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# CASES NOTED

## THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL— ONE WAY OR THE OTHER

The petitioner, Dickey, a federal prisoner in Leavenworth, Kansas, had been the subject of an outstanding arrest warrant from Gadsden County, Florida since 1960.<sup>1</sup> In 1962, 1963, and 1965, he filed petitions in the Gadsden Circuit Court asking the state attorney to either return him to Florida to stand trial for the crime charged by the warrant *or* to withdraw the detainer<sup>2</sup> against him on the ground that he was being denied a speedy trial. After each of these petitions were denied by the circuit court,<sup>3</sup> Dickey petitioned the Florida Supreme Court to issue a writ of mandamus ordering the circuit court to either secure his return for trial or withdraw the detainer.

In *Dickey v. Circuit Court*,<sup>4</sup> the Florida Supreme Court held that incarceration in another jurisdiction does not make the accused unavailable for trial since there have long been means by which one jurisdiction, for the purpose of a criminal trial, can obtain custody of a

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1. Robert Dean Dickey was in custody in the Jackson County Jail, Marianna, Florida, on federal bank robbery charges when he was identified by a female robbery victim as the man who had robbed the Clark's Motor Court in Gadsden County at 12:00 midnight on June 28, 1960. Pursuant to the identification an arrest warrant was issued charging Dickey with armed robbery. (Under Florida law this step tolls the statute of limitations. *See* *Rosengarten v. State*, 171 So.2d 591 (Fla. 2d Dist. 1965); *State v. Emanuel*, 153 So.2d 839 (Fla. 2d Dist. 1963).) From July 1960 to September 1960, Dickey remained in the Jackson County Jail, but the Gadsden County Sheriff's office, fully cognizant of his whereabouts, made no effort to serve the warrant or gain custody for trial. In September of 1960, Dickey was convicted on federal charges and was removed from Florida, first to Leavenworth and then to Alcatraz, whereupon a formal detainer was lodged against him.

2. A detainer, or hold order, notifies the incarcerating authorities that the prisoner is wanted, and requests that the authorities desiring custody be forewarned of the prisoner's release date so they can arrange to pick him up at the institution. The existence of a detainer may have several adverse effects upon the prisoner. He may, for that reason, be held under maximum security. He may also be denied opportunities open to other prisoners, such as transfer to a minimum security area, the privilege of being a trustee, or assignment to a job involving a degree of trust. The detainer makes the prisoner's future uncertain, and, thus, renders more difficult the formulation of an effective rehabilitation program. Many parole boards will not consider parole for a prisoner who has a detainer lodged against him. *See* L. HALL, Y. KASIMAR, W. LAFAYE, & J. ISREAL; *MODERN CRIMINAL PROCEDURE* 921 (3d ed. 1969) (chapter 19 provides a good discussion of the recent developments in the law of speedy trial).

3. The petitions were denied on several grounds: first, that Dickey's unavailability for trial in Florida was the result of his voluntary commission of a federal crime, the natural consequence of which was incarceration in a federal penal institution; second, that the speedy-trial issue was prematurely raised because only at the time of trial can a determination be made as to whether the delay has made a fair trial impossible; third, that even if the denial of an immediate trial was violative of Dickey's sixth amendment rights, it was a deprivation caused wholly by the federal officials having custody of his person, and relief must be sought from those authorities.

4. 200 So.2d 521 (Fla. 1967).

prisoner held by another.<sup>5</sup> Pursuant to the 1967 decision,<sup>6</sup> the Gadsden County State's Attorney issued an information and secured petitioner's return to Florida for the purpose of trying him for the 1960 robbery charge. Dickey then moved to quash the information alleging that he had been prejudiced by the long delay and that if he were tried, it would be a denial of his sixth amendment right to a speedy trial.<sup>7</sup> The motion was denied, and the petitioner was convicted and sentenced to ten years imprisonment. The petitioner then appealed from the trial court's denial of the motion to quash whereupon the District Court for the First District of Florida affirmed the conviction.<sup>8</sup> On certiorari to the United States Supreme Court, *held, reversed*: An accused who makes diligent and repeated efforts by motions in a state court to secure a prompt trial, who is tried and convicted eight years after the alleged commission of a crime, and who is prejudiced by the unnecessary delay, has been denied his constitutional right to a speedy trial. *Dickey v. Florida*, 398 U.S. 30 (1970).<sup>9</sup>

The right to a speedy trial is conferred by both the federal<sup>10</sup> and state<sup>11</sup> constitutions and expressed by both state statute<sup>12</sup> and federal rules.<sup>13</sup> Until recently, however, the right has been conservatively interpreted by the courts.<sup>14</sup> Prior federal decisions had held that the sixth

5. This decision by the Florida Supreme Court came two years before a similar decision by the U.S. Supreme Court in *Smith v. Hooey*, 393 U.S. 374 (1969).

6. In substance, the court held for Dickey, but since he had named the circuit court as respondent, rather than the appropriate state attorney, his petition was dismissed without prejudice to his right to file another petition naming the appropriate respondent. *Dickey v. Circuit Court*, 200 So.2d 521, 528 (Fla. 1967).

7. The motion to quash alleged that the delay of more than seven years was sufficiently prejudicial to make a fair trial impossible because an essential and material witness, Dickey's sister, had died in 1964, and that had she been available she would have testified that Dickey called her from Georgia on the night the alleged robbery was committed.

8. *Dickey v. State*, 215 So.2d 772 (Fla. 1st Dist. 1968).

9. In 1967, the Supreme Court in *Klopfer v. North Carolina*, 386 U.S. 213 (1967) held that the sixth amendment right to a speedy trial was binding upon the states through the fourteenth amendment. See notes 21 and 22 *infra* and accompanying text.

10. "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial. . . ." U.S. CONST. amend VI.

11. "In all criminal prosecutions the accused shall, upon demand, . . . have a speedy and public trial by impartial jury . . . where the crime was committed. . . ." FLA. CONST. DECL. OF RIGHTS § 16.

12. FLA. STAT. § 918.015 (Supp. 1970) provides: "*Right to speedy trial.*—In all criminal prosecutions the state and the defendant shall each have the right to a speedy trial." [Subsequent to the writing of this article, FLA. STAT. § 915.01 (Supp. 1970) and FLA. STAT. § 915.02 (Supp. 1970), which dealt with the "three term of court" speedy trial rule, have been repealed. In lieu thereof the Florida Supreme Court has passed an amendment to the Florida Rules of Criminal Procedure through which the right to a speedy trial as guaranteed by the Constitution shall be realized. See FLA. R. CRIM. P. 1.191 (1971).]

13. If there is unnecessary delay in presenting the charges to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

FED. R. CRIM. P. 48(b).

14. See *United States v. Ewell*, 383 U.S. 116 (1966), wherein the Court held a 19-month delay between arrest and hearing on the indictments was not a violation of the sixth amendment, because

amendment federal guarantee of a speedy trial was not directly applicable to state action,<sup>15</sup> but that an unreasonable delay of a state trial could, if sufficiently prejudicial, violate a defendant's due process rights under the fourteenth amendment due process clause.<sup>16</sup> In determining whether the denial of a speedy trial has assumed proportions which contravene the notion of due process the courts generally considered four factors: the length of delay, the reason for the delay, the prejudice to the defendant, and waiver by the defendant.<sup>17</sup> Thus, if there were a seemingly good reason for the state's delay,<sup>18</sup> if the defendant could show no prejudice,<sup>19</sup> or if the defendant had somehow waived his right to a speedy trial (e.g., by pleading guilty, by agreeing to a continuance, or by not making a timely demand for a trial),<sup>20</sup> there was no denial of due process of law.

Then, in 1967, the Supreme Court held in *Klopfer v. North Carolina*,<sup>21</sup> that the sixth amendment standards governing the right to a speedy trial are binding on the states through the fourteenth amendment:

In the light of *Gideon, Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in [*West v. Louisiana*, 194 U.S. 258 (1904)] and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against compelled self-incrimination, is "to be enforced against

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The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.

United States v. Ewell, 383 U.S. 116, 120 (1966), quoting from, *Beavers v. Haubert*, 198 U.S. 77, 87 (1905).

In *United States ex rel. Von Cseh v. Fay*, 313 F.2d 620 (2d Cir. 1963), a three year, seven month delay from indictment to trial was held *not* to be a denial of the right to a speedy trial since the state, claiming its principal witness was in India, had good reason for the delay. See generally Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587 (1965). Cf. *United States v. Chase*, 135 F. Supp. 230 (N.D. Ill. 1955), where a twenty-year delay in bringing the defendant to trial was considered to be a denial of the right to a speedy trial.

15. *Beasley v. Pitchess*, 358 F.2d 706 (9th Cir. 1966); *United States ex rel. Von Cseh v. Fay*, 313 F.2d 620 (2d Cir. 1963); *Odell v. Burke*, 281 F.2d 782 (7th Cir. 1960), cert. denied, 364 U.S. 875 (1960); *Germany v. Hudspeth*, 209 F.2d 15 (10th Cir. 1954).

16. *Beasley v. Pitchess*, 358 F.2d 706 (9th Cir. 1966).

17. *Id.* at 708; Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846 (1957).

18. See *United States ex rel. Von Cseh v. Fay*, 313 F.2d 620 (2d Cir. 1963) where the state's excuse for a three year and seven month delay was that its principal witness was in India and unavailable.

19. *Id.* The defendant was out on bail during the three year and seven month delay so the court reasoned he was not prejudiced by the delay.

20. See cases collected in Annot., 57 A.L.R.2d 302 (1958) (*Waiver or loss of accused's Right to a Speedy Trial*). See also *United States v. Lustman*, 258 F.2d 475 (2d Cir. 1958).

21. 386 U.S. 213 (1967).

the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." [Citation omitted.] We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage.<sup>22</sup>

This extension of the right to a speedy trial led to the new question of whether a state has, upon demand, an affirmative duty to secure the presence of the accused for trial when the accused is incarcerated by another sovereign.<sup>23</sup> This question was answered in the affirmative first by the Florida Supreme Court in *Dickey v. Circuit Court*,<sup>24</sup> and later by the United States Supreme Court in *Smith v. Hoey*.<sup>25</sup>

It is sufficient to say then when an accused held by another sovereign makes demand for speedy trial in this state on charges forming the basis for a detainer warrant pending against him the state must initiate action to procure the presence of the accused for trial, unless the circumstances make it unreasonable for the state to do so.<sup>26</sup>

However, in neither case did the holding go so far as to say that the refusal of a state to secure for trial an accused who was incarcerated by another sovereign was a *per se* denial of the sixth amendment right to a speedy trial. Indeed, in *Smith v. Hoey*, which was "remanded for further proceedings not inconsistent with this opinion," Justice Harlan stated in a separate opinion:

I do not believe that Texas should automatically forfeit the right to try petitioner. If the State still desires to bring him to trial, it should do so forthwith. At trial, if petitioner makes a *prima facie* showing that he has in fact been prejudiced by the State's delay, I would then shift to the State the burden of proving the contrary.<sup>27</sup>

It is somewhat ironic that Justice Harlan, in his separate opinion in *Smith v. Hoey*, raised the very questions which were before the Court in the instant case:

I believe however, that the State is entitled to more explicitness from us as to what is to be expected of it on remand. . . .

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22. *Id.* at 222, 223.

23. The converse of this question, *i.e.*, that an incarcerated defendant could not object to being remanded to another state for the purpose of trial, was established in *Ponzi v. Fessenden*, 258 U.S. 254 (1922).

24. 200 So.2d 521 (Fla. 1967).

25. 393 U.S. 374 (1969).

26. *Dickey v. Circuit Court*, 200 So.2d 521, 523 (Fla. 1967).

27. *Smith v. Hoey*, 393 U.S. 374, 384 (1969).

*If petitioner contends that he has been prejudiced by the nine-year delay, how is this claim to be adjudicated?*<sup>28</sup>

This was the state of the law when Dickey argued that the failure of Florida to secure his presence for trial pursuant to his 1962, 1963, and 1965 demands, and the resulting eight-year delay, was a denial of his right to a speedy trial.

The argument of the Florida Attorney General in the instant case was that when the petitioner demanded a trial in 1962, 1963, and 1965, there was no constitutional requirement that Florida provide him with a speedy trial in that *Klopfers* and *Smith v. Hooey* were not then the operative law.<sup>29</sup> Thus, the Court was presented with a perfect opportunity to hold *Klopfers* retroactive. Instead, Chief Justice Burger, speaking for the majority, and without *expressly* stating the specific constitutional basis for the decision, held for petitioner by stating:

[N]o valid reason for the delay existed; it was exclusively for the convenience of the State. On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law. In addition to exerting every effort to require the State to try him, there is abundant evidence of actual prejudice to petitioner in the death of two potential witnesses, unavailability of another, and the loss of police records. This is sufficient to make a remand on that issue [prejudice] unnecessary. We therefore reverse and remand . . . with directions to vacate the judgment appealed from and discharge the petitioner. . . .<sup>30</sup>

Justice Harlan, apparently uncertain of the constitutional basis for the majority's opinion, but strongly in favor of applying the due process clause of the fourteenth as opposed to making the sixth amendment binding on the states through the fourteenth,<sup>31</sup> reasoned that by either standard the petitioner was denied a speedy trial.

However, whether it be the Due Process Clause or the Sixth Amendment that is deemed to apply, I fully agree that petitioner's federal constitutional rights were violated by Florida's actions in this instance.<sup>32</sup>

Justice Brennan, in his concurring opinion, hinted that the constitutional basis for the decision is the due process clause.

Accordingly, assuming *arguendo* that *Klopfers* is not retroactive, the question here is whether petitioner's trial was un-

28 *Id.* (emphasis added).

29. Brief for Respondent at 14, *Dickey v. Florida*, 398 U.S. 30 (1970).

30. *Dickey v. Florida*, 398 U.S. 30, 36 (1970).

31. See the concurring opinion of Justice Harlan in *Klopfers v. North Carolina*, 386 U.S. 213, 226 (1967) and his separate opinion in *Smith v. Hooey*, 393 U.S. 374, 383 (1969).

32. *Dickey v. Florida*, 398 U.S. 30, 39 (1970).

constitutionally delayed under the test of due process applicable to the states prior to *Klopfer*.<sup>33</sup>

After a lengthy and comprehensive discussion of the history of the law relating to speedy trial, Justice Brennan concluded that the full scope of the newly expanded right is yet uncertain and undefined.

These comments provide no definitive answers. I make them only to indicate that many—if not most—of the basic questions about the scope and context of the speedy trial guarantee remain to be resolved.<sup>34</sup>

It may be that the impact of the instant case will be measured more by what was not said than by what was. The specific constitutional basis for the decision is somewhat ambiguous, and clarification by the Supreme Court is needed. The retroactivity of *Klopfer* remains an issue, but on the rationale of the instant case, state court defendants who assert a denial of a speedy trial prior to the 1967 *Klopfer* decision should be prepared to establish the unconstitutionality of the delay under the old test which necessitates a showing that the delay contravened the due process clause of the fourteenth amendment irrespective of the specific guarantee of speedy trial under the sixth amendment. Establishing this will, of course, depend upon the facts of each particular case. Apparently, prejudice from the delay must still be established, and this is true irrespective of the length of the delay. In this writer's opinion, a specific showing of prejudice should be wholly unnecessary if the defendant can show a substantial delay.<sup>35</sup> The question of what is a substantial delay should be determined by the Court as it further defines the scope of the speedy trial right. The rule which appears preferable would hold any trial more than six months after arrest to be stale. Establishing fixed guidelines for determining what is, and what is not, a "speedy trial" is essential if the right to a speedy trial is ever to enjoy the same enforceability as the now firmly established right to counsel.

The instant case has established that the right to a speedy trial no longer may be considered a mere theoretical or abstract right, but rather a right rooted in the pragmatic need to have charges promptly disposed. In spite of the Court's lengthy and comprehensive evaluation of the law in this area, many questions pertaining to the scope and application of the right to a speedy trial remain unanswered. However, it is almost certain that the trends evidenced by the instant case and its predecessors will result in increased awareness by the state of its duty to provide those

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33. *Id.*

34. *Id.*, at 56.

35. See generally *United States v. Lustman*, 258 F.2d 475 (2d Cir. 1958). See also *Hedgepeth v. United States*, 364 F.2d 684 (D.C. Cir. 1966); *Williams v. United States*, 250 F.2d 19 (D.C. Cir. 1957). This would only be true, however, when the delay is not attributable to the defendant's conscious effort to avoid trial.

charged with crimes a speedy trial. In the words of Justice Brennan, "the speedy trial guarantee should receive a more hospitable interpretation than it has yet been accorded."<sup>36</sup>

ALBERT G. CARUANA

### VOTING RIGHTS: LIMITATIONS ON THE FRANCHISE BASED ON PROPERTY OWNERSHIP IN GENERAL OBLIGATION BOND ELECTIONS

Pursuant to statutory provisions,<sup>1</sup> only real property taxpayers were permitted to vote in an election to authorize the issuance of general obligation and revenue bonds which were to be secured by property tax revenues.<sup>2</sup> The appellee, a nonfreeholder, challenged the constitutionality of this voting restriction and attacked the validity of the election. A three judge federal district court declared the election unconstitutional, enjoining the issuance of the approved bonds.<sup>3</sup> On appeal, the Supreme Court of the United States *held*, affirmed: The challenged provisions of the Arizona Constitution and statutes, when applied to exclude non-property owners from voting for the approval of the issuance of general obligation bonds, violate the equal protection clause of the United States Constitution.<sup>4</sup> *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970).

The right to vote in state elections, though fundamental, is not expressly guaranteed by the United States Constitution.<sup>5</sup> However, the states are limited somewhat as to their power to establish voter qualifications,<sup>6</sup> and limitations on the right to vote based on property owner-

36. *Dickey v. Florida*, 398 U.S. 30, 57 (1970) (concurring opinion).

Subsequent to the writing of this note, the trend has been in the direction of the establishment of court made rules of procedure which generally prescribe that the defendant must be tried within six months of arrest. *See, e.g., Second Circuit Rules Regarding Prompt Disposition of Criminal Cases*, 434 F.2d Advance Sheet No. 2 p. LI (1971). *See also* FLA. R. CRIM. P. 1.191 (1971), which provides, among other things, that a person charged with a misdemeanor be tried within 90 days from the time such person is taken into custody; that a person charged with a felony be tried within 180 days from the time such person is taken into custody; and that any person charged with any crime, upon *demand*, be brought to trial within 60 days of the filing of the demand.

1. ARIZ. CONST. art. 7, § 13 and art. 9, § 8; ARIZ. REV. STAT. ANN. §§ 9-523, 35-542 (1956); ARIZ. REV. STAT. ANN. § 35-455 (Supp. 1969).

2. The general obligation bonds were to be issued to finance municipal improvements. Under Arizona law, the city was legally privileged to use other revenues for this purpose.

3. *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970).

4. The rule announced was to be applied prospectively only, but was applicable in this case since the suit was brought within the prescriptive period (5 days) for challenging the election pursuant to ARIZ. REV. STAT. ANN. § 16-1202 (Supp. 1969).

5. At the time the constitution was ratified, the majority of the states imposed property qualifications to exercising the voting franchise. K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 110 (1918).

6. The states are prohibited from discriminating because of race, U.S. CONST. amend. XV; sex, U.S. CONST. amend. XIX; or ability to pay poll tax, U.S. CONST. amend. XXIV.