Maryland's Prompt Criminal Trial Provisions: Hicks and Beyond

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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

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, the charges shall be dismissed with prejudice, absent a finding of "good cause" for the postponement by the hearing judge, 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-
ments under section 591 were to be made for "extraordinary cause shown" and by the county administrative judge only. Soon thereafter, the court of appeals, as authorized by subsection 591(b), adopted former Maryland Rule 740, which incorporated section 591 by reference. Days later, in Young v. State, these two expressions of legislative and judicial policy were held by the court of special appeals to be directory only because no penalty had been provided for their violation. 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. 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. However, 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 no 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.
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."\textsuperscript{19}

Finally, in \textit{State v. Hicks},\textsuperscript{20} the court of appeals "cleared the waters,"\textsuperscript{21} holding the prompt trial provisions mandatory and dismissal of the charges as the appropriate penalty for their violation.\textsuperscript{22} On motion by the state for reconsideration, the court made it clear that it intended to overrule \textit{Young} and require mandatory dismissal.\textsuperscript{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,\textsuperscript{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."\textsuperscript{25} The court declared its ruling to be prospective only.\textsuperscript{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.\textsuperscript{27} Yet the court in \textit{Hicks} left for speculation what type of dismissal is warranted. One commentator concluded that dismissal should be absolute, or at least presumed abso-

\begin{itemize}
  \item \textbf{a. General Provision.}\n  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).
  \item \textbf{b. Change of Trial Date.}\n  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.
\end{itemize}

\textsuperscript{20} 285 Md. 310, 403 A.2d 356 (1979).
\textsuperscript{24} \textit{Id.} at 335, 403 A.2d at 369. \textit{See generally infra} Section IV (initial setting of a trial date).
\textsuperscript{25} State v. Hicks, 285 Md. 310, 335, 403 A.2d 356, 369 (1979). \textit{See generally infra} Section V (waiver of prompt trial provisions).
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

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).
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).
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.\textsuperscript{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.\textsuperscript{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 . . . ."\textsuperscript{40} In Hicks, the defendant's incarceration in another jurisdiction on the scheduled trial date amounted to extraordinary cause for postponement.\textsuperscript{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

\begin{itemize}
  \item[(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.
  \item[(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.
\end{itemize}

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.

40. Id. at 318, 403 A.2d at 360.
41. Id. at 318-20, 403 A.2d at 360-61.
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 guage 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).


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.

"Opinions 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." 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-

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).


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).

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. The mandatory dismissal penalty does not apply to cases brought and tried in the District Court of Maryland. 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.

The prompt trial provisions may also be defined by their exceptions. For example, they do not apply to delay between arrest and initial appearance in the circuit court. 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. 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," and the prompt trial provisions do not limit this authority. Thus, the trial judge may grant a continuance so long as it does not violate the defendant's constitutional

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)).
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).
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

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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.
within 180 days regardless of good cause, 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. 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. In other words, "a plea of guilty, effectively accepted, waives all procedural objections, constitutional or otherwise and all non-jurisdictional defects."

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." The trial judge may, in his discretion, deny a request for postponement but he may not grant postponement for approval by the hearing judge after the expiration of the 180 day period.

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).

[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.


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 reinstituted. As a general rule, "separate charging documents have separate lives and exist independent of each other." But as the court of appeals held in *Curley v. State*,

[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.

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. 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. 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.

IV. POSTPONEMENT OF TRIAL DATE

Any party 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: (1) request postponement from the hearing

71. See Md. R. P. 4-247.
74. *Id.* at 462, 474 A.2d at 508.
75. *Id.*
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 problems\(^84\) 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 motion\(^88\)

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\(^80\) 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 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).


\(^86\) 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 "upon 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,\textsuperscript{89} the defendant,\textsuperscript{90} a codefendant,\textsuperscript{91} or the trial court.\textsuperscript{92} Although the request may be oral,\textsuperscript{93} the better practice is to make the request and the reasons therefore in writing\textsuperscript{94} so that they become a part of the record.\textsuperscript{95} Although the request should be express and articulate,\textsuperscript{96} it may be made "by the requesting party's seeking some type of relief which by necessity requires the granting of a postponement \ldots"\textsuperscript{97}


For example, in *Monge v. State*, 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].” Similarly, in *State v. Hicks*, 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. In *Goins v. State*, 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, and in *Carey v. State*, an order by the county administrative judge for the defendant’s mental exam was held to be a *sua sponte* postponement.

### 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. 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.” Because the prompt provisions were enacted “to protect the societal interest in the prompt trial of criminal cases . . .,” the term “good cause” is simply a measuring device used to achieve this goal.

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

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99. Id. at 79-80, 461 A.2d at 26.
101. Id. at 318-19, 403 A.2d at 360-61.
103. Id. at 121, 425 A.2d at 1378.
105. Id. at 21-22, 472 A.2d at 447.
109. Id. at 229, 458 A.2d at 484.
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"
factor in constitutional speedy trial litigation, the "reason for delay" factor under constitutional speedy trial analysis may be helpful in determining what constitutes good cause in prompt trial litigation.

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. Although a defendant's need for postponement to secure counsel may be good cause, timing is extremely important. Thus, in one case, an eleventh hour request to change counsel was not good cause, and, in another case, the defendant's insistence, on the date of trial, that appointed counsel was unprepared was not extraordinary cause. The need by a defendant to visit a sick relative on the day of trial was also found not to constitute good cause.

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. 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, when time was taken up on a pretrial suppression motion, and when good cause was found on request for postponement by a codefendant. Moreover, extraordinary cause may exist where removal is granted and


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.


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), reprinted in Rubine, supra note 31, at 810 n.75.


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-

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).
144. See Joseph, supra note 6, at 636, 640.
weighs the need for such postponement. Newly discovered evidence, however, may constitute good cause.

Another source of litigation concerns whether the unavailability of judicial resources on the date of trial constitutes good cause for postponement. 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. The court of appeals intervened, however, and held in State v. Fraizer, 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. "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."

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).
151. Id. at 461-62, 470 A.2d at 1289-90.
ment or delay, while holding chronic court congestion as inexcusable under their respective state statutes or rules of procedure. 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.

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." 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]."

Like the early decisions of the Court of Special Appeals of Maryland, 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. 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

154. Id. at 457, 470 A.2d at 1287.
155. Loker, supra note 28, at 32.
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).
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disorder.”159

From the preceeding 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, “[f]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.


speedy trial analysis.” 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. 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.

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*:

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.

The court added a cautionary note in *Farinholt v. State*, 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.”

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

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


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

cretion, and of late more and more clarity and detail is prescribed."

Although approval may be granted informally, orders of postponement should be on the record and explicitly state the reasons therefor. Postponements made in chambers should also be recorded stenographically. 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. Postponement may be granted *sua sponte*, without request, hearing, or order of approval.

Although the trial judge plays a backstage role under the prompt trial provisions, 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.

As to burden of proof, the prompt trial provisions require that good cause of postponement be *shown* by the requesting party, who “bears the burden of demonstrating to the administrative judge or his designee that [the prompt trial] requirements are satisfied.” 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 record their performance on the record.”

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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).


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. 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, even though such a hearing is not a "critical stage" requiring his presence.

As both defense counsel and prosecuting attorneys have learned, the need to preserve the record for appellate review is crucial. A good example is Hughes v. State, 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.


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

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

This decision must be compared with *Larsen v. State*, in which approval of a postponement for lack of judicial resources was upheld because of a carefully developed record that clearly showed good cause. 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.

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; if it does not, all related charges must be dismissed with prejudice and forever, and the defendant is absolved of his crimes.

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. 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.

Because, however, there must be good cause shown for the length of the

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189. *Id.* at 702-03, 407 A.2d at 334.
delay between postponement and trial, \textsuperscript{198} request for postponement by a defendant \textsuperscript{199} or failure by a defendant to otherwise object to postponement \textsuperscript{200} 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." \textsuperscript{201} Nor is the defendant entitled to dismissal when he attempts to indirectly "gain advantage" through his own dilatory devices. \textsuperscript{202} Also, if the defendant fails to raise and move for dismissal on prompt or speedy trial grounds, appellate review on those issues is precluded. \textsuperscript{205}


\textsuperscript{205} \textit{See} Md. R.P. 885 and 1085 (1977) (appellate review); \textit{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). \textit{See generally Joseph, supra} note 6, at 621 (waiver by failure to move for dismissal); Loker, \textit{supra} note 28, at 31 (waiver for failure to move for dismissal); \textit{infra} Section VI (motion to dismiss under Md. R.P. 4-252).
Other examples of prompt trial waiver deal with pretrial motions by defendants, most of which would have also constituted good cause for postponement when requested by the state or the trial judge. For example, a defendant's motions for severance and for removal were both viewed as a waiver of the dismissal penalty because they extended the trial date beyond the 180-day period. 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]." 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. Other examples in the literature include waiver due to flight or unexcused absence of a defendant and refusal by a defendant to waive extradition.

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

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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).


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


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.\textsuperscript{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.\textsuperscript{217}

Although delay beyond the 180-day period due to bona fide plea negotiations would not constitute a waiver by the defendant,\textsuperscript{218} it may constitute good cause for the state to postpone.\textsuperscript{219} The acceptance of a guilty plea, however, "waives all procedural objections, constitutional or otherwise, and all non-jurisdictional defects."\textsuperscript{220} Moreover, once a defendant agrees to a plea bargain, "obviat[ing] the need for trial altogether," there is a \textit{de facto} waiver of the prompt trial penalty, even if the plea is not consummated within the 180-day period.\textsuperscript{221} A \textit{de facto} waiver analysis would apply equally to trial on charges for which the defendant received probation before judgment that he later violated.\textsuperscript{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.\textsuperscript{223} Because a defendant has no duty to bring himself to trial, the state should request a postponement for good cause\textsuperscript{224} 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.\textsuperscript{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 appeal\textsuperscript{226} than is a finding of waiver\textsuperscript{227} or of improper dismissal.\textsuperscript{228}

\textsuperscript{216} Howell v. State, 293 Md. 232, 443 A.2d 103 (1982).
\textsuperscript{218} Cf. Joseph, \textit{supra} note 6, at 633.
\textsuperscript{219} \textit{See generally supra} Section IV(B) (good cause for postponement).
\textsuperscript{221} \textit{Id.} at 182-83, 426 A.2d at 422-23.
\textsuperscript{222} \textit{See Joseph, supra} note 6, at 641.
\textsuperscript{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, \textit{supra} note 6, at 647. \textit{See generally infra} note 235 (strategy under Md. R.P. 4-252).
\textsuperscript{228} \textit{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. A fair reading of the prompt trial provisions dictates that all involved must show good cause when effecting any prompt trial postponement. This reading is


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, 438 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. 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


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.


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. 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. 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. 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].


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-
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
Prompt Trial Applicable (Without penalty)

Postponement by Hearing Judge for Good Cause Shown

Day 180
Prompt Trial Applicable (With penalty if no good cause or no waiver)
(Without penalty if good cause or waiver)

Speedy Trial Applicable

Trial Date

Prompt Trial Inapplicable

Continuance In Discretion of Trial Judge

Retrial

Prompt Trial Inapplicable

Postponement or Continuance In Discretion of Trial Judge

Speedy Trial Applicable