

may petition the courts for relief under this provision when the Sixth Amendment guarantee has not attached or is inapplicable.[11]

Earlier in this century, the Supreme Court recognized that the right to a speedy trial relates to the context and the circumstances surrounding the case and "the rights of public justice."[12] The right is unusual in that it serves interests of society which may, at times, be in opposition to those of the accused.[13] For example, a delay in bringing an accused to trial may actually work to his advantage if the state's case largely depends on a witness who may become unavailable with the passage of time. For this reason, delay is often used as a defense tactic, and deprivation of the right is not considered per se prejudicial to the accused's ability to adequately defend himself.[14] Because the Sixth Amendment guarantee is itself indicative that delay is often detrimental to the defendant, any "purposeful or oppressive" prosecutorial delay which is used to harass or hamper the defense is considered improper and invokes the constitutional protections.[15]

The right to a speedy trial is also different from other constitutional rights because it is "impossible to pinpoint a precise time in the process when the right must be asserted."[16] Consequently, it is "impossible to determine with [any] precision when the right has [actually] been denied."[17] Thus, an accurate assessment of a speedy trial claim depends not on some bright line rule but necessitates an inquiry into the context of each particular case and set of circumstances.[18]

Although the speedy trial provision is a single constitutionally-granted shield, it protects at least three separate but related interests of the defendant: (1) avoiding undue and oppressive pretrial incarceration; (2) minimizing anxiety and concern brought on by public accusation; and (3) limiting the possibility that delay will restrict the accused's ability to effectively defend himself.[19] The Supreme Court has recognized these defense interests as the standards by which prejudice is measured when a prosecutorial delay occurs.[20]

The right to a speedy trial as guaranteed by the Constitution

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11. *See infra* notes 30-34 and accompanying text.
12. Beavers v. Haubert, 198 U.S. 77, 87 (1905).
13. Barker v. Wingo, 407 U.S. 514, 519 (1972).
14. *Id.* at 521.
15. Pollard v. United States, 352 U.S. 354, 361 (1957).
16. *Barker*, 407 U.S. at 527.
17. *Id.* at 521.
18. *Id.* at 522.
19. United States v. Ewell, 383 U.S. 116, 120 (1966); *see* John C. Godbold, *Speedy Trial - Major Surgery for a National Ill*, 24 ALA. L. REV. 265, 268-72 (1972).
20. *See infra* note 83 and accompanying text.

has been considered most notably in the context of delays during the following periods: (1) between arrest and indictment;[21] (2) after indictment but prior to trial;[22] (3) after trial but prior to sentencing;[23] and (4) prior to retrial.[24] In *Bailey*, the situation involved somewhat different circumstances in that the delay resulted from the dismissal of the initial indictment and a subsequent reindictment. This unusual set of circumstances was due to a combination of the defendant's criminal conviction in another jurisdiction and the state's desire to enhance its case by gathering evidence for additional charges.[25]

In 1971, the Supreme Court clarified when the "speedy trial clock" begins to tick. The Court reasoned in *United States v. Marion*[26] that the speedy trial provision has no application until the "defendant in some way became an accused."[27] The right thus attaches at the time of arrest or upon the filing of formal charges, whichever comes first.[28] Ten years later, in *MacDonald v. United States*,[29] the Court held that the defendant loses "accused" status once charges are formally dropped.[30] Once charges have been dropped in good faith, the speedy trial provision has no further application until a reindictment.[31] Any delay occurring after such a dismissal, and any remedy for such a delay, are considered under a due process analysis rather than the Speedy Trial Clause.[32] If the prosecution

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21. United States v. MacDonald, 456 U.S. 1, 7 (1982) (two year delay between arrest and indictment).
22. Dillingham v. United States, 423 U.S. 64 (1975) (holding that aggregate delay of 22 months between arrest and indictment and 12 months between indictment and trial was violative of defendant's right to a speedy trial).
23. Pollard v. United States, 352 U.S. 354, 361 (1957) (two year delay between trial and sentencing).
24. Klopfer v. North Carolina, 386 U.S. 213, 219-21 (1967) (holding that state may not, without stated justification, indefinitely postpone reprosecution on an indictment over the objection of an accused who has been discharged from custody after a mistrial in the first prosecution).
25. *See infra* note 81 and accompanying text.
26. 404 U.S. 307 (1971).
27. *Id.* at 313.
28. *Id.* at 320.
29. 456 U.S. 1 (1982).
30. *Id.* at 8. Although *MacDonald* is similar to *Bailey* in that the charges against both defendants were dropped, the *MacDonald* holding was considered and distinguished by the court of special appeals. Bailey v. State, No. 88-737, slip op. at 4-5 (Md. Ct. Spec. App. Apr. 17, 1989) [available on microfiche as part of the record extract filed with the briefs for the appeal to the Court of Appeals of Maryland, State v. Bailey, 319 Md. 392, 572 A.2d 544 (1990) (No. 89-75)]. Unlike in *Bailey*, however, the prosecution in *MacDonald* had no case with which to move forward. The court of appeals evidently accepted this rationale because the issue was not raised again.
31. *Id.* at 7 & n.7.
32. *Id.* at 7. Note, however, that *Bailey* was decided primarily on a Sixth Amend-

drops charges with an improper motive, however, the speedy trial right continues to apply.[33]

Just six months after *Marion*, the United States Supreme Court in *Barker v. Wingo*[34] established a test to analyze the denial of the right to a speedy trial. For the first time, the Court set the "criteria by which the speedy trial right is to be judged."[35] In establishing this criteria, the Court rejected two alternative approaches commonly applied in the past: (1) trial required within a specified time period and (2) a "demand/waiver" approach whereby a prior demand for a speedy trial was a necessary condition to the consideration of the right.[36] Because the Constitution does not specify a definite time period for bringing an accused to trial, the Court reasoned that the first approach went beyond the constitutional requirements.[37] In rejecting the latter approach, the Court reasoned that it would be inconsistent with prior decisions to presume "waiver by inaction" of a fundamental constitutional right.[38]

The Court established the following four-part balancing test: (1) "the length of the delay;"(2) "the reason for the delay;" (3) "the defendant's assertion of his right;" and (4) "prejudice to the defendant."[39] The Court made clear the importance and desirability of implementing a test that weighed the conduct and assertions of both the prosecution and the accused[40] and suggested that this test be applied on an "ad hoc basis."[41]

Although an important factor in the analysis, prior decisions establish that the length of the delay is not exclusively determinative of whether the right to a speedy trial has been violated. A delay as long as five years has been allowed[42] while a time period as short as one year and fifteen days has been deemed a violation of the right.[43] Significantly, *Barker* proclaims that the length of the delay acts as a

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ment speedy trial basis even though Bailey raised the due process issue both on appeal to the court of special appeals and to the court of appeals. Although the court of special appeals did not address the due process issue, the court of appeals held that actual prejudice must exist for the Due Process Clause to take hold. State v. Bailey, 319 Md. 392, 420, 572 A.2d 544, 557, *cert. denied*, 498 U.S. 841 (1990).

33. Barker v. Wingo, 407 U.S. 514, 531 (1972).
34. *Id.* at 514.
35. *Id.* at 516.
36. *Id.* at 529-30. See *id.* at 522-28 for a general discussion and comparison of the two approaches.
37. *Id.* at 529.
38. *Id.* at 525.
39. *Id.* at 530.
40. *Id.*
41. *Id.*
42. The delay in *Barker* was more than five years between arrest and trial.
43. Epps v. State, 276 Md. 96, 345 A.2d 62 (1975) (defendant was arrested August 9, 1972, indicted September 25, 1972, and tried August 22, 1973).

"triggering mechanism;"[44] once the length of the delay reaches a constitutional dimension, a presumption of prejudice arises and the remaining factors of the balancing test are applied.[45]

In 1971, the Maryland General Assembly adopted a statutory prompt trial provision that is currently codified in article 27, section 591, of the Maryland Annotated Code.[46] The Court of Appeals of Maryland later adopted Maryland Rule 746[47] to make mandatory the prompt trial provisions of section 591,[48] which had previously been construed as only directory.[49] The time limits imposed by these provisions[50] are not, however, the measure of the Sixth Amendment right to a speedy trial;[51] the provisions were enacted primarily to protect society's interest in the prompt disposition of criminal cases.[52] Neither section 591 nor rule 746 confer any benefit on the accused beyond those already granted by the federal constitution.[53] In fact,

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44. Barker v. Wingo, 407 U.S. 514, 530 (1972).
45. *Id.*
46. MD. ANN. CODE art. 27, § 591 (1992); *see supra* note 6 and accompanying text.
47. Maryland Rule 746 is now Maryland Rule 4-271.
48. State v. Hicks, 285 Md. 310, 318, 403 A.2d 356, 360 (1979). The *Hicks* court explained:

> By our adoption of Rule 746 in 1977, we intended to supersede the provisions of § 591(a) and put teeth into a new regulation governing the assignment of criminal cases for trial. We did so pursuant to the authority vested in the Court by Article IV, § 18(a) of the Constitution of Maryland to make rules having the force of law governing "practice and procedure in and the administration of the . . . courts." . . . . The provisions of Rule 746 are of mandatory application, binding upon the prosecution and defense alike; they are not mere guides or bench marks to be observed, if convenient.

Id.; *see also* State v. Cook, 322 Md. 93, 95-96, 585 A.2d 833, 834 (1991) ("The dictates of the rule and the statute which it implemented are generally known as the Hicks Rule.").

49. *See Hicks*, 285 Md. at 316, 403 A.2d at 359 (citing Young v. State, 15 Md. App. 707, 292 A.2d 137, *aff'd*, 266 Md. 438, 294 A.2d 467 (1972)).
50. Section 591 provides that, absent a showing of "good cause" for postponement, a criminal defendant must be tried within 180 days from his or his counsel's first court appearance. MD. ANN. CODE art. 27, § 591(a), (b) (1992). As originally enacted, the statute required "extraordinary cause" for postponement; the standard was changed to "good cause" in 1980. *See* State v. Glenn, 53 Md. App. 717, 724, 456 A.2d 1300, 1303-04 (1983). Rule 4-271 provides that within 30 days of the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, a trial date within 180 days of that triggering event is to be set. MD. R. 4-271(a)(1). For a more in-depth discussion of Maryland's "prompt trial provisions," see Harold D. Norton, *Maryland's Prompt Criminal Trial Provisions:* Hicks *and Beyond*, 14 U. BALT. L. REV. 447 (1985).
51. *Hicks*, 285 Md. at 320, 403 A.2d at 361.
52. *See Hicks*, 285 Md. at 316-17, 320, 403 A.2d at 359-61.
53. *See, e.g.*, *Hicks*, 285 Md. at 320, 403 A.2d at 361-62 ("[In finding defendant's

the Court of Appeals of Maryland has stated specifically that "the statute and rule were not meant to supersede the constitutional rights to a speedy trial . . . ."[54]

Maryland has therefore adopted the *Barker* analysis and balancing test when considering the Sixth Amendment right to a speedy trial.[55] Prior to *Bailey*, the most extensive application of *Barker* by the Court of Appeals of Maryland was in *Brady v. State*[56] decided in 1981. In *Brady*, the court of appeals held that the defendant, whose prosecution was delayed fourteen months, was denied his right to a speedy trial because of the prosecution's negligence. The delay resulted from the State's inability to find Brady, although he was located somewhere within the state correctional system itself. This reason for the delay, deemed "prosecutorial indifference" by the court, was the determining factor in the court's decision to reverse Brady's conviction.[57]

III. THE INSTANT CASE

Alex Bailey (aka James Vron) was arrested on February 14, 1986, in Montgomery County, Maryland, and charged with violation

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incarceration in Delaware to constitute cause to justify a postponement], we intend no departure from the established law that the mere fact that a 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.").

54. State v. Cook, 322 Md. 93, 96, 585 A.2d 833, 834 (1991).

55. *See, e.g.*, Wilson v. State, 281 Md. 640, 382 A.2d 1053 (finding no violation of defendant's right to speedy trial despite the fact that hearing on the defendant's motion to dismiss did not take place until four years after his arrest, as defendant was in custody of the State of Maryland only 10 of those days and was incarcerated in other jurisdictions during the remainder of the period of delay; the prejudice resulting to the defendant was minimal; the defendant acted affirmatively to delay the trial; and there was little in the way of assertion by the defendant of his right to a speedy trial), *cert. denied*, 439 U.S. 839 (1978); Jones v. State, 279 Md. 1, 367 A.2d 1 (1976) (reversing conviction where prejudice resulted from 29 month delay from arrest until trial), *cert. denied*, 431 U.S. 915 (1977); Erbe v. State, 276 Md. 541, 350 A.2d 640 (1976) (finding that inadvertent five year delay between conviction and sentencing, although attributable to the State, did not prejudice defendant who failed to assert his right to a speedy trial; defendant was not incarcerated during this period, and may have benefited from the delay in view of the fact that he was put on probation when he was finally sentenced); Smith v. State, 276 Md. 521, 350 A.2d 628 (1976) (overturning conviction after prejudicial 16 month delay between arrest and trial; delays were attributable to the State and defendant had adequately asserted his right); Epps v. State, 276 Md. 96, 345 A.2d 62 (1975) (reversing conviction where delay was due to tactics of prosecutor and subsequent illness of arresting officer, and defendant's alibi witness became unavailable due to the delay).

56. 291 Md. 261, 434 A.2d 574 (1981).

57. *Id.* at 269, 434 A.2d at 578.

of the Controlled Dangerous Substance Act.[58] He was subsequently indicted by a grand jury on March 20, 1986, on charges of distribution of cocaine, possession with intent to distribute cocaine, and conspiracy to distribute cocaine.[59] In May of 1986, the State learned that Bailey was convicted *in absentia* in South Carolina on April 8, 1985, of possession with intent to distribute valium and trafficking in cocaine, for which he received a sentence of ten years.[60]

Upon learning of this conviction, the Maryland prosecutor entered a *nolle prosequi* as to the Maryland drug charges in order to allow South Carolina to enroll and execute its conviction.[61] The *nolle prosequi* was entered on June 6, 1986.[62] Bailey returned to South Carolina in June, appeared in Charleston County Court on October 16, and on October 22 began serving the previously imposed ten-year sentence.[63]

In Maryland, the grand jury returned a new indictment against Bailey on May 28, 1987. This indictment included the earlier charge of possession with intent to distribute cocaine, plus a new count of

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58. State v. Bailey, 319 Md. 392, 397, 572 A.2d 544, 546, *cert. denied*, 498 U.S. 841 (1990). For a complete chronology of events between this date and the trial in February 1988, see *id.* at 399-402, 572 A.2d at 547-48.
59. *Id.* at 399, 572 A.2d at 547.
60. Bailey was arrested and charged with trafficking in cocaine in Charleston County, South Carolina on September 5, 1984. On April 8, 1985, he was tried *in absentia* (TIA) and found guilty, with a 10 year sentence imposed. *Id.* at 399, 572 A.2d at 547.
61. In a letter of June 3, 1986, the Assistant State's Attorney informed the defense counsel as follows:

> I have recently been informed by the Solicitor's Office in Charleston, South Carolina, that your client, Alex Ray Bailey, was charged with trafficking cocaine there in 1984, and in fact was convicted in September, 1985 *in absentia*. Warrants based upon this have been on file at the Montgomery County Detention Center. In order to facilitate the South Carolina authorities in their efforts to enroll and execute their sentence, I have decided to enter a nolle prosequi to criminal number 41284. Your client will then be held under the South Carolina detainer and extradited. The State of Maryland does not intend to abandon its prosecution of Mr. Bailey, but we do feel that it would be appropriate for your client to personally answer these earlier charges in South Carolina and, if sentenced, to start serving his sentence there. I feel that that matter should be finally settled prior to the Montgomery County prosecution for the recent incident of February, 1986. We would then bring your client back to Montgomery County under the Interstate Agreement on Detainers.
>
> I will enter the nolle prosequi on Friday, June 6, 1986.

Id. at 400, 572 A.2d at 547.
62. *Id.* On June 9, 1986, Bailey's counsel responded by letter to the State's Attorney's office objecting to the procedure, and reiterating Bailey's previously requested demand for speedy trial. *Id.* at 400-01, 572 A.2d at 548.
63. *Id.* at 401, 572 A.2d at 548.

cocaine importation. In July 1987, the State filed a request under the Interstate Agreement on Detainers[64] to obtain Bailey for trial in Maryland and set a pickup date of August 18, 1987. Bailey fought extradition, and did not appear in Montgomery County until November 25, 1987.

After a trial date of December 8, 1987, was cancelled because of a conflict in the defense attorney's calendar, the case was reset for February 18, 1988. On February 17, the defendant filed a motion to dismiss for lack of a speedy trial. The motion was denied and the trial proceeded on February 23, 1988. The jury found Bailey not guilty on the importation charge and guilty on the possession charge.[65]

The Court of Special Appeals of Maryland reversed the lower court's conviction in an unreported decision,[66] holding that Bailey's right to a speedy trial had been denied. Petitions by the State for a writ of certiorari and the defendant's conditional cross-petition were granted, and the case was certified to the Court of Appeals of Maryland. The court of appeals was to determine whether the court of special appeals committed error in its determination of the relevant period by which to measure the length of the delay, and whether Bailey was denied his right to a speedy trial even if dismissal of the previous indictment did not toll the relevant period for speedy trial purposes.[67]

The court of appeals upheld the original conviction, finding that the time delay between the arrest and the trial did not violate Bailey's right to a fair and speedy trial. Since the delay was over two years long, however, it was of constitutional dimension,[68] thus triggering an analysis of the remaining factors established by *Barker*. The court applied the four-part *Barker* balancing test and determined that the unique circumstances involved were sufficient to outweigh any prejudice that may have resulted from the delay.[69]

IV. REASONING AND ANALYSIS

The court reasoned that the prosecuting attorney's use of discretion in entering the *nolle prosequi* was in good faith, and Bailey suffered no actual prejudice as a result of the actions of the prosecution.[70] The court looked at the question of prejudice, considering the three interests which the constitutional guarantee was designed

64. MD. ANN. CODE art. 27, §§ 616A-616S (1992).
65. Bailey v. State, 319 Md. 392, 401-02, 572 A.2d 544, 548 (1990).
66. Bailey v. State, No. 88-737 (Md. Ct. Spec. App. Apr. 17, 1989).
67. *Bailey*, 319 Md. at 408, 572 A.2d at 551.
68. *Id.* at 411, 572 A.2d at 553.
69. *Id.* at 419, 572 A.2d at 557.
70. *Id.*

to protect, and found no evidence that Bailey's defense had been impaired or that he had suffered any anxiety, concern, or was otherwise prejudiced while incarcerated or awaiting prosecution.[71] Even though the court assumed that the delay of over two years from arrest to trial was attributable entirely to the State,[72] the court of appeals concluded that Bailey was not denied his right to a speedy trial.[73]

To properly analyze the court's reasoning in *Bailey*, it would be instructive to examine it in light of prior applications of the *Barker* test. The court in *Bailey* applied the *Barker* factors in the following order:

1. The Defendant's Assertion of His Right

While most state courts and many lower federal courts had previously endorsed some form of demand/waiver rule,[74] the Supreme Court in *Barker* expressly rejected any such rule that forced a defendant to demand a speedy trial as a condition precedent to consideration of the speedy trial right.[75] The Court did acknowledge, however, that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[76]

The court of appeals acknowledged that Bailey had adequately asserted his right to a speedy trial, even from the early trial stages.[77]

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71. *Id.* at 416-19, 572 A.2d at 555-57.
72. *Id.* at 415, 572 A.2d at 555.
73. *Id.* at 419, 572 A.2d at 557. Neither the court of appeals nor the court of special appeals made reference to Maryland's statutory provision for speedy trial adopted in 1971. *See* MD. ANN. CODE art. 27, § 591 (1992); *see also supra* notes 46-54 and accompanying text. As previously mentioned, a postponement under this provision may be granted only upon a showing of "good cause." *Id.* Good cause will be found if the need to postpone outweighs any detriment to the public interest. Carter v. State, 54 Md. App. 220, 229, 458 A.2d 480, 484 (1983), *rev'd on other grounds sub nom.* State v. Beard, 299 Md. 472, 474 A.2d 514 (1984); *see also* Norton, *supra* note 50, at 461-67. This balancing test is applied by the hearing judge, and his decision will not be overturned absent abuse of discretion. Norton, *supra* note 50, at 462. Evidently, both appellate courts accepted that the *nolle prosequi* was for a legitimate reason and proceeded to implement and rely entirely on the *Barker* balancing test.
74. *See* Barker v. Wingo, 407 U.S. 514, 524 & nn.20-22 (1972). While noting that most states recognized a "demand" rule, the Court acknowledged that eight states rejected it at that time: Arizona, Colorado, Indiana, Kansas, New York, Oregon, Virginia, and West Virginia. *Id.* at 524 n.21.
75. *Id.* at 525.
76. *Id.* at 532.
77. *Bailey*, 319 Md. at 409, 572 A.2d at 552. The court stated:

> There is no dispute about Bailey's preservation of an assertion of his right to a speedy trial. As defense counsel told the judge at the hearing on the motion to dismiss: We are all in agreement that from day one,

Noting that this assertion was entitled to strong evidentiary weight in determining whether a defendant had been deprived of his right,[78] the court of appeals embraced the Supreme Court's reasoning that the strength of the defendant's assertions would be indicative of the personal prejudice he was experiencing. The more serious the deprivation of his right to a speedy trial, the more likely the defendant would complain.[79]

2. The Length of the Delay

"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."[80] The period of delay, not in itself determinative of whether the right has been denied, is measured from the time of arrest or when formal charges are filed against the defendant.[81]

The court of appeals was willing to accept, for the purpose of their analysis, that the entire period from arrest to trial constituted delay attributable to the prosecution.[82] Being only one part of the balancing test, the court did not consider a delay of this magnitude to weigh heavily enough against the State to tip the scales in the defendant's favor.

3. The Reason for the Delay

The court of appeals recognized that, even though the prosecutor has the right to enter a *nolle prosequi*, he runs the risk that doing

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literally, from the date that I entered my appearance in the District Court he has iterated, reiterated, and reiterated his demand for a speedy trial.

Id. at 401 n.4, 572 A.2d at 548 n.4.

78. *Id.* at 409-10, 572 A.2d at 552 (quoting *Barker*, 407 U.S. at 531-32).
79. *Id.*
80. *Barker*, 407 U.S. at 530.
81. United States v. Marion, 404 U.S. 307, 313 (1971).
82. State v. Bailey, 319 Md. 392, 415, 572 A.2d 544, 555 (1990). The Maryland appellate courts differed primarily in how they regarded the significance of the length of the delay. Establishing the relevant time period was the focus of the court of special appeals' speedy trial determination. *Id.* at 405-07, 572 A.2d at 550-51 (quoting Bailey v. State, No. 88-737, slip op. at 1-7 (Md. Ct. Spec. App. Apr. 17, 1989)). In reversing the circuit court, that court deemed three time periods to be significant. *Bailey*, 319 Md. at 405, 572 A.2d at 550 (quoting *Bailey*, No. 88-737, slip op. at 1-2). Central to its analysis was the time period from the dismissal of the original charges on June 6, 1986, until the reindictment on May 28, 1987. *Bailey*, 319 Md. at 406, 572 A.2d at 550 (quoting *Bailey*, No. 88-737, slip op. at 2-3). The court of special appeals was unwilling to accept that a nearly one-year delay after a *nolle prosequi* could ever be justified in order to obtain an enhanced punishment, noting that the evidence used to support the conviction two years later turned out to be no more than the same evidence that supported the initial indictment. *Bailey*, 319 Md. at 407, 572 A.2d at 551 (quoting *Bailey*, No. 88-737, slip op. at 5-6).

so might result in delay and denial of a speedy trial.[83] The court followed the *Barker* rationale that "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government."[84]

The State admitted that in dismissing charges they sought two advantages: (1) to develop an enhanced case of importation of a controlled dangerous substance against the defendant, and (2) to allow South Carolina to enroll a conviction *in absentia*, thus allowing Bailey to begin serving his time as a South Carolina prisoner.[85] Although the Court in *Barker* decries the impropriety of such tactics by prosecutors, such behavior is only a factor to be considered in the balancing analysis and is not determinative of whether the right to a speedy trial has been violated.[86] In balancing the factors, the court of appeals evidently considered the prosecutor's reasons for delay in bringing Bailey to trial less egregious than the intermediate appellate court below.

4. *Prejudice to the Defendant*

Reasoning that an affirmative demonstration of prejudice is not the sole determinant of denial of the constitutional right to a speedy trial, the Supreme Court in *Barker* assessed the degree of prejudice to the defendant in light of the three interests the right to speedy trial was designed to serve: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired.[87]

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83. *Bailey*, 319 Md. at 412, 572 A.2d at 553. The court of special appeals, however, was much more concerned with the prosecutor's motives in dismissing the earlier charges and the potential detriment to the defendant's case. Although consistent with the court of appeals' reasoning that the State had the right to make this procedural move, the court of special appeals expressly rejected both of the State's reasons for the dismissal, accepting the defense's argument that the dismissal was clearly to gain a tactical advantage by the State. Bailey v. State, No. 88-737, slip op. at 6 (Md. Ct. Spec. App. Apr. 17, 1989). The court of special appeals reasoned that "[t]he evidence supporting the conviction and the evidence supporting the reindictment is the same evidence that supported the initial indictment. The *nolle prosequi* here was only for purposes of tactical delay, not for purposes of building a *prima facie* case." *Id.*

84. *Bailey*, 319 Md. at 412, 572 A.2d at 553 (quoting *Barker*, 407 U.S. at 531).

85. *Id.* at 404, 572 A.2d at 549 (quoting the State's response to the motion to dismiss for lack of a speedy trial).

86. *Barker*, 407 U.S. at 531 & n.32. "We have indicated on previous occasions that it is improper for the prosecution intentionally to delay 'to gain some tactical advantage over [defendants] or to harass them.'" *Id.* at 531 n.32 (quoting United States v. Marion, 404 U.S. 307, 325 (1971)).

87. *Id.* at 532 (citing United States v. Ewell, 383 U.S. 116, 120 (1966)).

In Bailey's case, the first interest was not implicated since the majority of his incarceration prior to the Maryland trial was due to the previous conviction in South Carolina and not a result of the Maryland charges.[88] There may have been some anxiety and concern on Bailey's part since he was aware, as forewarned by the prosecution, that he would face the Maryland charges sooner or later, but the court felt this to be insignificant under the circumstances.[89] His greatest concern might have been the prospect of serving his Maryland conviction consecutively with the South Carolina sentence, but this would seem a bit premature given the totality of the situation.

The defense also claimed that the third interest of Bailey was violated in that his defense was impaired due to the loss of a potential witness.[90] The unavailable testimony evidently would have pertained to the importation charge that was added upon Bailey's reindictment. Since the jury subsequently found Bailey not guilty on that charge, the court of appeals reasoned that it was obvious Bailey was not prejudiced by the witness's absence.[91] The defense also claimed "actual prejudice" to Bailey in that he was not allowed to enjoy a work release program in the South Carolina jail and was kept in "lockdown status" due to the pending charges in Maryland.[92] The court of appeals held that such a suggestion was merely speculative and unsupported by the evidence, and was to be given little weight in assessing the factor of prejudice.[93]

While it is clear that the court of appeals looked to the *Barker* balancing test in considering whether Bailey's right to a speedy trial was denied, actual prejudice to the defendant was obviously the most important factor in their analysis. Lacking probative evidence that any significant prejudice actually resulted from the State's actions, the court was not convinced that Bailey was denied his constitutional guarantee.

The defendant's remedy for denial of the right to a speedy trial is dismissal of the indictment, a sanction previously depicted as "unsatisfactorily severe."[94] The Supreme Court in *Barker* considered this a "serious consequence," possibly allowing a guilty defendant

88. Bailey's time of incarceration in Maryland prior to the *nolle prosequi* and his return to South Carolina amounted to less than four months. *Bailey*, 319 Md. at 399-402, 572 A.2d at 547-48 (providing chronology of events).
89. *Id.* at 417, 572 A.2d at 556.
90. Brief of Respondent at 19-20, State v. Bailey, 319 Md. 392, 572 A.2d 544 (1990) (No. 89-75).
91. *Bailey*, 319 Md. at 419, 572 A.2d at 557.
92. *Id.* at 417, 572 A.2d at 555-56; *see also* Brief of Respondent at 18, State v. Bailey, 319 Md. 392, 572 A.2d 544 (1990) (No. 89-75).
93. *Bailey*, 319 Md. at 417, 572 A.2d at 556.
94. Barker v. Wingo, 407 U.S. 514, 522 (1972).

to go free without standing trial.[95] While acknowledging it as more serious than an exclusionary rule or a reversal for a new trial, the Court stressed that this "is the only possible remedy" when an accused has been deprived of the constitutional guarantee.[96] By affirming Bailey's drug conviction after a two year delay, the court of appeals sends a strong message that it will not grant this "unsatisfactorily severe" remedy unless a defendant can prove that even a delay of constitutional dimension was actually prejudicial.

Although the court of appeal's analysis is consistent with the Supreme Court's balancing test in *Barker*, it represents somewhat of a departure from the court's earlier application of the test in *Brady v. State*.[97] In *Brady*, the court of appeals was quick to overturn a conviction where the State's reason for a fourteen month delay was more akin to negligence than malevolence. In a 4-3 split decision, the court held that the State's indifference to Brady's whereabouts was the most important factor in a balancing analysis that revealed minimal prejudice to the defendant.

As characterized by the *Brady* dissent, the majority's decision to overturn Brady's conviction was primarily motivated by "disgust with the fact that we do not live in a perfect world where one may know at any given moment precisely who is incarcerated in Maryland."[98] This suggests that the majority intended to send a message to prosecutors that such negligence on the part of the State would not be tolerated and tips the scales in favor of defendants even when a clear showing of prejudice is lacking. Since the only remedy for denial of the speedy trial right is dismissal,[99] the *Brady* court's decision to invoke this severe remedy was also a decision to send this message emphatically.

The court in *Bailey*, however, indicated that this strict sanction should be reserved for those instances where an individual has actually suffered harm from the delay. The court found no actual prejudice and accepted the State's obvious attempt to gain a tactical advantage and a longer delay, attaching minimal significance to any prejudice Bailey may have suffered. This strongly suggests that the court now considers the reasons for delay less significant than whether any real

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95. *Id.*
96. *Id.* The Court quoted Justice White who had noted in an earlier case that overzealous application of the remedy would infringe "the societal interest in trying people accused of crime, rather than granting them immunization because of legal error . . . ." *Id.* at 522 n.16 (quoting United States v. Ewell, 383 U.S. 116, 121 (1966)).
97. 291 Md. 261, 434 A.2d 574 (1981); *see supra* notes 52-53 and accompanying text.
98. *Brady*, 291 Md. at 274, 434 A.2d at 581 (Smith, J., dissenting).
99. *See supra* notes 90-92 and accompanying text.

prejudice has resulted. Absent a showing of actual prejudice, the court of appeals now appears reluctant to overturn convictions even when delays are of significant duration.

One commentator has suggested that dismissal for a violation of the right to a speedy trial should only occur when the defendant's ability to defend himself is impaired by the delay.[100] The Supreme Court's opinion in *Barker* lends support to this suggestion by noting that of the three interests that the speedy trial right is designed to protect, possible impairment to the accused's defense is the most serious.[101] The court in *Bailey* noted this and, although not expressly stating that impairment was an absolute prerequisite to a finding of prejudice, was apparently satisfied that the absence of impairment in Bailey's case was proof that no prejudice resulted.[102]

The *Brady* dissent, joined by Judges Murphy and Rodowsky, emphasized that an impaired defense was not implicated in Brady's situation. When asked if the delay in any way damaged the defendant's ability to defend himself, Brady's counsel replied that "[n]o claim is made to that point of prejudice."[103] These same judges, now part of the *Bailey* majority, likewise were not convinced that Bailey's defense was impaired by the State's delay, and were unwilling to allow Bailey to walk free.

Considering the Supreme Court's recognition that delay at times may even work to the defendant's advantage,[104] it appears that the Maryland high court's decision to invoke the remedy only where the defense is actually impaired is more in harmony with the purpose of the constitutional protection. Judge Cole, who wrote both the majority opinion in *Brady* and the dissent in *Bailey*, is correct in his assessment that the court of appeals has departed from its application of the test in *Brady*. It is certainly arguable, however, that this more narrow application of the *Barker* test provides more protection to the general populace of Maryland by "secur[ing] rights to a defendant" while not "preclud[ing] the rights of public justice."[105] As

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100. Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 534-35 (1975). The author suggests that "the primary form of judicial relief against denial of a speedy trial should be to expedite trial, not to abort it." *Id.* at 535.

101. Barker v. Wingo, 407 U.S. 514, 532 (1972). The Court noted that "the inability of the defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past." *Id.*

102. State v. Bailey, 319 Md. 392, 417, 572 A.2d 544, 556 (1990).

103. Brady v. State, 291 Md. 261, 273, 434 A.2d 574, 580 (1981) (Smith, J., dissenting).

104. *Barker*, 407 U.S. at 521.

105. *Id.* at 522 (quoting Beavers v. Haubert, 198 U.S. 77, 87 (1905)).

such, the departure is an improvement over the result reached by the *Brady* majority.

The Supreme Court has clearly indicated that no one factor alone is either necessary or sufficient to find that a defendant's rights have been violated[106] and an affirmative demonstration of prejudice is not absolutely necessary to prove a denial of the speedy trial right.[107] Maryland's current analysis, however, seems to indicate that proof of actual prejudice, though not dispositive, is of greater importance than any other factor in the balancing test. While the other factors are still considered in the overall balancing process, future defendants in Maryland will likely have to provide a strong showing of actual prejudice in order to establish denial of the right to a speedy trial.

V. CONCLUSION

Although the Court of Appeals of Maryland appears to have shifted somewhat in their assignment of relative weights to the four factors employed in a speedy trial analysis, the decision in *Bailey* follows the premise of the Supreme Court in *Barker v. Wingo*: speedy trial claims are evaluated on an ad hoc basis, and no single factor is dispositive of denial of the right. While important in the overall analysis, the length of the delay serves primarily as a mechanism which triggers application of a balancing test to determine whether the right to a speedy trial was violated.

While the Maryland courts continue to rely on the *Barker* balancing test, proof of actual prejudice to the defendant is the determining factor in successfully overturning a conviction subsequent to a pre-trial delay. As the courts take a harder look at whether an accused has suffered any actual prejudice, the defense must produce convincing evidence of that prejudice to tip the scales in their favor. In particular, a showing that the delay has impaired the accused's ability to present his defense is considered most probative of actual prejudice.

Joseph W. Rasnic

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106. *Barker*, 407 U.S. at 533.
107. Moore v. Arizona, 414 U.S. 25, 26 (1973).