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## Speedy Trial—No “Mere Ceremonial”

Robert B. Henn\*

IN RECENT YEARS, THERE HAS BEEN A PROGRESSIVE REFINEMENT OF INDIVIDUAL RIGHTS, to the extent that due process must be accorded to the participant in not only judicial proceedings, but administrative actions as well.<sup>1</sup> Yet, in the face of this, the anomaly exists that one highly important individual right, clearly defined by the Speedy-Trial Clause of the Sixth Amendment, is persistently abused by courts who adhere to overly strict, and demonstrably improper, interpretations of its requirements, and by prosecutors who seem to feel that a prompt determination of the innocence or guilt of the accused is a matter of grace, not of right.

However, a clear description of Sixth-Amendment rights points out that:

. . . These are not mere ceremonials to be neglected at will in the interests of a crowded calendar or other expediencies. They are basic rights. They bulk large in the totality of procedural rights guaranteed to a person accused of a crime. . . .<sup>2</sup>

In the light of Supreme Court decisions handed down within the last five years,<sup>3</sup> and recently promulgated rules of court,<sup>4</sup> the Sixth-Amendment guarantee of a speedy trial, long a step-child of constitutional law, may be coming to life. Admittedly, the vitalization of this fundamental right is more apparent than real at present. While the Supreme Court, in *Dickey v. Florida*,<sup>5</sup> has ruled on the right of an accused to a speedy trial, the real analysis of the subject was in a concurring opinion.<sup>6</sup> But the second circuit rules, while still too new for the effect to be felt, continue to permit prosecutorial delay for “good cause”.<sup>7</sup> Whether prosecution is delayed for “good cause”, ineptness or downright malice, the emotional and monetary toll taken of the accused is the same.

While the Sixth Amendment guarantees to the accused “. . . the right to a speedy and public trial. . .”, the federal and state judiciaries have long acted in what must seem to defendants like a con-

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<sup>1</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>2</sup> *Pollard v. United States*, 352 U.S. 354, 364 (1959).

<sup>3</sup> *See, e.g.*, *Klopper v. North Carolina*, 386 U.S. 213 (1967); *Smith v. Hooy*, 393 U.S. 374 (1969); *Dickey v. Florida*, 398 U.S. 30 (1970); *United States v. Marion*, —U.S.—, 30 L.Ed.2d (1971).

<sup>4</sup> United States Court of Appeals Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, as amended May 24, 1971, 442 F.2d LIX.

<sup>5</sup> 398 U.S. 30 (1970).

<sup>6</sup> *Dickey v. Florida*, 398 U.S. 30, 44 (1970).

<sup>7</sup> United States Court of Appeals Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, as amended May 24, 1971, 442 F.2d LIX, Rule 4, at LX.

spiracy to deny that right of speedy trial.<sup>8</sup> In passing, it must be noted that while the framers of the Constitution saw fit to place the rights of speedy and public trial on the same plane by use of the conjunctive, the courts have seen fit to bend every effort toward assuring a *public* trial,<sup>9</sup> but have resorted to nearly every stratagem in the book to avoid reversing convictions or dismissing indictments for failure of a *speedy* trial.<sup>10</sup>

Interestingly, the Supreme Court has not spoken on the one point which seems to be the rallying cry of those who would deny the right to a speedy trial for the accused: the doctrine of "waiver".<sup>11</sup> The waiver doctrine, briefly stated, is that one accused of a crime must affirmatively seek to be tried,<sup>12</sup> resist all efforts by the prosecution to delay the trial,<sup>13</sup> and take no affirmative action of his own to delay trial.<sup>14</sup> If he fails in any of these requirements, he is deemed to have "waived" his right to be tried speedily.

The Court has affirmed the right of the accused to a speedy trial, by holding that a prisoner in a federal penitentiary has been denied that right by a state which took no action to have him returned to the state for trial until after the expiration of his federal sentence;<sup>15</sup> that the right is applicable to the states through the provisions of

<sup>8</sup> For a discussion and analysis of the speedy-trial question, *see generally* Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476 (1968), Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587 (1965).

<sup>9</sup> *See, e.g.*, United States *ex rel.* Orlando v. Fay, 350 F.2d 967 (2d Cir. 1956).

<sup>10</sup> *See, e.g.*, State *ex rel.* Lotz v. Hover, 174 Ohio St. 68, 186 N.E.2d 841, 843 (1962), ("... [R]ight to a speedy trial does not automatically accrue to the accused." . . .); State v. Sawyer, 266 Wis., 494, 63 N.W.2d 749, 751 (1954), ("The State and Federal Constitutions guarantee a right to a speedy, public trial but they do not compel one unless the person accused claims the right. . .") (Emphasis added.); State v. Cunningham, 171 Ohio St. 54, 167 N.E.2d 897, 902 (1960), ("... [W]here a criminal cause is continued without disclosing the ground, the court will presume the continuance was upon sufficient ground, in the absence of anything in the record to the contrary . . . and [notwithstanding] the fact that the cause had already been continued three times on motion of the state.") (Emphasis added).

<sup>11</sup> Not only has the Court not spoken on the waiver doctrine as applied to Sixth-Amendment considerations of speedy trial, it has hardly spoken on speedy trial at all. Beside the cases cited in note 3, *supra*, only three cases dealt substantially with speedy trial *per se*, and did not touch upon waiver. *See* Beavers v. Haubert, 198 U.S. 77 (1905); Pollard v. United States, 352 U.S. 354 (1957); United States v. Ewell, 383 U.S. 116 (1966).

<sup>12</sup> The comment by the court in Cunningham v. Haskins, Supt., 3 Ohio St.2d, 86, 209 N.E.2d 211 (1965), is reasonably representative: "... to constitute a denial of speedy trial, petitioner must have made a request for trial. He cannot create this defense by nonaction on his own part." *See also* United States v. Kaye, 251 F.2d 87 (2d Cir. 1958), *cert. denied*, 356 U.S. 919 (1958). For a case showing an affirmative application of the demand moiety of the waiver doctrine, *cf.* Kane v. Virginia, 419 F.2d 1369 (6th Cir. 1970), where a federal prisoner was granted habeas corpus relief and dismissal of state charges for lack of speedy trial (under the doctrine of Smith v. Hooy, 393 U.S. 374 (1969); in *Kane*, the prisoner had made persistent demands upon the Virginia authorities to be tried.

<sup>13</sup> United States v. Dichiarinte, 385 F.2d 333 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1969).

<sup>14</sup> *See, e.g.*, State v. Rice, 14 Ohio App.2d 20, 235 N.E.2d 732, 734 (1968), where the court said, "... if any delay could be ascribed to pleas, motions or proceedings filed on behalf of defendant, then claim of lack of speedy trial will fail. . . ." (Emphasis added.) *But see* State v. Meeker, 26 Ohio St.2d 9, 268 N.E.2d 589 (1971).

<sup>15</sup> Smith v. Hooy, 393 U.S. 374 (1969); Dickey v. Florida, 398 U.S. 30 (1970).

the Fourteenth Amendment;<sup>16</sup> that a state may not withhold prosecution of a charge, only to reinstate it at a later and more propitious time.<sup>17</sup> But in each case, the defendant had strenuously asserted his right to be tried speedily, had resisted prosecution efforts at delay, and had done no acts which could reasonably be construed as dilatory. Thus, the legitimacy of the waiver doctrine has never been squarely faced by the court.<sup>18</sup> Which is not to say that the question has never been presented.<sup>19</sup>

But whatever the reasons for not addressing the question of waiver squarely in the past, Mr. Justice Brennan's analytical concurrence in *Dickey*<sup>20</sup> may portend some reversal of restrictive lower-court rulings in times not too distant.

Indeed, the second circuit rules on the subject of "prompt disposition of criminal cases" indicate a growing awareness on the part of the judiciary, at least, that the subject does need the guidance of somebody besides the prosecutor's office.<sup>21</sup>

The contention is made here that the Sixth-Amendment right to a speedy trial is far too important to the proper adjudication of rights under our Constitution for the cavalier treatment it has received in the courts. Indeed, ". . . the equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake. . . ." <sup>22</sup> It is also worthy of note that the commentators on the subject are uniformly critical of the waiver doctrine.<sup>23</sup>

## The Tripartite Waiver Doctrine

### *Demand*

The majority rule in the United States, with respect to waiver of the right to a speedy trial by the inaction of the accused, holds

<sup>16</sup> *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

<sup>17</sup> *Id.*

<sup>18</sup> *Beavers v. Haubert*, 198 U.S. 77 (1905); *Pollard v. United States*, 352 U.S. 354 (1957); *United States v. Ewell*, 383 U.S. 116 (1966); *Smith v. Hooey*, 393 U.S. 374 (1969); *Dickey v. Florida*, 398 U.S. 30 (1970); *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

<sup>19</sup> *See e.g.*, *Worthington v. United States*, 1 F.2d 154 (7th Cir. 1924), *cert. denied*, 266 U.S. 626 (1924); *United States v. Kaye*, 251 F.2d 87 (2d Cir. 1957), *cert. denied*, 356 U.S. 919 (1958); *Parker v. United States*, 252 F.2d 680 (6th Cir. 1958), *cert. denied*, 356 U.S. 964 (1958); *State v. Williams*, 157 Conn. 114, 249, A.2d 245 (1968), *cert. denied*, 395 U.S. 927 (1969); *United States v. Fassoulis*, 293 F.2d 243 (2d Cir. 1961), *cert. denied*, 368 U.S. 919 (1961); *United States v. Dichiarinte*, 385 F.2d 333 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1969).

<sup>20</sup> *Dickey v. Florida*, 398 U.S. 30, 39 (1970).

<sup>21</sup> United States Court of Appeals Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, as amended May 24, 1971, 442 F.2d LIX.

<sup>22</sup> *Dickey v. Florida*, 398 U.S. 30, 51 (1970).

<sup>23</sup> *See e.g.*, Note, *The Right to a Speedy Criminal Trial*, 57 COL. L. REV. 846 (1957); Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587 (1965); Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 YALE LAW J. 767 (1968); Comment, *The Convict's Right to a Speedy Trial*, 61 CRIM. LAW J. 352, 360-64 (1970); Note, 49 NEBR. L. REV. 166 (1969).

that the defendant in a criminal proceeding must demand to be tried, or he will not be heard to complain later that he was denied a speedy trial.<sup>24</sup> A vigorous minority, however, decries this position, holding that a state or the federal government, having begun the proceedings against the accused in the first place, is under a duty to carry the cause forward by the mandate of the Sixth Amendment and corresponding provisions in state constitutions. This minority view is gaining adherents, and enjoys the position of better constitutional logic. For instance, in *United States v. Dillon*,<sup>25</sup> the accused had been indicted approximately eight years prior to the reported decision in 1960. The case had been handled by one assistant district attorney after another, but for reasons not expressed in the opinion, was never brought to trial. While Dillon was not ready at all times to stand trial, nevertheless continuances or delays which could be ascribed to him were very few in number; on the other hand, the government had sought one delay after another. Finally, when the case was brought on for trial in 1960, Dillon moved for dismissal on the grounds that he had been denied a speedy trial. The district court agreed with him.

In *People v. Prosser*,<sup>26</sup> the petitioner had been sentenced under a habitual-offender statute. After sentencing, he petitioned the New York court for release on the grounds that an earlier sentence had been for a misdemeanor; therefore, his sentence as a habitual offender was improper. After his release on the strength of this petition, the prosecuting attorney in the county where he had been sentenced as a habitual offender reinstated prosecution on the original indictment for burglary and larceny—five years after the event. The New York court held that this practice of holding an open indictment over the head of the accused was clearly improper, and that the state had a positive obligation to go forward with the prosecution, because the accused could not himself cause the prosecution to be pressed.

The Ohio case of *State v. Meeker*<sup>27</sup> was decided in part on similar grounds. Meeker had introduced a plea of guilty to one of four counts of an indictment for armed robbery and related offenses. Although Meeker was sentenced on the one count, the other counts were not formally disposed. Five years later, Meeker obtained his release from prison on habeas corpus on the grounds that he had been denied the right to counsel at his trial. The state then reinstated the old counts of the indictment. The Ohio State Supreme Court, as New York has done, held in part that the state could not properly with-

<sup>24</sup> The list of cases following this line is seemingly endless. See cases cited in Note, *The Right to a Speedy Criminal Trial*, 57 Col. L. Rev. 846, 853, *United States v. Lustman*, 258 F.2d 475, 478 (2d Cir. 1958); *United States v. Quinn*, 314 F.Supp. 233 (S.D.N.Y. 1970); *Fabian v. State*, 3 Md. App. 270, 239 A.2d 100 (1968); *State v. Henry*, 13 Ohio App.2d, 235 N.E.2d 533 (1968).

<sup>25</sup> 183 F. Supp. 541 (S.D.N.Y. 1960).

<sup>26</sup> 309 N.Y. 353, 130 N.E.2d 891 (1955).

<sup>27</sup> 26 Ohio St.2d 9, 268 N.E.2d 589 (1971). See *State v. Meeker*, No. 5193, Lake County Common Pleas, May 21, 1969, opinion of Simmons, J., at p. 4.

hold prosecution on some counts of an indictment, just in case the accused should later be released.

### *Acquiescence*

Acquiescence, in the context of the Speedy Trial Clause, can be defined as the defendant's joining the prosecution, or at least not opposing prosecutorial actions, in delaying trial.<sup>28</sup> While not so thoroughly explored as the demand doctrine, this holding is also well represented in decisional law.<sup>29</sup>

Like the demand doctrine, the acquiescence doctrine holds that inaction by the accused can be used to defeat his claim to denial of a speedy trial. If, for instance, the prosecution seeks a continuance and the defendant does not actively oppose this move, he will generally be held to have acquiesced in the delay, and thus to have waived his right to a speedy trial.<sup>30</sup>

### *Actions by the Accused*

Holdings that any "dilatatory" actions by the accused serve to forestall his right to a speedy trial are functionally the other side of the acquiescence coin. One who raises no objection to prosecutorial dilatatory tactics is held to have acquiesced;<sup>31</sup> one who employs dilatatory tactics of his own is held not only to have acquiesced in delay, but to have caused it, and thus to have waived his right to speedy trial.<sup>32</sup> As the name implies, this is a doctrine requiring affirmative action by the accused, but the affirmative action can result in an implied waiver.<sup>33</sup> If this statement of the doctrine is confusing to the reader, it is no less so to the accused whose Sixth-Amendment right is defeated by it.

<sup>28</sup> See e.g., *Hedgepeth v. United States*, 364 F.2d 684, 688 (D.C. Cir. 1966); *United States v. Roberts*, 408 F.2d 360 (2d Cir. 1969); *United States v. Richardson*, 291 F. Supp. 441 (S.D.N.Y. 1968).

<sup>29</sup> *United States v. Kabot*, 185 F.Supp. 159 (S.D.N.Y. 1960); *Dickey v. Florida*, 398 U.S. 30, 51 (1970).

<sup>30</sup> *People v. Jones*, 266 N.E.2d 411, 414, (Ill. App. 1971); *Shepherd v. United States*, 163 F.2d 974, 976 (8th Cir. 1947); *People v. Prosser*, 309 N.Y. 353, 130 N.E.2d 891, 896 (1955) 'semble'.

<sup>31</sup> *Id.*; *Hedgepeth v. United States*, 364 F.2d 684, 688 (D.C. Cir. 1966); *United States v. Roberts*, 408 F.2d 360 (2d Cir. 1969); *United States v. Richardson*, 291 F.Supp. 441 (S.D.N.Y. 1968); *United States v. Kabot*, 185 F.Supp. 159 (S.D.N.Y. 1960); *Dickey v. Florida*, 398 U.S. 30 (1970).

<sup>32</sup> *People v. Jones*, 266 N.E.2d, 411, 414 (Ill. App. 1971); *State ex rel. O'Leary v. Cuyahoga Falls Municipal Court*, 176 Ohio St. 197, 198 N.E.2d 660, 661 (1964); *United States ex rel. Hanson v. Ragen*, 166 F.2d 608 (7th Cir. 1948) *cert. denied*, 334 U.S. 849 (1948); *State ex rel. Thomas v. District Court of Thirteenth Judicial Dist. In and For Big Horn County*, 151 Mont. 1, 438 P.2d 554 (1968); *Raburn v. Nash*, 78 N.M. 385, 431 P.2d 874 (1967), *petition dismissed* 389 U.S. 999 (1968); *Hall v. State*, 3 Md. App. 680, 240 A.2d 630 (1968).

<sup>33</sup> As the discussion with respect to acquiescence and actions by the accused tends to show, the difference between the two is not always clear-cut, even though one is ostensibly passive and the other active in its operation. See also Note, *The Right to a Speedy Criminal Trial*, 57 COL. L. REV. 846, 856; *State ex rel. O'Leary v. Cuyahoga Falls Municipal Court*, 176 Ohio St. 197, 198 N.E.2d 660 (1964); *Mattoon v. Rhay*, 313 F.2d 683, 685 (9th Cir. 1963); *People v. Jones*, 266 N.E.2d 411 (Ill. App. 1971); *But see United States v. Dillon*, 183 F. Supp. 541 (S.D.N.Y. 1960); *People v. Prosser*, 309 N.Y. 353, 130 N.E.2d 891 (1955).

### The Unconstitutional Waiver Doctrine

“. . . Everyone is for a ‘speedy trial’ as a constitutional principle, but there is a good deal of resistance to a speedy trial in practice”.<sup>34</sup> The Sixth Amendment to the United States Constitution says “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .” “. . . The word ‘speedy’ was nowhere modified or watered down. . . .”<sup>35</sup> The Sixth Amendment does *not say* “. . . so long as he demands one early in the course of the proceedings, fights the prosecution tooth and nail in any of its attempts to delay trial, and doesn’t bring any motions before trial himself; *provided* however, that if the prosecutor is busy, or just doesn’t feel like bringing the case to trial, this Amendment shall be of no effect.” Some of these contentions in our non-existent continuation of the Speedy-Trial Clause are merely without support in parallel decisions based on the other rights found in the Sixth Amendment;<sup>36</sup> others are directly contrary to recognized constitutional principles;<sup>37</sup> and some of the pronouncements found in decisional law relative to the Speedy-Trial Clause lead to logical absurdities.<sup>38</sup>

Some points should be made clear as a preamble to any criticism of the waiver doctrine in its application to the Speedy-Trial Clause:

(1) There can be no real quarrel with a holding of waiver where the accused uses clearly dilatory tactics in an effort to delay an almost certain conviction, such as unsupportable motions for change of venue or continuance, or baseless allegations of *Miranda* violations.

(2) Procedural delays for the benefit of the accused are properly looked upon with favor by the courts, but should not be construed as a waiver *per se* of the constitutional right to a speedy trial.<sup>39</sup>

(3) Where one procures delay by extra-judicial tactics such as flight from the jurisdiction, intimidation of witnesses or subornation or perjury, he is properly held to be estopped from asserting his right to a speedy trial.

(4) Delay in a criminal trial frequently, but by no means always, operates in the defendant’s favor, and any claim of deprivation of constitutional right due to such delay is properly regarded with a jaundiced, but not a jaded, eye.<sup>40</sup>

<sup>34</sup> Nixon, *The President’s Message*, 54 JUDICATURE 404, 405 (1971).

<sup>35</sup> *Id.*

<sup>36</sup> See *People v. Jones*, 266 N.E.2d 411, 414 (Ill. App. 1971); *State ex rel. O’Leary v. Cuyahoga Falls Municipal Court*, 176 Ohio St. 197, 198 N.E.2d 660, 661 (1964); *Mattoon v. Rhay*, 313 F.2d 683 (9th Cir. 1963); *State v. Meeker*, 26 Ohio St.2d 9, 268 N.E.2d 589 (1971).

<sup>37</sup> *Cf.* cases cited, note 12, *supra*, and notes 67 and 69, *infra*, with *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

<sup>38</sup> See notes 68 through 73, *infra*, accompanying text, and cases there cited.

<sup>39</sup> Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1598-99 (1965). See also *United States v. Davis*, 365 F.2d 251, 255 (6th Cir. 1966) (defendant incompetent to stand trial).

<sup>40</sup> *United States ex rel. Von Cseh v. Fay*, 313 F.2d 620, 623 (2d Cir. 1963).

But with the above comments to the contrary notwithstanding, the principles of constitutional law are ill served by unsupportable legal fictions<sup>41</sup> to achieve the dubious end of being sure that some "rotten crook" doesn't thwart justice by virtue of the prosecution having tabled his case for several years.<sup>42</sup> It does not require citation of authority to say that under our system of jurisprudence, an accused is *only* that; he is not guilty until so proven in a court of law, after a trial conducted with all the procedural fairness required by the mandate of our Constitution, with proper regard for the provisions of the Sixth Amendment. The *first* command of the Sixth Amendment is for a speedy trial.

Who, then, is to say that one clause of the Sixth Amendment is less important than another? Or that the Sixth Amendment is less important than the First? Or the Fifth? And so forth.

Indeed, going even in the opposite direction from the tendency of the lower courts to denigrate the Speedy-Trial Clause, Mr. Chief Justice Warren, speaking for the Court in *Klopfer v. North Carolina*, said:

"The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the *most basic rights* preserved by our Constitution."<sup>43</sup>

#### *The Demand Doctrine*

The Sixth-Amendment guarantee of a speedy trial is skeletal, as are other clauses in the Bill of Rights; the framers gave us no flesh upon this skeleton. Are we therefore permitted to clothe it as is our wont, operating in a legal vacuum? Or must we adhere to principles that are generic to the interpretation of our Constitution as a unified system?

The contention presented here is that judicial interpretation of our Constitution is and has been reasonably uniform; what has applied to one amendment or clause has been held to apply in a parallel, if not identical fashion, to others.<sup>44</sup>

<sup>41</sup> *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Bruce v. United States*, 351 F.2d 318 (5th Cir. 1965) (Seven-year delay; defendant held to have waived speedy trial by lack of demand); *but see* note 4, *supra*; and *cf.* *United States v. Mann*, 291 F. Supp. 268 (S.D.N.Y. 1968) (even assuming that defendant had waived speedy trial by inaction, it would be improper to try him 16 years after the alleged crime).

<sup>42</sup> Mr. Chief Justice Stone was perhaps more elegant in his description of the application of the Constitution to all of the people without discrimination when he said: ". . . Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. *Ex parte Milligan*, 4 Wall. 2, 119, 132. . . ." *Ex parte Quirin*, 317 U.S. 1, 25 (1942).

<sup>43</sup> *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967) (Emphasis added).

<sup>44</sup> *See e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966), where the Court drew analogies within and between the Fifth and Sixth Amendments (self-incrimination and right to counsel).



This is as it should be; there is no justification for liberal construction of one portion of any law, with concomitant strict construction of another portion of that same law. So if one may only waive his right against self-incrimination “. . . knowingly and intelligently . . .”,<sup>45</sup> is it asking less that he waive his right to a speedy trial with that same quantum of knowledge and intelligence?

Thus, there exists no rational basis for holding waiver by silence in speedy-trial cases, while requiring clear and firm announcement in open court in other types of cases, and even in some cases, *prohibiting* waiver of a right.<sup>46</sup> Yet the state and lower federal courts have done just that.<sup>47</sup>

The demand doctrine, with its finding of tacit waiver, is without support from the Supreme Court, except in the Court's silence in the matter.<sup>48</sup> But in speaking on another Sixth-Amendment right, the right to counsel, Mr. Justice Black, speaking for the Court, said in *Johnson v. Zerbst*,

. . . The Sixth Amendment stands on a constant admonition that if the constitutional safeguards it provides be lost, justice will not “still be done” . . . . [T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty. . . .

. . . There is insistence here that petitioner waived this constitutional right. . . . It has been pointed out that “courts indulge every reasonable presumption *against* waiver” of fundamental constitutional rights and that we “do not presume acquiescence in the loss of fundamental rights.” A waiver is ordinarily an *intentional* relinquishment or abandonment of a *known* right or privilege. . . .<sup>49</sup> (Emphasis added.)

In *Johnson v. Zerbst*, the petitioner had been arrested on a charge of uttering counterfeit money. Interestingly, the problem there was not the lack of speedy trial, but rather a too-speedy trial. Johnson was held in prison, unable to make bail for about two months. Then in the space of two days, he was indicted, arraigned, tried, convicted,

<sup>45</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>46</sup> *Cf., e.g., United States v. Jones*, 403 F.2d 498 (7th Cir. 1968), *cert. denied*, 394 U.S. 947 (1969) (failure of defendant to demand trial resulted in waiver of right), *with United States ex rel. Bruno v. Herold*, 271 F.Supp. 491 (S.D.N.Y. 1967), *rev'd on other grounds* 408 F.2d 125 (2d Cir. 1969) (counsel's failure to object to clearing of court did not result in waiver of defendant's right to a public trial), *and with McDowell v. United States*, 274 F.Supp. 426 (E.D. Tenn. 1967) (defendant held to have no constitutional right to waive jury to avoid risking the death penalty). Interestingly, these are all Sixth-Amendment rights.

<sup>47</sup> *Id.*

<sup>48</sup> Note 19, *supra*; however, see *Sheppard v. Ohio*, 352 U.S. 910 (1956), *denying certiorari*, and *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950), *denying certiorari*.

<sup>49</sup> 304 U.S. 458, 463-64 (1938), *citing Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), *Hodges v. Easton*, 106 U.S. 408, 412 (1882), and *Ohio Bell Telephone Co. v. Public Utilities Comm'n.*, 301 U.S. 292, 307 (1932). Note that Mr. Justice Black, here scarcely lifting pen from paper, dealt at once with demand and acquiescence and their too-ready acceptance in depriving the accused of constitutional rights.

sentenced and removed to the Atlanta Federal Penitentiary. On habeas corpus, Johnson maintained that he had been denied the right to counsel. The district court, in denying the petition of habeas corpus, held that Johnson had waived the right by not demanding counsel. The Supreme Court, as we have seen, was rather short in dealing with this holding by the district court.

If we accept the premise that Sixth-Amendment rights are co-equal (ignoring, for the moment, the question of the equality of other amendments, one with the other), then this statement must be as valid with respect to a speedy trial as it is concerning the right to the assistance of counsel. Indeed, if we substitute speedy-trial terminology for the operational words of the right to counsel, the proscription against waiver is highlighted:

The constitutional right of an accused to [a speedy trial] invokes, of itself, the protection of a trial court. . . . This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. . . .

The purpose of the constitutional guaranty of right to [a speedy trial] . . . would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution. . . .<sup>50</sup>

In contrast to the state and lower federal courts, Mr. Justice Black in *Johnson* inveighed strongly against silent, implied, negligent, or any other kind of waiver of constitutional rights, excepting only ". . . an intentional relinquishment . . . of a known right. . ."<sup>51</sup>

The Court's distaste for implied waiver by failure strongly to assert a right is also shown in another Sixth-Amendment aspect, the Confrontation Clause. In *Barber v. Page*,<sup>52</sup> the petitioner's attorney in the state preliminary hearing had not cross-examined a witness; the witness's testimony was introduced by transcript at trial, over objection by the petitioner. The witness, at the time of trial, was in federal prison, and the state had made no effort to produce him at trial. The state court held that the petitioner had not been denied the right of confrontation; in argument before the Supreme Court, the state maintained that the petitioner had waived the right by failure to cross-examine the witness at the time of the preliminary hearing.<sup>53</sup> Mr. Justice Marshall, speaking for eight members of the Court was uncharitable in his criticism of the state's position:

. . . That contention is untenable. . . . To suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial

<sup>50</sup> *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

<sup>51</sup> *Id.* at 464.

<sup>52</sup> 390 U.S. 719 (1968).

<sup>53</sup> *Id.* at 720, 725.

hardly comports with this Court's definition of a waiver as "an intentional relinquishment or abandonment of a known right or privilege."<sup>54</sup>

But the Court didn't stop there. "Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined [the witness] at the preliminary hearing . . ."<sup>55</sup>

If the Confrontation Clause is so important as to call forth this gratuitous dictum, one is constrained to wonder why speedy-trial has been so studiously ignored, when the opportunity seems to present itself at almost every Term.<sup>56</sup>

It has already been submitted here that the right to a speedy trial is no less important than any other Sixth-Amendment right.<sup>57</sup> The right is rooted deeply in our common-law heritage, being found almost explicitly in Magna Carta: ". . . we will not deny or defer to any man either justice or right",<sup>58</sup> furnishing a sound basis for the language of the Sixth Amendment.

The barons at Runnymede were certainly not putting words on paper simply to describe technicalities. They spoke from experience which showed the dangers inherent in unbridled power over the lives of the citizens. Perhaps in our sophisticated society, we have become so accustomed to these trappings of civilization that we label some as "technicalities". The right to a speedy trial, sadly, seems to be one of those.

Our constitutional ancestors. . . , conscious as they were of history, . . . added provisions to our Constitution designed to assure order and method in the criminal process—to assure that every man receives procedural fairness without which there is no justice.

Insistence upon procedural standards, commanded by our Constitution, is *not* a technicality. . . . Observance of the rights which secure freedom is not a technicality. . . .

What is liberty if it is not the right to due process of law in all of its forms, before the state may consign us to prison or take our life?<sup>59</sup>

An excellent—if indeed, not the prime—reason for construing the Speedy-Trial Clause strictly *against* the prosecution is because of its effect on the "little man", the indigent, the uninformed.

Consider the following analysis of human behavior: A spectacular murder occurs; the accused is prominent; the case has all the trappings of sex, scandal and sensationalism so dear to the hearts of the

<sup>54</sup> *Id.* at 725 (citing *Johnson v. Zerbst*, 304 U.S. 458, 465 (1933)).

<sup>55</sup> *Id.*

<sup>56</sup> Note 19, *supra*; *But cf.* the opinion by Mr. Justice Frankfurter in the denial of certiorari in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919: ". . . [A] denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. . . ."

<sup>57</sup> *Klopper v. North Carolina*, 386 U.S. 213, 226 (1967), and accompanying text.

<sup>58</sup> Magna Carta, c 29, quoted in *Klopper v. North Carolina* 386 U.S. 213, 223 (1967) (emphasis added).

<sup>59</sup> Fortas, *The Fight for Due Process*, 73 CASE AND COM. 16, (1968).

yellow journalists.<sup>60</sup> Here, the prosecution would not even fleetingly consider dragging its feet. The speedier the trial, the better, while the lurid details are fresh in the minds of all. Further, the accused, assuming that speedy trial is to his advantage and liking, would stridently demand to be brought to trial; and being of more than moderate means would be able to afford counsel to protect his rights, or if of less affluence could nevertheless acquire a "public-spirited" attorney for reasonable expense.

But what of the "pump jockey" at a ghetto gas station, accused of the theft of two tires from his former employer? He steadfastly maintains his innocence, and languishes in jail, unable to make bond. Without funds to retain counsel, he is unrepresented until counsel is assigned.<sup>61</sup> Assigned counsel, either from the ranks of socially-conscious attorneys, or the Legal Aid Society, have little time for the constitutional in-fighting that the demand doctrine imposes upon them.<sup>62</sup> The prosecution, busy with the big murder case or other day-to-day business won't push this two-bit larceny unless it is absolutely necessary.

Thus, the one who needs most the protection of the Sixth Amendment is least likely to get it. Under the proposition advanced here, the right to a speedy trial doesn't seem to be much of a "technicality".

#### *The Acquiescence Doctrine*

The notion that the accused waives his right to a speedy trial by his acquiescence in motions by the prosecution to continue or delay trial does a dis-service to cooperation and courtesy between attorneys. A prosecuting attorney's workload is usually quite large. It happens, on occasion, that he finds it necessary to ask for a continuance simply due to the press of his work or conflicts in court calendars. In a civil case, the opposing attorney, almost as a matter of course, would agree to the postponement, and ordinarily neither side is penalized for such action. However, under cases interpreting the right of the accused to a speedy trial, defense counsel must oppose such a motion, even if comity and courtesy would ordinarily require that he assist his brother attorney in solving his time problem, because as we have seen,<sup>63</sup> failure of defense counsel to object to a continuance causes him to run a severe risk of "waiving" his client's right to be tried speedily.

Referring again to *Johnson v. Zerbst*,<sup>64</sup> we see that the Court, in addition to defining waiver as "... an intentional relinquishment or

<sup>60</sup> See, e.g., *Sheppard v. Ohio*, 352 U.S. 910 (1956), *denying certiorari*; *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

<sup>61</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>62</sup> The writer speaks here from his personal experience in the Cleveland-Marshall Legal Aid program, and discussions with attorneys in Ohio, New York and California.

<sup>63</sup> See Note 30, *supra*.

<sup>64</sup> 304 U.S. 453 (1938).

abandonment of a known right or privilege. . . ,<sup>65</sup> also said “. . . we do not presume acquiescence in the loss of fundamental rights. . . .”<sup>66</sup> So we see that the Court seems to be out of step with the rest of the federal judiciary by proclaiming that acquiescence will not be presumed, absent unequivocal actions or words by the accused.

Acquiescence, like demand, is improperly inferred by the failure of the accused stridently to demand his rights. “Presuming waiver from a silent record is *impermissible* . . . .”<sup>67</sup> (Emphasis in the original). Here, the Court was speaking of the Sixth Amendment right to counsel. We must then ask, is the Sixth Amendment right to a speedy trial to be offered *less* readily?

#### *Acts by Defendant*

It is not to be denied that certain acts by the defendant are properly held to be a waiver; this applies to rights other than the right to a speedy trial. The accused may waive his right to counsel, he may waive the right not to testify against himself, or he may waive the right not to have troops quartered in his house.

Within the scope of the Speedy-Trial Clause, the action by the defendant of removing himself from the jurisdiction of the court is a waiver of his right to a speedy trial in terms so clear as to afford no basis for argument.<sup>68</sup> Other examples could be brought forth; unquestionably, there is a continuum beginning with defendant's flight and going through to cases where defendant has stood ready at all times and has demanded trial. Somewhere between these two extremes is a point where legitimate debate would center on the question: Which acts by the defendant properly constitute a waiver of his right to a speedy trial? The contention made here is that current judicial holdings are weighted improperly and far too heavily against the defendant.

If an accused is charged with a crime, he dares not, under current holdings, assert certain constitutional rights, on pain of “forfeiting” his right to be tried speedily.<sup>69</sup> For instance, if he moves to suppress evidence on the ground of illegal search (Fourth Amendment); on the ground of improper post-arrest proceedings without the assistance of counsel (Sixth Amendment); if he moves to change venue (Sixth Amendment); or even possibly if he asks for a bill of particulars (Sixth Amendment), the weight of present authority holds that he has, by his own act, contributed to delay in bringing the matter

<sup>65</sup> *Id.* at 464.

<sup>66</sup> *Id.*

<sup>67</sup> *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

<sup>68</sup> *Flagg v. State*, 11 Ga. App. 37, 74 S.E. 562 (1912); *Goman v. Maxwell*, 176 Ohio St. 236, 199 N.E.2d 10 (1964).

<sup>69</sup> *People v. Jones*, 266 N.E.2d 411, 414 (Ill. App. 1971); *State ex rel. O'Leary v. Cuyahoga Falls Municipal Court*, 176 Ohio St. 197, 198 N.E.2d 660, 661 (1964); *Mattoon v. Rhay*, 313 F.2d 683 (9th Cir. 1963).

speedily to trial, and has thus "waived" his Sixth Amendment right to a speedy trial.<sup>70</sup>

Such holdings do not bear up under rational analysis. Does our Constitution require the accused to decide which rights he will assert, as compared to others, which are then unavailable? It hardly seems proper that we ration constitutional guarantees, telling the accused, in effect, that he may choose one from Column A, two from Column B, and so forth, but that his choice of suppressing illegally procured evidence precludes a speedy trial, or that defendant's demand for trial by jury precludes his requesting a change of venue.<sup>71</sup> Or that we say "Here, take any five rights you want. Leave the rest; they're over your limit." *Nowhere* is there any authority for such a holding. Yet that is the precise effect of the current majority position.

. . . [T]he state . . . may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.<sup>72</sup>

In considering the statements made immediately preceding here, we see the thinness of the logic on which too many holdings have been based in denying to the accused his fundamental right to a speedy trial. Indeed, it may even be said that such a holding of waiver of the right to a speedy trial by the assertion of other constitutional rights casts a "chilling effect" on the assertion of those rights,<sup>73</sup> and thus that such a position is unconstitutional *per se*.

### The future of the Speedy-Trial Clause.

Mr. Justice Brennan, in *Dickey v. Florida*,<sup>74</sup> spoke at length in his concurring opinion about the yet unresolved questions raised by the Speedy-Trial Clause. It would seem that the Court's somewhat short shrift with respect to *Dickey* goes no further than the rather narrow holding of the case. However, the concurring opinion can be read as leaving the door ajar to further attacks on the waiver doctrine.<sup>75</sup> It should be noted that while the opponents of the waiver doctrine

<sup>70</sup> *People v. Jones*, 266 N.E.2d 411 (Ill. App. 1971); *but see State v. Meecker*, 26 Ohio St. 2d 9, 268 N.E.2d 589 (1971).

<sup>71</sup> An interesting lawyer's comment on this is found in HOLMES, *THE SHEPPARD MURDER CASE* 213 (1961); "How it can be seriously argued that a man is trying to escape trial because he refuses to surrender his constitutional right to a jury trial strains comprehension. . . ."

<sup>72</sup> *Frost & Frost Trucking Co. v. R.R. Commission of California*, 271 U.S. 583, 594 (1926).

<sup>73</sup> *Cf. North Carolina v. Pearce*, 395 U.S. 711, 724 (1969).

<sup>74</sup> 398 U.S. 30 (1970).

<sup>75</sup> *Id.* at 44.

are still in the minority, that minority seems to be gaining strength, and certainly they have the better law.<sup>76</sup>

### The Speedy-Trial Clause as it should be

The Sixth Amendment promises the right to a speedy trial to the accused in *all* criminal prosecutions without qualification. Thus, it cannot be held to hinge upon the demand by the accused that he be brought to trial, any more than the accused must demand the Sixth Amendment's requirements of representation by counsel, trial by jury, or confrontation of witnesses against him.

It is the duty of the public prosecutor not only to prosecute those charged with crime, but also to observe the constitutional mandate guaranteeing a speedy trial. If a prosecutor fails to do so, the defendant cannot be held to have waived his constitutional right to a speedy trial.<sup>77</sup>

Thus, in a parallel with the right of the accused not to have to testify against himself, neither should the accused, having been proceeded against by the state, be required to bring his own cause to trial.<sup>78</sup> Indeed, it is *impossible* for the accused to bring himself to trial.

It is surely as improper for the state to require a man to harry and badger the prosecution to bring his case along as it is for the state to require him to prove his innocence, simply because the state has preferred charges against him. The Fifth Amendment does not permit the latter; the Sixth Amendment should not be construed to permit the former.

The Speedy-Trial Clause should be read in a more reasonable fashion than it has, and this without regard to protestations of clogged court calendars and heavy prosecution workloads. Complaints that this application of the Sixth Amendment would be improper or administratively unsound are without merit.<sup>79</sup>

. . . [T]he fact that . . . delay was attributable to congested calendar conditions . . . and that the district attorney was "ready" and judges "willing" to hear the case seems to me beside the point. As far as the defendant is concerned, he suffered the denial of a speedy trial whether the prosecutor or the court was at fault or completely blameless. . . .<sup>80</sup>

The Fifth Amendment proclaims that no man may be forced to convict himself out of his own mouth. Certainly, this makes the job of the investigation and the prosecutor more difficult; however, this has not deterred the Court from placing severe restraints on the

<sup>76</sup> *United States v. Mann*, 291 F.Supp. (S.D.N.Y. 1968); *United States v. Dillon*, 183 F.Supp. 541 (S.D.N.Y. 1960); *State v. Meeker*, 26 Ohio St. 2d 9, 268 N.E.2d 589 (1971). And see Second Circuit Criminal Rules, *supra.*, Note 4, Rule 8, at LXI.

<sup>77</sup> *United States v. Dillon*, 183 F.Supp. 541 (S.D.N.Y. 1960). This opinion was quoted with approval by Mr. Justice Brennan in *Dickey v. Florida*, 398 U.S. 30, at 44 (1970).

<sup>78</sup> See *Williams v. Florida*, 399 U.S. 78, (1970) (Dissenting opinion by Black, J.).

<sup>79</sup> *Pollard v. United States*, 362 U.S. 354, 364 (1959).

<sup>80</sup> *People v. Ganci*, 27 N.Y.2d 418, 267 N.E.2d 263, 270 (1971) (dissenting opinion by Fuld, J.).

admissability of coerced confessions.<sup>81</sup> So, by the same token, minor inconveniences to the judge, the prosecutor or policeman is insufficient reason for denial of the application of other constitutional guarantees. Certainly, the mandate of the First Amendment causes administrative difficulties in many jurisdictions. But it is clear that such difficulties are insufficient of themselves to permit any abridgement of the freedom of speech, religion or assembly.<sup>82</sup> Administrative difficulties are insufficient excuse to permit any abridgement of *any* constitutional right.

### Conclusion

The foregoing discussion has traced, albeit somewhat roughly, and perhaps too briefly, the contours of the waiver doctrine; and has shown the constitutional weakness of that doctrine as applied to the Speedy-Trial Clause. Waiver, as defined in *Johnson v. Zerbst*,<sup>83</sup> requires that the accused apply himself deliberately and intelligently to the serious matter of waiving his constitutional rights. But the waiver doctrine gratuitously supplies that application for the accused in the case of his right to a speedy trial.

By analogy with other constitutional rights, the right to a speedy trial is properly one which can be waived by the accused only in the clearest terms. Thus, once the state has begun proceedings against any person, the state is properly charged with the speedy prosecution of those proceedings to their reasonable determination. And once the state has brought charges, the accused properly need make no move to hasten these proceedings. Therefore, if the state brings an action and then permits this action to lie fallow, the accused should properly be dismissed from the consequences of that indictment without regard to whatever action he may have taken, except where that action is clearly inimical to reasonable adjudication of the cause.

It is hoped that the Court will soon see fit to consider the question of waiver of the constitutional right to a speedy trial. As shown, the demand doctrine needs clarification and delineation; the thesis developed here holds that the demand doctrine should be invalidated as it applies to Sixth Amendment rights, and particularly to the right of the accused to a speedy trial.

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<sup>81</sup> Cf. *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>82</sup> See, e.g., *New York Times v. United States*, 403 U.S. 713 (1971).

<sup>83</sup> 304 U.S. 458 (1938).