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Notes and Comments: The Right to a Speedy Trial in Maryland

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NOTES AND COMMENTS

THE RIGHT TO A SPEEDY TRIAL IN MARYLAND

In the wake of the Supreme Court's 1972 decision in Barker v. Wingo, *Maryland appellate courts have enforced more rigorously the right of criminal defendants to a speedy trial. This article surveys the application and treatment of the* Barker *criteria by the Maryland courts in recent decisions.*

I. INTRODUCTION

The sixth amendment to the Federal Constitution[1] and article 21 of Maryland's Declaration of Rights[2] guarantee a criminal defendant the right to a speedy trial. Until recently, there were few occasions when the appellate courts of Maryland vigorously enforced this right.[3] During the past year and a half, however, five dismissals of criminal charges have been granted or affirmed on the ground that the State failed to provide the defendants with a speedy trial.[4] This turnabout by Maryland's appellate courts appears to represent a belated, strict interpretation of the guidelines established by the Supreme Court in 1972 in *Barker v. Wingo*.[5]

1. U.S. CONST. amend. VI. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967), which held that the sixth amendment speedy trial right is incorporated in the due process clause of the fourteenth amendment and thus applicable to the states.
2. MD. DEC. OF RIGHTS art. 21.
3. For a thorough discussion of the history of the speedy trial privilege in Maryland, see State v. Lawless, 13 Md. App. 220, 283 A.2d 160 (1971).
4. Smith v. State, 276 Md. 521, 350 A.2d 628 (1976); Epps v. State, 276 Md. 96, 345 A.2d 62 (1975); State v. Smith, 31 Md. App. 328, 356 A.2d 328 (1976); Evans v. State, 30 Md. App. 423, 352 A.2d 343 (1976); State v. Wynn, 26 Md. App. 39, 336 A.2d 800 (1975).
5. 407 U.S. 514 (1972). In addition to the *Barker* decision, one factor that has probably influenced the Maryland appellate courts is the Federal Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, passed in 1974 and effective July 1, 1976, which provides fixed time limits between arrest and indictment, indictment and arraignment, and arraignment and trial. The time limits will decrease each year up through 1979 and will eventually allow only 100 days between arrest and trial. If the time limits are not met, the sanction called for is dismissal of the charges. In deciding whether the dismissal should be with or without prejudice, the court must consider the seriousness of the crime, the factors leading to the dismissal and the impact of a reprosecution upon the administration of justice. Although the Act does not apply to the states and although no mention of the Act was made in any of the five dismissals cited in note 4 *supra*, it is likely that the Act has had a strong influence on the Maryland decisions. This may be inferred from the fact that the first of these decisions occurred very soon after the passage of the Act. There is also a Maryland statute, MD. ANN. CODE art. 27, § 591 (1976), which requires that within 2 weeks after arraignment a trial date must be set, and the date cannot exceed six months from the time of arraignment. Some dis-

This article will briefly address the history of speedy trial in Maryland before *Barker* and analyze the effect and construction of the *Barker* criteria as they were applied in the aforementioned recent dismissals. The conclusion will project what the future may hold for Maryland speedy trial litigation.

II. PRE-*BARKER* ERA IN MARYLAND

Before *Barker*, the Maryland Court of Appeals considered the speedy trial issue on twenty-five occasions, granting only one dismissal.[6] During this same period, the Maryland Court of Special Appeals decided that the accused had been denied his right to a speedy trial on two of sixty-five occasions.[7] Several of the earlier cases held that the accused waived his right to a speedy trial by failure to make a demand for trial.[8] Other cases decided that the speedy trial right did not apply to the period of time prior to arrest or indictment.[9] Still others concluded that the right to a speedy trial did not apply to delays in the entertainment and disposition of motions for a new trial,[10] appeals,[11] or defective delinquency determinations.[12]

Throughout most of the pre-*Barker* era, no objective criteria were established by the Maryland courts for the determination of

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cretion is permitted with regard to postponements. Since the Section was enacted in 1971, its effect has been diminished by the court of special appeals, holding that the provision is directory rather than mandatory. State v. Hunter, 16 Md. App. 306, 295 A.2d 779 (1972).

6. Jones v. State, 241 Md. 599, 217 A.2d 367 (1966). See *State v. Lawless*, 13 Md. App. 220, 226 n.4, 283 A.2d 160, 166 n.4 (1971), for the period of time prior to October of 1971, the date of the *Lawless* decision. There were no speedy trial cases in the court of appeals between *Lawless* and the June, 1972 *Barker* decision.
7. Caesar v. State, 10 Md. App. 40, 267 A.2d 750 (1970) and Wilson v. State, 8 Md. App. 299, 257 A.2d 553 (1969). See *State v. Lawless*, 13 Md. App. 220, 226 n.4, 283 A.2d 160, 166 n.4 (1971), for the period of time prior to *Lawless*. There were seven speedy trial cases in the court of special appeals between *Lawless* and *Barker*: Young v. State, 15 Md. App. 707, 292 A.2d 137 (1972); Thompson v. State, 15 Md. App. 335, 290 A.2d 565 (1972); Carter v. State, 15 Md. App. 242, 289 A.2d 837 (1972); State v. Hamilton, 14 Md. App. 582, 287 A.2d 791 (1972); Bowie v. State, 14 Md. App. 567, 287 A.2d 782 (1972); Kelley v. State, 14 Md. App. 287, 286 A.2d 806 (1972); Hoss v. State, 13 Md. App. 404, 283 A.2d 629 (1971).
8. *See, e.g.*, the general discussion of waiver in *Harris v. State*, 194 Md. 288, 296–99, 71 A.2d 36, 40–41 (1950), which is the classic waiver case in Maryland. In *Harris* there was a failure on the part of the accused to demand a speedy trial at any time. For a case in which there was a timely demand followed by a failure to reassert the demand, see *State v. Murdock*, 235 Md. 116, 200 A.2d 666 (1964). For a discussion of the various types of waiver cases and an exhaustive listing of these cases, see *State v. Lawless*, 13 Md. App. 220, 228 n.8, 283 A.2d 160, 167–68 n.8 (1971).
9. State v. Lawless, 13 Md. App. 220, 228 n.9, 283 A.2d 160, 167–68 n.9 (1971).
10. *Id.* at 230 n.10, 283 A.2d at 168 n.10.
11. *Id.* at 230 n.11, 283 A.2d at 168 n.11.
12. *Id.* at 230 n.12, 283 A.2d at 168 n.12.

whether the speedy trial right had been denied an accused.[13] In 1965, however, an article discussing the problems involved in dealing with speedy trial suggested the now accepted "four-factor" analysis to determine whether or not a defendant's right to a speedy trial had been violated.[14] The four factors suggested in that discussion were: (1) the length of delay; (2) the reason for the delay; (3) prejudice to the accused; and (4) waiver by the accused.[15]

The four-factor analysis was first applied in Maryland by the court of special appeals in *Hall v. State*.[16] In *Hall*, the court held that several affirmative acts by the accused constituted a waiver of his right to a speedy trial.[17] Judge Thompson, writing for the court, ruled that if an accused waives his right to a speedy trial, he is precluded from a later assertion that the right was violated.[18] The court of special appeals noted, however, in *Fabian v. State*[19] that if the waiver resulted merely from the accused's failure to assert the right to a speedy trial, the defendant would not be precluded from subsequently asserting the right if he could show that a delay caused by the State resulted in his suffering actual prejudice.[20] Absent such a showing, a failure to demand trial constituted a waiver of the right and determined the speedy trial question, regardless of any other factors.[21]

Thus, at the time *Barker* was decided, Maryland had at least superficially already adopted a version of the four-factor test. The Maryland appellate courts, however, employed no well-defined analytical techniques in applying the factors to individual situations. Maryland also subscribed to the demand-waiver doctrine under which a defendant is considered to have waived his right for any period of time prior to which he has not demanded trial. This doctrine was expressly disapproved by the Supreme Court in *Barker*.[22]

13. Prior to the adoption of the four-factor test in *Hall v. State*, 3 Md. App. 680, 240 A.2d 630 (1968), the Maryland courts treated each case on an ad hoc basis. *See, e.g.*, Jones v. State, 241 Md. 599, 217 A.2d 367 (1966); Harris v. State, 194 Md. 288, 71 A.2d 36 (1950).
14. Note, *The Lagging Right To A Speedy Trial*, 51 VA. L. REV. 1587 (1965).
15. *Id.* at 1590.
16. 3 Md. App. 680, 240 A.2d 630 (1968).
17. These acts included several collateral motions by the accused. There was a removal from Baltimore to Montgomery County and one request for a postponement. The court held that each of these delaying actions constituted a waiver of speedy trial for the period during which they took place. *Id.* at 686–87, 240 A.2d at 634–35.
18. *Id.* at 686, 240 A.2d at 634.
19. 3 Md. App. 270, 239 A.2d 100 (1968).
20. *Id.* at 286, 239 A.2d at 111.
21. *Id.*
22. See text accompanying notes 35 & 36 *infra*.

III. *BARKER V. WINGO*

Prior to its decision in *Barker v. Wingo*,[23] the Supreme Court had dealt infrequently with the sixth amendment right to a speedy trial and had not established any guidelines for determining when the right had been violated.[24] In his concurring opinion in *Dickey v. Florida*,[25] Mr. Justice Brennan criticized the Court for not having "trace[d the] contours" of this most basic constitutional right.[26] Justice Brennan enumerated the "basic factors" which should be considered and then engaged in a lengthy discussion of these factors.[27]

Thus, the *Barker* Court faced the speedy trial question with no precedential objective guidelines to follow. In *Barker*, the petitioner, Willie Mae Barker, and Silas Manning were arrested shortly after a murder in July of 1958. Kentucky officials chose to try Manning first, believing a conviction of Barker would be impossible without the testimony of Manning. Consequently, the Commonwealth sought and was granted a number of postponements while it made an effort to convict Manning. Meanwhile, Barker remained in jail for ten months before he was released on bond.[28] When the Commonwealth sought a twelfth postponement

23. 407 U.S. 514 (1972).
24. *Id.* at 515. *See also* Mr. Justice Brennan's concurring opinion in *Dickey v. Florida*, 398 U.S. 30, 40–41 (1970). The Supreme Court case most often cited in connection with speedy trial prior to *Barker* was *Beavers v. Haubert*, 198 U.S. 77 (1905). There were several indictments against petitioner for various crimes. Consequently, there were delays in trying the petitioner on all of the crimes. In dealing with the speedy trial issue, the Court said that the right is a relative one — consistent with delays and dependent upon circumstances. It was found that there is no denial of the speedy trial right when the trial of one indictment is delayed pending another trial in a different jurisdiction. Another case cited by Justice Brennan in *Dickey* was *United States v. Ewell*, 383 U.S. 116 (1966), in which the respondents were convicted of narcotics violations. The indictments were subsequently dropped. New complaints were issued and respondents were rearrested and reindicted. Respondents moved for a dismissal due to the lack of a speedy trial after a total of 19 months had elapsed since the date of their original arrest. A federal district court granted the motion. The Supreme Court spoke primarily in terms of prejudice, holding that there had been no demonstration of prejudice. Based on this lack of prejudice, the Court reversed the dismissals of the several indictments that had been pending. *Beavers* and *Ewell* are but two examples of what Justice Brennan was referring to when he complained that no speedy trial guidelines had ever been enunciated. In each case, the reasoning and analysis was such that it would only be meaningful precedent in cases with similar fact situations. Justice Brennan thus proposed that more widely applicable standards be established by the Court at the next available opportunity.
25. 398 U.S. 30, 39–57 (1970).
26. *Id.* at 40–41.
27. *Id.* at 48. The three factors Mr. Justice Brennan set out were: 1) the source of the delay; 2) the reasons for the delay; and 3) whether the delay prejudiced interests protected by the sixth amendment.
28. Barker thereafter remained out on bond until after his conviction.

in February, 1962, Barker objected through counsel for the first time and filed a motion to dismiss on the ground that he had been denied a speedy trial. This motion came three and one-half years after the initial arrest.

Manning was finally convicted in the fall of 1962 and, shortly thereafter, the Commonwealth moved to set a trial date for Barker. Two more postponements were granted due to the illness of the arresting officer, a chief prosecution witness. The trial was finally held in October of 1963 and, with Manning testifying for the prosecution, Barker was convicted and given a life sentence. His appeal, based, *inter alia*, on speedy trial claims, was denied by the Kentucky Court of Appeals.[29]

In February, 1970, Barker was denied habeas corpus relief in the United States District Court for the Western District of Kentucky. On appeal to the Sixth Circuit Court of Appeals, the district court's denial of habeas corpus was affirmed.[30] The Supreme Court granted certiorari.[31] *Barker* presented, and the Court seized the opportunity to establish criteria for dealing with speedy trial issues. The Court adopted a version of the four-factor test.

In a general discussion of the right to a speedy trial, Justice Powell's majority opinion distinguished this "generically different" right from those other rights aimed at protection of the accused in a criminal case. The discussion noted the interest that society has in promptly trying those accused of committing crimes and pointed out that delays often worked to the accused's advantage by enabling him to bargain more successfully with the state. The cost of pretrial incarceration and the loss of earned wages also were mentioned as societal interests which are compromised by lengthy delays.[32]

The Court rejected two alternatives that had been suggested "as ways of eliminating some of the uncertainty which courts experience in protecting the right to a speedy trial."[33] The first of these — a fixed time period after which the right to a speedy trial has been violated per se — was dismissed because the Court felt the adoption of such a rule should be a legislative rather than a judicial function.[34] The second suggested alternative was the so-called "demand rule" or "demand-waiver doctrine." Under this rule, an accused "waives any consideration of his right to a speedy

29. 385 S.W.2d 671 (Ky. 1964). For a more detailed recitation of the Barker fact situation, see 407 U.S. at 516–19 and Uviller, *Barker v. Wingo: Speedy Trial Gets A Fast Shuffle*, 72 COLUM. L. REV. 1376, 1376–78 (1972).
30. 442 F.2d 1141 (6th Cir. 1971).
31. 404 U.S. 1037 (1972).
32. 407 U.S. at 519–22.
33. *Id.* at 522–23.
34. *Id.* at 523.

trial for any period prior to which he has not demanded a trial."[35] The Court rejected this doctrine, based on the premise that a waiver of a constitutional right must be intelligent, voluntary and *intentional*.[36]

The Court then adopted a four-factor balancing test for the analysis of speedy trial cases:

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.[37]

"The length of delay," said the Court, "is to some extent a triggering mechanism."[38] In other words, there must be some significant delay "dependent upon the peculiar circumstances of the case" before the balancing process is begun.[39]

In using the balancing process, different weights should be accorded to different reasons for the delay. While deliberate delay by the prosecution for the purpose of "hamper[ing] the defense" should weigh heavily in the accused's favor, other reasons such as "negligence or overcrowded courts" should be viewed in a more neutral light and "a valid reason, such as a missing witness, should serve to justify appropriate delay."[40]

With respect to the defendant's responsibility to assert his right, the Court noted that failure to assert the right is not determinative but merely one of the factors to be weighed in the balancing process.[41]

The fourth factor, prejudice to the defendant, was considered by the Court in light of the defendant's interests to be protected. Disadvantages to the defendant caused by pretrial delay were discussed, with particular emphasis on pretrial incarceration, mental anguish and the possibility of an impaired defense.[42]

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35. *Id.* at 525.
36. *Id.*
37. *Id.* at 530. As pointed out by the Court, *id.* at 530 n.30, there is little difference between the criteria set out in Note, *The Lagging Right To A Speedy Trial*, *supra* note 14, the factors discussed by Justice Brennan in *Dickey* enumerated in note 27 *supra*, and the four factors as set out in *Barker*.
38. 407 U.S. at 530. The length of delay is also one of the factors considered in the balancing process.
39. *Id.* at 530–31.
40. *Id.* at 531.
41. *Id.* at 531–32.
42. *Id.* at 532–33.

The Court commented on how the balancing process should be carried out:

> 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. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the constitution.[43]

The Court initiated the balancing process in *Barker* by noting that the five year delay was "extraordinary,"[44] and that only seven months of the delay could be "attributed to a strong excuse" — a missing prosecution witness.[45] Four years of the delay occurred due to the Commonwealth's inability to convict Manning. Although Barker spent ten months in jail and was forced to live "for four years under a cloud of suspicion and anxiety," the Court felt that "prejudice was minimal" because no witnesses died and there were no apparent lapses of memory which affected the outcome.[46] Finally, and most importantly, the Court believed that Barker was not at all anxious to be tried. Instead, Barker gambled on Manning's chances for acquittal, which would undoubtedly have resulted in the dismissal of the charges against Barker.[47]

In the Court's view, the "minimal prejudice" and the defendant's lack of forceful assertion of his right outweighed the length and causes of the delay. The Court held that Barker's right to a speedy trial was not denied.[48]

Justice Powell's opinion in *Barker* has been criticized by some for lacking specificity with regard to application of the four factors. As one author noted:

> The decision cannot be criticized because no rigid rule was established, for we cannot expect hard edges defining constitutional rights. . . . But Mr. Justice Powell does more than opt for a flexible standard; in well ordered paragraphs, he essays instruction concerning the governing

43. *Id.* at 533.
44. *Id.* The balancing process mechanism was thus triggered and the first factor established.
45. *Id.* at 534.
46. *Id.*
47. *Id.* at 535–36.
48. *Id.* at 536. The balancing process employed in *Barker* is discussed further in connection with the post-*Barker* Maryland cases considered in Section IV, *infra.*

> factors. His analysis of these factors proves less than gratifying. The result is a right debilitated, its components askew.[49]

This criticism was expanded with regard to the four factors:

> It is the Court's discussion of these factors and their interrelationship that Mr. Justice Powell's opinion fails to slake the thirst for authoritative instruction.[50]

Regardless of the merits of this criticism, the guidelines established in *Barker* were at least a step in the right direction of safeguarding the sixth amendment right.

IV. THE FOUR FACTORS AND THE BALANCING PROCESS: POST-*BARKER* ERA IN MARYLAND

There have been twenty-eight speedy trial decisions in Maryland since *Barker*.[51] Initially, despite *Barker*, there was no apparent refining of Maryland's approach to this issue. Only very recently did the Maryland courts seriously apply *Barker*, with ultimate dismissals in *State v. Wynn*,[52] *Epps v. State*,[53] *Smith v.*

49. Uviller, *Barker v. Wingo: Speedy Trial Gets A Fast Shuffle*, 72 COLUM. L. REV. 1376 (1972).
50. *Id.* at 1383.
51. The issue has been decided twenty-five times since *Barker* in the court of special appeals: Grandison v. State, 32 Md. App. 705, 363 A.2d 523 (1976); Lee v. State, 32 Md. App. 671, 363 A.2d 542 (1976); Davis v. State, 32 Md. App. 318, 360 A.2d 467 (1976); Isaac v. State, 31 Md. App. 604, 358 A.2d 273 (1976); State v. Smith, 31 Md. App. 328, 356 A.2d 328 (1976); Daniels v. State, 30 Md. App. 432, 352 A.2d 859 (1976); Evans v. State, 30 Md. App. 423, 352 A.2d 343 (1976); Ward v. State, 30 Md. App. 113, 351 A.2d 452 (1976); Jones v. State, 29 Md. App. 182, 348 A.2d 55 (1975); State v. Wynn, 26 Md. App. 39, 336 A.2d 800 (1975); Erbe v. State, 25 Md. App. 375, 336 A.2d 129 (1975); State v. Becker, 24 Md. App. 549, 332 A.2d 272 (1975); Matthews v. State, 23 Md. App. 59, 325 A.2d 897 (1974); Bell v. State, 22 Md. App. 496, 323 A.2d 677 (1974); Guarnera v. State, 20 Md. App. 562, 318 A.2d 243 (1974); Davidson v. State, 18 Md. App. 61, 305 A.2d 474 (1973); Fowler v. State, 18 Md. App. 37, 305 A.2d 200 (1973); State v. Jones, 18 Md. App. 11, 305 A.2d 177 (1973); McIntyre v. State, 17 Md. App. 526, 302 A.2d 672 (1973); Collins v. State, 17 Md. App. 376, 302 A.2d 693 (1973); State v. DuBose, 17 Md. App. 292, 301 A.2d 32 (1973); Williams v. State, 17 Md. App. 110, 299 A.2d 878 (1973); Sylvester v. State, 16 Md. App. 638, 299 A.2d 129 (1973); Miller v. Warden, 16 Md. App. 614, 299 A.2d 862 (1973); State v. Hunter, 16 Md. App. 306, 295 A.2d 779 (1972). The court of appeals has decided the speedy trial issue three times since *Barker*: Erbe v. State, 276 Md. 541, 350 A.2d 640 (1976); Smith v. State, 276 Md. 521, 350 A.2d 628 (1976); Epps v. State, 276 Md. 96, 345 A.2d 62 (1975). In *Jones v. State*, 29 Md. App. 182, 348 A.2d 55 (1975) (Davidson, J., dissenting), there was a lengthy discussion of the very complicated fact situation. After applying the balancing process, the court of special appeals affirmed the conviction. The decision has been appealed to the court of appeals and certiorari was granted. The oral arguments were heard in September, 1976 and the decision should be forthcoming shortly.
52. 26 Md. App. 39, 336 A.2d 800 (1975).
53. 276 Md. 96, 345 A.2d 62 (1975).

State[54] (hereinafter referred to as *Lee Smith*), *Evans v. State*,[55] and *State v. Smith*[56] (hereinafter referred to as *William Smith*).

A. The Four Factors

1. Length of Delay

In the *Barker* opinion there was a very limited discussion of the length of delay factor. As expressed by Justice Powell, "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."[57] This language indicated that the delay period necessary to trigger the balancing process varies according to the circumstances of each case.[58]

Wynn,[59] decided in 1975, was the first of the "dismissal cases." The period of delay in *Wynn* began in December, 1969 with Wynn's arrest and ended in April, 1974 when the indictments were dismissed. Citing *Barker* and *State v. Jones*,[60] the court of special appeals found the fifty-two month delay to be of "constitutional dimension." Thus, the court "must view the facts and circumstances in the light of the other three factors. . . ."[61]

In its discussion of the length factor in *Epps*,[62] the court of appeals mentioned that the accrual time begins from "the date on which the defendant became 'an accused' . . . up until the date he was tried."[63] Relying on *Barker*, the court held that the one year, fourteen day delay in *Epps* was "sufficiently inordinate to constitute a 'triggering mechanism'."[64]

In *Lee Smith*,[65] the court of appeals reasoned that, inasmuch as a delay of slightly more than one year was sufficient to activate the triggering mechanism in *Epps*, the sixteen month delay experienced by Smith would, a fortiori, be sufficient to require inquiry into the other factors.[66] By its language, the court implied that any delay greater than the one year, fourteen day delay in *Epps* would be of constitutional dimension and would automatically initiate the balancing process. In attempting to further clarify the

54. 276 Md. 521, 350 A.2d 628 (1976).
55. 30 Md. App. 423, 352 A.2d 343 (1976).
56. 31 Md. App. 328, 356 A.2d 328 (1976).
57. 407 U.S. at 530–31.
58. *Id.* at 531.
59. 26 Md. App. 39, 336 A.2d 800 (1975).
60. 18 Md. App. 11, 305 A.2d 177 (1973).
61. 26 Md. App. at 41, 336 A.2d at 802.
62. 276 Md. 96, 345 A.2d 62 (1975).
63. *Id.* at 109, 345 A.2d at 71.
64. *Id.* at 111, 345 A.2d at 72.
65. 276 Md. 521, 350 A.2d 628 (1976).
66. *Id.* at 528, 350 A.2d at 633.

length issue, the *Lee Smith* court said that the length of delay, in addition to being a triggering mechanism, should also "be given some, but not determinative weight" in the balancing process itself.[67]

Following the *Lee Smith* and *Epps* rationale, the court of special appeals found that the eighteen month delay in *Evans* was also "of constitutional proportion."[68]

In *William Smith,*[69] there was a delay of nearly four years from the time of Smith's arrest until the date that the indictment was dismissed due to the lack of a speedy trial.[70] The State conceded in its brief that "[t]he delay . . . is clearly long enough to be presumptively prejudicial."[71] After citing *Epps* and *Barker,* the court of special appeals proceeded with its treatment of the other factors without further discussion of the length factor.[72]

In the dismissal cases, the Maryland courts have apparently ignored Justice Powell's words in *Barker.* The opinion in *Barker* stated that "the length of delay that will provoke . . . an inquiry [into the other factors] is necessarily dependent upon the peculiar circumstances of the case."[73] Before the dismissal cases, Maryland's courts appeared to be properly interpreting the instructions set forth in *Barker.* For example, the court of special appeals in *Matthews v. State*[74] found that a delay of one year was not of constitutional dimension *"under the circumstances of this case."*[75] Several months later, however, the same court found that a nine and one-half month delay was constitutionally significant in *State v. Becker.*[76] These two cases exemplify the interplay which should exist between the length of delay and the other circumstances of the case. Despite these decisions, and despite the language in *Barker,* when *Epps, Lee Smith* and *Evans* are read together, the Maryland courts seem to have quantified the length factor by the rule that any length of delay greater than one year will automatically require that the balancing process be entered into, regardless of the other circumstances existing in the case.

67. *Id.*
68. 30 Md. App. 423, 427, 352 A.2d 343, 346 (1976).
69. 31 Md. App. 328, 356 A.2d 328 (1976).
70. *Id.* at 331–32, 356 A.2d at 330.
71. *Id.*
72. *Id.*
73. 407 U.S. at 530–31.
74. 23 Md. App. 59, 325 A.2d 897 (1974).
75. *Id.* at 65, 325 A.2d at 901 (emphasis added). The circumstances included a five month period in which no motion for a speedy trial had been filed. There was also one instance in which the accused failed to appear in court while out on bail.
76. 24 Md. App. 549, 332 A.2d 272 (1975).

2. Reason For The Delay

In the Maryland decisions immediately after *Barker*, the courts generally did not engage in any extensive analyses of the reason factor.[77] However, in its 1975 decision in *State v. Becker*,[78] the court of special appeals accorded the reason factor greater importance. In *Becker*, the reasoning was thorough and extensive and included a chronological recitation of the record from the beginning of the prosecution until the charges were dismissed.[79] In weighing the various reasons for the nine and one-half month delay, the court noted that there was no intentional delay caused by the State but that a portion of the delay had been caused by the State's negligence.[80] The "heart of the problem" was the period of delay attributed to the inability of Becker to secure the attendance of several key witnesses.[81] The prosecution had agreed to assist Becker in this effort, as he was proceeding *pro se*, but failed to render effective assistance. The delay due to these circumstances was apparently weighed against the State by the trial judge.[82]

The court of special appeals held this to be error. The State should not have been assisting "the man it was prosecuting" in a function that his attorney would have had the duty to perform had the right to counsel not been waived:

> We think the appellee [Becker] must equally share responsibility with the State whose wrongful conduct was no more than ineffective, but well intentioned aid.[83]

In *Wynn*, the State was unable to locate its witnesses for a period of four years. A concerted five day effort after this four year period resulted in the State's location of the missing witnesses.[84] As the court said, "[i]t is reasonable to infer that both witnesses could have been located readily at any time."[85] Although this reason was considered to be on the "neutral side," the court ruled that the "negligence and lack of due diligence" on the part of the State over such a long period of time could have been independently determinative of the speedy trial issue.[86]

77. *See, e.g.*, Sylvester v. State, 16 Md. App. 638, 299 A.2d 129 (1973).
78. 24 Md. App. 549, 332 A.2d 272 (1975).
79. This chronological listing is not new. As early as *State v. Hall*, 3 Md. App. 680, 240 A.2d 630 (1967), a similar list was included in the opinion.
80. 24 Md. App. at 561, 332 A.2d at 279-80.
81. *Id.* at 563, 332 A.2d at 280.
82. *Id.*
83. *Id.*
84. 26 Md. App. at 42, 336 A.2d at 802.
85. *Id.*
86. *Id.*

In *Epps*, the court of appeals took a slightly different stance in its evaluation of the reason for delay factor. There were three co-defendants who were originally to have been tried without a jury on December 28, 1972—approximately five months after Epps' arrest. This period was held to be clearly " 'chargeable to the State'."[87] On the day set for trial, Epps' two co-defendants requested a jury trial. Epps objected and through counsel, asked " 'to be tried today and separately'." The State argued for postponement of the entire case and the trial judge agreed, rescheduling trial for April 13, 1973. In so doing, he added:

> I don't think your clients have any cause to complain that they have been denied a speedy trial since *they* are the cause of this postponement.[89]

The April trial did not occur on the scheduled date but was postponed until June 12, 1973, the next available trial date. After one final "neutral" postponement, the trial was held in late August, 1973.

The court of appeals held the span of time between December 28, 1972 and June 12, 1973 to be the "critical period."[90] In its discussion of the reason factor, the court disagreed with the trial court and concluded:

> the entire period [December 28, 1972 through June 12, 1973] was caused by 'governmental action' — by both the courts and the prosecutors; none of it may be considered as having been 'neutral', none of it certainly is attributable to the appellant.[91]

Lee Smith involved a total delay of sixteen months. Included in this period was a six week psychiatric evaluation of the defendant, an unexplained six month period from the time the defendant was pronounced fit for trial to the date set for trial, a five month delay caused by the State's negligence in failing to locate the prosecutrix until several days prior to the trial, a two week delay for a further psychiatric examination which resulted in a postponement for two months until the next available trial date, and a three week delay caused by the arresting officer's being out of the country.[92]

The court of appeals stated that every postponement after the first medical examination was attributable to the State, "[c]onsequently we must carefully scrutinize the justifications assigned

87. 276 Md. at 111, 345 A.2d at 73.
88. *Id.* at 99, 345 A.2d at 66.
89. *Id.* at 100, 345 A.2d at 66 (emphasis in the original).
90. *Id.* at 112, 345 A.2d at 73.
91. *Id.* at 117, 345 A.2d at 75–76.
92. 276 Md. at 522–26, 350 A.2d at 630–32.

by the state for each ensuing delay."[93] The six month period that occurred after the first medical exam was unexplained. Smith had not complained, however, so whatever the reason, it was not to be weighed too heavily against the State.[94] The five month delay which ensued was crucial to the determination of a lack of a speedy trial. Prior to the trial date, the State discovered that the prosecutrix could not be located, so the trial which was scheduled for Monday, June 11th, 1973, was postponed on the preceding Friday. On Friday evening, just hours after the postponement was granted, the State was able to locate the prosecutrix. Yet the State made no effort to try to reset the trial but rather, remained silent on the matter.[95] Nor was there any effort by the prosecution to expedite this case. Consequently, the new trial date was set for five months later. During that period, Smith's mental condition deteriorated further and another delay was necessary for him to receive another mental evaluation. He was again pronounced fit and a new trial date was set.[96] This trial was also postponed because the arresting officer was unavailable.[97] Thus, the postponement from the first trial date which was caused by the State's negligence had a snowballing effect and, consequently, the remainder of the delay was chargeable to the State.[98]

Evans reduced the analysis of the reason factor to simple mathematics. The first portion of the eighteen month delay was due to the failure of the arresting officer to appear on six different occasions for scheduled preliminary hearings. The trial court dismissed the charges after the fifth failure but Evans was subsequently reindicted. Following the indictment, there was a series of essentially administrative delays totalling approximately twelve months. Of this period, all but two months was charged to the State. Upon reciting these facts, the court of special appeals tersely recapitulated its finding and concluded by stating that the "state is chargeable with delay in a ratio seven and a half times that chargeable to the appellant."[99] There was no discussion as to whether the time chargeable to the State was for valid reasons, reasons to be weighed neutrally, or for reasons that should be weighed heavily against the State.

In *William Smith*, the most recent dismissal case, the court of special appeals avoided the ratio analysis which had been introduced in *Evans* only two months before. The discussion of the

93. *Id.* at 529, 350 A.2d at 633.
94. *Id.* at 529, 350 A.2d at 633–34.
95. *Id.* at 523–25, 350 A.2d at 630–31.
96. *Id.* at 525, 350 A.2d at 631.
97. *Id.*
98. *Id.* at 531, 350 A.2d at 635.
99. 30 Md. App. at 429, 352 A.2d at 348.

reason factor only dealt with the amount of time "chargeable" to the State and the amount "chargeable" to Smith.[100] The court found that the State was responsible for twenty-eight months of the delay while Smith was charged only with seven months. The remaining ten months of delay were due to neutral reasons.[101] Again, as in *Evans,* the court made no attempt at "weighing" the different reasons beyond determining which party was at fault.[102]

In light of the *Evans* and *William Smith* decisions, it seems certain that the court of special appeals has not adhered to Justice Powell's instruction with regard to the analysis of the reason factor. The method of merely determining which party was at fault for the various periods of delay and then comparing the total time chargeable to each was clearly not what Justice Powell had in mind when he suggested that *"different* weights should be assigned to different reasons."[103]

3. Prejudice

The Supreme Court in *Barker* identified three of the interests of the defendant which the speedy trial right "was designed to protect": the prevention of "oppressive pretrial incarceration;" the minimization of anxiety and concern on the part of the accused; and the protection of the accused's right to assist counsel in the preparation of the defense.[104] The Court noted that the most serious problems arise when the last of these interests is not protected, because "the inability of a defendant to adequately prepare his case skews the fairness of the entire system."[105]

In reversing an order dismissing an indictment in *State v. Becker,*[106] the court of special appeals stated that it is not essential that the defendant affirmatively demonstrate prejudice since prejudice is but one factor to be considered in the balancing process.[107] This thought, briefly mentioned in *Barker,* was expanded upon by the Supreme Court in *Moore v. Arizona.*[108] *Moore* held that no actual prejudice need be shown by the defendant when challenging the denial of his constitutional right, particularly when the length of the delay is "inordinately long."[109] Indeed, the burden may well shift to the State to affirmatively prove lack of prejudice.[110]

100. 31 Md. App. at 331–32, 356 A.2d at 330.
101. *Id.*
102. *Id.*
103. 407 U.S. at 531 (emphasis added).
104. *Id.* at 532.
105. *Id.*
106. 24 Md. App. 549, 332 A.2d 272 (1975).
107. *Id.* at 566, 332 A.2d at 282.
108. 414 U.S. 25 (1973).
109. *Id.* at 26–27.
110. *Id.*

In *Wynn*, the defendant did not show prejudice resulting from a delay in excess of four years. According to the court of special appeals, when the delay is "patently inordinate, . . . it is for the state to make an affirmative showing of no prejudice."[111]

The court of special appeals discussed the prejudice factor in *Evans*, including pretrial incarceration and the resulting mental anguish therefrom, but there was no affirmative finding of prejudice.[112] Seemingly the prejudice was presumed to exist.

Actual prejudice of varying degrees was established in the other three dismissal cases, *Epps*, *Lee Smith* and *William Smith*. In *Epps*, the accused was incarcerated from the time of his arrest until his trial slightly over a year later because he was unable to make bail.[113] In addition, a key defense witness available to testify on the date originally set for trial was unavailable when the trial was held eight months later, due to his being stationed overseas in the military service.[114] Thus, the keystone of Epps' defense was "obliterated" when the trial court granted a postponement of the original trial date notwithstanding Epps' objection and insistence that he be tried immediately.[115]

Lee Smith, like *Epps*, presented a situation in which the defendant suffered significant pretrial incarceration — nine months out of the total sixteen month period of delay.[116] Furthermore, the preparation of Smith's defense was at least minimally impaired due to the five month period chargeable to the State during which Smith's mental condition was such that he was unable to assist counsel.[117] Finally, Smith suffered some degree of financial ruin and "his family was forced onto the public welfare rolls . . . ," a situation which surely affected, to some degree, Smith's "anxiety and concern."[118]

William Smith also suffered prejudice in two ways. First, although the facts of the case are somewhat vague, it is clear that Smith was in jail for at least thirteen months awaiting trial on these charges.[119] In addition, an alibi witness died thirty-two

111. 26 Md. App. at 42, 336 A.2d at 802.
112. 30 Md. App. at 429–30, 352 A.2d at 348.
113. 276 Md. at 99, 119, 345 A.2d at 65, 77.
114. *Id.* at 100, 119–20, 345 A.2d at 66, 77–78.
115. *Id.* at 120, 345 A.2d at 77.
116. 276 Md. at 532–33, 350 A.2d at 635.
117. *Id.* at 533, 350 A.2d at 636.
118. *Id.* at 533, 350 A.2d at 635.
119. 31 Md. App. at 330, 356 A.2d at 330. It appears from the facts that Smith was in the Washington, D.C. jail serving a sentence for an unrelated crime at the time of his original indictment. From there he was sent to a federal prison in Kentucky for a further period. Smith was delivered from this institution to Prince George's County pursuant to a writ of *Habeas Corpus ad Prosequendum*. It is at that point in time that the 13 month pretrial incarceration period began.

months into the delay period.[120] Thus, Smith was subjected to two of the types of prejudice specifically mentioned in *Barker*.[121]

Thus, while demonstrations of actual prejudice, including pretrial incarceration, unavailability of defense witnesses, inability to assist counsel and financial hardship, have weighed heavily in three of the dismissal cases, a showing by the defendant of actual prejudice is not essential to a finding that the speedy trial right has been denied. In the two cases in which dismissals were granted without proof of prejudice, it was said that prejudice may be presumed from extraordinary delay. More accurately, perhaps, the longer the delay attributable to the State, the less the burden is on the defendant to demonstrate prejudice. Indeed, when the delay is particularly long, the State may be burdened with showing a lack of prejudice, or rebutting a presumption of prejudice.

4. Waiver

The waiver-assertion factor appears to be mired in confusion in Maryland at the present time. In the past, Maryland firmly adhered to the demand-waiver doctrine which, simply stated, provided that a criminal defendant waived his speedy trial right by failing to assert it affirmatively.[122] There were many Maryland cases before *Barker* in which this doctrine was applied and none resulted in a finding that an accused was denied his right to a speedy trial.[123] The confusion now exists because the Supreme Court in *Barker* specifically rejected the demand-waiver doctrine on the theory that a failure to make a demand cannot constitute "an intentional relinquishment . . . of a known right or privilege."[124] The Court further held that the courts should "indulge every reasonable presumption against waiver."[125] After a thorough discussion, the Court disposed of the doctrine:

> We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives the right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.[126]

120. *Id.* at 331, 336 A.2d at 330.
121. 407 U.S. at 532.
122. *E.g.*, State v. Murdock, 235 Md. 116, 123, 200 A.2d 666, 669–70, *cert. denied*, 379 U.S. 914 (1964).
123. *Id.*
124. 407 U.S. at 528. *See also* text accompanying notes 35–36, *supra.*
125. 407 U.S. at 525.
126. *Id.* at 528.

Inasmuch as the sixth amendment right to a speedy trial is applicable to the states, it would appear that the Court's unequivocal rejection of demand-waiver would apply to the states as well. However, there is a serious question as to whether the Maryland courts agree.[127] For example, in a post-*Barker* case, *Williams v. State*,[128] petitioner's motion for dismissal due to the lack of a speedy trial was denied by the trial court. The court of special appeals affirmed on the ground enunciated by the trial court, that defendants had waived their right to a speedy trial by not demanding it until the day their trial was to begin.[129]

In *Lee Smith*, the court of appeals stated:

> [T]he decisions of the United States [Supreme] Court, in reference to the corresponding provisions of the Federal Constitution, in this case, the sixth amendment, are adopted by the [Maryland] court as authority which is very persuasive, *although not necessarily controlling*.[130]

In a footnote, the court noted that since the accused had made numerous requests for a speedy trial, no decision would have to be made as to whether the earlier demand-waiver cases in Maryland "are still viable."[131]

Erbe v. State,[132] decided on the same day as *Lee Smith*, expressed a similar view. *Erbe* involved a very lengthy post-conviction delay in sentencing. In a discussion of the pre-*Barker* demand-waiver cases in Maryland, the court also dealt with the interplay between the Maryland and Federal rights to a speedy trial. It was concluded that for the purposes of its decision in

127. The Maryland position is difficult to understand in light of the Supreme Court's language in *Klopfer v. North Carolina*, 386 U.S. 213 (1967). In *Klopfer*, the Court quoted *Pointer v. Texas*, 380 U.S. 400, 406 (1965), in which the sixth amendment right of confrontation was held to apply to the states pursuant to the due process clause of the fourteenth amendment.

> [T]he protection of the confrontation guarantee [like other sixth amendment rights], is to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those federal rights against encroachment.

386 U.S. at 222–23. The Court went on to say that the right to a speedy trial is as fundamental as other sixth amendment rights. Thus, by analogy, the same vigor with which the Court enforced the right of confrontation in *Pointer* should be applied to the speedy trial right.

128. 17 Md. App. 110, 299 A.2d 878 (1973).
129. *Id.* at 118, 299 A.2d at 882.
130. 276 Md. at 526, 350 A.2d at 632 (emphasis added).
131. *Id.* at 527 n.2, 350 A.2d at 632 n.2.
132. 276 Md. 541, 350 A.2d 640 (1975).

Erbe, the court would treat these rights as coterminous.[133] The court of appeals then stated that it was possible to render a decision in the case by considering only the other factors.[134]

Thus, the language in *Lee Smith* and *Erbe* raised a question as to whether the Maryland courts still adhere to the demand-waiver doctrine. Unfortunately, the court of appeals was not required to decide the issue in either case.[135] Perhaps Judge O'Donnell's concurring opinion in *Lee Smith* will guide the court in the future. As he saw the problem,

> [the Court] seem[s] to suggest the view that in Maryland the demand-waiver doctrine . . . may still be of continuing force and effect. . . . [However, it should be clear that as] a result of the decision in *Barker v. Wingo*, it appears to be no longer open to question that the demand-waiver doctrine heretofore applied by this Court . . . has been repudiated and that such a demand is no longer a condition precedent to the application of the right.[136]

In *Evans*, the court of special appeals, while not expressly doing so, apparently adopted Judge O'Donnell's thinking on the subject. Judge (now Chief Judge) Gilbert, in writing for the court, said that "the failure to demand does not, *ipso facto*, amount to a waiver of that fundamental right. Instead, failure to demand is relegated to the status of '. . . another factor to be considered in interaction with the three others . . . .' "[137]

The *William Smith* decision did not mention the assertion factor in the recitation of the facts but only stated that Smith "made numerous *pro se* motions for a speedy trial . . . throughout his period of incarceration in Prince George's County."[138] From this language, it can be presumed that no waiver issue arose in this case.

It appears that at least the court of special appeals abides by the holding in *Barker* which rejected demand-waiver. Until a case involving the demand-waiver issue reaches the court of appeals, however, it cannot be said with certainty what Maryland's position is on the issue.

133. *Id.* at 546, 350 A.2d at 643.
134. *Id.* at 544–46, 350 A.2d at 642–43.
135. There was no assertion issue in *Smith* because of his many demands for a speedy trial. In *Erbe*, the court concluded that although there was no demand for sentencing, the case could be decided without dealing with the demand-waiver issue.
136. 276 Md. at 536, 350 A.2d at 637–38.
137. 30 Md. App. at 430–31, 352 A.2d at 349, *citing* State v. Jones, 18 Md. App. 11, 305 A.2d 177 (1973).
138. 31 Md. App. at 331, 356 A.2d at 329.

B. The Balancing Process

In accordance with *Barker*, the Maryland courts have avoided the application of any hard and fast rules in carrying out the balancing process. The dismissal cases suggest, however, that a delay of more than one year between accusation and trial may *ipso facto*, trigger inquiry into the other factors.[139] The shortest period to date which has precipitated a balancing resulting in dismissal is one year and fourteen days.[140] Whether a shorter period will suffice remains to be seen. Once the weighing process was initiated, each of the dismissal cases was considered in the light of the particular factual situation presented.

For example, in *Wynn*, the court based its holding that there had been a denial of the right to a speedy trial primarily on two factors.[141] The first of these was the fifty-two month delay. The length would not have been determinative if the reasons for the delay had been justified.[142] In *Wynn*, the lengthy delay was due to missing state witnesses — a valid reason according to *Barker*.[143] The State was guilty of negligence, however, as the missing witnesses were found after comparatively little effort. The length and reason factors coupled with the presumption of prejudice sufficiently outweighed the fact that Wynn never demanded that he be tried.[144]

Lee Smith and *Epps* presented similar applications of the balancing process. The length of delay in both cases extended more than one year.[145] As pointed out in *Lee Smith*, in addition to triggering the investigation into the other factors, the length of delay "should, by itself, be given some, but not determinative, weight."[146] Although the circumstances were somewhat different, a substantial portion of the delay in each case was chargeable to the State. In *Epps*, eight months of the total delay was caused by the trial court's refusal to try Epps separately after his two co-defendants demanded a jury trial on the morning that all three were to be tried non-jury.[147] Approximately seven months of the total delay in *Lee Smith* occurred due to the State's negligence in failing to locate the prosecutrix and in failing to expedite the

139. *See* Smith v. State, 276 Md. 521, 528, 350 A.2d 628, 633 (1976).
140. Epps v. State, 276 Md. 96, 111, 345 A.2d 62, 72 (1975).
141. Although the court mentioned in its summary that all four factors were favorable to the defendant, the discussion centered around the length and reason factors.
142. 26 Md. App. at 41, 336 A.2d at 802.
143. 407 U.S. at 531.
144. 26 Md. App. at 40, 336 A.2d at 801.
145. In *Smith*, the delay was approximately sixteen months. 276 Md. at 528, 350 A.2d at 633. The delay in *Epps* was one year, fourteen days. 276 Md. at 111, 345 A.2d at 73.
146. 276 Md. at 528, 350 A.2d at 633.
147. See text accompanying notes 87–91, *supra*.

case once the witness was located.[148] In both cases, these delays weighed heavily against the State.

Both Smith and Epps suffered actual prejudice. Each was jailed for significant amounts of time while awaiting trial.[149] In addition, Smith's mental condition deteriorated during the delay to such an extent that he was incapable of assisting counsel in his defense.[150] Epps suffered prejudice in that his chief alibi witness was unavailable at the time of trial due to the State-caused delay.[151] Thus, harmful prejudice was shown in both cases.

There arose no demand-waiver issue in either case. Both defendants demanded a speedy trial on the date of the first postponement, and each made several subsequent demands.[152]

In both cases, therefore, there were substantial periods of delay most of which were caused by the State; each accused suffered some degree of actual prejudice; and each made frequent and timely demands for a speedy trial. Hence, the cases were dismissed.

Evans was a closer case than the other dismissal cases. As in the other three, the delay of eighteen months in *Evans* assumed "constitutional proportion."[153] No actual prejudice was shown, however, but it was presumed due to the length of the delay. Also, no demand was made by Evans for a speedy trial until the day of his trial.[154] The determinative factor in *Evans* was the reason for the delay.[155] Five postponements were necessary because of the failure of the prosecuting officer to appear in court. Several other delays were caused by court congestion and administrative problems.[156] Lack of diligence on the part of the State in prosecuting the accused emerged as the deciding factor. The court of special appeals stated that:

> On balance, in this case, the appellant's failure to demand a speedy trial prior to the date of trial, while weighing against him, does not outweigh what appears to be an air of indifference with respect to the prosecution of this case from its inception.[157]

148. See text accompanying notes 92–98, *supra*.
149. Smith was in jail for nine months before being released on bond. 276 Md. at 532–33, 350 A.2d at 635. Epps was incarcerated for the entire period between his arrest and trial. 276 Md. at 119, 345 A.2d at 77.
150. 276 Md. at 533, 350 A.2d at 636.
151. 276 Md. at 120, 345 A.2d at 77.
152. Smith made four separate demands for a speedy trial, the first coming on the date of the first postponement. 276 Md. at 532, 350 A.2d at 635. A similar situation occurred in *Epps*, 276 Md. at 117–18, 345 A.2d at 76.
153. 30 Md. App. at 427, 352 A.2d at 346.
154. *Id.* at 429–30, 352 A.2d at 348.
155. *Id.* at 430–31, 352 A.2d at 349.
156. See the chronological listing of the various periods of delay and the reasons, 30 Md. App. at 427–28, 352 A.2d at 347.
157. 30 Md. App. at 431, 352 A.2d at 349.

There was a very limited application of the balancing process in *William Smith.* As in *Epps* and *Lee Smith,* all four factors weighed against the State being permitted to prosecute the accused. There was a total pretrial delay period of nearly four years,[158] an overwhelming proportion of the delay was chargeable to the State,[159] actual prejudice to the accused was affirmatively demonstrated[160] and Smith made numerous demands for a speedy trial.[161] With all of these factors weighing against the State, the court perfunctorily dismissed the case.

V. CONCLUSION

The Maryland courts have taken great strides in the protection of this most fundamental constitutional right — the right to a speedy trial. Maryland's appellate courts have recently applied the *Barker* balancing test with vigor and may have gone further than *Barker* required. In the author's opinion, the recent dismissal cases suggest that, if either of Maryland's appellate courts were confronted with the *Barker* fact situation, the charges would have been dismissed. A Maryland application of the four-factor test to the *Barker* fact situation might proceed as follows: A delay of five years is constitutionally significant and sufficiently triggers the balancing process.[162] The reasons for delay varied, but none of it may be charged to Barker. More than four years of the total five year delay was caused by the State's desire to convict Barker's alleged accomplice.[163] The remainder of the delay was incurred because of a neutral reason — a missing state witness.[164] Thus, the ratio of the delay is four years chargeable to the State, no time chargeable to Barker and approximately one year of neutral delay. With respect to prejudice, *Barker,*[165] like *Epps,*[166] *Lee Smith*[167] and *William Smith*[168] involved a substantial period of pretrial incarceration — ten months in *Barker* as compared to one year in *Epps,* nine months in *Lee Smith* and thirteen months in *William Smith.* Maryland courts have also pointed out that when there is a particularly long delay, prejudice can be presumed and no actual prejudice need be shown.[169] The final factor, demand for trial,

158. 31 Md. App. at 331–32, 356 A.2d at 330.
159. *Id.*
160. *Id.* at 331, 356 A.2d at 329.
161. *Id.*
162. *See* text accompanying notes 52–76, *supra.*
163. 407 U.S. at 517.
164. *Id.* at 517–18.
165. 407 U.S. at 517.
166. 276 Md. at 111, 345 A.2d at 73.
167. 276 Md. at 528, 350 A.2d at 633.
168. 31 Md. App. at 331–32, 356 A.2d at 330.
169. *See, e.g.,* Smith v. State, 276 Md. at 532, 350 A.2d at 635.

would probably tip the scales in Barker's favor in the Maryland courts even though Barker was silent during the first three and one-half years following his arrest.[170] In Maryland, assuming arguendo that demand-waiver is still in effect,[171] Barker may have waived his right to a speedy trial for this three and one-half year period. During the subsequent twenty month period, however, Barker made numerous demands for a speedy trial, a period sufficient to constitute a denial of speedy trial.[172] Thus, the two factors which seemed to weigh most heavily against Barker in the Supreme Court — waiver and prejudice — are the two factors which would ultimately result in a dismissal if the case arose in Maryland.

Where will the Maryland courts go from here? Again, one can only speculate, but the trend toward stricter enforcement of the speedy trial right as evidenced in the dismissal cases, is apt to continue. With federal legislation such as the Speedy Trial Act placing direct pressure on the federal courts, it is likely that similar mandatory legislation may eventually be forthcoming in Maryland as well. Perhaps the courts sense this and, as a result, are attempting to prepare our trial courts so that the transition will be orderly rather than chaotic.

George Church

ADDENDUM

Since the initial printing of this article, there have been two more "dismissal" cases in Maryland. The more significant of the two is *Jones v. State,* No. 3 (Ct. App., Dec. 14, 1976) (discussed briefly in note 51, *supra*), in which the court of appeals reversed the court of special appeals' decision upholding Jones' conviction. The defendant in the case, John Edward (Liddy) Jones, was convicted of narcotics violations after a two and one-half year pretrial period.

In its discussion of the reason factor, the court of appeals avoided the strict mathematical analysis espoused by the court of special appeals in *Evans v. State* (see discussion at p. 59, *supra*):

> While we must scrutinize the entire interval between arrest and trial, and attempt to ascribe the reasons for particular delay, it is not possible or even desirable to do so with mathematical precision.

The court ultimately decided that of the total two and one-half year delay, eighteen months "were largely the result of [Jones']

170. 407 U.S. at 517.
171. See discussion in Section IV, A(4), *supra.*
172. 407 U.S. at 517–18.

own actions." There was a crucial eleven month period, however, which "was attributable substantially if not entirely to the State's dilatoriness." The court termed the State's attempt to excuse this delay as "nothing more than a concocted diaphonous smoke screen." The court concluded this portion of the analysis by finding that the delays caused by Jones and by neutral factors in no way mitigated the eleven month delay attributable to the State.

The assertion factor was also weighed in favor of Jones because he and his attorneys made numerous requests for a speedy trial, beginning early in the pretrial period.

In dealing with the prejudice factor, the court noted that no affirmative showing of prejudice is required. The court found that Jones had suffered no actual prejudice even though two witnesses died, because the deaths occurred prior to the crucial period of delay. In addition, the court briefly mentioned the mental anguish suffered by the defendant as a result of the delay.

In his dissenting opinion, Chief Judge Murphy asserted that the State's dereliction in failing to try Jones during the crucial period was not so gross as to warrant the reversal ordered by the majority. In his view, the decision "should serve as a bitter lesson to prosecutors and judges throughout the state not to risk playing Russian roulette with the public's right to have criminal defendants brought to the bar of justice on a timely basis."

In contrast to *Jones, Pyle v. State*, No. 139 (Ct. Sp. App., Dec. 3, 1976) presented a very simple fact situation in which the State waited eleven months to try the defendant. The primary significance of the case is that the total length of delay which triggered the balancing process was eleven months, slightly less than the one year, fourteen day delay in *Evans v. State*, the shortest period until *Pyle* which had triggered the four-factor analysis.