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And the Saints Go Marching Out - Rule 1100: Pennsylvania's Implementation of the Right to a Speedy Trial

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I. INTRODUCTION

Rule 1100 of the Pennsylvania Rules of Criminal Procedure[1] im-

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1. PA. R. CRIM. P. 1100, Prompt Trial provides:

(a)(1) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1973 but before July 1, 1974 shall commence no later than two hundred seventy (270) days from the date on which the complaint is filed.

(2) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1974 shall commence no later than one hundred eighty (180) days from the date on which complaint is filed.

(b) For the purpose of this Rule, trial shall be deemed to commence on the date the trial judge calls the case to trial.

(c) At any time prior to the expiration of the period for commencement of trial, the attorney for the Commonwealth may apply to the court for an order extending the time for commencement of trial. A copy of such application shall be served upon the defendant through his attorney, if any, and the defendant shall also have the right to be heard thereon. Such application shall be granted only if trial cannot be commenced within the prescribed period despite due diligence by the Commonwealth. Any order granting such application shall specify the date or period within which trial shall be commenced.

(d) In determining the period for commencement of trial, there shall be excluded therefrom such period of delay at any stage of the proceedings as results from:

(1) the unavailability of the defendant or his attorney;

(2) any continuance in excess of 30 days granted at the request of the defendant or his attorney, provided that only the period beyond the 30th day shall be so excluded.

(e)(1) When a trial court has granted a new trial and no appeal has been perfected, the new trial shall commence within one hundred and twenty (120) days after the date of the order granting a new trial.

(2) When an appellate court has granted a new trial, or has affirmed an order of a trial court granting a new trial, the new trial shall commence within one hundred and twenty (120) days after the appellate court remands the record to the trial court. The date of remand shall be the date as it appears in the appellate court docket.

(f) At any time before trial, the defendant or his attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this Rule has been violated. A copy of such application shall be served upon the attorney for the Commonwealth, who shall also have the right to be heard thereon. Any order granting such application shall dismiss the charges with prejudice and discharge the defendant.

plements the state constitutional right to a speedy trial[2] by requiring the dismissal of charges against a defendant if his trial has not commenced 180 days after the complaint has been filed.[3] Aside from some limited statutory exceptions discussed below,[4] Rule 1100 sanctions the automatic discharge, without a trial on the merits, of individuals who otherwise might have been found guilty and sent to prison.[5]

Since 1974, its effective date,[6] Rule 1100, and specifically its per se approach to speedy trial violations,[7] has been barraged by criticism, particularly from prosecutors who must succumb to its mandate. Prior to 1974, the specific nature of the defendant's right to a speedy trial was determined by a balancing test taking into account the length and reason for the delay, whether or not the defendant asserted his right, and the effect of the delay on the defendant's ability to defend himself.[8] Rule 1100 with its mandatory dismissal provisions rejects the balancing test and thus makes it less difficult for the defendant to establish an actionable violation of his right.

This article will cursorily trace the evolution of the right to a speedy trial, from the Magna Carta to present constitutional protections, identifying the interests served by the right and examining the rights that attach upon violation. Following a discussion of the recent trend among the states to adopt statutes and rules similar to Pennsylvania's Rule 1100, the article will analyze the operation of the rule and the body of case law that has developed in interpreting it.

(g) Nothing in this Rule shall be construed to modify any time limit contained in any statute of limitations.

2. PA. CONST. art. I, § 9 provides in part: "In all criminal prosecutions the accused hath a right to . . . have . . . a speedy public trial . . . ."

3. PA. R. CRIM. P. 1100(a)(2), 1100(f).

4. PA. R. CRIM. P. 1100(c), 1100(d). *See* notes 75-88 and accompanying text *infra*.

5. *See* Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525 (1975) [hereinafter cited as *Rights and Remedies*]; Comment, *Speedy Trial Guarantees in Pennsylvania: Impact of Rule 1100*, 78 DICK. L. REV. 755, 771 (1974) [hereinafter cited as *Impact of Rule 1100*].

6. Rule 1100 was adopted June 8, 1973 and pronounced effective as set forth in sections (a)(1) and (a)(2) of the Rule. Amended and effective December 9, 1974. PA. R. CRIM. P. 1100.

7. PA. R. CRIM. P. 1100(f) (failure to bring a defendant to trial within the prescribed 180 days is a per se violation of his right to a speedy trial).

8. For a discussion of how the right to a speedy trial operated in Pennsylvania prior to Rule 1100, see *Impact of Rule 1100, supra* note 5, at 760.

II. Historical/Constitutional Development

A. *Origins*

Any discussion of the right to a speedy trial should begin with its thirteenth century pronouncement in the Magna Carta: "We will sell to no man, we will not deny or defer to any man either justice or right to speedy justice."[9] But even as early as 1166 in the Assize of Claredon, evidence of the right can be found.[10] In these early formulations of the right to a speedy trial, the right was interpreted as protecting the accused from lengthy pretrial detention. This protection from lengthy pretrial incarceration surfaced again in the Habeas Corpus Act of 1679,[11] providing for the release on bail of defendants not indicted at the term following incarceration.[12] The idea of a right to a speedy trial crossed the Atlantic with the American colonists, and became part of the sixth amendment to the United States Constitution.[13] Today, the right is protected not only by the Federal Constitution but by the law of each of the fifty states as well.[14]

B. *Constitutional Development*

The Supreme Court has decided comparatively few cases dealing with the constitutionally protected right to a speedy trial.[15] Com-

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9. Magna Carta, c. 29 (1215). For historical background of the right to a speedy trial, see Klopfer v. North Carolina, 386 U.S. 213, 223-26 & nn. 8-21 (1967).

10. In the Assize of Claredon it was stated:

> And when a robber or murderer or thief or receiver of them has been arrested through the aforesaid oath, if the justices are not about to come speedily enough into the country where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices.

2 English Historical Documents 408 (1953).

11. Habeas Corpus Act of 1679, 31 Car. II c. 2. *See also Rights and Remedies, supra* note 5; Note, *The Right to a Speedy Trial: Ohio Follows the Trend, 43* U. Cin. L. Rev. 610, 611 (1974) [hereinafter cited as *Ohio Follows the Trend*].

12. This is the so-called two-term rule. *See Rights and Remedies, supra* note 5, at 532 n.45.

13. U.S. Const. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ." For implementation of the Federal Constitutional right to speedy trial, see Fed. R. Crim. P. 48.

14. *See* Klopfer v. North Carolina, 386 U.S. 213, 226 (1967).

15. Beavers v. Haubert, 198 U.S. 77 (1905) (right to a speedy trial not violated by continuance of New York indictments for removal to stand trial in the District of Columbia); Pollard

mentators are uncertain whether the lack of early case law resulted from the Court's refusal to hear speedy trial cases or defendants' failure to assert the right. Nevertheless, a substantial body of law exploring the various concerns embodied in the right has appeared in a series of recent cases.

For example, in 1966 in *United States v. Ewell,*[16] appellees claimed their right to a speedy trial was infringed when nineteen months elapsed between dismissal of their first indictments and the handing down of their second indictments. In holding that no violation of the right to a speedy trial had occurred, the Supreme Court announced the interests protected by the sixth amendment. The Court understood the guarantee was intended: 1) to protect against undue and oppressive incarceration prior to trial, 2) to minimize the anxiety and concern accompanying public accusation, and 3) to limit the possibilities that long delay will impair the ability of an accused to defend himself.[17]

In 1967, the Court elaborated upon the sixth amendment analysis in *Klopfer v. North Carolina.*[18] Klopfer, a university professor, was charged with criminal trespass, and after mistrial had been declared, his case was continued to the following court term. There-

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v. United States, 352 U.S. 354 (1957) (although sentence was not imposed for two years, it did not amount to a violation of defendant's right to a speedy trial since the delay was not purposeful or oppressive); United States v. Ewell, 383 U.S. 116 (1966) (19-month delay between original arrests and hearing on indictments did not violate speedy trial provision of the Constitution); Klopfer v. North Carolina, 386 U.S. 213 (1967) (sixth amendment right to a speedy trial held to be a fundamental right and made applicable to the states through the fourteenth amendment); Smith v. Hooey, 393 U.S. 374 (1969) (a defendant incarcerated in a jurisdiction outside of the one where a prior charge was pending must also be afforded a speedy trial); Dickey v. Florida, 398 U.S. 30 (1970) (a defendant is not voluntarily outside of the jurisdiction when imprisoned on an offense committed subsequent to the pending charge; his right to a speedy trial must still be afforded him); United States v. Marion, 404 U.S. 307 (1971) (although the crimes were committed three years before the indictments were brought, the Court held the sixth amendment's guarantee of a speedy trial is applicable only after a person has been accused of a crime, *i.e.*, after arrest or filing of a complaint); Barker v. Wingo, 407 U.S. 514 (1972) (Court established four factor balancing test for determining violations of the right to a speedy trial); Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973) (imprisoned state defendant may resort to federal habeas corpus upon exhaustion of state remedies in order to compel the state to try him or release him); Strunk v. United States, 412 U.S. 434 (1973) (when the right to a speedy trial has been infringed, the only possible remedy is dismissal of the charges); Moore v. Arizona, 414 U.S. 25 (1973) (defendant need not prove prejudice to his defense; he may be exposed to prejudice when other interests are invaded provided the other *Barker* balancing factors are in defendant's favor).

16. 383 U.S. 116 (1966).
17. *See id.* at 120.
18. 386 U.S. 213 (1967).

after, a *nolle proseque* with leave to reinstate charges at a future date was entered by the district prosecutor. Under the procedure, the indictment was not discharged, and the statute of limitations for the crime was tolled, permitting an indefinite delay between the date of the indictment and trial. The Court invalidated the North Carolina *nolle proseque* procedure, stating that reserving for the prosecution the right to reinstate the criminal charges violated a defendant's right to a speedy trial.

Klopfer is an important sixth amendment decision. The Court recognized that all three interests enumerated in *Ewell* need not be infringed before the protection of the right will attach. Since Klopfer had not been in jail pending trial, the first interest — the right to be free from lengthy pretrial incarceration — had not been infringed. The Court, nevertheless, believed that the mere pendency of an indictment subjected the defendant to public scorn, deprived him of employment, and curtailed his freedom of speech and association.[19] The *Klopfer* Court thus relied primarily on enchroachment of the second interest, minimization of concern and anxiety accompanying public accusation, to invalidate the North Carolina procedure. The effect of the decision was to force the prosecution to drop the charges or proceed to trial without delay. Furthermore, the Court announced that the right to a speedy trial was one of the fundamental and basic rights preserved by the Constitution.[20] By incorporating the right to a speedy trial into the due process clause of the fourteenth amendment, the Court imposed federal speedy trial standards on the states. Thereafter, all speedy trial claims were to be measured by federal standards, unless state law offered greater protection.[21]

Evolution of the right to a speedy trial continued in *Smith v. Hooey*.[22] In 1960, while imprisoned in the federal penitentiary in Leavenworth, Kansas, petitioner Smith was indicted in Texas for theft. After filing numerous "motions" to commence trial, Smith brought a mandamus proceeding in the Texas Supreme Court asking for a rule to show cause why the pending charge should not be dismissed. When mandamus was refused, Smith petitioned the

19. *Id.* at 222.

20. *Id.* at 223.

21. *See* Note, *Right to a Speedy Trial*, 20 STAN. L. REV. 476, 477 n.6 (1968) [hereinafter cited as *Speedy Trial*].

22. 393 U.S. 374 (1969).

United States Supreme Court. The Court, referring to the three interests enunciated in *Ewell* as "constitutional demands," held that the delay in bringing a defendant to trial on a charge pending in one jurisdiction while the defendant was incarcerated in another state for a separate offense infringed upon the defendant's constitutional guarantee to a speedy trial.[23]

The Court evaluated the effects of the Texas indictment on the defendant and found the charge prejudiced all three interests protected by the right to a speedy trial. The Court dispelled the formerly accepted view that a defendant's interest against undue and oppressive incarceration, the first interest protected by the sixth amendment right to a speedy trial, could not be infringed when the defendant was already in prison. Even though the defendant was already incarcerated on a separate charge, denial of a speedy trial violated his interest in freedom from oppressive incarceration. Since trial would not occur until the defendant's prison term had run, a consecutive sentence would be inevitable and he was thereby denied the possibility of receiving at least a partially concurrent sentence. Furthermore, the defendant might be denied parole or his prison conditions might worsen because of the pending charge.[24]

The Court next indicated that the defendant's interest against prolonged public accusation with its accompanying anxiety was also affected despite the accused's presence in prison on another charge. This interest, as developed in the *Klopfer* opinion, focuses on the deterioration of the accused's relationship with society. Arguably, once the accused was in prison, his societal relationship could not deteriorate further. In *Hooey,* however, the Court concentrated on the accused's personal anxiety, the resultant depression, the lowering of his morale, and the ultimate corrosive effects on a prisoner's rehabilitation. The Court found that the defendant's right to a speedy trial was violated because the pending charge caused such anxiety.[25]

Finally, the Court noted that impairment of defendant's ability to defend himself, the third interest served by the right to speedy

23. The Supreme Court of Texas had conceded in its opinion that if the defendant had been incarcerated in Texas, he would have been given a trial upon request. The Texas court, however, refused to infringe upon the authority of another state by ordering a defendant's appearance in a Texas court. *Id.* at 380.

24. *Id.* at 378 & n.8.

25. *Id.* at 378-79.

trial, was markedly increased when the defendant was in prison.[26] Incarcerated far from the location of the pending charge, the accused was unable to confer with witnesses, or even keep track of them. Furthermore, the passage of time might erode any investigation the defendant had conducted. Thus, the Court concluded in *Hooey* that all three interests protected by the right to a speedy trial were violated when an out-of-state prisoner was not tried within a reasonable time after his request for trial.

In 1971, the Court limited the scope of the sixth amendment when, in *United States v. Marion,*[27] it declared that the right to a speedy trial attached only *after* charges[28] were brought. In 1970, the defendant, Marion, was indicted for fraudulent business practices which allegedly occurred between 1965 and 1966. The Federal Trade Commission learned of defendant's scheme involving misrepresentation, alteration of documents, and nonperformance of contracts in 1967 and issued a cease and desist order. When the criminal indictments did not follow until 1970, Marion argued that the three year delay from the time the government learned of the offense and the date of the indictment violated his right to a speedy trial under the sixth amendment. The Court conceded that the ability of the accused to defend was prejudiced by the delay, but nevertheless denied Marion's constitutional claim by finding this possible interference with the ability to defend to be insufficient reason to wrench the sixth amendment from its proper context.[29] Thus the Court refused to extend the right to a speedy trial to pre-accusation delays reasoning that the statute of limitations provided a sufficient safeguard against unreasonably lengthy delays between the time when the alleged offense occurred and the indictment.[30]

The Court's decision illustrated the relative importance of and the time factors inherent in the three protected interests. In *Klopfer,* the Court found a denial of defendant's right to a speedy trial solely on a showing that his interest in minimizing public accusation was prejudiced. In *Marion,* the defendant's ability to present his defense

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26. *Id.* at 379.

27. 404 U.S. 307 (1971).

28. While making it clear that the right was not necessarily dependent upon formal charges, the Court did not pinpoint the exact time the right would attach. The reach of the sixth amendment did not, however, extend to pre-arrest. *Id.* at 321.

29. *Id.* at 321-22.

30. In the instant case, the statute of limitations, pursuant to 18 U.S.C. § 3282 (1970), was five years. *Id.* at 324 n.15.

was impaired, but the sixth amendment protection was not operative. The inconsistency, however, is only superficial. The interest in being free from pretrial incarceration and the anxiety accompanying public accusation is not necessarily violated until an offense has been charged. In contrast, while pre-accusation delay may injure a defendant's defense, sufficient safeguards are provided by the statute of limitations. It appears, therefore, that the speedy trial protections will not be implemented when the only interest prejudiced is afforded protection by another guarantee. Furthermore, the Court may have given the third interest, defense preparation, an apparent subordinate role in *Marion*, not only because of the alternate safeguard, but also because of the dual effect delay has on defendant's defense — the delay may in fact benefit the accused.[31]

Probably the most important decision on the speedy trial guarantee was made in *Barker v. Wingo*.[32] Barker had been charged with the 1958 deaths of an elderly couple. More than five years later, after Barker's accomplice was finally convicted,[33] Barker went to trial on the murder charges. Although the Court affirmed Barker's conviction,[34] it established a balancing test to determine whether a defendant's right to a speedy trial has been violated.

The Court identified four factors to be considered in determining a sixth amendment speedy trial violation: 1) length of delay, 2) the reason for delay, 3) the defendant's assertion of his right,[35] and 4)

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31. The suggestion that delay may benefit the defense was recognized in Barker v. Wingo, 407 U.S. 514 (1972), where the Court stated:

> A second difference between the right to a speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

Id. at 521.

32. 407 U.S. 514 (1972).

33. It took six trials to convict Barker's accomplice, Silas Manning, of both murders. *Id.* at 516-17.

34. The Court felt Barker was satisfied with trial delay, that he was gambling on Manning not being convicted, making his chances of acquittal better. Only when Manning was convicted in early 1963 did delay begin to prejudice Barker. *Id.* at 536.

35. This is the so-called demand rule. *See generally* Godbold, *Speedy Trial — Major Surgery for a National Ill*, 24 ALA. L. REV. 265, 277-80 (1972) [hereinafter cited as *National Ill*]; *Rights and Remedies, supra* note 5, at 539-41; *Speedy Trial, supra* note 21, at 482-85;

prejudice to the defendant.[36] Recognizing that a balancing test required ad hoc application, the Court did give some guidelines by stating that when delay occurred between arrest and trial, rather than between knowledge of the crime and the indictment as in *Marion*, the most serious deprivation of the right to a speedy trial was the prejudice to defendant's interest in preparing his defense.[37]

Soon after *Barker*, the Court considered what relief should be afforded a defendant when his right to a speedy trial is infringed upon. In *Strunk v. United States*,[38] the defendant had been convicted of interstate transportation of a stolen automobile. Strunk claimed a ten month delay between the indictment and his trial violated his right to a speedy trial. The Court of Appeals found Strunk's right to a speedy trial had been violated, but instead of dismissing the charges, it ordered the lower court to credit the delay between the indictment and arraignment, 259 days, to the defendant's sentence.[39] On petition, the Supreme Court held that once a denial of the right to speedy trial is found, the only possible remedy is dismissal of the charges.[40]

At least one commentator has expressed abhorrence of the remedy announced in *Strunk*.[41] To ameliorate its effect, Professor Amsterdam suggests a limited reading of the case: dismissal of the charges is appropriate only as a posttrial remedy. Appropriate preconviction remedies, corresponding to the interest prejudiced, include release from jail when lengthy pretrial incarceration occurs and dismissal of the charge without prejudice when anxiety accompanies prolonged public accusation. A violation should warrant dismissal only when defendant's defense has been prejudiced.[42]

Although the discussion thus far has concentrated on the defendant's rights, the sixth amendment right to a speedy trial not only protects defendants, but protects societal interests as well.[43] Those

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Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1594 (1965) [hereinafter cited as *Lagging Right*].

36. 407 U.S. at 530.
37. *Id.* at 532.
38. 412 U.S. 434 (1973).
39. United States v. Strunk, 467 F.2d 969, 973 (7th Cir. 1972), *rev'd*, 412 U.S. 434 (1973).
40. 412 U.S. at 440. *But see Rights and Remedies, supra* note 5, at 532-39.
41. *Rights and Remedies, supra* note 5, at 532-39.
42. *Id.* at 535.
43. In *Barker* the Court stated:

> The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the

interests advanced by a prompt trial include administrative efficiency, cost savings, more effective prosecution, and early rehabilitation.[44] Another interest, although not directly protected by the right to a speedy trial, but nonetheless served by operation of the sixth amendment, is the societal interest in public justice — the interest in quickly punishing a criminal for his anti-social acts.[45]

III. Recent Trend

Undeniably, there has been a recent trend in criminal justice to quantify the time lapse between arrest and trial, thereby rendering certain conduct a per se violation of the right to a speedy trial.[46] For example, the Second Circuit announced rules on the subject,[47] and the American Bar Association covered the topic in its Minimum Standards of Criminal Justice.[48] All of the statutory and judicial announcements are similar in that they provide for a specific time period in which a defendant must be brought to trial.[49] Pennsylvania's Rule 1100 is a good example of this recent trend.

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general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.

407 U.S. at 519.

44. *Id.* at 519-21. *See also Ohio Follows the Trend, supra* note 11, at 612.

45. In *Ewell,* the Court states: "A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." 383 U.S. at 120.

46. The right to a speedy trial is guaranteed in every state constitution except those of New York and Nevada. Both states, however, have statutes protecting the right. *See e.g.,* Cal. Penal Code § 1382 (West 1970); Fla. R. Crim. P. 3.191; Ill. Ann. Stat. ch. 38, § 102-5 (Smith-Hurd 1970); Ind. R. Crim. P. 4; Mass. Gen. Laws Ann. ch. 277, § 72 (West 1968); Miss. Code Ann. § 99-17-1 (1972); Nev. Rev. Stat. § 178.495 (1971); N.M. R. Crim. P. 95; N.C. Gen. Stat. § 15.10 (1965); Ohio Rev. Code Ann. § 2945.71-.73 (Page 1974); Pa. R. Crim. P. 1100. For a complete list of the state constitutional provisions, see Comment, *The Convicts Right to a Speedy Trial,* 61 J. Crim. L. 352, 356 & n.54 (1970).

47. These rules were announced at the close of the opinion in the case of United States *ex rel.* Frizer v. McMann, 437 F.2d 1312 (2d Cir. 1971). For a discussion of these rules, see Comment, *Speedy Trials and the Second Circuit Rules Regarding the Prompt Disposition of Criminal Cases,* 71 Colum. L. Rev. 1059 (1971) [hereinafter cited as *Second Circuit Rules*]; Note, *A Look at the New Second Circuit Rates for the Prompt Disposition of Criminal Cases,* 56 Minn. L. Rev. 73 (1971); *Ohio Follows the Trend, supra* note 11, at 618-19.

48. *ABA Project on Minimum Standards for Criminal Justice — Relating to Speedy Trial* (Approved Draft 1968) [hereinafter referred to as *ABA Standards*].

49. It should be noted that in *Barker,* the Court refused to set a specific time period for the defendant to be brought to trial, believing it not to be constitutionally required, but a legislative function. The Court, however, recognized the states' right to implement such requirements. 407 U.S. at 523.

IV. Pennsylvania Rule of Criminal Procedure 1100

Rule 1100[50] was formulated to protect the criminal defendant's right to a speedy trial and to help eliminate the backlog in criminal cases in Pennsylvania.[51] Simply stated, Rule 1100 provides that criminal defendants be brought to trial[52] within 180 days[53] from the date on which the complaint is filed; if they are not, the complaint against them is discharged with prejudice.[54]

Logically, then, judicial analysis in Rule 1100 questions begins with a calculation[55] of the number of days from the date of the complaint to the time trial commences.[56] If that figure exceeds the statutorily imposed limitation of 180 days, a delay exists which may or may not warrant discharge. The court will find a violation of Rule 1100 and dismiss the charges when the delay cannot be excluded by 1100(d)(1) or (d)(2) exceptions, or by a timely filed, properly granted 1100(c) extension by the Commonwealth.[57]

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50. For a discussion of speedy trial guarantees in Pennsylvania prior to Rule 1100, see *Impact of Rule 1100, supra* note 5, at 757. *See, e.g.*, Commonwealth v. Montgomery, 246 Pa. Super. Ct. 371, 371 A.2d 885 (1977); Commonwealth v. Hailey, 470 Pa. 488, 368 A.2d 1261 (1977); Commonwealth v. Griffin, 243 Pa. Super. Ct. 115, 364 A.2d 477 (1976); Commonwealth v. Watson, 239 Pa. Super. Ct. 426, 360 A.2d 710 (1976); Commonwealth v. Wilson, 238 Pa. Super. Ct. 340, 357 A.2d 163 (1976).

51. Commonwealth v. Hamilton, 449 Pa. 297, 297 A.2d 127 (1972). Rule 1100 was devised pursuant to the opinion in *Hamilton*. *See* Pa. R. Crim. P. 1100, Comment.

52. Pa. R. Crim. P. 1100(b) and the Comment to the rule explain when the trial actually commences for purposes of the rule.

53. Pa. R. Crim. P. 1100(a)(2). Pa. R. Crim. P. 1100(a)(1) applies to cases where the complaint was filed before July 1, 1974 and gives the prosecution 270 days to bring a defendant to trial.

54. Pa. R. Crim. P. 1100(f).

55. Pa. R. Crim. P. 1100, Comment states: "It is intended that the number of days set forth in paragraphs (a)(1), (a)(2) be calculated as prescribed by the Act of November 25, 1970, P.L. 707, No. 290, § 3, 1 P.S. § 1908." 1 Pa. Cons. Stat. Ann. § 1908 (Purdon 1964) provides in part:

> When any period of time is referred to in any statute, such period in all cases . . . shall be so computed as to exclude the first and include the last day of such period. Whenever the last day of any such period shall fall on Saturday and Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.

The author notes that § 1908, its specific application going only to statutes, is here applied to a procedural rule. This obvious conflict is intensified upon examination of the language of Rule 1100: "Trial . . . shall commence no later than . . . days from *the date on which the complaint is filed.*" (Emphasis supplied). It is curious that § 1908 is utilized at all when the reading of the Rule is clear on its face.

56. *See* Pa. R. Crim. P. 1100(a)(2).

57. Commonwealth v. O'Shea, 465 Pa. 491, 350 A.2d 872 (1976). *O'Shea* arose when the defendant was awarded a new trial by the Pennsylvania Supreme Court following reversal of

Perhaps the most important decision on Rule 1100 is *Commonwealth v. Shelton*,[58] wherein the Pennsylvania Supreme Court declared that " 'judicial delay' may justify the granting of an application for an extension when timely filed." [59] It is to be emphasized that judicial delay is only applicable to Rule 1100(c) extensions and not appropriate for (d)(1) or (2) exclusions.[60] Two exam-

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his murder conviction. 456 Pa. 288, 318 A.2d 713 (1974). Under Rule 1100(e), O'Shea was to be retried within 90 days (now 120). The Commonwealth, petitioning to the United States Supreme Court for a writ of certiorari, received an 1100(c) extension. Trial was to commence within 30 days from disposition of the petition to the Supreme Court. When certiorari was denied, the Commonwealth improperly listed trial seventy (70) days later, forty (40) days beyond the extension. When the trial court dismissed the indictment, the Commonwealth appealed to the Pennsylvania Supreme Court. The court ruled the discharge of O'Shea proper, explaining *inter alia*, that once the extended period expired, the Commonwealth could not petition for an additional extension under Rule 1100(c). Finding such a maneuver untimely, the court cited Commonwealth v. Woods, 461 Pa. 255, 336 A.2d 273 (1975), an early Rule 1100 case. The court further explained that an extension for the Commonwealth under 1100(c) did not toll the original time period, but created a new limitation within which trial must commence. Any new extension must be requested within that limitation. But, if trial is scheduled beyond the set period, the Commonwealth may still present testimony regarding time excludable due to the defendant.

58. 239 Pa. Super. Ct. 195, 361 A.2d 873, *aff'd*, 469 Pa. 8, 364 A.2d 694 (1976). In *Shelton*, a special investigating grand jury returned a presentment against the defendant on December 20, 1973. An indicting grand jury returned a true bill against Shelton on January 3, 1974. Shelton then obtained a discovery order from the lower court which was found to be in conflict with a previous impounding order. On July 3, 1974, the impounding order was modified; on October 9, 1974, a pretrial hearing to dispose of motions was held where Shelton made an oral motion to dismiss pursuant to 1100(f), which was followed by a written motion on October 21, 1974. The Commonwealth answered the petition and filed for an 1100(c) extension on November 14, 1974. The lower court denied Shelton's dismissal motion but certified the case for immediate appeal. The superior court reversed the lower court and dismissed the indictment against Shelton. The Commonwealth petitioned for allowance of appeal to the Pennsylvania Supreme Court which was granted.

Besides holding judicial delay could be an acceptable exclusion under 1100(c), the court further explained the operation of Rule 1100. The court observed that 1100(f) triggers the presentation of circumstances leading to the excludable periods under 1100(d)(1) and (2). Also, in determining whether an extension has been timely filed by the Commonwealth, excluded periods under 1100(d) are considered.

Lastly, the court affirmed the superior court's dismissal of the indictment since the Commonwealth failed to file a timely extension.

59. 469 Pa. at 15, 364 A.2d at 698.

60. *See also* Commonwealth v. Kelly, 246 Pa. Super. Ct. 196, 369 A.2d 879 (1976); Commonwealth v. Kemp, 245 Pa. Super. Ct., 294, 369 A.2d 410 (1976); Commonwealth v. Mayfield, 469 Pa. 214, 364 A.2d 1345 (1976). The question of whether judicial delay should be an allowable extension has been answered in some jurisdictions with the "ready-rule". *See generally Ohio Follows the Trend, supra* note 11, at 629-33. *See, e.g.*, United States *ex rel.* Frizer v. McMann, 437 F.2d 1312 (2d Cir. 1971) (Second Circuit Rule 4); N.Y. CRIM. PROC. LAW § 38.30 (McKinney 1972).

The underlying rationale is that the defendant's right to a speedy trial is protected to the

ples given by the court as possible acceptable judicial delays, although not exclusive, were pending judicial proceedings in the case[61] and scheduling congestion.[62]

Appellate courts in the Commonwealth have extensively explored the various sections of Rule 1100. One of the intricacies of 1100(a) was recently decided when the Pennsylvania Supreme Court interpreted the meaning of when the complaint is filed.[63] In an arrest by warrant, the date on which the complaint is filed was found to be the date when criminal proceedings are initiated. The court further stated that when there is a warrantless arrest, criminal proceedings begin with the arrest, but refused to decide in the warrantless arrest situation, whether the arrest or the presentment of the complaint would commence the running of the mandatory period.[64] In an interpretation of what constitutes a complaint under the Juvenile Act[65] for purposes of 1100(a), a delinquency petition was found not to be a complaint.[66] The Superior Court held that criminal proceedings were initiated for 1100(a) only when the Criminal Division of the court obtained jurisdiction of the charges from Juvenile Court.[67] Other questions regarding this section arise when the original complaint is dismissed and a second one is brought. When the initial complaint is properly dismissed and there is no improper prosecutorial design to circumvent Rule 1100, then the rule commences to

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extent that the prosecution has used due diligence. When the prosecution is not responsible for delay, that is, delay is predicated by the judiciary, although the defendant's right to a speedy trial may be infringed, it is not infringed at the hands of the prosecution.

61. *See* Commonwealth v. Bowers, 250 Pa. Super. Ct. 77, 378 A.2d 461 (1977) (time consumed by the trial court in determining pretrial motions is not excludable under 1100(d)); Commonwealth v. Millhouse, 239 Pa. Super. Ct. 445, 362 A.2d 398 (1976) (Commonwealth argued that seventy-nine day delay over confusion of a discovery order was excludable under 1100(d), but the court found the delay not excludable under 1100(d), although it might have qualified for an 1100(c) extension had the Commonwealth filed a timely motion to extend).

62. *See e.g.*, Commonwealth v. Kollock, 246 Pa. Super. Ct. 16, 369 A.2d 787 (1977) (Commonwealth's 1100(c) extension properly granted if timely filed, if the Commonwealth has exercised due diligence, and trial is scheduled at earliest possible date); Commonwealth v. Fisher, 244 Pa. Super. Ct. 361, 368 A.2d 762 (1976) (where delay is occasioned by court congestion, trial court may properly grant the Commonwealth's 1100(c) petition for extension).

63. Commonwealth v. Mitchell, 472 Pa. 553, 372 A.2d 826 (1977).

64. *Id.* at 558 n.2, 372 A.2d at 829 n.2.

65. Act of Dec. 6, 1972, No. 333, 1972 Pa. Laws 1146, § 11, 11 PA. CONS. STAT. ANN. § 50-101 (Purdon Supp. 1977-1978).

66. Commonwealth v. Bell, 245 Pa. Super. Ct. 164, 369 A.2d 345 (1977).

67. The Supreme Court of Pennsylvania has granted petition for allowance of appeal in the case.

run with the filing of the subsequent complaint.[68] However, where a portion of the charges arising out of a criminal transaction are still pending, the 180-day rule for a subsequent complaint on a related offense will run from the date of the original complaint.[69]

Rule 1100(b) defines "commencement of trial" as the date when the judge calls the case to court; some first step in the commencement must be shown,[70] that is, a substantial commitment of the court's time, leading to a determination of guilt or innocence.[71] Recent decisions have determined that trial does not necessarily commence with the hearing on a suppression motion unless the hearing has been reserved to be heard at trial.[72] If the defense fails to apply for dismissal of the charges under 1100(f) prior to commencement of trial, the issue is waived.[73]

Rule 1100(c) permits the Commonwealth to petition the court for an order extending the 180 day period. The Commonwealth's petition must be timely submitted[74] and will be granted only if trial cannot commence "despite due diligence by the Commonwealth."[75] The extension does not toll the original period but creates a new limitation within which trial must commence.[76] As discussed earlier, judicial delay *may* be grounds for an extension[77] under 1100(c), but what constitutes "due diligence"[78] has been somewhat more elusive.

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68. Commonwealth v. Mumich, 239 Pa. Super. Ct. 209, 361 A.2d 359 (1976); Commonwealth v. Braithwaite, 385 A.2d 423 (Pa. Super. Ct. 1978).

69. Commonwealth v. Earp, 476 Pa. 369, 382 A.2d 1215 (1978).

70. Commonwealth v. Evans, 249 Pa. Super. Ct. 142, 375 A.2d 799 (1977).

71. *See* PA. R. CRIM. P. 1100, Comment. *See also* Commonwealth v. Williams, 245 Pa. Super. Ct. 146, 378 A.2d 906 (1976).

72. Commonwealth v. Lane, 245 Pa. Super. Ct. 146, 369 A.2d 335 (1976).

73. Commonwealth v. Byrd, 250 Pa. Super. Ct. 250, 378 A.2d 921 (1977).

74. Commonwealth v. Harris, 243 Pa. Super. Ct. 503, 366 A.2d 267 (1976); Commonwealth v. Walk, 239 Pa. Super. Ct. 437, 362 A.2d 378 (1976); Commonwealth v. Woods, 461 Pa. 255, 336 A.2d 273 (1975).

In determining whether an extension is timely filed, a court will consider properly excluded delays pursuant to 1100(d). Commonwealth v. Kidd, 251 Pa. Super. Ct. 140, 380 A.2d 416 (1977).

75. *See* PA. R. CRIM. P. 1100(c).

76. *See* Commonwealth v. O'Shea, 465 Pa. 491, 350 A.2d 872 (1976); Commonwealth v. Adams, 237 Pa. Super. Ct. 452, 352 A.2d 97 (1975). The courts have explicitly condemned the practice of lower courts holding the extension hearing beyond the period. Commonwealth v. Mancuso, 247 Pa. Super. Ct. 245, 372 A.2d 444 (1977).

77. *See* text accompaning notes 57-61 *supra*. *See also* Commonwealth v. Kollock, 246 Pa. Super. Ct. 16, 369 A.2d 787 (1977).

78. *See, e.g.*, Commonwealth v. Rambo, 250 Pa. Super. Ct. 314, 378 A.2d 953 (1977); Commonwealth v. Mancuso, 247 Pa. Super. Ct. 245, 372 A.2d 444 (1977); Commonwealth v. Martin, 246 Pa. Super. Ct. 407, 371 A.2d 903 (1977); Commonwealth v. Lewis, 247 Pa. Super.

Rule 1100 provides certain exceptions in calculating the prescribed 180 days.[79] Section (d)(1) excludes from the 180-day period the time in which the defendant or his attorney are unavailable.[80] A requirement of due diligence has, however, been read into the language of 1100(d)(1),[81] and consequently, for a delay to be excluded pursuant to 1100(d)(1), the Commonwealth must demonstrate, by the preponderance of the evidence, that the defendant's whereabouts were unknown and that the police exercised due diligence in attempting to locate him,[82] even if he is incarcerated elsewhere.[83] The courts have also determined that a delay caused by a co-defendant, but not agreed to by the defendant, is not excludable pursuant to 1100(d)(1).[84]

Another exception to the 180-day calculation is found in Section 1100(d)(2). It provides that for any continuance of greater than 30 days requested by the defendant, each day over 30 will be excluded from the calculation of the mandatory period. In *Commonwealth v. Shields*,[85] the superior court held that nothing in the rule or elsewhere limited the defendant to only one 30-day continuance during the mandatory period.[86] In a 4-3 decision,[87] the majority justified its literal reading of the rule by noting that a continuance is within the discretion of the trial judge and if a defendant requests a continuance near the end of the period, the court could condition the con-

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Ct. 46, 371 A.2d 1318 (1977); Commonwealth v. Brown, 242 Pa. Super. Ct. 397, 364 A.2d 330 (1976); Commonwealth v. Hagans, 242 Pa. Super. Ct. 393, 364 A.2d 328 (1976); Commonwealth v. Mayfield, 239 Pa. Super. Ct. 279, 362 A.2d 994, *rev'd*, 469 Pa. 214, 364 A.2d 1345 (1976); Commonwealth v. Shelton, 239 Pa. Super. Ct. 195, 361 A.2d 873, *aff'd*, 469 Pa. 8, 364 A.2d 694 (1976); Commonwealth v. Cutillo, 235 Pa. Super. Ct. 131, 339 A.2d 123 (1975).

79. The actual calculation of the 180 days is provided by statute. *See* note 56 *supra*.

80. *See* PA. R. CRIM. P. 1100(d)(1). *See, e.g.*, Commonwealth v. Miller, 247 Pa. Super. Ct. 132, 371 A.2d 1362 (1977); Commonwealth v. Haynes, 245 Pa. Super. Ct. 17, 369 A.2d 271 (1976).

81. *See* PA. R. CRIM. P. 1100, Comment.

82. Commonwealth v. Mitchell, 472 Pa. 553, 372 A.2d 826 (1977); Commonwealth v. Martofel, 248 Pa. Super. Ct. 206, 375 A.2d 60 (1977); Commonwealth v. McCafferty, 242 Pa. Super. Ct. 218, 363 A.2d 1239 (1976).

83. Commonwealth v. Flores, 247 Pa. Super. Ct. 140, 371 A.2d 1366 (1977).

84. *See* Commonwealth v. Kelly, 246 Pa. 196, 369 A.2d 879 (1976). *But see* Commonwealth v. Devoy, 248 Pa. Super. Ct. 353, 375 A.2d 134 (1977) (Commonwealth's witness' unavailability does not render defendant unavailable under 1100(d)(1)); Commonwealth v. Brown, 242 Pa. Super. Ct. 397, 364 A.2d 330 (1976); Commonwealth v. Hagans, 242 Pa. Super. Ct. 393, 364 A.2d 328 (1976).

85. 247 Pa. Super. Ct. 74, 371 A.2d 1333 (1977).

86. *Id.* at 77, 371 A.2d at 1334.

87. Writing the dissenting opinion was Judge Van de Voort, joined by President Judge Watkins and Judge Jacobs.

tinuance on the defendant's waiver of the rule. If necessary, for example, where the continuance would extend beyond the mandatory period, the Commonwealth could obtain an 1100(c) extension.[88]

The most important section of Rule 1100 in terms of effect is 1100(f). Section (f) allows for the dismissal of the charges with prejudice when the mandatory time limitation has been violated,[89] and the defendant files a timely motion. In the context of section (f), timely has a dual meaning: the petition must be filed prior to trial, and, more importantly, the petition to dismiss must be made after the mandatory period has expired.[90]

V. Conclusion

The flexibility that the United States Supreme Court found essential in establishing its balancing test in *Barker* to resolve speedy trial claims is lost in Rule 1100. Admittedly, the rule advances two important interests: the defendant's constitutional right to a speedy trial and reduction of the backlog of criminal cases, the latter identified as a crucial concern of the Pennsylvania Supreme Court in *Commonwealth v. Hamilton.*[91] Does advancement of these interests, however, justify release of potentially guilty defendants?

The constitutional protection is difficult to quarrel with; the defendant has a right to a speedy trial and a rule establishing a per se violation certainly enforces the right by eliminating any required showing of prejudice. Undoubtedly, more defendants are discharged under a per se rule and thus, Rule 1100 effectively insures protection of both the state and federal constitutional right to a speedy trial.

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88. 247 Pa. Super. Ct. at 78, 371 A.2d at 1335.

89. An 1100(f) dismissal is a final order from which the Commonwealth may appeal. Commonwealth v. Andrews, 251 Pa. Super. Ct. 162, 380 A.2d 428 (1977).

90. *See* Commonwealth v. Robinson, 238 Pa. Super. Ct. 508, 362 A.2d 1005 (1976) (where defense filed an 1100(f) motion to dismiss two days prior to the final trial date and asked that all proceedings be stayed pending the petition, the court affirmed the denial of the dismissal petition, finding the petition was untimely). *See also* Commonwealth v. Richbourgh, 246 Pa. Super. Ct. 300, 304 n.8, 369 A.2d 1331, 1334 n.8 (1977). ("The validity of a defendant's petition to dismiss the charges against him pursuant to Section (f) of Rule 1100 depends upon a showing that the prescribed period was violated at the time of the filing of the petition to dismiss.").

91. 449 Pa. 297, 297 A.2d 127 (1972). *See also* Commonwealth v. Bennett, 236 Pa. Super. Ct. 509, 516, 345 A.2d 754, 757 (1975) ("The purpose of the speedy trial rule [Rule 1100] is to make sure that defendants receive trials as quickly as possible both for their own satisfaction and in order to preserve the evidence so as to minimize prejudice at trial.").

But as the United States Supreme Court made clear, the defendant's constitutional right is adequately protected by a balancing test. The question remaining, therefore, is whether the interest in reducing the criminal case backlog outweighs the societal interest in convicting individuals who have committed crimes.