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## Sixth Amendment--Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of their Indictments

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# SIXTH AMENDMENT—EXTENDING SIXTH AMENDMENT SPEEDY TRIAL PROTECTION TO DEFENDANTS UNAWARE OF THEIR INDICTMENTS

**Doggett v. United States, 112 S. Ct. 2686 (1992)**

## I. INTRODUCTION

In *Doggett v. United States*,<sup>1</sup> the United States Supreme Court, in a 5-4 decision, extended Sixth Amendment speedy trial protection to a defendant unaware of his indictment. Implementing the *Barker v. Wingo*<sup>2</sup> four-part test for speedy trial claims, Justice Souter's majority opinion held that the "extraordinary" eight-and-a-half year delay between the defendant's indictment and arrest presumptively impaired his defense and therefore violated the Speedy Trial Clause.<sup>3</sup>

The Court found that the defendant's inability to prove specific prejudice did not defeat the speedy trial claim.<sup>4</sup> Instead, the majority contended that, whether a defendant has proven prejudice or not, an extraordinary delay between the indictment and trial compromises a trial's reliability, even if in unidentifiable ways.<sup>5</sup> Justice Souter added that in cases involving such an extraordinary delay, mere negligence in prosecution, not bad faith on the government's part, was sufficient to bring a cognizable constitutional claim.<sup>6</sup>

Justice Thomas, in his dissent, argued that granting relief to a defendant unaware of an indictment unwisely extended the Sixth Amendment beyond its intended scope.<sup>7</sup> Justice Thomas suggested that the Sixth Amendment protects liberty interests which, in this case, were not infringed since the defendant was neither incarcerated for a lengthy period of time nor subject to the anxiety of await-

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<sup>1</sup> 112 S. Ct. 2686 (1992).

<sup>2</sup> 407 U.S. 514 (1972).

<sup>3</sup> *Doggett*, 112 S. Ct. at 2694.

<sup>4</sup> *Id.* at 2693.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 2695 (Thomas, J., dissenting).

ing trial.<sup>8</sup>

In a separate dissent, Justice O'Connor criticized the majority for loosening the requirement of proving actual prejudice in favor of presumed prejudice.<sup>9</sup> Justice O'Connor suggested that pretrial delay injures the government just as much, if not more, than the defendant.<sup>10</sup>

This Note examines Sixth Amendment Speedy Trial protection and argues that the Court reasonably extended the right of the "accused" under the Sixth Amendment to an individual unaware of an indictment against him. This Note argues that the Court majority correctly extended the Sixth Amendment to protect against defense impairment caused by long delays. Therefore, defendants unaware of the charges against them can still base a speedy trial claim on the impairment of their defense, regardless of whether liberty infringement has occurred.

This Note further argues that the Court majority properly found that, in cases where lengthy delays occur, the defendant should not have to prove actual prejudice. The Court failed, however, to distinguish between extraordinary delays, which foster presumed prejudice, and shorter delays which do not. Since the Court left no way for the government to rebut presumptive prejudice brought about by extraordinary delays, this Note argues that the distinction is crucial. Furthermore, this Note criticizes the irrebuttable presumption of prejudice the Court has constructed in lengthy delays.

Finally, this Note argues that the Court wisely held the government to a higher prosecutorial due diligence standard. The Court, however, did little to explain what the due diligence standard is or should be. This Note contends that, at the very least, courts should compel prosecutors to take reasonable steps to notify defendants of outstanding charges.

## II. SIXTH AMENDMENT SPEEDY TRIAL BACKGROUND

The Sixth Amendment Speedy Trial Clause provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy . . . trial."<sup>11</sup> Since only the "accused" falls under the scope of the Sixth Amendment, the Court has ruled that individuals experiencing prejudicial delay before an official accusation cannot enjoy

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<sup>8</sup> *Id.* at 2695-96 (Thomas, J., dissenting).

<sup>9</sup> *Id.* at 2694 (O'Connor, J., dissenting).

<sup>10</sup> *Id.* (O'Connor, J., dissenting).

<sup>11</sup> U.S. CONST. amend. VI.

speedy trial protection.<sup>12</sup> Therefore, the Court has granted Sixth Amendment protection only to individuals officially accused by arrest or indictment.<sup>13</sup> Dismissal of the indictment is the exclusive remedy for a speedy trial violation.<sup>14</sup>

The Sixth Amendment right to a speedy trial does not incorporate precise time limits within which prosecutors, once instituting a criminal prosecution, must complete it. Instead of reading the language strictly to forbid any delays, the Supreme Court has decided that courts should handle defendants' Sixth Amendment Speedy Trial claims by considering the specific facts of each case.<sup>15</sup>

In *Barker v. Wingo*,<sup>16</sup> the Supreme Court articulated a four-part test for reviewing the facts of each case in determining whether post-accusation delay violates the Speedy Trial Clause. According to *Barker*, courts must balance: 1) the length of the delay; 2) the reason for the delay; 3) whether the defendant promptly asserted the speedy trial right; and 4) the amount of prejudice suffered.<sup>17</sup> The *Barker* court noted that, although each factor was relevant for consideration, it "regard[ed] none of the four factors . . . as either a necessary or sufficient condition . . . [T]hey are related factors and must be considered together with such other circumstances as may

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<sup>12</sup> See *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986) (when not subject to indictment or formal restraint, person not protected under the Sixth Amendment). Federal and state statutes of limitations protect individuals against prejudicial pre-accusation delay. In addition, the Court has applied the Due Process Clause in this area to guarantee the defendant's fair trial. U.S. CONST. amends. V & XIV. See generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 18.3 at 794-98 (2d ed. 1992) (noting the various statutes and court rules which compliment the Sixth Amendment); See also *United States v. Anagnostou*, No. 91-3263, 1992 WL 217090 (7th Cir. Sept. 10, 1992) (due process at issue since pre-indictment delays are not covered under the Sixth Amendment).

<sup>13</sup> See *United States v. Marion*, 404 U.S. 307, 320 (1971) (Sixth Amendment protection triggered by "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer for a criminal charge").

<sup>14</sup> See *Strunk v. United States*, 412 U.S. 434, 440 (1973) ("in light of the policies which underlie the right to a speedy trial, dismissal must remain the only possible remedy"); See also ABA STANDARDS FOR CRIMINAL JUSTICE, § 12-4.1 (2d ed. 1980 & Supp. 1986) (lists comparable state and federal statutes); For criticisms of this rule, see Anthony Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 535 (1975) (unless pretrial delay has impaired the accused's defense, "the primary form of judicial relief against denial of a speedy trial should be to expedite the trial, not to abort it"). Due to these concerns, the federal Speedy Trial Act of 1974 has made absolute discharge the discretion of the court. See 18 U.S.C. § 3162(a)(2) (1988).

<sup>15</sup> *Doggett v. United States*, 112 S. Ct. 2686, 2690 (1992). See also *Barker v. Wingo*, 407 U.S. 514, 523-30 (1972) (rejecting demand-waiver approach); *Beavers v. Haubert*, 198 U.S. 77, 89 (1905) (speedy trial claims are relative).

<sup>16</sup> 407 U.S. 514 (1972).

<sup>17</sup> *Id.* at 530-32.

be relevant."<sup>18</sup>

Due to the imprecision of the constitutional standard for speedy trial claims, Congress enacted the Federal Speedy Trial Act of 1974 which dictates specific time limits for completing the key stages of a federal criminal prosecution.<sup>19</sup> The Speedy Trial Act requires a trial to begin no more than seventy days from the filing of the information or indictment, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later.<sup>20</sup> In addition to the Speedy Trial Act, state statutes and the Federal Rules of Criminal Procedure contain speedy trial provisions to prevent post-accusation delays.<sup>21</sup>

Nevertheless, the Speedy Trial Clause of the Sixth Amendment has remained an important, yet imprecise, measure of protection for defendants prejudiced by post-accusation delay.

### III. FACTUAL AND PROCEDURAL HISTORY

On February 22, 1980, a federal grand jury indicted Mark Doggett for conspiring to import and distribute cocaine.<sup>22</sup> Authorities issued a warrant for his arrest the same day.<sup>23</sup> Douglas Driver, the Drug Enforcement Administration's (DEA) principal agent investigating the conspiracy, informed the United States Marshal's Service that the DEA would oversee the apprehension of Doggett and his accomplices.<sup>24</sup>

On March 18, 1980, Driver instructed two law enforcement officers to arrest Doggett at his parent's home.<sup>25</sup> When they arrived at Doggett's home, however, Doggett's mother informed the officers that her son had left for Bogota, Columbia, four days earlier.<sup>26</sup> Doggett apparently had left, unaware that authorities had indicted

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<sup>18</sup> *Id.* at 533.

<sup>19</sup> While the constitutional protections are applicable to state and federal offenders, the Speedy Trial Act governs only federal criminal prosecutions. *See* 18 U.S.C. §§ 3161-3174 (1988).

<sup>20</sup> Since Doggett was not arraigned, he did not fall under the Speedy Trial Act. *See* 18 U.S.C. § 3161(c)(1) (1988). In addition, the Act specifically excludes delay caused by the absence or unavailability of the defendant. 18 U.S.C. § 3161(h)(3) (1988).

<sup>21</sup> *See, e.g.,* CAL. PENAL CODE § 1382 (West 1982 & Supp. 1992); ILL. REV. STAT. ch. 38, paras. 103-105(a) (1980 & Supp. 1992); WASH. R. CRIM. P. 3.3(c) (West 1990); *See also* FED. R. CRIM. P. 48(b) (authorizing dismissal for any "unnecessary delay" by government in presenting charge to grand jury, finding information or bringing defendant to trial).

<sup>22</sup> *Doggett v. United States*, 112 S. Ct. 2686, 2688 (1992).

<sup>23</sup> *Doggett v. United States*, 906 F.2d 573, 575 (11th Cir. 1990).

<sup>24</sup> *Doggett*, 112 S. Ct. at 2688.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

him and issued a warrant for his arrest.<sup>27</sup>

In order to catch Doggett on his return to the United States, Driver sent word of Doggett's outstanding arrest warrant to United States Custom's stations and a number of law enforcement organizations.<sup>28</sup> Driver entered a notation in the Treasury Enforcement Communications System (TECS), a computer network that helps Customs agents screen people entering the country.<sup>29</sup> After initially failing to place Doggett on an additional national crime computer system, Driver eventually entered the information on March 18, 1981.<sup>30</sup> In September 1981, Doggett's TECS entry expired, unbeknownst to Driver, and Doggett's name vanished from the system.<sup>31</sup>

On September 21, 1981, Agent Williams, in charge of DEA operations in Panama, informed Driver that Panamanian authorities had arrested Doggett on drug charges.<sup>32</sup> Driver requested informal expulsion proceedings, but made no attempt to initiate extradition proceedings because law enforcement officials in the United States Embassy in Panama told him that the extradition treaty between the United States and Panama did not cover drug offenses.<sup>33</sup> On October 15, 1981, Panama's attorney general agreed to expel Doggett to the United States once the Panamanian government completed its prosecution.<sup>34</sup> Agent Williams left Panama in July 1982 and reported to Driver that Doggett remained in Panamanian custody.<sup>35</sup>

On July 15, 1982, the Panamanian authorities released Doggett.<sup>36</sup> Several cables from the United States embassy in Panama to the State Department in Washington, D.C. indicated that the United States was notified of Doggett's release and his plans to return to Columbia.<sup>37</sup> This information apparently eluded the DEA.<sup>38</sup> Doggett proceeded to Columbia, where he lived with his aunt for nearly three months.<sup>39</sup> On September 25, 1982, Doggett returned to the United States and passed unhindered through U.S. Customs at John F. Kennedy Airport in New York.<sup>40</sup>

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<sup>27</sup> *Doggett*, 906 F.2d at 576.

<sup>28</sup> *Doggett*, 112 S. Ct. at 2688.

<sup>29</sup> *Id.*

<sup>30</sup> *Doggett*, 906 F.2d at 576.

<sup>31</sup> *Doggett*, 112 S. Ct. at 2688.

<sup>32</sup> *Doggett*, 906 F.2d at 576.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

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

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Doggett v. United States*, 112 S. Ct. 2686, 2688 (1992).

<sup>40</sup> *Id.*

From 1982 to 1985, however, Agent Driver continued to believe that Doggett remained in jail in Panama.<sup>41</sup> Driver assumed that Doggett had received a lengthy sentence from the Panamanians and did not communicate with Agent Williams' successor concerning Doggett's status.<sup>42</sup> Only after his own fortuitous assignment to Panama in 1985 did Driver discover of Doggett's departure to Columbia.<sup>43</sup> Driver, however, made no attempt to track Doggett down either abroad or in the United States.<sup>44</sup>

In the meantime, after returning to the United States, Doggett led a normal, productive and law-abiding life.<sup>45</sup> He met his wife in October 1982 and married her a year later.<sup>46</sup> Doggett interacted openly and freely in the community using his real name and made no attempt to conceal his identity or whereabouts.<sup>47</sup> He financed two homes through the bank, possessed credit cards, registered to vote, filed income tax returns, obtained a driver's license, received three traffic tickets, earned his associate degree at college and worked as a computer operations manager.<sup>48</sup>

Doggett remained lost to the American criminal justice system until September 1988, when he underwent a credit check pursuant to a Marshal's office program that checks outstanding warrants.<sup>49</sup> Within thirty minutes, the government discovered Doggett's driver's license number, the make and tag of his car, his wife's name, his employer and his address.<sup>50</sup> On September 5, 1988, nearly six years after his return to the United States and eight-and-a-half years after his indictment, the government arrested Doggett on charges of conspiring to import and distribute cocaine.<sup>51</sup>

Doggett moved to dismiss the indictment, arguing that the government's failure to prosecute him earlier violated his Sixth Amendment right to a speedy trial.<sup>52</sup> On December 27, 1988, the magistrate entered a Report and Recommendation suggesting the denial of Doggett's motion to dismiss.<sup>53</sup> Relying on *Barker*, the mag-

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<sup>41</sup> Doggett v. United States, 906 F.2d 573, 576 (11th Cir. 1990).

<sup>42</sup> *Id.* at 576-77.

<sup>43</sup> Doggett, 112 S. Ct. at 2688.

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

<sup>45</sup> Doggett, 906 F.2d at 577.

<sup>46</sup> *Id.*

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Doggett v. United States, 112 S. Ct. 2686, 2690 (1992).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*, See also Brief for Petitioner at 6, Doggett v. United States, 112 S. Ct. 2686 (1992) (No. 90-857) [hereinafter Brief for Petitioner].

istrate found that the delay between Doggett's indictment and arrest was long enough to be "presumptively prejudicial," and the delay "clearly [was] attributable to the negligence of the government."<sup>54</sup> The magistrate also found that Doggett had appropriately asserted his right to a speedy trial since no evidence existed that he had known of the charges against him until his arrest.<sup>55</sup> The magistrate further found, however, that Doggett made no affirmative showing that the delay impaired his ability to mount a successful defense or had otherwise prejudiced him.<sup>56</sup> In his recommendation to the district court, the magistrate contended that the failure to demonstrate particular prejudice sufficed to defeat Doggett's speedy trial claim.<sup>57</sup>

On January 31, 1989, the district court entered an order denying Doggett's motion to dismiss the speedy trial claim, accepting the magistrate's Report and Recommendation.<sup>58</sup> On February 3, 1989, Doggett entered a conditional guilty plea pursuant to Federal Rule of Criminal Procedure 11(a)(2), expressly reserving the right to appeal his ensuing conviction on the speedy trial claim.<sup>59</sup> At sentencing on March 31, 1989, a trial court found Doggett guilty of a felony, sentencing him to three years probation and a one thousand dollar fine.<sup>60</sup>

Doggett appealed to the Eleventh Circuit.<sup>61</sup> A split panel of the court of appeals affirmed the conviction.<sup>62</sup> Relying on *Ringstaff v. Howard*,<sup>63</sup> the appellate court ruled that, absent bad faith by the government, Doggett could prevail only by proving "actual prejudice" or by establishing that "the first three *Barker* factors weighed heavily in his favor."<sup>64</sup>

Applying this standard, the Eleventh Circuit majority agreed with the magistrate that Doggett had not shown actual prejudice.<sup>65</sup> Attributing the government's delay to "negligence" rather than "bad faith,"<sup>66</sup> the court concluded that *Barker*'s first three factors did not weigh so heavily against the government so as to make proof of

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<sup>54</sup> *Doggett*, 112 S. Ct. at 2690.

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

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*; *Doggett v. United States*, 112 S. Ct. 2686, 2690 (1992).

<sup>60</sup> Brief for Petitioner, *supra* note 53, at 6.

<sup>61</sup> *Doggett v. United States*, 906 F.2d 573 (11th Cir. 1990).

<sup>62</sup> *Id.* at 582; *Doggett*, 112 S. Ct. at 2690.

<sup>63</sup> 885 F.2d 1542 (11th Cir. 1989) (en banc).

<sup>64</sup> *Doggett*, 906 F.2d at 578-79.

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

<sup>66</sup> *Doggett*, 112 S. Ct. at 2690.



specific prejudice unnecessary.<sup>67</sup> In his dissent, Judge Clark argued that the majority placed an undue emphasis on Doggett's inability to prove actual prejudice.<sup>68</sup> The Supreme Court granted Doggett's petition for certiorari.<sup>69</sup>

#### IV. THE SUPREME COURT OPINIONS

##### A. THE MAJORITY

Writing for the majority,<sup>70</sup> Justice Souter reversed the decision of the Court of Appeals and remanded the case. Souter's opinion upheld the *Barker* four-part speedy trial claim analysis and balanced the respective facts of Doggett's case.

In considering the first *Barker* factor, an uncommonly lengthy delay, the majority easily found that the eight-and-a-half year delay "was not customarily prompt."<sup>71</sup> The majority presumed that prejudice intensifies over time and found that Doggett's delay stretched beyond the bare minimum needed to trigger judicial examination of the claim.<sup>72</sup>

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> 111 S. Ct. 1070 (1991).

<sup>70</sup> *Doggett*, 112 S. Ct. at 2686. Justices White, Blackmun, Stevens and Kennedy joined Justice Souter's opinion.

<sup>71</sup> *Id.* at 2691. The *Barker* enquiry ends if a delay does not exist which could presumptively cause prejudice. In this way, the length of delay is a triggering mechanism. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972) ("The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.")

The Supreme Court has still never specifically identified what length of time constitutes presumptive prejudice. See *United States v. \$8850*, 461 U.S. 555, 565 (1983) ("[L]ittle can be said on when a delay becomes presumptively improper"). Lower courts, however, have repeatedly ruled delays over a year presumptively prejudicial. See, e.g., *Gov't of Virgin Islands v. Pemberton*, 813 F.2d 626, 628 (3d Cir. 1987) (16-month delay); *Redd v. Sowders*, 809 F.2d 1266, 1269 (6th Cir. 1987) (32-month delay); *Ringstaff v. Howard*, 885 F.2d 1542, 1543 (11th Cir. 1989) (23-month delay); *Davis v. Puckett*, 857 F.2d 1035, 1040 (5th Cir. 1988) (13-month delay); *United States v. Ashford*, 924 F.2d 1416, 1421 (7th Cir. 1991) (18-month delay prejudicial because courts have ruled that delays as little as twelve months are prejudicial); See also Gregory P.N. Joseph, *Speedy Trial Rights in Application*, 48 *FORDHAM L. REV.* 611, 623 n.71 (1980) (collection of cases suggests delay over eight months meets this standard, while a delay of less than five months does not), cited in *Doggett*, 112 S. Ct. at 2691 n.1.

The Court has noted some time periods which do not run as part of a speedy trial claim. See *United States v. Loud Hawk*, 474 U.S. 302 (1986); *United States v. Marion*, 404 U.S. 307 (1971); *United States v. MacDonald*, 456 U.S. 1 (1982) (if charges are brought and dismissed only to be instituted again later, the period between the cessation of one criminal proceeding and the commencement of another is not significant under the Speedy Trial Clause). See also *Dillingham v. United States*, 423 U.S. 64 (1975) (per curiam) (delay between the identification of a person as a probable criminal and either the arrest or prosecution of that person is addressed as a matter of due process).

<sup>72</sup> *Doggett*, 112 S. Ct. at 2691 n.1 ("[P]resumptive prejudice' does not necessarily

Justice Souter's opinion then considered the second *Barker* factor, the reason for the delay before the trial.<sup>73</sup> The Court was skeptical of the government's persistence in tracking down Doggett, stating that the government made no serious effort to find Doggett for six years prior to his arrest.<sup>74</sup> While the majority did not believe the government acted in bad faith, Justice Souter noted that the government's actions were "findable negligence," which weighed against its prosecution.<sup>75</sup>

Justice Souter also briefly touched upon the third *Barker* factor, assertion of the speedy trial claim. Although the government maintained that Doggett had not promptly sought his Sixth Amendment claim,<sup>76</sup> the majority refused to punish Doggett for not invoking his speedy trial right until after his arrest.<sup>77</sup> The majority noted that if Doggett had known of the charges, this knowledge would have weighed heavily against Doggett. Doggett, however, was unaware of the indictment.<sup>78</sup>

Justice Souter then addressed the government's principal contention. The government presented two arguments implicating the fourth *Barker* factor, amount of prejudice suffered.<sup>79</sup> First, attempting to limit *Barker*, the government contended that, outside the protection of liberty interests, the Speedy Trial Clause was not generally intended to protect a criminal defendant's fair trial.<sup>80</sup> Consequently, according to the government, Doggett was not really an "accused;" therefore, the Sixth Amendment did not protect him against having his defense impaired by the government.<sup>81</sup>

The majority refused to honor this argument, which would

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indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry."').

<sup>73</sup> *Id.* at 2691.

<sup>74</sup> *Id.*

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

<sup>76</sup> Brief for United States at 14, *Doggett v. United States*, 112 S. Ct. 2686 (1992) (No. 90-857) [hereinafter Brief for United States].

<sup>77</sup> *Doggett*, 112 S. Ct. at 2691.

<sup>78</sup> The Court did not appreciate the government's attempt to re-create the facts in arguing that Doggett actually did know about the indictment. *Id.* The government argued that since Doggett's mother had visited him in Panama and his brothers had heard of the trial of Doggett's co-conspirators, Doggett must have been aware of the indictment. See Brief for United States, *supra* note 76, at 4, 6, 13. Although the facts were suspicious, the Court noted that the evidentiary question had been settled below at the trial level where Doggett had not testified. *Doggett*, 112 S. Ct. at 2691.

<sup>79</sup> *Doggett*, 112 S. Ct. at 2692.

<sup>80</sup> Brief for United States, *supra* note 76, at 9-12; *Doggett*, 112 S. Ct. at 2692.

<sup>81</sup> Brief for United States, *supra* note 76, at 9-12. The government cited precedent that a defendant, if not an accused, must establish prejudice before receiving speedy trial relief. See *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971) (protracted delay only violates due process if the government ad-

“read part of *Barker* right out of the law.”<sup>82</sup> Instead, Justice Souter explained that pretrial prejudice is not merely protected under the Due Process Clause.<sup>83</sup> Under the Sixth Amendment, the majority contended, the speedy trial inquiry must weigh the effects of delay on the accused’s defense, just as it has to weigh any other form of prejudice that *Barker* recognized.<sup>84</sup>

The second argument raised by the government was that Doggett had not shown how the delay prejudiced him.<sup>85</sup> Justice Souter agreed with the prosecution that Doggett’s prejudice could only arise from the possibility that his defense was impaired; he was neither subjected to pretrial detention nor aware of the charges, an awareness which could have potentially caused anxiety or humiliation.<sup>86</sup>

The majority, however, disagreed with the government’s contention that Doggett had to show exactly how the delay weakened his defense. Although the majority conceded that Doggett had come up short in this respect, Justice Souter noted that “consideration of prejudice is not limited to the specifically demonstrable.”<sup>87</sup> Justice Souter explained that since prejudice is difficult to prove, it is not essential for defendants to show prejudice in every speedy trial claim as long as the defendant experienced lengthy delays.<sup>88</sup>

While the Court would not go so far as to state that presumptive prejudice by a long delay carried a Sixth Amendment claim, Justice Souter noted that mixing other relevant facts with an extensive delay increases the likelihood of a successful claim.<sup>89</sup> Excessive delay, the Court reasoned, compromises the reliability of a trial in ways a defendant cannot prove.<sup>90</sup>

Next, Justice Souter considered how large a role the presumptive prejudice stemming from Doggett’s eight-year delay could play

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vances no satisfactory reason for the delay and the defendant experiences actual prejudice from the delay).

<sup>82</sup> *Doggett*, 112 S. Ct. at 2692.

<sup>83</sup> *Id.* at 2692 n.2 (“We reject the government’s argument that the effect of delay on adjudicative accuracy is exclusively a matter for consideration under the Due Process Clause.”).

<sup>84</sup> *Id.* at 2692. These other forms of prejudice recognized by *Barker* were pretrial incarceration and the anxiety and humiliation of awaiting trial after posting bond. See *Smith v. Hoovey*, 393 U.S. 374, 377-78 (1969).

<sup>85</sup> Brief for the United States, *supra* note 76, at 15.

<sup>86</sup> *Doggett*, 112 S. Ct. at 2692.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2692-93.

<sup>89</sup> *Id.* at 2693.

<sup>90</sup> The reliability of a trial is compromised, for example, by witness memory loss or other loss of evidence. *Id.*

in his speedy trial claim.<sup>91</sup> The court looked at three hypothetical cases. In the first case, where the government pursued Doggett with reasonable diligence, the majority suggested Doggett's claim would fail absent specific prejudice.<sup>92</sup> In this hypothetical, the majority assumed the pretrial delay was excusable and justified. In the second hypothetical, in which the government caused the delay in bad faith, the majority said that Doggett would surely prevail, especially with an extensive delay.<sup>93</sup>

The Court's third hypothetical mirrored Doggett's case, in which prosecutorial negligence caused the delay in bringing the accused to trial.<sup>94</sup> In this case, the majority suggested balancing the *Barker* factors according to the facts.<sup>95</sup> Although noting that negligence certainly weighed less heavily against the government than deliberate bad faith, the majority said, "[I]t still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun."<sup>96</sup> Due to the presumption that negligent behavior compounds prejudice over time, the majority further presumed that evidentiary prejudice grows.<sup>97</sup>

In effect, the majority ruled that negligence compounds with time, even if the accused cannot prove that prejudice exists. Though the Court hinted that the government could "persuasively rebut"<sup>98</sup> Doggett's contentions, it did not dictate how the government could have done so. In fact, the Court merely noted, "[w]hile the Government ably counters Doggett's efforts to demonstrate particularized trial prejudice, it has not, *and probably could not have*, affirmatively proved that the delay left his ability to defend himself unimpaired."<sup>99</sup>

In a final policy argument, the majority noted that it was not willing to punish Doggett for the prosecutor's mistakes and allow the government to "gamble with the interests of criminal suspects assigned a low prosecutorial priority."<sup>100</sup> Instead, the Court dismissed Doggett's indictment due to the combination of the government's negligence in causing the extraordinary delay and the

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2694.

<sup>99</sup> *Id.* at 2694 n.4 (emphasis added).

<sup>100</sup> *Id.* at 2693.

presumption of prejudice stemming from the extensive delay which, though unproven, was not persuasively rebutted by the government.<sup>101</sup>

#### B. JUSTICE O'CONNOR'S DISSENT

In a short dissent, Justice O'Connor expressed her displeasure with the majority in allowing speculative prejudice from a delay to tip the scales in favor of a speedy trial claim.<sup>102</sup> O'Connor stated that the Court has always required a showing of actual prejudice to the defendant before weighing prejudice in the balance.<sup>103</sup> Justice O'Connor noted that Doggett, even with the lengthy delay, did not suffer any anxiety or restriction of his liberty.<sup>104</sup>

In addition, Justice O'Connor suggested that delay is a "double-edged sword," which would hurt the government's prosecution just as much as Doggett's defense.<sup>105</sup> She reasoned that since the government had the burden of proving its case beyond a reasonable doubt, it was even more adversely affected by the delay than Doggett.<sup>106</sup>

#### C. JUSTICE THOMAS' DISSENT

In his dissent, Justice Thomas<sup>107</sup> berated the majority for redefining the Sixth Amendment Speedy Trial Clause outside of its original intent. Justice Thomas stated that the Speedy Trial Clause exists to protect an accused from undue incarceration and the anxiety and humiliation stemming from public accusation.<sup>108</sup> Directly opposing the majority's allegations, Thomas claimed that the Sixth Amendment was not intended to protect against prejudice to a defendant's defense or later disruptions of a normal life.<sup>109</sup>

First, Justice Thomas said that the Sixth Amendment does not

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 2694 (O'Connor, J., dissenting).

<sup>103</sup> *Id.* (O'Connor, J., dissenting).

<sup>104</sup> *Id.* (O'Connor, J., dissenting).

<sup>105</sup> *Id.* (O'Connor, J., dissenting) (quoting *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986)).

<sup>106</sup> *Doggett v. United States*, 112 S. Ct. 2686, 2694 (1992) (O'Connor, J., dissenting). See also *Loud Hawk*, 474 U.S. at 315.

<sup>107</sup> Justice Scalia and Chief Justice Rehnquist joined Justice Thomas' dissent.

<sup>108</sup> *Doggett*, 112 S. Ct. at 2695 (Thomas, J., dissenting). Thomas quoted precedent that "[T]he speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *Id.* (quoting *United States v. MacDonald*, 456 U.S. 1, 8 (1982)).

<sup>109</sup> *Doggett*, 112 S. Ct. at 2695 (Thomas, J., dissenting).

protect against prejudice to the defendant's defense.<sup>110</sup> Justice Thomas did not accept the majority's assertion that "precedent supports" the fact that the Sixth Amendment protects against defense prejudice.<sup>111</sup> Thomas stated that the Speedy Trial Clause is not directed against delay-related prejudice generally but against delay-related prejudice to a defendant's liberty.<sup>112</sup> Justice Thomas said that "inordinate delay . . . may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense."<sup>113</sup>

Justice Thomas stressed that the key in analyzing Sixth Amendment Speedy Trial claims has always been to consider prejudice to an individual's *liberty*.<sup>114</sup> He argued that any precedential language suggesting that defendants need not prove actual prejudice in speedy trial claims existed because the Court had never foreseen a case in which such a large delay could occur with the defendant not suffering any impairment of liberty.<sup>115</sup>

Justice Thomas suggested that if the Speedy Trial Clause was aimed at safeguarding against prejudice to the defense, then it would presumably limit all prosecutions that occur long after the crime.<sup>116</sup> According to Justice Thomas, defendants prosecuted years after a crime are just as hampered in defending themselves whether they "were indicted the week after the crime or the week before the trial."<sup>117</sup> Therefore, "[t]he initiation of a formal criminal prosecution is simply irrelevant to whether the defense has been prejudiced by delay."<sup>118</sup>

Justice Thomas believed Doggett was not an "accused" under

<sup>110</sup> *Id.* (Thomas, J., dissenting).

<sup>111</sup> *Id.* at 2696 (Thomas, J., dissenting).

<sup>112</sup> *Id.* (Thomas, J., dissenting); *See also* United States v. Loud Hawk, 474 U.S. 302, 312 (1986) ("[T]he Speedy Trial Clause's core concern is impairment of liberty.").

<sup>113</sup> *Doggett*, 112 S. Ct. at 2696 (Thomas, J., dissenting) (quoting United States v. Marion, 404 U.S. 307, 320 (1971)).

<sup>114</sup> *Id.* at 2695-96 (Thomas, J., dissenting). For a background on the history of the Sixth Amendment, *see* Klopfer v. North Carolina, 386 U.S. 213, 223-25 (1967) (describing the roots of the Speedy Trial Clause in English law).

<sup>115</sup> Thomas noted that the precedent case, *Moore v. Arizona*, cited by the majority for the contention that prejudice is not necessary in all speedy trial claims, is misleading since again the Court did not foresee a situation like Doggett's. *See Doggett*, 112 S. Ct. at 2697 n.3 (Thomas, J., dissenting) (quoting *Moore v. Arizona*, 414 U.S. 25, 27 (1973) (per curiam)) [emphasis added] ("[P]rejudice is *inevitably* present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty.").

<sup>116</sup> *Doggett*, 112 S. Ct. at 2697 (Thomas, J., dissenting).

<sup>117</sup> *Id.* at 2696-97 (Thomas, J., dissenting).

<sup>118</sup> *Id.* at 2697 (Thomas, J., dissenting).

the Sixth Amendment since he did not suffer liberty infringement. Consequently, he could not seek Sixth Amendment protection.<sup>119</sup> Instead of relying on the Sixth Amendment for protection against prejudice by a long delay, Justice Thomas suggested that Doggett look to the applicable statute of limitations and the Due Process Clause, which "always protects defendants against fundamentally unfair treatment by the government in criminal proceedings."<sup>120</sup>

Second, Justice Thomas discounted any entitlement to relief under the Speedy Trial Clause due to the disruption of Doggett's life, an issue which he criticized the majority for not even addressing.<sup>121</sup> Thomas said the Sixth Amendment does not protect a right of repose, a right to remain free from secret or unknown indictments which could later disrupt his new law-abiding life.<sup>122</sup>

After looking at common law repugnance to a criminal right to repose, Justice Thomas again noted that an individual unaware of an indictment should seek relief under federal and state statutes of limitations: "Such statutes not only protect a defendant from prejudice to his defense . . . but also balance his interest in repose against society's interest in the apprehension and punishment of criminals."<sup>123</sup> Justice Thomas wrote that "to recognize a constitutional right to repose is to recognize a right to be tried speedily after the offense," converting the Speedy Trial Clause into a constitutional statute of limitations.<sup>124</sup>

Justice Thomas' dissent outlined his fear that, in becoming so

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<sup>119</sup> *Id.* (Thomas, J., dissenting).

<sup>120</sup> *Id.* at 2698 (Thomas, J., dissenting). *See, e.g.*, *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307, 324 (1971); *United States v. MacDonald*, 456 U.S. 1, 8 (1982) ("The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations."); *See also Toussie v. United States*, 397 U.S. 112, 114-15 (1970) (statutes of limitations are "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.")

<sup>121</sup> The Court had asked for re-argument on this issue. *See United States v. Doggett*, 112 S. Ct. 631 (1991) (directing the parties to brief the question "whether the history of the Speedy Trial Clause of the Sixth Amendment supports the view that the Clause protects a right of citizens to repose, free from the fear of secret or unknown indictments for past crimes, independent of any interest in preventing lengthy pretrial incarceration or prejudice to the case of criminal defendant.")

<sup>122</sup> *Doggett*, 112 S. Ct. at 2699 (Thomas, J., dissenting).

<sup>123</sup> *Id.* (Thomas, J., dissenting). Thomas noted that statute of limitations take into account the severity of the crime. For example, a graver offense has a much longer statute of limitations than a minor one. *See, e.g.*, Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 652-53 (1954) (comparing state statutes of limitations for various crimes).

<sup>124</sup> *Doggett*, 112 S. Ct. at 2700 (Thomas, J., dissenting).

engrossed in applying *Barker's* four-prong test, the Court had lost sight of the nature and purposes of the Sixth Amendment's Speedy Trial Clause and consequently, it opened up new unintended liberties under the clause.<sup>125</sup> Justice Thomas identified the majority's error as failing to recognize that "speedy trial guarantees cannot be violated—and thus *Barker* does not apply at all—when an accused is entirely unaware of a pending indictment against him."<sup>126</sup>

According to Justice Thomas, pretrial delay and the disruption of life remain relevant in the speedy trial analysis, but only insofar as deciding whether a defendant, deprived of a liberty interest protected under the clause, deserves relief.<sup>127</sup> The two factors, however, are not relevant where no liberty infringement exists since they exist outside the scope of the Sixth Amendment.<sup>128</sup>

Like the majority, Justice Thomas ended his opinion with a policy consideration. Instead of prodding prosecutors to be more diligent, Justice Thomas predicted that the *Doggett* decision would actually "transform the courts of the land into boards of law-enforcement supervision" with the courts "indulg[ing] in ad hoc and result-driven second-guess[ing] of the government's investigatory efforts."<sup>129</sup>

## V. ANALYSIS

The *Doggett* majority correctly granted relief under the Sixth Amendment Speedy Trial Clause. The Court extended the definition of "accused" under the Amendment at least to defendants unaware of their indictments. In doing so, the Court properly realized *Doggett's* potential defense impairment after an eight-and-a-half year delay, which occurred largely due to government negligence. The Court, however, did not note whether their decision affects the due process requirements of actual prejudice in the pre-indictment stage. Extending the Speedy Trial Clause, and therefore the *Barker* test, to the pre-indictment stage of the criminal process would seem reasonable since defense impairment occurs during delays at all stages in the prosecution.

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<sup>125</sup> *Id.* (Thomas, J., dissenting).

<sup>126</sup> *Id.* (Thomas, J., dissenting).

<sup>127</sup> *Id.* at 2700 n.5 (Thomas, J., dissenting).

<sup>128</sup> Thomas noted that the delay between the indictment and trial probably even helped *Doggett* as evidenced by his sentence of only a \$1000 fine and three years probation. *Id.* at 2701 n.6 (Thomas, J., dissenting) ("[T]he delay gave *Doggett* the opportunity to prove what most defendants can only promise: that he no longer posed a threat to society. There can be little doubt that, had he been tried immediately after his cocaine-importation activities, he would have received a harsher sentence.").

<sup>129</sup> *Id.* at 2700-01 (Thomas, J., dissenting).



The *Barker* balancing test, upheld by the court, provides a helpful, ad-hoc basis for lower courts to analyze the respective factors crucial in determining whether a speedy trial violation has occurred. The Court's application of the *Barker* test to lengthy delays such as in *Doggett*, however, has some flaws. First, the Court failed to specify what constitutes an "extraordinary" delay, which allows a defendant to allege presumptive prejudice. Similarly, the Court did not discuss how the government in cases of extraordinary delay could rebut the presumption of prejudice. By not suggesting a standard by which the government could rebut a defendant's presumptive prejudice, the Court seemingly imposed an irrebuttable presumption of prejudice for lengthy delays caused in any part by the prosecution.

The Court also appropriately ruled that, where the government fails to use diligence in apprehending a defendant, the delay weighs against the prosecution. The Court, however, failed to specify this minimum level of prosecutorial due diligence. This Note argues that the Court should have imposed on the government an obligation to notify the defendant of the charges. Then, by failing to exercise reasonable efforts to notify the defendant, courts could hold the prosecution to a higher standard without indulging in an ad-hoc grading of prosecutors' efforts.

#### A. WAS DOGGETT AN "ACCUSED"?

The Sixth Amendment Speedy Trial Clause protects the "accused" from long delays in prosecution.<sup>130</sup> Historically, an individual not subject to arrest or indictment cannot enjoy Sixth Amendment protection.<sup>131</sup> Before arrest or indictment, the Court interprets the Fifth Amendment Due Process Clause, along with state and federal statutes of limitations, to protect defendants against prejudice stemming from long delays between a crime and formal accusation.<sup>132</sup>

Whether or not an individual is an "accused" under the Sixth Amendment affects the evidentiary burden and, therefore, also likely dictates the result. "Accused" individuals receive protection

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<sup>130</sup> U.S. CONST. amend. VI.

<sup>131</sup> See *United States v. Marion*, 404 U.S. 307, 320 (1971) (Sixth Amendment protection triggered by "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer for a criminal charge . . ."). See also *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986) (when not subject to indictment or formal restraint, person not protected under the Sixth Amendment).

<sup>132</sup> See, e.g., *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977); *Marion*, 404 U.S. at 325-26 (Due Process Clause may provide basis for dismissing indictment if the defendant can show at trial that prosecutorial delay before the indictment was filed prejudiced the right to a fair trial).

under the Sixth Amendment speedy trial four-part balancing test laid out in *Barker*. An individual not deemed accused, however, must rely on the Due Process Clause.<sup>133</sup> The Court has required defendants relying on the Due Process Clause to present concrete evidence showing material harm and prosecutorial bad intent, instead of merely engaging in the balancing test.<sup>134</sup> “Accused” individuals, therefore, have a lower burden of proving that harm occurred due to the prosecution’s delay.

The majority and dissent in *Doggett* disagreed whether Doggett was in fact an “accused” entitled to relief under the Sixth Amendment. Justice Thomas noted in his dissent that an accused typically suffers liberty infringement as a result of the delay.<sup>135</sup> Doggett, however, did not endure pretrial incarceration, nor did he suffer humiliation and anxiety while awaiting trial, prejudices normally protected against under the Sixth Amendment. Instead, for much of the period after the indictment, Doggett lived a normal life in Virginia, unaware of the charges.<sup>136</sup> Since the delay did not explicitly inconvenience Doggett, Justice Thomas’ dissent argued that Doggett did not merit Sixth Amendment protection.

Although Doggett did not suffer actual harm to his liberty, the majority correctly protected against Doggett’s probable defense impairment due to the delay. The Court did so by holding that the government’s filing of the indictment initiated Doggett’s Sixth Amendment protection as an accused, regardless of his knowledge of the charges.<sup>137</sup> The Court stated that once receiving the indictment, passage of time impaired Doggett’s defense.<sup>138</sup> Therefore, once the prosecution files an indictment, courts should continue to hold the government responsible for diligently arresting defendants and granting expeditious trials.<sup>139</sup>

Justice Thomas’ dissent, however, argued that the indicted individual who has not suffered liberty infringement cannot enjoy Sixth

<sup>133</sup> U.S. CONST. amends. V & XIV.

<sup>134</sup> See, e.g., *Marion*, 404 U.S. at 324 (allowing for dismissal under the Due Process Clause “if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to the defendant’s rights to a fair trial and that the delay was an intentional device of government to gain advantage over the accused”); *Acha v. United States*, 910 F.2d 28, 32 (1st Cir. 1990).

<sup>135</sup> *United States v. Doggett*, 112 S. Ct. 2686, 2695-96 (1992) (Thomas, J., dissenting) (suggesting that in analyzing Sixth Amendment speedy trial claims, courts should look at the effects on the defendant’s liberty).

<sup>136</sup> Brief for Petitioner, *supra* note 53, at 3.

<sup>137</sup> *Doggett*, 112 S. Ct. at 2692.

<sup>138</sup> *Id.* at 2693 (“[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.”).

<sup>139</sup> See *infra* notes 191-201 and accompanying text.

Amendment protection. He assumed that the only reason previous cases had not made this explicit was because no one had ever envisioned a fact pattern where such a long delay could occur between the indictment and arrest of an unaware individual.<sup>140</sup> This fact, however, is not a reason to reverse the decision. Simply put, the Court has repeatedly stated that an individual becomes "accused" once indicted.<sup>141</sup>

In addition, the Court's purpose of protecting against defense impairment also comports with precedent. Justice Souter stated, "[o]nce triggered by . . . indictment . . . the speedy trial enquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice that *Barker* recognized."<sup>142</sup> The Court has long recognized defense impairment as "the most serious" protection of the Sixth Amendment since it "skews the fairness" of the trial.<sup>143</sup> Memory lapses and the loss of both witnesses and evidence, which all damage a defendant's defense, occur with delay, whether or not the defendant is aware of the indictment.<sup>144</sup>

Since defense impairment compounds with time after the crime regardless of when or whether an indictment is filed, Justice Thomas failed to see why indicting an individual allows the person to be "accused" if the person did not suffer liberty infringement.<sup>145</sup> Justice Thomas reasoned that prejudice due to defense impairment grows with time after a crime regardless of when or whether the government files an indictment.<sup>146</sup>

Under Justice Thomas' reasoning, however, defense impairment does not merit Sixth Amendment protection. According to Justice Thomas, Doggett could not enjoy Sixth Amendment protection since he was ignorant of the indicted charges and not "ac-

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<sup>140</sup> *Doggett*, 112 S. Ct. at 2697 (Thomas, J., dissenting).

<sup>141</sup> See, e.g., *United States v. MacDonald*, 456 U.S. 1, 6-7 (1982) (Sixth Amendment speedy trial right attaches when formal criminal charges instituted and prosecution begins); *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986); *United States v. Marion*, 404 U.S. 307, 320 (1971) (Sixth Amendment protection triggered by "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer for a criminal charge . . ."); See also ABA STANDARDS FOR CRIMINAL JUSTICE, § 12-2.2(a) (2d ed. 1980 & Supp. 1986) ("[T]he time for trial should commence running . . . from the date the charge is filed . . .").

<sup>142</sup> *Doggett*, 112 S. Ct. at 2692.

<sup>143</sup> *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

<sup>144</sup> *Doggett*, 112 S. Ct. at 2692-93 (suggesting that time erodes exculpatory evidence and testimony).

<sup>145</sup> *Id.* at 2697 (Thomas, J., dissenting).

<sup>146</sup> *Id.* at 2696 (Thomas, J., dissenting) ("[P]rejudice to the defense stems from the interval between crime and trial which is quite distinct from the interval between accusation and trial.").

cused."<sup>147</sup> At that moment, however, Doggett would also not qualify for protection under the presiding statute of limitation<sup>148</sup> or the Due Process Clause,<sup>149</sup> both of which guard against delay *before* formal accusation. Therefore, under Justice Thomas' reasoning, Doggett would not qualify for *any* defense impairment protection, regardless of the length of delay before his trial.

The Court majority correctly interpreted the definition of an accused to protect an indicted defendant unaware of the accusation and solely concerned about defense impairment. Allowing protection for defense impairment, however, threatens to tear apart the Court's distinction between pre- and post-indictment delay and its subsequent reliance on separate constitutional amendments. Defense impairment, after all, really exists at any time after the criminal act regardless whether or not an indictment has been filed.<sup>150</sup> An inherent discrepancy exists in granting Doggett Sixth Amendment protection merely by being indicted without realizing it.

The Court likely only intended to extend speedy trial protection to defendants unaware of pending charges. Once the Court stresses defense impairment by granting Sixth Amendment protection to someone unaware of charges, however, it is uncertain why courts should deny this important protection to others concerned about having his or her defense impaired.<sup>151</sup>

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<sup>147</sup> *Id.* at 2700 (Thomas, J., dissenting) ("[S]peedy trial guarantee cannot be violated . . . when an accused is entirely unaware of a pending indictment.").

<sup>148</sup> Under statutes of limitations, protection ends with the filing of an indictment. *See* 18 U.S.C. § 3282 (1988) ("[E]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.").

<sup>149</sup> *See* *United States v. Marion*, 404 U.S. 307, 324 (1971) (Due Process Clause requires dismissal of indictment if *pre-indictment* delay caused substantial prejudice to defendant).

<sup>150</sup> *See Doggett*, 112 S. Ct. at 2696 (Thomas, J., dissenting) (defense impairment exists whether or not formal charges are implemented).

<sup>151</sup> For example, some commentators have suggested that potential defendants not yet charged should receive speedy trial guarantees since they also need to prepare their case and are affected by long pretrial delays. *See, e.g.,* Note, *Justice Overdue: Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95, 100 (1952) (potential defendants' ability to prepare an adequate defense rests upon the same critical factors whether accused or not); *See also* Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607, 628-38 (1990) (arguing that construing the Speedy Trial Clause to exclude pre-accusation delay is not an accurate interpretation "[b]ecause delay can occur at any stage of the criminal process, from offense to conviction, the purposes of the speedy trial would seem to be served fully only by limiting undue delay at whatever point in the process it occurs."); Allyn Z. Lite, *The Pre-Accusation Delay Dilemma*, 10 SETON HALL L. REV. 539, 543 (1980) ("[T]he prejudice which a criminal defendant actually suffers from unreasonable prosecutorial delay before trial is the same regardless of the stage of the pre-trial proceedings during which

If the Court moves away from distinguishing between pre- and post-indictment delay, individuals at all stages in the criminal process, previously only offered protection under the strict "show harm" requirements of the Fifth Amendment, could fall under the more lenient Sixth Amendment *Barker* test.<sup>152</sup> Since the *Barker* balancing test meticulously analyzes the facts of each case, the Court could streamline doctrinal baggage, while protecting defense impairment in all phases of a trial where speedy trial is at issue, by implementing the *Barker* test for all speedy trial claims.<sup>153</sup>

#### B. THE PREJUDICE FACTOR

The fourth *Barker* factor in analyzing a speedy trial claim considers the amount of prejudice placed on the defendant due to the delay in the proceedings.<sup>154</sup> Although the Supreme Court, prior to *Doggett*, had stated that an affirmative demonstration of prejudice to a defense was not a prerequisite to affording speedy trial relief,<sup>155</sup>

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it was occasioned."); ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 14, § 12-2.2(a) ("Indeed, if the uncharged defendant is compared with a defendant who knows he or she is charged but is not brought to trial promptly thereafter, the former may be at an even greater disadvantage because the defendant is not prompted to prepare his or her defense.").

<sup>152</sup> The notion that pre-indicted defendants have speedy trial interests has received some acknowledgement from the Court. *See Marion*, 404 U.S. at 328 (Douglas, J., concurring) ("The right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pre-indictment delays as it is to post-indictment delays"); *See also* *United States v. Loud Hawk*, 474 U.S. 302, 318 (1986) (Marshall, J., dissenting) ("We have . . . recognized that one may stand publicly accused without being under indictment."). However, pre- and post-accusation delay remain protected under two different balancing tests and two different constitutional amendments. Short of a complete overhaul of the existing speedy trial guarantees, it is more likely the *Doggett* decision will remain limited to protecting defendants unaware of pending indictments from defense impairment. At least one circuit court has recently noticed the tightrope the Supreme Court is drawing in trying to distinguish pre- and post-indictment defense impairment protection. *See United States v. Anagnostou*, No. 91-3263, 1992 WL 217090, at \*3 n.2 (7th Cir. Sept. 10, 1992) (ruling that *Doggett's* holding does not upset longstanding requirements that defendants prove actual prejudice under the Due Process Clause); *See also Pharm v. Hatcher*, No. 90-3539, 1993 WL 8193, at \*3 n.5 (7th Cir. Jan. 19, 1993) (adopting *Anagnostou's* view that *Doggett* did not change the standards for pre-accusation delay).

<sup>153</sup> Due to the interest in protecting against all pretrial delay and the lack of any clearly developed test for pre-accusation delay, lower courts have already used the *Barker* balancing test in pre-indictment settings. *See, e.g., United States v. Barket*, 530 F.2d 189 (8th Cir. 1976); *United States v. Shaw*, 555 F.2d 1295 (5th Cir. 1977); *United States v. Stoddart*, 574 F.2d 1050 (10th Cir. 1978); *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977).

<sup>154</sup> *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

<sup>155</sup> *See Moore v. Arizona*, 414 U.S. 25, 26 (1973); *See also Barker*, 407 U.S. at 533 ("We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.").

lower courts generally required some showing of prejudice.<sup>156</sup>

Believing a showing of prejudice was necessary to pursue his speedy trial claim, Doggett attempted to prove that several events occurred during the long delay which prejudiced his trial.<sup>157</sup> The defense noted that seventeen tape-recorded conversations, a government informant and a material witness—all relevant to Doggett's prosecution—had disappeared.<sup>158</sup> The defense summed up the prejudice by alleging, "Doggett's delayed arrest completely disrupted his life, drained his financial resources, interfered with his liberty and may well have actually interfered with his ability to present a defense."<sup>159</sup>

To rebut these arguments by the defense, the government alleged that Doggett's prejudice claims were purely speculative.<sup>160</sup> The government suggested that the tape recordings, made in the course of the government's undercover investigation, would most likely have confirmed Doggett's guilt.<sup>161</sup> The government further noted that Doggett's presumed prejudice due to the long delay should receive little merit.<sup>162</sup>

The *Doggett* majority never mentioned the missing tapes or witnesses, but instead noted that "consideration of prejudice is not limited to the specifically demonstrable."<sup>163</sup> The Court decided that because an extraordinary delay occurred due to government negligence, a presumption of prejudice existed.<sup>164</sup> Doggett, therefore, did not have to prove prejudice. Although lower courts, prior to *Doggett*, had not assumed defendants suffered prejudice due to delays,<sup>165</sup> the majority in *Doggett* found that, in an "extraordinary" de-

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<sup>156</sup> See, e.g., *Gov't of Virgin Islands v. Birmingham*, 788 F.2d 933, 936 (3d Cir. 1986) (prejudice is key factor, absence of prejudice decisive); *Perez v. Sullivan*, 793 F.2d 249, 256 (10th Cir. 1986) (great reluctance to find speedy trial violation absent prejudice); *United States v. DeClue*, 899 F.2d 1465, 1471 (6th Cir. 1990) (defendant must show "substantial prejudice"); *United States v. Juarez-Fierro*, 935 F.2d 672, 676 (5th Cir. 1991) (defendant made no attempt to show impairment by delay; this is the "most important inquiry"); *Rayborn v. Scully*, 858 F.2d 84, 94 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 842 (1989). But see Eleventh Circuit rule that in absence of actual prejudice, speedy trial claim affirmed if other three *Barker* factors all weigh heavily against the government. *United States v. Dennard*, 722 F.2d 1510, 1513-14 (11th Cir. 1984); *United States v. Davenport*, 935 F.2d 1223, 1239 (11th Cir. 1991); *Ringstaff v. Howard*, 885 F.2d 1542, 1545 (11th Cir. 1989).

<sup>157</sup> Brief for Petitioner, *supra* note 53, at 6.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 11.

<sup>160</sup> Brief for the United States, *supra* note 76, at 15-18.

<sup>161</sup> *Id.* at 16.

<sup>162</sup> *Id.* at 15-18.

<sup>163</sup> *United States v. Doggett*, 112 S. Ct. 2686, 2692 (1992).

<sup>164</sup> *Id.* at 2693.

<sup>165</sup> Courts, for example, tended not to assume memory lapse occurred. See, e.g.,

lay, this presumptive prejudice exists.<sup>166</sup>

Although the majority assumed Doggett's prejudice, it did not contradict precedent. The *Barker* Court noted that prejudice caused by defense impairment is the most difficult type of prejudice to prove because time erodes evidence and testimony.<sup>167</sup> Therefore, the *Doggett* Court reasoned that, in an eight-and-a-half year delay, prejudice surely exists, even if defendants cannot prove its existence.<sup>168</sup>

In her separate dissent, Justice O'Connor criticized the majority's reliance on presumptive prejudice. Justice O'Connor suggested that the delay prejudiced the government more than Doggett since the government would have a much more difficult time proving its case beyond a reasonable doubt.<sup>169</sup> Similarly, Justice Thomas' dissent noted that the delay undoubtedly helped Doggett by reducing his sentence.<sup>170</sup>

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United States v. Brock, 782 F.2d 1442, 1447 (7th Cir. 1986); United States v. DeClue, 899 F.2d 1465, 1470-71 (6th Cir. 1990). Nor did courts find prejudice when defendants offered vague conclusory allegations. *See, e.g.*, United States v. Rein, 848 F.2d 777, 781 (7th Cir. 1988) ("vague allegations" of difficulty finding employment, mental problems, deprivation of motor vehicle use and possible lapses of memory insufficient to prove prejudice); United States v. Juarez-Fierro, 935 F.2d 672, 676 (5th Cir. 1991) (conclusory statements alone, of anxiety suffered from delay, insufficient to support constitutional challenge).

<sup>166</sup> *Doggett*, 112 S. Ct. at 2693.

<sup>167</sup> *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *See also* United States v. Brown, 520 F.2d 1106, 1111-12 (D.C. Cir. 1975) (personal prejudice found where defendant lost contact with some or all potential witnesses); United States v. Re, 335 F. Supp. 1176 (S.D. N.Y. 1972) (prejudice may arise from deterioration of health and advancing age during delay interim); United States v. Rogers, 781 F. Supp. 1181, 1189-90 (S.D. Miss. 1991) (prejudice found due to impaired cognitive functions which caused defendant to be unable to meaningfully assist in his defense).

<sup>168</sup> *Doggett*, 112 S. Ct. at 2693. *See generally* United States v. Marion, 404 U.S. 307, 328-29 (1971) (Douglas, J., concurring) (quoting *Regina v. Robins*, 1 Cox's C.C. 114 (Somerset Winter Assizes (1844)):

It is monstrous to put a man on his trial after such a lapse of time. How can he account for conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servant and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial.

<sup>169</sup> *Doggett*, 112 S. Ct. at 2694 (O'Connor, J., dissenting). *See also* *Barker*, 407 U.S. at 521 (noting that the Court has long noted that speedy trial claims are especially confusing since "pre-trial delay, the danger against which the right is designed to protect, often works to the advantage of a criminal defendant, particularly one who is not confined while awaiting trial."); JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 326 (C.K. Ogden ed., 1931) ("[I]t is desirable that punishment should follow offense as closely as possible; for its impression upon the minds of men is weakened by distance, and, besides, distance adds to the uncertainty of punishment, by affording new chances of escape.").

<sup>170</sup> *Doggett*, 112 S. Ct. at 2701 n.6 (Thomas, J., dissenting).

Although both dissents may have correctly assumed that delay could have also prejudiced the government, they cannot refute that the Bill of Rights protects individuals instead of the government.<sup>171</sup> The Sixth Amendment should not protect the government from delays caused by poor prosecution techniques or from losing exculpatory evidence; instead, it should protect defendants from prejudice arising from these delays.<sup>172</sup> Therefore, the dissent fails to note that Doggett may have received an undeserving conviction altogether.

### 1. *Lack of Standard for Determining Extraordinary Delays*

The Court correctly inferred presumptive prejudice due to Doggett's extraordinary delay caused by government negligence.<sup>173</sup> The Court failed, however, to distinguish between "extraordinary" delays that foster this presumed prejudice and regular delays that do not.<sup>174</sup> The majority merely noted that, when performing the *Barker* test, the longer the delay, the greater the presumption of prejudice.<sup>175</sup>

Whether or not an extraordinary delay exists, however, greatly affects which party has the burden of showing the existence of prejudice.<sup>176</sup> When no extraordinary delay exists, courts will not presume prejudice,<sup>177</sup> so that the defendant still has the burden of

<sup>171</sup> LAFAVE & ISRAEL, *supra* note 13, § 2.1 ("Bill of Rights . . . designed to ensure that the federal government did not overstep its authority and deny the rights of the individual."); *See also* *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992) (Bill of Rights served as protection for individuals from unjustified interference by the government).

<sup>172</sup> LAFAVE & ISRAEL, *supra* note 13, § 2.8(e) (constitutional guarantee paramount regardless of the practical costs or efficiency of the criminal process).

<sup>173</sup> *Doggett*, 112 S. Ct. at 2693 (suggesting that court's toleration of government negligence should vary "inversely with its protractedness.").

<sup>174</sup> The Court only mentions that the delay is "extraordinary." *Id.* at 2694; *See also* *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (five-year delay "extraordinary").

<sup>175</sup> *Doggett*, 112 S. Ct. at 2693 ("[T]he weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows."). The majority likely did not mention any specific time frame for fear that the time limit would begin to appear like the constitutional statute of limitations, which the dissent accused the majority of installing instead of the *Barker* balancing test.

<sup>176</sup> Commentators have noted that the party holding the burden of proving prejudice may dictate the result of the case. *See generally* Survey, *Right To a Speedy Trial, The Supreme Court, 1971 Term*, 86 HARV. L. REV. 164, 170-71 (1972) (the party with the burden rarely prevails because it is so difficult to establish actual prejudice).

<sup>177</sup> For example, in a post-*Doggett* case, the Second Circuit dismissed a Sixth Amendment speedy trial claim after the defendant failed to demonstrate prejudice from the seven-month delay between the indictment and trial. Though the court acknowledged the *Doggett* Court's determination that failure to show prejudice is not necessarily fatal to a speedy trial inquiry, the court distinguished the case since the delay was only seven months and not due to government negligence, so much as the complexity of the case. *United States v. Vassell*, No. 92-1045, 1992 WL 183226 (2d Cir. Aug. 3, 1992).

The *Doggett* majority, in finding prejudice, did perhaps skirt one of the major issues,



establishing prejudice.<sup>178</sup>

On the other hand, in an extraordinary delay, a presumption of prejudice automatically exists due to the length of the delay.<sup>179</sup> Instead of making the defendant prove actual harm, the government has the burden of rebutting a presumption of prejudice.<sup>180</sup> Thus, whether the delay is extraordinary is crucial in affecting the burden of proof. The Court, though, failed to specify a means of determining when a delay is extraordinary.<sup>181</sup>

To protect itself from criticism and give guidance to lower courts, the Court should have installed the applicable statute of limitations as the time frame where courts can imply presumptive prejudice after the indictment is filed.<sup>182</sup> The Court has already noted that "these statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."<sup>183</sup> Since statutes of limitations are fostered to "minimize the danger of official punishment because of acts in the far-distant past," their time limits should apply to accused defendants similarly prejudiced by poor prosecution.<sup>184</sup> In this case, where the applicable statute of limitations was

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namely how large a role prejudice plays when the delay is not extraordinary. Lower courts have been in disarray as to whether a requirement of actual prejudice exists in asserting a speedy trial claim. See *supra* notes 155-156 and accompanying text. The Court could have upheld the Eleventh Circuit test and said that, since the other three factors weigh against the government, a Sixth Amendment violation occurred. The Court, however, chose not to comment on the Eleventh Circuit test, addressing the presumption of prejudice due to the long delay.

<sup>178</sup> See Recent Case, *The Right to a Speedy Trial*, 26 VAND. L. REV. 171, 173 (1973) (defendant generally has the burden of showing actual prejudice).

<sup>179</sup> *Doggett*, 112 S. Ct. at 2693-94; See also *United States v. Shell*, No. 91-30206, 1992 WL 214048 (9th Cir. Sept. 8, 1992) (post-*Doggett* case which found six-year delay meant defendant did not have to prove prejudice).

<sup>180</sup> *Doggett*, 112 S. Ct. at 2694.

<sup>181</sup> For a similar criticism, see H. Richard Uviller, *Barker v. Wingo: Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1394 (1972) ("[T]he [Barker] Court should have identified a point at which prejudice is presumed, shifting the critical burden to the state to prove the negative.").

<sup>182</sup> This suggestion was formulated in *Doggett's* Supreme Court brief:

Where the defendant lacks knowledge of the indictment and the statute of limitations has expired from the date of indictment to the date of arrest, actual prejudice should be presumed . . . [T]his time frame, which would have given the government five years from the indictment in this case, is very generous to the Government, can be easily ascertained by all concerned, and follows a closely analogous time frame established by Congress.

Brief for Petitioner, *supra* note 53, at 13.

<sup>183</sup> *United States v. Marion*, 404 U.S. 307, 322 (1971).

<sup>184</sup> *Toussie v. United States*, 397 U.S. 112, 114-15 (1970) (statute of limitations are "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.").

five years, the Court could properly assume that Doggett suffered prejudice due to the eight-year delay between the indictment and trial.<sup>185</sup>

## 2. *Failure to Define Rebuttable Presumption of Prejudice*

In addition to its failure to establish the length of an extraordinary delay, which shifts the burden of proving a constitutional violation, the *Doggett* majority also failed to explain how the government could have rebutted Doggett's presumptive prejudice. Justice Souter's opinion indicated that the government had not persuasively rebutted Doggett's prejudice, but it did not state how the government could have rebutted this unsubstantiated prejudice.<sup>186</sup> In fact, the Court suggested that the government probably could not have done so.<sup>187</sup> Under the Court's nebulous reasoning, a delay that fosters presumed prejudice appears irrebuttable.

In an "extraordinary" delay, therefore, the government apparently cannot rebut presumptive prejudice.<sup>188</sup> For example, in a post-*Doggett* case, the Ninth Circuit held that a six-year delay violated the Speedy Trial Clause even though the defendant conceded that most of the essential witnesses and documentary evidence were still available.<sup>189</sup> The Ninth Circuit, while quoting from *Doggett* that the government can "persuasively rebut" the presumption of prejudice, merely noted that the government had not done so in this case.<sup>190</sup> Therefore, once a court has found an "extraordinary" delay, the prosecution cannot rebut presumptive prejudice and loses.

The *Doggett* majority correctly found that a long delay is apt to impair an individual's defense. At the very least, however, the Court needs to distinguish between extraordinary delays and other delays.

<sup>185</sup> See 18 U.S.C. § 3282 (1988) (applicable federal statute of limitations stating federal authorities must file charges within five years after the offense unless otherwise noted).

<sup>186</sup> *Doggett v. United States*, 112 S. Ct. 2686, 2693 (1992).

<sup>187</sup> *Id.* at 2693 n.4 ("[W]hile the government ably counters Doggett's efforts to demonstrate particularized trial prejudice, it has not, and probably could not have, affirmatively proved that the delay left his ability to defend himself unimpaired"); See also Uviller, *supra* note 181, at 1394-95 (cited in *Doggett* at 2693 n. 4) (suggesting that rebutting this presumption of prejudice is extremely difficult "since the critical facts are known only to the defendant.").

<sup>188</sup> In this way, an "irrebuttable presumption of prejudice" is, for all intents and purposes, a statute of limitations. The Court has built a statute of limitations around its nebulous "extraordinary delay."

<sup>189</sup> *United States v. Shell*, No. 91-30206, 1992 WL 214048, at \*2 (9th Cir. Sept. 8, 1992).

<sup>190</sup> *Id.* ("Although the Court [in *Doggett*] did not define precisely what type of evidence must be shown to rebut the presumption, we have little doubt that the government has failed to meet its burden.").

In addition, where an extraordinary delay exists, the Court should enunciate what the government must show in order to rebut prejudice. In the absence of such a standard, extraordinary delay becomes an irrebuttable presumption of prejudice.

### C. PROSECUTORIAL IMPLICATIONS

Under the second *Barker* prong, courts must consider the prosecutor's and defendant's respective reasons for the delay in the proceedings.<sup>191</sup> Since an "extraordinary" delay presumptively prejudices defendants, the *Doggett* decision places a heightened burden on the prosecution to limit post-indictment delay. The Court, however, did not properly specify these prosecutorial duties of diligence.<sup>192</sup> The majority described the diligence duty only by stating that the DEA "made no serious effort" to determine if *Doggett* had returned to the United States.<sup>193</sup> This "findable negligence," coupled with the lengthy delay, tipped the *Barker* balancing test in *Doggett's* favor.<sup>194</sup>

After *Doggett*, the impact of diligence and negligence by the prosecution remains uncertain. The Court has previously stated that the government has a constitutional duty to make a diligent good-faith effort to bring indicted defendants to trial without unnecessary delay.<sup>195</sup> Following *United States v. Loud Hawk*,<sup>196</sup> lower courts limited this requirement, ruling that, absent bad faith, the government is not largely accountable for delays due to gathering materials for trial,<sup>197</sup> limited prosecutorial resources<sup>198</sup> and crowded court

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<sup>191</sup> *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

<sup>192</sup> The Court has recognized the vague area defining prosecutorial duties:

The duty which the Sixth Amendment places on government officials to proceed expeditiously with criminal prosecution would have little meaning if those officials could determine when that duty was to commence . . . [I]t is precisely because [the speedy trial right] is relative that we should draw the line so as not to condone illegitimate delays whether at the pre- or the post-indictment stage.

*United States v. Marion*, 404 U.S. 307, 331-32 (1971) (Douglas, J., concurring).

<sup>193</sup> *Doggett v. United States*, 112 S. Ct. 2686, 2691 (1992).

<sup>194</sup> *Id.*

<sup>195</sup> See *Smith v. Hooey*, 393 U.S. 374, 383 (1969); See also *Dickey v. Florida*, 398 U.S. 30, 37-38 (1970) ("Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial.").

<sup>196</sup> 474 U.S. 302, 316 (1986) (Supreme Court declined to hold the government responsible for delay attributable to the government's interlocutory appeal.).

<sup>197</sup> *Doggett*, 112 S. Ct. at 2693; See also *United States v. Vassell*, No. 92-1045, 1992 WL 183226 (2d Cir. Aug. 3, 1992) (no Sixth Amendment violation due to government's delay in collecting accomplice defendant for plea bargain).

<sup>198</sup> See, e.g., *Davis v. Puckett*, 857 F.2d 1035 (5th Cir. 1988) (shortage of prosecutorial staff is a neutral and non-prejudicial reason that should weigh less heavily against the government).

dockets.<sup>199</sup>

In addition, courts have found that defendants similarly possess a duty to limit pretrial delays. Although the Supreme Court has not explicitly stated so, lower courts often hold that missing defendants have waived their rights to a speedy trial.<sup>200</sup> Some lower courts, however, have recently placed a higher burden on the government in its effort to locate and apprehend missing defendants.<sup>201</sup> Courts, though, have never held law enforcement officials to “heroic efforts” in apprehending defendants purposefully avoiding apprehension or fleeing to unknown parts.<sup>202</sup>

*Doggett* presented a different scenario—a missing defendant who was not fleeing prosecution. The Court correctly held the prosecution in this case to a higher standard to apprehend *Doggett*.<sup>203</sup> If the government actively pursues a missing defendant, thus meeting the higher standard, the ensuing delay should not run

<sup>199</sup> See *Strunk v. United States*, 412 U.S. 434, 436 (1973) (“Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay . . .”); *Gov’t of Virgin Islands v. Birmingham*, 788 F.2d 933, 937 (3d Cir. 1986) (delay due to crowded docket and territorial courts desire to seek clarification of law not weighed strongly against the government); See also Note, *The Right To a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 858 (1957) (the Speedy Trial Clause protects against bad faith of the prosecution, not against court delay).

<sup>200</sup> See, e.g., *United States v. Williams*, 782 F.2d 1462 (9th Cir. 1986) (government not faulted for 39-month delay when defendant used fake identification, possessed no telephone and did not pay taxes); *United States v. Mitchell*, 957 F.2d 465, 469 (7th Cir. 1992) (government not faulted for delay after defendant fled to Columbia where he was incarcerated); *United States v. Perez-Cestero*, 737 F. Supp. 752 (S.D.N.Y. 1990) (government not responsible for eight-and-a-half year period after defendant jumped bail and fled to Venezuela). See also 18 U.S.C. § 1073 (1988) (federal crime to travel in interstate or foreign commerce with the intent to avoid prosecution).

<sup>201</sup> The Second Circuit has broadly read the good-faith effort to bring a defendant to trial. See *United States v. Diacolios*, 837 F.2d 79, 82 (2d Cir. 1988) (the government is not only charged with the burden of bringing the criminal defendant to trial but is also obligated to exercise due diligence in attempting to locate and apprehend the defendant, even if he is a fugitive fleeing prosecution). See also *Rayborn v. Scully*, 858 F.2d 84, 90 (2d Cir. 1988), cert. denied, 488 U.S. 1032 (1989); *United States v. Deleon*, 710 F.2d 1218, 1221 (7th Cir. 1983); *United States v. Bagga*, 782 F.2d 1541, 1543 (11th Cir. 1986) (citing *Smith v. Hooy* which established that the government has an affirmative obligation to locate and apprehend a known suspect). For a criticism of the expansion of prosecutorial due diligence to apprehend fugitives, see Bruce A. Green, ‘Hare and Hounds:’ *The Fugitive Defendant’s Constitutional Right To Be Pursued*, 56 BROOK. L. REV. 439 (1990) (Green argues that the Second Circuit in *Diacolios* abandoned precedent in holding that a fugitive may hold the prosecution partially responsible for the delay if the prosecution did not diligently attempt to apprehend him.).

<sup>202</sup> See, e.g., *Rayborn*, 858 F.2d at 90; *Diacolios*, 837 F.2d at 83 (“due diligence . . . does not require government to pursue that which is futile”); *Bagga*, 782 F.2d at 1543; *Deleon*, 710 F.2d at 1221-22.

<sup>203</sup> *Doggett v. United States*, 112 S. Ct. 2686, 2694 (1992).

as part of a defendant's speedy trial claim.<sup>204</sup> If, however, the prosecution does not actively seek the defendant, the delay should serve as part of a defendant's speedy trial claim. Therefore, prosecutors must actively seek out all defendants whom they have indicted.<sup>205</sup>

The dissent, however, would not compel prosecutors to actively seek out people unaware of their indictments.<sup>206</sup> Thus, under the dissent's formulation, the government has no incentive to quickly arrest individuals unaware of charges. The prosecution could indict individuals sporadically, prosecuting at will, regardless of any consequences from time delay. Therefore, so long as the government indicted a person within the applicable statute of limitations, the dissent seemingly would uphold the conviction of the defendant unaware of an indictment many years later. On the contrary, courts should require the prosecution to diligently seek defendants under protections granted by the Sixth Amendment.<sup>207</sup>

*Doggett*, which holds prosecutors to higher standards, may continue to shift the burden on the prosecution to limit delays after filing an indictment. For example, in *United States v. Shell*, a post-*Doggett* case, the Ninth Circuit held the prosecution negligent, even though the defendant had earlier fled to another country under an alias.<sup>208</sup> The court found that the government misplaced the defendant's files for five years after locating him.<sup>209</sup> This holding mirrored Justice Souter's assertion in *Doggett* that merely because a

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<sup>204</sup> The Federal Speedy Trial Act follows a similar procedure. The Act specifically excludes delay caused by the absence or unavailability of the defendant. 18 U.S.C. § 3161(h)(3)(a) (1988). See also *United States v. Nash*, 946 F.2d 679, 680 (9th Cir. 1991); *United States v. Garrett*, 720 F.2d 705, 707-08 (D.C. Cir. 1983), cert. denied, 465 U.S. 1037 (1984) (holding that "absence or unavailability" of a defendant occurs 1) when the defendant's whereabouts are unknown due to an attempt to avoid apprehension or prosecution, or when the defendant's whereabouts cannot be determined by due diligence, or 2) when the defendant's whereabouts are known, but presence at trial cannot be obtained by due diligence, or defendant resists appearing at or being returned for trial).

<sup>205</sup> Of course, one way in which prosecutors can alleviate the burden of actively seeking out indicted defendants is to know where the individuals are before filing the indictment. Then, provided the authorities file the indictment within the applicable statute of limitations, the prosecution conceivably can quickly locate the individual.

<sup>206</sup> *Doggett*, 112 S. Ct. at 2700 (Thomas, J., dissenting) (speedy trial guarantee cannot be violated when accused is unaware of a pending indictment).

<sup>207</sup> See generally LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 4-5 (2d ed. 1988) (Bill of Rights needed to supplement implied limits on government for protection of individual rights).

<sup>208</sup> *United States v. Shell*, No. 91-30206, 1992 WL 214048 (9th Cir. Sept. 8, 1992).

<sup>209</sup> *Id.* at \*1 ("Five years delay attributable to the government's mishandling of Shell's file, like the eight year delay in *Doggett*, creates a strong presumption of prejudice."). See also *United States v. Shelton*, No. 90-00140, 1992 WL 357501 (W.D. Mo. Nov. 23, 1992) (defendant's indictment dismissed after two-year delay where no attempt was made to apprehend defendant who had not hidden himself from law enforcement authorities).

defendant is a low priority does not mean his or her Sixth Amendment protection lessens.<sup>210</sup>

On the same day the Court decided *Doggett*, it also granted certiorari and remanded *Aguirre v. United States*, another Sixth Amendment speedy trial case.<sup>211</sup> This decision may further define the Court's prosecutorial due diligence expectations. In *Aguirre*, the Ninth Circuit found a five-year delay between indictment and trial presumptively prejudicial but excusable since the delay resulted from the government's inability through diligent efforts to locate the defendant.<sup>212</sup> Therefore, the court ruled against the defendant's speedy trial claim.

The Supreme Court, however, remanded the case in light of the *Doggett* decision.<sup>213</sup> The Court likely believed that the prosecution in *Aguirre* did not actively seek the defendant.<sup>214</sup> After the government issued the indictment, they failed to contact Aguirre's family or lawyer.<sup>215</sup> The government only placed "stops" in various computer systems and then forgot about the matter for five years.<sup>216</sup> Like *Doggett*, Aguirre returned to the United States and lived openly, never assuming a false identity.<sup>217</sup> Aguirre held several jobs, including one with the state's department of revenue where he was fingerprinted, licensed and cleared for security.<sup>218</sup>

The *Aguirre* case, therefore, presents another fact pattern to help decipher government prosecutorial duties. However, the diligence standard that the Court intends the lower courts to follow under the second *Barker* prong is still unclear. The Supreme Court obviously wants to give courts discretion to use the *Barker* balancing test, yet balancing inherently places the courts in a position of ad

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<sup>210</sup> *Doggett*, 112 S. Ct. at 2693 ("Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority.")

<sup>211</sup> *Aguirre v. United States*, 112 S. Ct. 3021 (1992).

<sup>212</sup> *Aguirre v. United States*, No. 89-50265 (9th Cir. 1991) (unpublished disposition available on WESTLAW).

<sup>213</sup> *Aguirre*, 112 S. Ct. 3021 (1992). As in *Doggett*, the government did not show that Aguirre had knowledge of any formal indictment against him. Aguirre, however, also had not proven any prejudice to his defense, except for a key witness who said he was having trouble remembering the events from over six years ago.

<sup>214</sup> *Aguirre*, No. 89-50265, slip op. at 3 (9th Cir. 1991) (Pregerson, J., dissenting) ("[G]overnment's attempts to locate Aguirre while he was living this open lifestyle were feeble, at best.")

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 2.

<sup>218</sup> *Id.*

hoc second-guessing prosecutors' actions.<sup>219</sup>

In light of the confusing standards, the Court should have instituted a notice requirement on the prosecution under the second prong of the *Barker* test. This notice requirement would help clarify which party is accountable for different periods of pretrial but post-indictment delay.<sup>220</sup> In the absence of a reasonable attempt to notify the defendant, the reason for the delay would weigh heavily against the prosecution.<sup>221</sup> The prosecution should incur punishment for not allowing defendants the opportunity to compile a defense at the most beneficial time, especially since it is so easy to take reasonable steps to notify the defendant.<sup>222</sup> Once the defendant receives notice, however, he or she then holds the burden of reducing the trial delay. If, after notice, the defendant evades arrest, any later actions should weigh heavily against the speedy trial claim.<sup>223</sup>

A notice requirement also could explain clearly the government's prosecutorial faults in the Supreme Court's cases. In *Doggett*, for example, the prosecution failed to exercise reasonable diligence

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<sup>219</sup> See *Doggett*, 112 S. Ct. 2686, 2700-01 (1992) (Thomas, J., dissenting).

<sup>220</sup> Federal courts have used similar notice requirements with regard to sealed indictments. One district court recently held that the sealing of an indictment while awaiting a second indictment did not justify a 13-month delay. Since the indictment was sealed and the defendant was not aware of it, the government bore the burden of justifying the delay. *United States v. Rogers*, 781 F. Supp. 1181, 1186 (S.D. Miss. 1991). Similarly, another court stated that sealed indictments place the burden to bring a defendant's case to trial squarely on the government. *United States v. Shelton*, No. 90-00140, 1992 WL 357501, at \*2 (W.D. Mo. Nov. 23, 1992).

<sup>221</sup> Some factors which would show reasonable attempts to notify include: 1) periodic attempts to locate defendant at last known place of residence and employment, 2) periodic interviews with defendant's friends and family, 3) periodic requests for foreign assistance, 4) periodic placement of defendant's name on various crime computers and 5) periodic reviews of defendant's telephone and employment records. See *United States v. McGeough*, No. 82-00327, 1992 WL 390234 (E.D.N.Y. Dec. 8, 1992) (government not deemed negligent after ten-year delay in which it repeatedly attempted to notify defendant of charges).

<sup>222</sup> See *United States v. Marion*, 404 U.S. 307, 334 (1971) (Brennan, J., concurring) ("[T]he crucial question in determining the legitimacy of government delay may be whether it might reasonably have been avoided—whether it was unnecessary."). See also ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 14, § 12-2.2 ("If the defendant is not arrested or otherwise notified of the charge, the defendant is not prompted to seek out witnesses on his or her behalf when they might be available."); See also *Rost v. Municipal Court*, 184 Cal. App. 2d 507, 512 (1960):

The Constitutional requirement of a trial requires that a defendant be served with a warrant of arrest within a reasonable time after the filing of the complaint. Thereby he would be given notice of the fact that a charge has been made against him at a time when witnesses in his behalf, if any there be, are available.

*Id.*

<sup>223</sup> In these cases, the defendant could be said to have "implied notice" whereby the speedy trial right has most likely been waived. See *supra* notes 200-02 and accompanying text.

in notifying Doggett of the indictment.<sup>224</sup> The DEA waited twenty-six days after filing the indictment to arrest him at his parent's home.<sup>225</sup> Second, even when the DEA knew Doggett was in jail in Panama, the DEA failed to notify him of the indictment.<sup>226</sup> Finally, the government failed for six years to perform a cursory check to ascertain whether Doggett had returned to the United States, a check which would have led immediately to Doggett's discovery.<sup>227</sup>

Similarly, in *Aguirre*, the prosecution failed to take reasonable steps to notify the defendant of the pending indictment. Although Aguirre was in contact with the American Embassy in London, he was not made aware of the indictment.<sup>228</sup> In addition, the prosecution failed to notify either Aguirre's family or lawyer.<sup>229</sup> Finally, the government, once again, did not attempt to check if he had returned to the United States.<sup>230</sup>

A notice requirement would also satisfy the policy arguments raised by both the *Doggett* majority and dissent. On one hand, the notice requirement would satisfy the Court's desire to encourage prosecutors to actively seek out defendants.<sup>231</sup> Courts would also hold prosecutors to similar standards for all defendants, so that no defendant would engender less Sixth Amendment protection.

On the other hand, notice requirements would not "transform the courts into boards of law-enforcement supervision," thus satisfying the dissent's policy concern.<sup>232</sup> The courts would simply assess whether prosecutors had reasonably attempted notice. Little need would exist for the court to second-guess any of the prosecution's other actions. Once the government met this standard, courts would not find negligence under the second *Barker* prong.

## VI. CONCLUSION

The *Doggett* majority correctly granted relief under the Sixth

<sup>224</sup> Brief for Petitioner, *supra* note 53, at 14.

<sup>225</sup> *United States v. Doggett*, 112 S. Ct. 2686, 2688 (1992) (Doggett indicted on Feb. 22, 1980, and DEA attempted to apprehend him Mar. 18, 1980.).

<sup>226</sup> Brief for Petitioner, *supra* note 53, at 14.

<sup>227</sup> *Doggett*, 112 S. Ct. at 2691.

<sup>228</sup> *Aguirre v. United States*, No. 89-50265, slip. op. at 2 (9th Cir. 1991) (Pregerson, J., dissenting).

<sup>229</sup> *Id.* at 3.

<sup>230</sup> The accused living openly in the jurisdiction should surely weigh heavily against the prosecution's due diligence. *See, e.g.*, *People v. Serio*, 13 Misc. 2d 973 (1958) (state had not followed due diligence when defendant lived openly in jurisdiction, had name listed in telephone directory, was employed by a well-known firm and had appeared in the local courts on other matters).

<sup>231</sup> *Doggett*, 112 S. Ct. at 2693-94.

<sup>232</sup> *Id.* at 2700-01 (Thomas, J., dissenting).



Amendment Speedy Trial Clause because of the defense impairment caused by delays. In doing so, the Court extended the definition of "accused" under the Amendment, at least to defendants unaware of charges against them. The Court, however, did not mention whether their decision affects the due process requirements of actual prejudice in the pre-indictment stage. Extending the Speedy Trial Clause, and therefore the *Barker* test, to the pre-indictment stage of the criminal process would seem reasonable since defense impairment due to delay occurs at all stages of the prosecution.

The *Barker* balancing test, upheld by the Court, provides a helpful ad-hoc basis for lower courts to analyze crucial factors in deciding whether a speedy trial violation has occurred. The Court's application of the *Barker* test to lengthy delays in *Doggett*, however, has some flaws. First, the Court did not distinguish between extraordinary and normal delays. Since the Court stated that extraordinary delays contain a built-in presumption of prejudice which the prosecution apparently cannot rebut, this distinction is crucial. In failing to mention how the prosecution could rebut prejudice caused by extraordinary delays, the Court has unnecessarily implemented an irrebuttable presumption of prejudice for long delays caused in any part by the prosecution.

Although the Court mentioned that prosecutors must follow a higher standard in bringing missing defendants to trial, the Court did not specify this due diligence standard. The Court should have compelled prosecutors to take reasonable steps to notify defendants of outstanding charges. In this way, defendants would maintain their constitutional right to a speedy trial without placing the courts in the position of second-guessing a prosecutor's performance.

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