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THE FEDERAL SPEEDY TRIAL ACT: STAMPEDE INTO AMBUSH

ROBERT L. DOYEL *

INTRODUCTION

Almost ten years have passed since the adoption of the Speedy Trial Act of 1974.¹ Experience with the application of the Act during those years has shown that the purposes for which the Act was adopted have not been achieved.² The severe time limitations of the Act,³ virtually unlimited pre-accusation delay,⁴ and nondiscoverability of names and addresses of witnesses⁵ combine to give an unfair advantage to the prosecutor.

PURPOSES OF THE SPEEDY TRIAL ACT OF 1974

Enhancement of the accused's sixth amendment⁶ right to a speedy trial was only an incidental motive behind the enactment of the Speedy Trial Act.⁷ The preamble to the Act does not

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1. 18 U.S.C. §§ 3161—3174 (1976 & Supp. IV 1980).

2. Since the inception of the Act it has generated a great deal of commentary both favorable, *see, e.g.,* Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667 (1976); Misner, *Delay, Documentation and the Speedy Trial Act*, 70 J. CRIM. L. & CRIMINOLOGY 214 (1979), and unfavorable, *see, e.g.,* Black, *The Speedy Trial Act—Justice on the Assembly Line*, 8 ST. MARY'S L.J. 225 (1976); Kozinski, *That Can of Worms: The Speedy Trial Act*, 62 A.B.A.J. 862 (1976).

3. 18 U.S.C. §§ 3161—3174 (1976 & Supp. IV 1980).

4. *See generally* Hansen & Reed, *The Speedy Trial Act of 1974 in Constitutional Perspective*, 47 MISS. L.J. 365 (1976); Note, *Better Never than Late: Pre-Arrest Delay as a Violation of Due Process*, 1978 DUKE L.J. 1041.

5. FED. R. CRIM. P. 16 is the principal authority for pretrial discovery, and it is silent with regard to witnesses' names. *See infra* notes 124-128 and accompanying text.

6. U.S. CONST. amend. VI.

7. The legislative history of the Act indicates that many of the burdens placed on defendants were not inadvertent. Although the Act was at least partially intended to clarify the speedy trial rights of defendants, its sponsors' major concern was to protect society from crimes committed by defendants who are released pending trial.

Project, *The Speedy Trial Act: An Empirical Study*, 47 FORDHAM L. REV. 713, 739 (1979) [hereinafter cited as *Fordham Study*]. "Defense counsel are beginning to learn that 'it is obvious that the Speedy Trial Act of 1974 was not written with the rights of the defendant in mind.'" Misner, *supra* note 2, at 226, quoting *United States v. Rothman*, 567 F.2d 744, 747 (7th Cir. 1977). "The interests of the public in a speedy criminal sanction . . . would have pri-

even refer to protection of the defendant. The preamble sets forth the Act's purpose of "assist[ing] in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes."⁸ The first paragraph of Partridge's legislative history summarizes the changing purposes of speedy trial legislation:

The Speedy Trial Act of 1974 was a product of the national concern with increasing crime in the late 1960's. Many states had adopted speedy trial legislation before the late sixties, and speedy trial bills had been introduced in Congress from time to time. The state legislation and the early congressional bills, however, had been concerned with clarifying the rights of defendants. In the late sixties, speedy trial legislation acquired a second purpose: it was seen as a vehicle for protecting society's interest in bringing criminals to justice promptly.⁹

The Barker Decision

Prior to the enactment of speedy trial statutes, questions of timely prosecution were resolved under case law interpreting the sixth amendment, especially *Barker v. Wingo*.¹⁰ In *Barker*, the Supreme Court established a four-part test for determining whether a defendant's constitutional right to a speedy trial had been violated.¹¹ The four factors to be considered are the length of delay, the reason for the delay, assertion by the defendant of his speedy trial right, and prejudice to the accused.¹² *Barker* also recognized that society has an interest in speedy adjudication of criminal cases because "[i]n addition to the 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."¹³

macy in this legislation. It will help some accused persons, but by and large it will help the system achieve the goal of speedy application of the criminal law." *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 92nd Cong., 1st Sess.* 141 (1971) (statement of Prof. Freed). See also Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY 50, 50-51 (1982).

8. 18 U.S.C. § 3161 (1976 & Supp. IV 1980).

9. A. PARTRIDGE, LEGISLATIVE HISTORY OF THE SPEEDY TRIAL ACT OF 1974 11 (1980).

10. 407 U.S. 514 (1972).

11. *Id.* at 530. See *infra* notes 12-18 and accompanying text.

12. *Id.*

13. *Id.* at 519. *Accord* *Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J., concurring); *Beavers v. Haubert*, 198 U.S. 77, 86 (1905); *United States v. Didier*, 542 F.2d 1182, 1188 (2d Cir. 1976).

The *Barker* test is quite flexible and is, therefore, not quantifiable within specific time frames. Instead, with the *Barker* test, the length of constitutionally permissible delay varies according to the facts and circumstances of each case. Dissatisfaction with *Barker* prompted efforts, led by the American Bar Association, to establish fixed standards for measuring and requiring speedy trials in criminal cases.¹⁴ The House of Representatives Committee on the Judiciary, in its report on the Speedy Trial Act, expressed criticism of *Barker*. *Barker* provided no guidance, the committee said, to the defendant or the criminal justice system.¹⁵ Instead, the *Barker* test "reinforce[d] the legitimacy of delay."¹⁶ The committee also criticized the *Barker* test for permitting courts to find a one-year delay prima facie evidence of a denial of the speedy trial right in some cases and to sanction delays up to 18 years in other cases.¹⁷ Because of this perceived inadequacy of the *Barker* test, Congress adopted speedy trial legislation in an effort to protect the public's right in reducing crime and recidivism by a speedy resolution of criminal cases.¹⁸

Legislative History of the Speedy Trial Act

In June 1971, Senator Sam Ervin introduced the Speedy Trial Act. At this time, the Nixon administration was promoting legislation to permit "preventive detention" of defendants on pretrial release.¹⁹ Senator Ervin offered his bill as an alternative to preventive detention.²⁰ The pressure for preventive detention legislation eventually dissipated, but Ervin's bill continued to be considered until it was finally adopted in 1974.

14. *Fordham Study*, *supra* note 7, at 717. The American Bar Association was the first to establish recommended standards with the promulgation of Standards Relating to Speedy Trial in 1968. AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 269-79 (1974) [hereinafter cited as *ABA Standards*].

15. H.R. REP. NO. 1508, 93d Cong., 2d Sess. 11 (1974).

16. *Id.*

17. *Id.*

18. *Fordham Study*, *supra* note 7, at 713; THE PROCESSING OF FEDERAL CRIMINAL CASES UNDER THE SPEEDY TRIAL ACT OF 1974 (AS AMENDED 1979): LEVELS AND PATTERNS OF COMPLIANCE PRIOR TO THE IMPOSITION OF SANCTIONS IX, 1 (1980) (report by ABT Associates Inc. submitted to the Department of Justice) [hereinafter cited as ABT REPORT]; Frase, *supra* note 2, at 669.

19. The Speedy Trial Act had its beginnings in the so-called "Pre-Trial Crime Reduction Act" introduced by Congressman Abner J. Mikva in 1969. Congressman Mikva introduced his bill as an alternative to the "repugnant, and probably unconstitutional" preventive detention advocated by the administration. A. PARTRIDGE, *supra* note 9, at 12-13.

20. *Id.* at 13-14.

The Act's legislative history contains occasional references to the defendant's speedy trial rights, but more often the legislative history reflects a congressional intent to vindicate society's right to the prompt adjudication of criminal cases and the prevention of crime by criminals on pretrial release.²¹ The preamble to the Act refers to unnamed "other purposes," but the only expressly stated purpose in the preamble is reducing crime and recidivism.

The emphasis on crime reduction can be understood in the context of the late sixties and early seventies, an era of political demonstrations in which the Nixon administration took a hard line on crime generally, as well as on demonstrators.²² However, evidence of crime related to pretrial release was meager, as indicated by the House Report:

The National Bureau of Standards study provides the only statistical data on rearrests of defendants awaiting trial. In a study of 712 defendants during four weeks in 1968, the study found that of the 426 defendants on pretrial release, 47 were rearrested and formally charged with crimes committed while on release. This amounts to an 11 percent recidivism, or rearrest, rate. But, most importantly, the study's recidivist index shows:

- (a) An increased propensity to be re-arrested when released more than 280 days;
- (b) an increased propensity of persons classified as dangerous under the proposed legislation to be re-arrested in the period from 24 to 8 weeks prior to trial; and
- (c) a somewhat greater propensity to be re-arrested while awaiting sentence or appeal after trial when on pre-trial release.²³

The Report acknowledged that the subcommittee could not rely on this study as an indication of recidivism rates for federal defendants, but the subcommittee apparently relied on the study anyway because there was no other evidence presented.²⁴ Even in this small study, 89 percent of released defendants were not rearrested. In the other 11 percent of the cases, rearrests apparently occurred more frequently when trial was delayed more than nine months, when the defendant was classified as dangerous, or when the defendant was released *after* trial. Obviously, the only available statistics did not support the conclu-

21. *Id.* at 14-15. Partridge recognizes that not all statements of legislative purpose were "balanced," but expressions of both the defendant's and society's rights are found throughout the legislative materials. *Id.* at 14. On the other hand, Misner asserts that in adopting the Act, Congress was "[p]rompted by a desire to reduce criminal activity, and by a wish to erect a fitting memorial to retiring Senator Sam Ervin." Misner, *supra* note 2, at 214.

22. See A. PARTRIDGE, *supra* note 9.

23. H.R. REP. NO. 1508, 93d Cong., 2d Sess. 15-16 (1974).

24. *Id.* at 16.

sion that there was a high incident of crime committed by all types of defendants released before trial, or that a drastically brief time from arrest to trial was an appropriate remedy for the pretrial crime that did occur. Yet the preamble to the Act states that the Act's purpose was to reduce crime and recidivism.

It can be argued that the crime reduction language of the preamble relates to crime generally and not just to crime committed by defendants on pretrial release. This interpretation of the preamble is supported by the House Report's reference to increasing crime rates and its conclusion that "faster and efficient criminal processing would increase the deterrent effect of the criminal law, ease the task of rehabilitation of offenders and reduce crime."²⁵

Whatever prompted the belief that society needed more expeditious handling of criminal cases, it is apparent that Congress did not trust lawyers and judges to effect this change. Senator Ervin himself made it clear that distrust of the participants in the criminal process was at least part of the impetus for speedy trial legislation, stating that:

[t]here is no question in my mind that speedy trial will never be a reality until Congress makes it clear that it will no longer tolerate delay. Unfortunately, while it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial. The court, defendant, his attorney and the prosecutor may have different reasons not to push for trial, but they all have some reason. The over-worked courts, prosecutors, and defense attorneys depend on delay in order to cope with their heavy caseloads. The end of one trial only means the start of another. To them, there is little incentive to move quickly in what they see as an unending series of cases. The defendant, of course, is in no hurry for trial because he wishes to delay his day of reckoning as long as possible.²⁶

Senator Ervin's remarks support the thesis that the Speedy Trial Act was not designed for the protection of the defendant

25. H.R. REP. NO. 1508, 93d Cong., 2d Sess. 11 (1974).

26. *Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773, and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 158 (1974). The legislative materials considered by the House and Senate in connection with amendments proposed in 1979 include articles displaying distrust of, perhaps even contempt for, the lawyers and judges involved in the criminal process. See Misner, *supra* note 2, at 214-15, 219-26; *Fordham Study*, *supra* note 7, at 752-53. The former article is reproduced as an appendix to *Proposed Amendments to the Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 419 (1980); the latter article is reproduced as an appendix to *The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 643 (1979).

but to further society's interest in speedy prosecutions in order to prevent crime.²⁷

PROVISIONS OF THE SPEEDY TRIAL ACT

Rush to Trial after Arrest or Indictment

Under the Speedy Trial Act, as amended in 1979,²⁸ cases must be processed rapidly. The government ordinarily must indict an arrested defendant within 30 days following the arrest.²⁹ If a not guilty plea is entered, the trial must occur within 70 days following the date of the indictment or the date of the defendant's first appearance, whichever occurs last.³⁰ The Act contains provisions for excluding delays from these time frames,³¹ and the period within which the defendant must be indicted or tried can be extended by the number of days excludable under these provisions.³² The exclusions, however, are applicable only when special circumstances are present since the Act is a clear statement by Congress that in ordinary circumstances the indictment should occur within 30 days after arrest and the trial should be held within 70 days following the indictment.³³

The time available to a particular defendant depends upon whether his arrest occurs before or after the indictment.³⁴ If there is a pre-indictment arrest, the two time periods provide the defendant no more than 100 days³⁵ to secure counsel and

27. If indeed crime and recidivism rates can be correlated with the length of prosecutions, the Act has not achieved its goal of crime prevention because "the courts have achieved only slight improvements in the actual time elapsed in processing cases." Bridges, *supra* note 7, at 53.

28. 18 U.S.C. §§ 3161—3174 (1976 & Supp. IV 1980).

29. *Id.* at § 3161(b).

30. *Id.* at § 3161(c) (Supp. IV 1980). The Act originally provided for three intervals: 30 days from arrest to indictment, 10 days from indictment to arraignment, and 60 days from arraignment to trial. 18 U.S.C. §§ 3161(b) and (c) (Supp. 1978).

31. 18 U.S.C. § 3161(h) (1976 & Supp. IV 1980).

32. For example, excludable periods of delay include the time when the defendant or an essential witness is unavailable, *id.* at § 3161(h)(3); up to 30 days while the court has a pretrial motion under advisement, *id.* at § 3161(h)(1)(G); and periods of continuances granted because the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," *id.* at § 3161(h)(8).

33. *Cf.* SECOND CIRCUIT GUIDELINES UNDER THE SPEEDY TRIAL ACT, § III.B, comment 4 (1978).

34. Under § 3161(b), an arrest expressly triggers the running of the 30-day arrest to indictment period; under § 3161(c), an indictment or first appearance expressly triggers the 70-day indictment to trial period; however, the period before the arrest is not subject to the Act at all. *United States v. Iaquina*, 674 F.2d 260, 264, 269 (4th Cir. 1982).

35. The initial appearance following the arrest but before indictment is the first appearance for § 3161(c) purposes, and the 70-day indictment to

prepare for trial. If there is no pre-indictment arrest, the defendant has no more than 70 days to find a lawyer and get ready for trial. The accused is afforded some protection from the prejudice due to short preparation time by the 1979 amendments' prohibition against commencing trial sooner than 30 days following the defendant's first appearance "through counsel."³⁶

Congress attempted to strengthen the Act by requiring dismissal of charges if the 30- or 70-day time limit is not met.³⁷ Dismissal can be with or without prejudice, as determined by the court after considering factors set forth in the Act.³⁸ However, since the dismissal sanction became effective in July 1980,³⁹ it has been of no practical value to defendants. The Speedy Trial Act has not significantly reduced the time actually required for processing criminal cases throughout the federal system.⁴⁰ Statistics indicate that dismissal sanctions are being imposed fewer than 20 times in over 30,000 cases.⁴¹ Therefore it appears that neither the societal interest in, nor the accused's right to, a speedy trial is being vindicated by the Act. Yet "the preponderance of defendants are limited to a maximum preparation time of seventy days"⁴² because most of them are not arrested before the date of their indictment.⁴³ This rush to trial in the average case is the most negative aspect of the Speedy Trial Act.

trial period is therefore triggered not by the first appearance but by the filing of the indictment. *United States v. Carrasquillo*, 667 F.2d 382, 384 (3d Cir. 1982).

36. 18 U.S.C. § 3161(c)(2) (1976 & Supp. IV 1980).

37. *Id.* at § 3162(a).

38. 18 U.S.C. §§ 3161—3174 (1976 & Supp. IV 1980).

39. *Id.* at § 3163(c).

40. *See supra* note 27.

41. In the 10 months ending June 30, 1981, the federal courts disposed of 30,500 cases; in only 19 of those cases was the dismissal sanction used. Of those 19 cases, only nine were dismissed with prejudice. Five cases were dismissed without prejudice, and the records do not reflect whether the remaining five dismissals were with or without prejudice. Administrative Office of the United States Courts, REPORT FOR THE YEAR ENDED JUNE 30, 1981, ON THE IMPLEMENTATION OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 107 (1981).

42. *Fordham Study*, *supra* note 7, at 740. Unfortunately, the full 70 days will seldom be available because all defendants indicted by one grand jury cannot normally be brought to trial on the last day of the period. *See United States Department of Justice, DELAYS IN THE PROCESSING OF CRIMINAL CASES UNDER THE SPEEDY TRIAL ACT OF 1974* 32 n.40 (1979) [hereinafter cited as *Justice Dept. Study*].

43. It appears that just over one-third of all cases are commenced by arrest prior to indictment. Administrative Office of the United States Courts, SIXTH REPORT ON THE IMPLEMENTATION OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 12 (1980).

*Minimal Restrictions on the Prosecutor's Pretrial
Preparation Time*

Perhaps the heaviest burdens of the Act have fallen upon defendants and defense counsel. Defense attorneys argue that the Act provides insufficient time to prepare an effective defense, especially when indictment precedes arrest. In that situation, the defense has only minimal time to prepare for trial. The prosecutor, on the other hand, can prepare his case extensively *before* indictment.⁴⁴

In those cases in which there is a pre-indictment arrest by federal authorities, the government and the defendant are subject to the same time constraints following the arrest only if the offense and the arrest occur more or less contemporaneously. Both sides are confronted with limited time for preparation in such cases because indictment must follow arrest by no more than 30 days and the trial must occur within 70 days following indictment.⁴⁵ Thus both sides must be ready for trial within a few weeks following the date of the alleged crime. If, however, the date of the alleged offense is some time before the arrest, or if there is no pre-indictment arrest, government counsel has a substantial advantage over defense counsel in terms of investigation and preparation time because the Speedy Trial Act does not apply to the time between the offense and the arrest or indictment.⁴⁶ Furthermore, only federal arrests trigger the Act's time limits, *i.e.*, the defendant must be in federal custody. The Act is not triggered by state custody even if federal law enforcement officers have participated in the investigation or in the arrest itself.⁴⁷

Since the Act does not apply to the time between the offense and a subsequent arrest, any prejudice to the defendant from delay between the date of the offense and the institution of proceedings by arrest or indictment must be measured against the fifth and sixth amendments. Unfortunately, neither amendment provides the defendant with protection.⁴⁸ The same events, arrest or indictment, trigger the protection of both the Speedy

44. *Fordham Study*, *supra* note 7, at 715 (emphasis added). Unlike state speedy trial legislation, Professor Black says, the federal Act requires a speedy trial whether the defendant wants one or not and is unique in turning the time limitations against the defendant. Black, *supra* note 2, at 225-27.

45. 18 U.S.C. §§ 3161(b), 3161(c) (1976 & Supp. IV 1980).

46. *United States v. Iaquinta*, 674 F.2d 260, 264 (4th Cir. 1982). *See also* *United States v. Lai Ming Tanu*, 589 F.2d 82 (2d Cir. 1978).

47. *United States v. Iaquinta*, 674 F.2d 260 (4th Cir. 1982); *United States v. Lai Ming Tanu*, 589 F.2d 82 (2d Cir. 1978).

48. Dissatisfaction with the Supreme Court's sixth amendment decision in *Barker* was at least in part what led to the adoption of the Act. *See supra* notes 10-18 and accompanying text.

Trial Act and the speedy trial clause of the sixth amendment.⁴⁹ Ordinarily, therefore, neither the Speedy Trial Act, nor the constitutional right to a speedy trial, will provide any remedy for delay from the date of the offense to the date of arrest or indictment. Furthermore, the Supreme Court recently held that “[t]he Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations.”⁵⁰

The due process clause of the fifth amendment provides the defendant only marginally better protection against pre-arrest delay than the sixth amendment. The due process constraints against pre-accusation⁵¹ delay were first obliquely articulated in *United States v. Marion*,⁵² which concluded that the “Due Process Clause . . . would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellee’s rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused”⁵³ The Court in *Marion* did not say that both prejudice to the accused and intentional tactical delay by the prosecutor would be necessary before the due process clause would require dismissal—only that if both were present, dismissal would be mandated. The Court added only slight clarification in *United States v. Lovasco*,⁵⁴ in which it held that although prejudice to the defendant must be shown, this by itself is not enough; the reason for the delay must also be shown.⁵⁵

The circuit courts have not always been consistent in their interpretation of the due process protection against pre-accusa-

49. *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971). Apparently it takes a federal arrest to invoke sixth amendment speedy trial rights in federal prosecutions. “Of course, an arrest or indictment by one sovereign would not cause the speedy trial guarantees to become engaged as to possible subsequent indictments by another sovereign.” *United States v. MacDonald*, — U.S. —, 102 S. Ct. 1497, 1503 n.11 (1982). *But see* *Gravitt v. United States*, 523 F.2d 1211 (5th Cir. 1975), *reh’g denied*, 526 F.2d 378 (5th Cir. 1976).

50. *United States v. MacDonald*, — U.S. —, 102 S. Ct. 1497, 1502 (1982).

51. In *United States v. Marion*, 404 U.S. 307, 313, 320 (1971), the Supreme Court held the speedy trial clause of the sixth amendment to be inapplicable until the defendant is accused by indictment, information or arrest. The term “pre-accusation” in the context of this article refers to the period of time prior to the engagement of the constitutional speedy trial right.

52. 404 U.S. 307 (1971).

53. *Id.* at 324.

54. 431 U.S. 783 (1977).

55. *Id.* at 790.

tion delay.⁵⁶ However, it appears that the courts usually require a showing of actual prejudice and either intentional⁵⁷ or negligent⁵⁸ conduct by the prosecutor. This is such a difficult standard of proof that a defendant will seldom be able to establish a right to dismissal under the fifth amendment for wrongful and prejudicial delay prior to arrest or indictment.⁵⁹

Although the due process clause does provide some minimal protection from pre-accusation delay, the Speedy Trial Act does not afford the accused any protection from pre-accusation delay. In *United States v. Iaquina*,⁶⁰ the court stated that the Act

[s]ets . . . certain very definite, mechanical-like rules within which one must be indicted *after an arrest* but those rules have nothing to do with what the United States Attorney does pre-arrest. It certainly does not attempt to change the settled principle that, apart from the constraints of the applicable statute of limitations, the time for the commencement of a prosecution—much like the decision whether to prosecute at all—generally lies entirely within the prosecutor's discretion.⁶¹

Also, a prosecutor is not obligated to indict as soon as there is enough evidence to prosecute.⁶²

The time limitations of the Act and the prosecutor's virtually unlimited discretion in determining when to file charges has led to a tactical change in the timing of some arrests. During hearings on the 1979 amendments to the Act, Assistant Attorney General Heymann reported that during the year ending June 30, 1978, the number of cases commenced by arrest had decreased from 18,849 to 9,169. He indicated that this decrease was due to a change in arrest policies implemented to avoid violating the Speedy Trial Act.⁶³ Studies of practices under the Act support

56. Note, *Better Never than Late: Pre-Arrest Delay as a Violation of Due Process*, 1978 DUKE L.J. 1041, 1045.

57. *United States v. Dennis*, 625 F.2d 782, 794 (8th Cir. 1980); *United States v. Indelicato*, 611 F.2d 376, 382 (1st Cir. 1979); *United States v. Elsbery*, 602 F.2d 1054, 1059 (2d Cir.), *cert. denied*, 444 U.S. 994 (1979); *United States v. Ramos*, 586 F.2d 1078 (5th Cir. 1978).

58. *United States v. Mays*, 549 F.2d 670, 678 (9th Cir. 1977).

59. The courts are more likely to find a constitutional violation for post-accusation delay than for pre-accusation delay. *Arnold v. McCarthy*, 566 F.2d 1377, 1382 (9th Cir. 1978). The most common effect from pre-accusation delay is faded memories, neither easily established nor readily accepted as prejudice by the courts. *United States v. West*, 607 F.2d 300, 302-05 (9th Cir. 1979); *United States v. Ramos*, 586 F.2d 1078 (5th Cir. 1978).

60. 674 F.2d 260 (4th Cir. 1982).

61. *Id.* at 269.

62. 674 F.2d 260 (4th Cir. 1982).

63. S. REP. NO. 212, 96th Cong., 1st Sess. 20-21 (1979). One effect of the reduction in arrest is that persons who should have been confined were at large. *Id. Accord Justice Dept. Study, supra* note 42, at 23.

Heymann's assertion.⁶⁴ A Justice Department report succinctly stated the reasons for the reduction in the rate of pre-indictment arrests as follows:

As reported by several planning groups, and confirmed by United States Attorneys, many United States Attorneys have instructed law enforcement agencies in their districts to avoid making arrests before indictment whenever possible, notwithstanding the existence of clear, or even abundant, probable cause. The reason is obvious: whereas an arrest "starts the clock," an investigation not interrupted by an arrest may continue without limitation until completed. Apparently, the practice of deferring arrests is not uncommon.⁶⁵

Thus, in cases in which there is no federal arrest prior to indictment, it is possible for the government to pursue its investigation without any real time restrictions. Before the Speedy Trial Act's rush to judgment begins, the prosecution is able fully to prepare its case, delaying indictment until it is ready for trial and thereby gaining a tremendous advantage over defense counsel who, prior to the indictment, has probably never heard of the case or met the defendant.⁶⁶

NEGATIVE ASPECTS OF THE SPEEDY TRIAL ACT

Disparate Voices United in Criticism

Practice under the Speedy Trial Act has spawned a vast amount of criticism from diverse and, at times, antagonistic sources.⁶⁷ Defense attorneys have voiced complaints of insufficient time to prepare an adequate defense.⁶⁸ The United States Department of Justice, ordinarily not an advocate for defend-

64. *Fordham Study*, *supra* note 7, at 740-42; ABT REPORT, *supra* note 18, at 79-89; *Justice Dept. Study*, *supra* note 42, at 22-23. *But see* SPEEDY TRIAL ACT—ITS IMPACT ON THE JUDICIAL SYSTEM STILL UNKNOWN 42-43 (1979) (although all eight United States Attorneys questioned reported that they avoid arrest prior to indictment, only one blamed this practice on the Act) [hereinafter cited as GAO Report].

65. *Justice Dept. Study*, *supra* note 42, at 22-23.

66. ABT REPORT, *supra* note 18, at 89, suggests that the practice of delaying indictment in order to prepare the prosecution's case "may give the prosecutor an unfair advantage during the indictment-to-trial interval. While the prosecutor may have virtually unlimited time in preparing the case, constrained only by the statute of limitations, the defense counsel has only 70 net days." *Fordham Study*, *supra* note 7, at 742 n.180, found that nine of the 15 prosecutors interviewed reported that they were fully prepared for trial at the time of the indictment. Such "[e]xtensive pre-indictment preparation by the Government can place defendants who become aware of the charges against them only after indictment at a serious strategic disadvantage." *Id.* at 742-43.

67. *See, e.g.*, Berreby, *Courts Play Beat the Clock*, NAT'L L.J., Oct. 26, 1981, at 1, col. 1; *see generally supra* note 2 and *infra* notes 72-92.

68. *Fordham Study*, *supra* note 7, at 743. Fourteen of the 15 experienced attorneys interviewed voiced this opinion. Ten of 16 total attorneys de-

ants or defense counsel, has noted that defense counsel normally has only one to three weeks to meet the client, familiarize himself with the case, negotiate discovery disclosure, research the law, and prepare his motions.⁶⁹ The Act has been unpopular, too, with that impartial trier of fact, the federal court system.⁷⁰ Repeal of the Act and return to the use of Federal Rule 50 has been recommended by several district courts.⁷¹ The Act has also been declared unconstitutional in some districts because it violates the doctrine of separation of powers.⁷² The American Bar Association, the Judicial Conference of the United States, and the United States Justice Department all have recommended that Congress expand the arbitrarily set time period between arraignment and trial to afford defense counsel sufficient time to schedule, prepare for, and commence trials.⁷³ The academic community, too, has criticized the arraignment-to-trial time limit because it "fail[s] to address the crucial issue of the amount of time needed to dispose of criminal cases."⁷⁴ Most observers agree that the burden of the Act weighs most heavily on the defendant⁷⁵ who is restricted to 70 days net despite the probability that the prosecutor has prepared extensively prior to indictment.

clared that they had gone to trial unprepared because of "tighter scheduling" due to the Act. *Id.*

69. *Justice Dept. Study, supra* note 42, at 32. The short time frame for filing motions is not expressly mandated by the Act, but is commonly employed to speed the processing of cases under the Act. *See, e.g.,* PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES: FINAL PLAN PURSUANT TO SPEEDY TRIAL ACT OF 1974 11 (1979) ("All pre-trial motions . . . shall be filed no later than ten days after arraignment."); ABT REPORT, *supra* note 18, at 64.

70. Thirteen district courts recommended that the Act be repealed. Administrative Office of the United States Courts, SIXTH REPORT ON THE IMPLEMENTATION OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 52 (1980).

71. *Id.* Some district courts favor a return to the use of FED. R. CRIM. P. 50(b) to govern speedy trial issues.

72. Other criticism of the Act has emerged from case law. In *United States v. Howard*, 440 F. Supp. 1106, 1109 (D. Md. 1977), *aff'd*, 590 F.2d 564 (4th Cir.), *cert. denied*, 440 U.S. 976 (1979), the district court declared the Act unconstitutional, saying that "its commands cannot be given effect because they are an unconstitutional legislative encroachment on the judiciary." *Id.* Justice Tom Clark, sitting with the Second Circuit, has written that "there is a question under the doctrine of separation of powers that the Congress can exercise judicial authority to the extent indulged here." *United States v. Martinez*, 538 F.2d 921, 923 (2d Cir. 1976).

73. S. REP. NO. 212, 96th Cong., 1st Sess. 24 (1979).

74. Frase, *supra* note 2, at 681. *Accord* Bridges, *supra* note 7, at 51. Hearings on the 1979 amendments revealed a consensus that time limits were too short if the exclusion provisions were strictly construed. A. PARTRIDGE, *supra* note 9, at 22.

75. *Fordham Study, supra* note 7, at 715; Administrative Office of the United States Courts, THIRD REPORT ON THE IMPLEMENTATION OF TITLE I AND TITLE II OF THE SPEEDY TRIAL ACT OF 1974 13 (1978); Bridges, *supra* note 7, at 51; *Justice Dept. Study, supra* note 42, at 31-32.

Nature of Complaints

Federal defenders' most common complaint regarding the Act is the insufficient time they have in which to develop a rapport with the defendant. Because defendants often regard their court-appointed counsel as employees of the establishment, they may withhold information due to a lack of trust.⁷⁶ As a result, the attorney may be unable to thoroughly evaluate the case, foregoing the recommendation of a guilty plea when one would be desirable.⁷⁷ Furthermore, a defendant who does not trust his counsel may reject his advice.⁷⁸ Lack of rapport may thus result in needless and protracted litigation.

Often defendants for whom federal defenders have been appointed later manage to retain private counsel after raising the necessary funds.⁷⁹ Such privately-retained counsel encounter special problems.⁸⁰ Private practitioners do not often have the staff to devote solely to the criminal case which is subject to the rapidly dwindling 70-day time limitation. Unfortunately, the private practitioner "can't shut down his practice to concentrate on one case."⁸¹ He may be forced to obtain continuances for other cases in civil litigation, or to refund the defendant's fee so that he or she can retain yet other counsel. Those attorneys subse-

76. Defense attorneys anticipate difficulty in gaining the confidence of their client; considering alternatives to prosecution, such as pretrial diversion; or working out a plea bargain because of the time frames. Court-appointed defense attorneys say they often meet their clients for the first time at the arraignment hearing and may not have sufficient time to evaluate the charge or develop the case by trial date.

GAO Report, *supra* note 64, at 17.

77. Several prosecutors interviewed in the *Fordham Study* indicated that the imbalance in preparation time induced more defendants to plead guilty. *Fordham Study*, *supra* note 7, at 743 n.181.

78. See BINDER & PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH 10-11 (1977).

79. During one recent period, 20,000 (or 47 percent) of the 43,500 defendants for whom counsel were appointed were represented by private attorneys not affiliated with federal defender organizations. Administrative Office of the United States Courts, ANNUAL REPORT OF THE DIRECTOR 31 (1981).

80. Administrative Office of the United States Courts, SIXTH REPORT ON THE IMPLEMENTATION OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 41 (1980). "Satisfactory financial arrangements between the defendant and his attorney often cannot be made in such short time—both as to attorney's fees and fees for investigative work." REPORT OF THE AD HOC COMMITTEE ON THE SPEEDY TRIAL ACT OF THE COMMITTEE ON COURT ADMINISTRATION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, app. A (July 18, 1977) [hereinafter cited as THE RUBIN REPORT].

81. C. Anthony Friloux, President of the National Association of Criminal Defense Lawyers, Remarks at the 1979 Annual Convention of the American Bar Association, *reprinted in* 25 CRIM. L. REP. (BNA) 2489 (Sept. 5, 1979).

quently hired will face even tighter time frames because they enter the case even later than at arraignment.

Generally, the federal defense bar in a given district is small.⁸² Scheduling conflicts inescapably arise since the most competent defense lawyers may be representing several defendants at one time.⁸³ Contemporaneously ticking speedy trial clocks compound the problem of providing an adequate defense to each defendant. To alleviate the problem, some districts have restricted the number of cases to which a lawyer can be assigned, and some attorneys have voluntarily reduced their criminal caseload in order to devote more attention to individual cases. Others refuse to handle federal criminal cases at all.⁸⁴ As access to competent, experienced criminal defense lawyers shrinks, some defendants necessarily must be assigned to or retain counsel who are less qualified than their more proficient counterparts. Such unexperienced counsel require more time to prepare an adequate defense, but regardless of expertise, all attorneys are subject to the same 70-day rush to judgment. A diminished quality of representation and thus a diminished quality of justice can be the only result.

Congressional Response

Despite the overwhelming criticism from all quarters of the legal community, Congress in 1979 was not persuaded that the Speedy Trial Act adversely affects defendants,⁸⁵ rationalizing that the Act does provide for continuances in certain circumstances. Section 3161(h)(8) allows continuances to be excluded from the 70-day period,⁸⁶ but only upon the court's finding that

82. Administrative Office of the United States Courts, SIXTH REPORT ON THE IMPLEMENTATION OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 41 (1980). Accord THE RUBIN REPORT, *supra* note 80, at 5.

83. Misner, *supra* note 2, at 220 n.57.

84. Administrative Office of the United States Courts, SIXTH REPORT ON THE IMPLEMENTATION OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 41 (1980). Accord THE RUBIN REPORT, *supra* note 80, at app. A.

The rigid and stringent time limitations of the Act preclude a lawyer specializing in criminal work from representing more than a few clients at one time. The time to prepare a case is too short from the defense standpoint. As one lawyer summed up the situation, "the plain result is that an act which was designed to be of aid and benefit to defendants defeats its purpose."

Id.

85. S. REP. NO. 212, 96th Cong., 1st Sess. 24, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 805.

86. 18 U.S.C. § 3161(h)(8) (1976 & Supp. IV 1980). Section 3161(h) provides for the exclusion of other time periods. This article is concerned only with those cases in which the net time from indictment to trial is felt to be too short irrespective of other excludable time provisions. In 1981, 35,371 criminal cases were completed at the district court level. The excludable

“the ends of justice served by granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.”⁸⁷

Section 3161(h)(8)(B) sets forth the factors that the court shall consider in ruling upon a request for an “ends of justice” continuance. The first is whether a denial of the request would be likely either to make a continuation of the proceeding impossible or to result in a miscarriage of justice.⁸⁸ The court may also grant a continuance if the case is so unusual or complex that it is unreasonable to expect adequate preparation for pre-trial proceedings or for the trial itself.⁸⁹ A case may be “unusual or complex” as a result of the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law.⁹⁰ Thus, continuances will be granted under the foregoing provisions only in cases in which the defendant can prove that (1) the proceeding will *probably* terminate if no continuance is allowed, (2) a miscarriage of justice will *likely* result without the continuance, or (3) the case is unusual or complex *and* it is *unreasonable* to expect adequate preparation. Obviously only an extraordinary case will qualify for continuance for any of these reasons.

“Liberal” Amendment Inadequate

An ostensibly more liberal section was added to the Act in 1979.⁹¹ Under section 3161(h)(8)(B)(iv), a continuance may be granted even though the case is not unusual or complex, if denial of the request *would* (not “is likely to”) (1) deny the defendant reasonable time to obtain counsel, (2) *unreasonably* deny the government or the defendant continuity of counsel, or (3) deny defense counsel or government counsel “the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.”⁹² Although this new section appears to expand the number of cases in which contin-

time provisions were not applied in 21,420 of them (60.6 per cent). Administrative Office of the United States Courts, REPORT FOR THE YEAR ENDED JUNE 30, 1981, ON THE IMPLEMENTATION OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 121 (1981).

87. 18 U.S.C. § 3161(h)(8)(A) (1976 & Supp. IV 1980). One can infer from this language that if a continuance is granted there can be no speedy trial in that case, since a prerequisite to the granting of the continuance is a finding that the interest in a speedy trial is outweighed by the ends of justice.

88. 18 U.S.C. § 3161(h)(8)(B)(i) (1976 & Supp. IV 1980).

89. 18 U.S.C. § 3161(h)(8)(B)(ii) (1976 & Supp. IV 1980).

90. *Id.*

91. 18 U.S.C. § 3161(h)(8)(B)(iv) (1976 & Supp. IV 1980). The Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, § 5, 93 Stat. 327, 328 (1979).

92. 18 U.S.C. § 3161(h)(8)(B)(iv) (1976 & Supp. IV 1980).

uances will be granted,⁹³ a defense attorney seeking more preparation time must show that (1) refusal of the requested continuance will deny him the *reasonable time necessary* for preparation, (2) he has exercised due diligence, and (3) the ends of justice outweigh both society's and the defendant's interest in a speedy trial. How are those factors to be measured?

In most cases, "[t]he extent to which the Act hampers a defendant in the preparation of his case . . . is probably not susceptible to objective verification."⁹⁴ It is the improbability of establishing proof of prejudice from delay in the non-exceptional case that makes it virtually impossible to have a request for a continuance sustained in those districts strictly construing the Act.⁹⁵

Courts have varied in their interpretation of "ends of justice."⁹⁶ The effectiveness of section 3161(h)(8) is undermined by strict construction in some courts and liberal construction in others.⁹⁷ Some judges have interpreted the "ends of justice"

93. "More liberal use of the excludable time provisions, especially section 3161(h)(8), can effectively alleviate the difficulties encountered by defendants and their counsel under the permanent limits." *Fordham Study*, *supra* note 7, at 746. This statement is even more appropriate after the 1979 amendments to 3161(h)(8)(B).

94. *Justice Dept. Study*, *supra* note 42, at 33. "The prejudice from lack of preparation and experience cannot be nicely weighed." *United States v. Cronin*, 675 F.2d 1126, 1128 (10th Cir. 1982).

95. *See infra* notes 101-105 and accompanying text.

96. It is not surprising that the courts are inconsistent. Congress in 1974 favored a conservative view of "ends of justice" provisions but became somewhat more liberal by 1979. A PARTRIDGE, *supra* note 9, at 31. Nevertheless, the Senate Judiciary Committee declared that if "counsel for the defendant moves for an 'ends of justice' continuance under section 3161(h)(8) to allow him or her additional time to prepare for trial, the court should scrutinize closely his or her good-faith efforts to prepare for trial. . . ." *Id.* at 75. Similarly, the committee stated:

Although some witnesses contended that all time consumed by motions practice, from preparation through their disposition, should be excluded, the Committee finds that approach unreasonable. This is primarily because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple. However, the Committee would permit through its amendments to subsection (h)(8)(B) reasonable preparation time for pretrial motions in cases presenting novel questions of law or complex facts. We suggest caution by courts in granting "ends of justice" continuances pursuant to this section, primarily because it will be quite difficult to determine a point at which preparation actually begins.

S. REP. NO. 212, 96th Cong., 1st Sess. 33-34 (1979).

97. "With respect to the indictment-to-trial period, judges, prosecutors, and defense attorneys alike expressed concern over continued judge variability in the use of exclusions." ABT REPORT, *supra* note 18, at XV. *See S. REP. NO. 212*, 96th Cong., 1st Sess. 42 (1979). The inconsistency of rulings has spread to the circuit courts as well. Some appellate courts apply the traditional rules for the granting of continuance, *i.e.*, that the decision on a request for a continuance rests entirely within the discretion of the trial

provision as "a broad source of justification for delay" while others have construed the section very strictly and will almost never grant continuances.⁹⁸ ABT Associates concluded that "narrow construction of the 'ends of justice' provision [is] the major reason for continuing difficulties in securing continuity of counsel and adequate time for effective case preparation."⁹⁹

Right to Waiver

If the defendant could waive the "right" to have the case come to trial within 70 days, the burden of the time limitations would be eased. Most state speedy trial statutes permit a waiver of the time limits by the accused.¹⁰⁰ The Federal Speedy Trial Act permits the defendant to waive only the 30-day minimum to trial provision¹⁰¹ and the dismissal sanction.¹⁰² Arguably, if the defendant can waive the 70-day trial limit by failing to move for dismissal after the delay, he should be able expressly to waive the time limit before the delay occurs. Commentators, however, generally agree that no such waiver is permitted by the Act.¹⁰³

judge whose decision will be reversed only upon a finding of abuse of discretion. *United States v. Aviles*, 623 F.2d 1192, 1196 (7th Cir. 1980); *United States v. Lanier*, 578 F.2d 1246, 1253 (8th Cir. 1978). Other courts reject the "abuse of discretion" standard for section 3161(h)(8) motions and apply the "clearly erroneous" test to any findings of fact and a "reversible if contrary to law" test to any question of law. *United States v. Nance*, 666 F.2d 862 (10th Cir. 1981); *United States v. Fielding*, 645 F.2d 719, 722 (9th Cir. 1981).

98. ABT REPORT, *supra* note 18, at 41. *Accord Fordham Study*, *supra* note 7, at 747; *Justice Dept. Study*, *supra* note 42, at 41; *Bridges*, *supra* note 7, at 61. One judge felt that "the premium placed on speed might have an unfortunate 'chilling effect' on motions for continuances. That is, some defense and Government attorneys may decline to seek continuances even though they may be entitled to them and the continuance may be necessary for effective case preparation." ABT REPORT, *supra* note 18, at 42.

99. ABT REPORT, *supra* note 18, at XV. In some districts, according to federal defenders, continuances are easily obtained, but in others, they are rarely granted. It is those districts in which the "ends of justice" provision is strictly construed that defense counsel has the most difficulty in getting prepared in the non-exceptional case. See also *Fordham Study*, *supra* note 7, at 748-49, where it is suggested that the imbalance in preparation time be considered in determining whether to grant or deny a section 3161(h)(8) continuance.

100. Frase, *supra* note 2, at 698.

101. "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel. . . ." 18 U.S.C. § 3161(c)(2) (1976 & Supp. IV 1980).

102. "Failure of the defendant to move for dismissal prior to the trial or entry of a plea of guilty or *nolo contendere* shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2) (1976 & Supp. IV 1980).

103. See, e.g., Misner, *supra* note 2, at 228-29; ABT REPORT, *supra* note 18, at 96-97. Judge Thomas C. Platt of the Eastern District of New York has argued, however, that refusing the accused the right to waive the provisions

Guidelines of the Administrative Office of the United States Courts declare that a defendant's mere request or consent to a continuance is not sufficient to toll the operation of the time limits.¹⁰⁴ The Senate Committee on the Judiciary stated unequivocally that "any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal . . . is contrary to legislative intent and subversive of its primary objective. . . ."¹⁰⁵

A defendant seeking a delay for more preparation time may be able to use extra-Act, traditional rules governing continuances.¹⁰⁶ In *Avery v. Alabama*,¹⁰⁷ the Supreme Court recognized that the denial of a requested continuance may be a sixth amendment violation if defense counsel does not have sufficient opportunity to confer with the accused and prepare a defense.¹⁰⁸ The rule is well settled that "[t]he matter of continuance is traditionally within the discretion of the trial judge."¹⁰⁹ Convictions will be reversed for denial of a continuance only if one of a defendant's fundamental rights has been violated.¹¹⁰ Thus, extra-Act procedures provide no more likelihood of a continuance than the "ends of justice" provisions of section 3161(h)(8).

of the Act may be a denial of due process. Platt, *The Speedy Trial Act of 1974: A Critical Commentary*, 44 BROOKLYN L. REV. 757, 768-73 (1978).

104. Administrative Office of the United States Courts, GUIDELINES TO THE ADMINISTRATION OF THE SPEEDY TRIAL ACT OF 1974 53 (amended 1979).

105. S. REP. NO. 212, 96th Cong., 2d Sess. 39 (1979). After reviewing the legislative history, the Third Circuit stated: "We do not think a defendant may waive the public's right to a speedy trial unless he complies with the requirements carefully set forth in section 3161(h)." *United States v. Carasquillo*, 667 F.2d 382, 390 (3d Cir. 1982). But see *United States v. deLongchamps*, 679 F.2d 217 (11th Cir. 1982), in which the court did not address the question of whether waivers are permitted; rather it seemed to assume a defendant can obtain a continuance by waiving a speedy trial. *Id.* at 219.

106. See generally Comment, *Assuring the Right to an Adequately Prepared Defense*, 65 J. CRIM. L. & CRIMINOLOGY 302 (1974).

107. 308 U.S. 444 (1940).

108. *Id.* at 446-47.

109. *Id.* See *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

110. Comment, *Assuring the Right to an Adequately Prepared Defense*, 65 J. CRIM. L. & CRIMINOLOGY 302, 305 (1974). But see a recent line of cases in the Tenth Circuit which offers a more liberal rule for the granting of continuances:

Cases after *Dyer [v. Crisp]*, 613 F.2d 275 (10th Cir. 1980) (*en banc*) have established that when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel. See *U.S. v. King*, 664 F.2d 1171, 1172-73 (10th Cir. 1981); *U.S. v. Golub*, 638 F.2d 185, 187 (10th Cir. 1980). This is an eminently reasonable rule, for there is no way an appellate court can say precisely how a given case would have been handled by a reasonably diligent and prop-

Since the defendant cannot waive the Act's time limit and continuances are not readily available in nonexceptional cases, the defendant, willingly or unwillingly, must go to trial within 70 days. When the United States Attorney has taken months or years to prepare the indictment, it is patently unrealistic to expect defense counsel to duplicate the prosecutor's effort in 70 days.¹¹¹ The short preparation period afforded defense counsel in the nonexceptional case "is simply not enough time and must inevitably result in a reduced standard of defense preparation."¹¹²

The Discovery Connection

Although nearly all states require that a list of witnesses be made available to the accused,¹¹³ federal discovery rules do not require such disclosure.¹¹⁴ Moreover, the Jencks Act¹¹⁵ precludes discovery of a government witness' statement until after that witness has testified at the trial.¹¹⁶ Nondiscoverability of witnesses' names and addresses and the statements of prospective government witnesses often prevents a defense attorney from having a proper understanding of the case and a reasonable opportunity to prepare a defense.¹¹⁷ In testimony before the Senate Judiciary Committee during the 1979 hearings, one

erly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed

Under *King* and *Golub*, the circumstances to be considered in determining whether inadequacy of representation may be inferred without proof of specific prejudice at trial include: "(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel."

United States v. Cronin, 675 F.2d 1126, 1128-29 (10th Cir. 1982).

111. Seventy days is the maximum time that may be available. The time may be as short as 30 days from appointment of counsel to trial, and even shorter, perhaps only one week, from counsel's first contact with the case to the pretrial motion deadline. See *supra* notes 28-42 and accompanying text.

112. REPORT OF THE AD HOC SUBCOMMITTEE ON THE SPEEDY TRIAL ACT TO THE COMMITTEE ON COURT ADMINISTRATION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5 (1977).

113. Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557, app. A. at 622-28.

114. *Weatherford v. Bursey*, 429 U.S. 545 (1977); *United States v. Rosales*, 680 F.2d 1304 (10th Cir. 1981). The basic discovery provision, FED. R. CRIM. P. 16, is silent on the discoverability of witnesses' names. In capital cases, witnesses' identities must be disclosed pursuant to 18 U.S.C. § 3432 (1976 & Supp. IV 1980).

115. 18 U.S.C. § 3500 (1976 & Supp. IV 1980).

116. *Id.*

117. *The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 96 (1979) (statement of John Cleary).

speaker suggested that "[i]n order to expedite the criminal process, there should be a free flow of all information made available to the defense save only in those cases where the prosecution can affirmatively demonstrate some actual or reasonably expected threat to a witness."¹¹⁸

The defendant may on occasion know absolutely nothing about the charges and be of little help to defense counsel. Even when he does have knowledge about the offense, he still may not know the identity of the adverse witnesses. Furthermore, the defendant may not recognize the legal significance of facts and fail to disclose them, or may intentionally omit important information for psychological reasons.¹¹⁹

Uncooperativeness of law enforcement agents who frequently refuse to talk to defense counsel also hampers investigations. Accordingly, even if the identity of these witnesses is known, counsel is unlikely to learn from them anything that will either assist in cross-examination or lead to the location of other witnesses. If potential witnesses are out of state, their names and identities are even less susceptible to discovery without mandatory disclosure.

Defense counsel often confronts an adverse witness for the first time in the courtroom after that witness has already become acquainted with the prosecution. Impartial testimony is

118. *The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 96-97 (1979) (statement of John Cleary). Cleary advocates substantial overhaul of federal discovery laws, citing the Jencks Act, 18 U.S.C. § 3500 (1976 & Supp. IV. 1980), as one of the "worst road blocks." 96th Cong., 1st Sess. 96-97 (1979). Austere time limitations are an innovation of the Act. Disadvantages to defense counsel for indigents are not new, as has been recognized by Justice William Brennan, long an advocate of liberal discovery rules:

Moreover, the court-appointed lawyer in a criminal case usually comes to the case late, after the state has gathered its evidence against the accused. Assigned counsel therefore must do what he can within the limited time usually allowed him before trial, often long after the trail has grown cold. He must deal with an accused whose obvious interest in self-justification complicates his lawyer's task of finding the true facts. Even if he can learn the names of the witnesses against his client, those witnesses have already talked to the state's investigators and more frequently than not have been warned not to talk with anyone representing the accused.

Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 WASH. U.L.Q. 279, 286. See generally Comment, *A Proposed Rule of Criminal Pre-Trial Discovery*, 49 U. COLO. L. REV. 443 (1978); *Symposium, Discovery in Federal Criminal Cases*, 33 F.R.D. 47 (1963).

119. Psychological blocks to the free flow of information are a common problem in attorney-client relationships, both civil and criminal. For example, a client may perceive facts as irrelevant, or he may perceive them as threatening to his legal position. In both instances he may fail to disclose the facts to his attorney. See generally BINDER & PRICE, *LEGAL INTERVIEWING AND COUNSELING, A CLIENT CENTERED APPROACH* (1977).

difficult to obtain on cross-examination under these circumstances.¹²⁰ Neither does the defense attorney have an opportunity before trial for reflection and formulation of a strategy for the cross-examination of a witness whose very existence is unknown.

Federal investigators commonly obtain written statements from prospective witnesses. If a significant amount of time has elapsed between the taking of the statement and the filing of charges against the defendant, the witness' memory may have faded by the time defense counsel talks to him. The witness may even have forgotten about giving the statement. The prosecutor will, of course, have the witness read his statement before taking the stand. Therefore, the story given by the witness to defense counsel may vary significantly from his trial testimony given after his memory was refreshed by a review of the statement.¹²¹

One result of the Speedy Trial Act in some districts is that fewer preliminary hearings are conducted.¹²² This is especially true where arrests have been intentionally delayed until after indictment. The omission of the preliminary hearing eliminates a very good opportunity for the defendant to discover details of the prosecutor's case.¹²³

These instances of prejudice attributable to inadequate discovery could be mitigated by mandatory disclosure of both the names and addresses¹²⁴ of adverse witnesses and their statements. There is ample legal precedent for the discovery of the identity of witnesses¹²⁵ and of their statements.¹²⁶ Moreover, in 1974, the Supreme Court recommended that Rule 16 be amended to include witness disclosure,¹²⁷ but Congress rejected the amendment.¹²⁸ Now that the Speedy Trial Act is fully effective with its attendant prejudice to the defendant from the com-

120. Weninger, *Criminal Discovery and Omnibus Procedure in a Federal Court: A Defense View*, 49 S. CAL. L. REV. 514, 548 (1976).

121. Faded memories alone will not ordinarily warrant dismissal; regardless of the length of delay, people will forget details. *United States v. Marion*, 404 U.S. 307 (1971).

122. *Justice Dept. Study*, *supra* note 42, at 23.

123. *Id.* See Weninger, *supra* note 120, at 529.

124. Disclosure of the names alone is inadequate; without the addresses of witnesses who reside in metropolitan areas or in foreign states, the defendant may be unable to locate them.

125. *United States v. Rosales*, 680 F.2d 1304, 1305 (10th Cir. 1981); *United States v. Richter*, 488 F.2d 170 (9th Cir. 1973).

126. *Dennis v. United States*, 384 U.S. 855, 870-71 (1966) (grand jury testimony).

127. Amendments to the Federal Rules of Criminal Procedure, FED. R. CRIM. P. 16(a)(1)(E) (April 22, 1974); H.R. 6799, 94th Cong., 1st Sess. (1975).

128. H.R. REP. NO. 414, 94th Cong., 1st Sess. 6 (1975).

bined effects of extensive pre-indictment preparation by the government and limited preparation time for defense counsel, concealment of witnesses' identities and statements converts the trial into an ambush. Today there is an even more critical need for the proposed amendment to Rule 16 on disclosure than there was in 1974.

CONCLUSION

The prosecutor often has substantially unlimited time for thorough preparation before seeking an indictment. After the indictment, the defense attorney in the nonexceptional case has, at most, 70 days to prepare for trial under the Speedy Trial Act. The brief preparation time in many cases is insufficient for reasons which may not be subject to objective proof, resulting in prejudice to the defendant's case. The fully prepared prosecutor may have surprise witnesses, whose identities are not discoverable, with which to ambush the defendant at trial. The fundamental unfairness of this situation is readily apparent.

Several interim measures which would help to alleviate the problems created by the Act deserve consideration. First, trial courts could more liberally grant requests for continuances under section 3161(h)(8), providing defenders with sufficient time to adequately prepare a defense. Granting continuances need not be mandatory, but a more flexible approach is clearly needed. Permitting the defendant to waive the 70-day indictment to trial time limitation offers another alternative. Lastly, disclosure of the names of witnesses and their statements by court order would facilitate the defendant's discovery procedures. Defense counsel could thus use discovery time more efficiently without impeding the swift administration of justice.

Congress, too, has a responsibility for implementing changes in the Act which would restore fairness to the criminal proceeding. It could amend the Speedy Trial Act, extending the 70-day indictment to trial period to a more reasonable length, depending on the nature of the crime charged. Amending Rule 16 to permit the discovery of the names and addresses of persons having knowledge of the offense or who are likely to testify at trial, along with their statements, would also lessen some of the hardship encountered by the defense in meeting the strict time limitation.