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THE PRE-ACCUSATION DELAY DILEMMA

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The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases. Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial. [1]

INTRODUCTION

In authoring the majority opinion for the Supreme Court in *Dickey v. Florida*,[2] Chief Justice Burger expressed this pragmatic view of the basic issues surrounding the more common claims of a citizen's right to a speedy trial.[3] This thumbnail sketch, however, does not address the more recently recognized problem which involves the confrontation between the prosecutorial function and a potential defendant's constitutional protections. This problem concerns the extent of permissible pre-accusation delay. The problem arises because of the Supreme Court's recognition of the principle that "the Sixth Amendment speedy trial provision has no application until the putative defendant . . . becomes an 'accused' " through the initiation of

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[1] Dickey v. Florida, 398 U.S. 30, 37–38 (1970) (footnote omitted).

[2] 398 U.S. 30 (1970).

[3] The sixth amendment of the federal constitution guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy . . . trial." U.S. CONST. amend. VI.

criminal proceedings against him.[4] The pre-accusation delay problem has been highlighted and compounded by the passage of the Speedy Trial Act of 1974,[5] since the Act has been perceived as a legislative scheme also addressing a citizen only after formal accusation or arrest.[6] The statute, which attempts to codify the constitutional right to a speedy trial, will not remedy in any way the significant prejudice which can be suffered by a defendant during the pre-accusation period.[7] The complexities surrounding these problems must be examined through a re-analysis of the relationship between the speedy trial clause of the sixth amendment and the due process clause of the fifth amendment.[8] Because neither the statute nor the due process clause is able to provide protection to a defendant who has suffered pre-accusation delay, it is the intent of this article to urge expansion of the scope of the speedy trial clause, applying its guarantees to defendants who have suffered such delay.

The Supreme Court's interpretation of the speedy trial clause as affording no protection in a pre-accusation delay situation presents the possibility of disparate treatment to criminal defendants in basically similar situations. Assume that in one case, because of a protracted investigation by prosecutorial authorities following the alleged commission of a criminal offense, no arrest is made nor indictment issued until several years after the alleged offense. Assume that in another case, the suspect is arrested, indicted and arraigned im-

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[4] United States v. Marion, 404 U.S. 307, 313 (1971). Additionally, Rule 48(b) of the Federal Rules of Criminal Procedure, which authorizes the dismissal of an indictment "[i]f there is unnecessary delay in presenting the charge to the grand jury," is also inapplicable to pre-accusation delay. 404 U.S. at 319. Furthermore, the provisions of the speedy trial clause do not require the prosecution to initiate an investigation and bring forth formal accusation within any particular period of time. Dillingham v. United States, 423 U.S. 64, 65 (1975); United States v. Brown, 520 F.2d 1106 (D.C. Cir. 1975).

[5] 18 U.S.C. § 3161–§ 3174 (West Cum. Supp. 1979). Through the Speedy Trial Act of 1974, Congress has imposed rigid time limits within which defendants accused of federal crimes must be brought to trial. *See* notes 89–93 *infra* and accompanying text. The stated purpose of the Act was "to assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial." 1974 U.S. CODE CONG. & AD. NEWS 7402. *See* Lacey, *An Outline and Appraisal of the Federal Speedy Trial Act*, 2 SETON HALL LEGIS. J. 1 (1976).

[6] By expressly making the Speedy Trial Act applicable only to "[a] defendant charged with an offense," 18 U.S.C. § 3161(a), Congress kept the Act "completely consistent with the Sixth Amendment and obviously foreclose[d] applying the statute . . . to periods prior to the time [when a person becomes] a 'defendant' or [is] charged with an 'offense.' " United States v. Brown, 520 F.2d 1106, 1128 (D.C. Cir. 1975).

[7] *See* notes 87–97 *infra* and accompanying text.

[8] The due process clause of the fifth amendment provides in relevant part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

mediately following the commission of the offense, but his trial is then delayed for several years following the formal accusation. Even if the period of delay between the date of the commission of the alleged offense and the criminal trial is ultimately the same in both of these cases, the speedy trial clause might be held to have been violated in the latter example, but not even applicable to the former. This is because the protections of the speedy trial clause are activated only after a defendant has restraints imposed upon his liberty either by arrest or formal accusation.[9] Traditionally, the applicable statute of limitations has been the foremost safeguard of a criminal defendant's rights against being brought to trial on overly stale criminal charges in the pre-accusation delay situation.[10] Because this protection is statutory, the due process clause of the fifth amendment has a limited role to play in protecting against oppressive prosecutorial delay.[11] Consistent with due process analysis, such delay is intolerable when it violates "fundamental conceptions of justice which lie at the base of our civil and political institutions."[12]

THE DILEMMA: *MARION* AND DUE PROCESS ANALYSIS

In *United States v. Marion*,[13] the seminal decision of the Supreme Court on the subject of pre-accusation delay, the Court outlined

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[9] *See* United States v. Lovasco, 431 U.S. 783, 788 (1977); Barker v. Wingo, 407 U.S. 514 (1972); United States v. Marion, 404 U.S. 307, 323 (1971).

[10] *See* United States v. Marion, 404 U.S. 307, 315 n.8 (1971); United States v. Ewell, 383 U.S. 116, 122 (1966). In Toussie v. United States, 397 U.S. 112 (1970), the Supreme Court explained that it is "[t]he purpose of a statute of limitations . . . to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." *Id.* at 114–15. That proposition, however, that the applicable statute of limitations is the primary guarantee of an individual's right not to face charges whose underlying facts may have become obscured by the passage of an unreasonable period of time, has been the focus of well-reasoned criticism. In Nickens v. United States, 323 F.2d 808 (D.C. Cir. 1963), Judge Wright expressed the view that the constitutional right to a speedy trial cannot be made to depend upon the statutory period of limitations. He theorized that "the minimum right of the accused to a speedy trial is preserved by the command of the Sixth Amendment," regardless of the terms of the statute of limitations, and should be "measured by a flexible standard which takes account of all the circumstances." *Id.* at 813 n.4 (concurring opinion) (citations omitted).

[11] United States v. Marion, 404 U.S. 307, 324 (1971). *See* notes 14–28 *infra* and accompanying text.

[12] United States v. Lovasco, 431 U.S. 783, 790 (1977); Duncan v. Louisiana, 391 U.S. 145, 148 (1968); Lisenba v. California, 314 U.S. 219, 236 (1941). In *Rochin v. California*, Justice Frankfurter discussed the due process standards of "civilized conduct" which are required in criminal prosecutions, in terms of "the community's sense of fair play and decency." 342 U.S. 165, 173 (1952).

[13] 404 U.S. 307 (1971).

a stringent test to be applied by federal courts when considering whether the extent and effect of the delay is constitutionally impermissible.[14] The Court recognized that the due process clause of the fifth amendment would require dismissal of the indictment "if it were shown at trial that the preindictment delay in this case caused substantial prejudice to [defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."[15] The specific issue to be decided in *Marion* was whether dismissal of a federal indictment was constitutionally required by reason of the passage of a three-year period between the occurrence of the alleged crime and the filing of the indictment.[16] Prior to the trial, the defendants moved to dismiss the indictment, contending that it was returned "an unreasonably oppressive and unjustifiable time after the alleged offenses."[17] The defendants asserted the general contention that loss of memory of events surrounding the alleged offense and other events over the three-year period, coupled with negligence and indifference by the prosecutor in his investigation and presentation of the case to the grand jury, warranted the dismissal of the indictment.[18] Although there was no showing of actual resultant prejudice, the district court dismissed the indictment for "lack of speedy prosecution."[19]

On direct appeal, the Supreme Court reversed the judgment of the district court, holding the protections of the speedy trial clause to be inapplicable to the pre-accusation period,[20] and that there was no violation of due process where the defendants had not demonstrated

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[14] *Id.* at 324. Since the time of the Supreme Court's issuance of the *Marion* decision in late 1971, federal courts have been inundated with pre-indictment delay cases which have reflected the various possible degrees of delay and resulting prejudice. One judge recently noted that during the first few years following *Marion*, the Fifth Circuit alone decided 33 cases upon "*Marion* motions" to dismiss for impermissible pre-indictment delay. United States v. West, 568 F.2d 365, 366 n.1 (5th Cir. 1978).

[15] 404 U.S. at 324.

[16] *Id.* at 318.

[17] *Id.* at 310.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 321. The *Marion* Court noted that certain procedural and proof problems would arise if the protections of the sixth amendment were made applicable to a period prior to arrest or indictment:

> Allowing inquiry into when the police could have arrested or when the prosecutor could have charged would raise difficult problems of proof. As one court has said, "the Court would be engaged in lengthy hearings in every case to determine whether or not the prosecuting authorities had proceeded diligently or otherwise."

Id. at n.13 (quoting United States v. Port, Crim. No. 33162 (N.D. Cal. June 2, 1952)).

actual prejudice resulting from intentional prosecutorial delay.[21] Justice White, writing for a four-Justice majority,[22] stressed that the mere possibilities of prejudice which are "inherent in any extended delay . . . are not in themselves enough to demonstrate that [defendants] cannot receive a fair trial and therefore to justify the dismissal of the indictment."[23] It was clearly indicated that the Court would require a demonstration of actual prejudice to the defense before it would consider the defendant's claim of a due process violation.[24] The Court did not attempt to list in any detail those situations which would require dismissal, but instead admonished that "the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case."[25] In the subsequent case of *United States v. Lovasco*,[26] the Court clarified the *Marion* due process inquiry by stating that courts are required to consider "the reasons for the delay as well as the prejudice to the accused."[27] Thus, under the present *Marion* guidelines, even though proof of actual resultant prejudice is generally a necessary element of the due process claim, it is not by itself sufficient reason to dismiss the indictment.[28]

Essential to the argument for the application of the guarantees of the speedy trial clause to pre-accusation delay situations is the recognition that the prejudice which a criminal defendant actually suffers from unreasonable prosecutorial delay before trial is the same regardless of the stage of the pre-trial proceedings during which it was occasioned.[29] Witnesses become inaccessible and memories are dulled

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[21] *Id.* at 325–26.

[22] Only seven members of the Court participated when the Justices delivered the *Marion* decision. Justice White's opinion was joined by Chief Justice Burger and Justices Stewart and Blackmun. Justice Douglas, joined by Justices Brennan and Marshall, concurred in the result, but would have held that the guarantee within the speedy trial clause is applicable to the pre-indictment stage, and "that the right to a speedy trial is denied if there were years of unexplained and inexcusable pre-indictment delay." 404 U.S. at 333 (Douglas, J., concurring).

[23] *Id.* at 326. Justice White reasoned:

> Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not sufficient reason to wrench the Sixth Amendment from its proper context. Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case.

Id. at 321–22 (footnote omitted).

[24] *Id.* at 326.

[25] *Id.* at 325.

[26] 431 U.S. 783 (1977).

[27] *Id.* at 790.

[28] *Id.*

[29] *See* United States v. Marion, 404 U.S. at 330–33 (Douglas, J., concurring).

regardless of when delay occurs.[30] A defendant who is charged with a specific criminal offense is at least on notice that a criminal prosecution has been initiated against him.[31] He can thereafter begin to muster his defense while any post-accusation prosecutorial delay accrues. The individual who has not yet been formally indicted or arrested may be put at a special disadvantage by suffering lengthy pre-accusation delay. He is unaware that the law enforcement authorities are prepared to arrest and institute criminal proceedings against him at some future time known only to those authorties. Without knowledge that criminal charges are to be brought against him, the potential defendant has no reason to fix in his memory the happenings surrounding the commission of the alleged criminal offense.[32] It must be recognized that the defendant in the post-accusation delay setting can devote his powers of recall to the events surrounding the alleged crime and can begin to prepare a defense, while during a period of pre-accusation delay the prosecution may very well be proceeding to strengthen and solidify its case, thereby gaining a greater advantage with the passage of each day.[33] By allowing the prosecution to reap the rewards of its own slow progress, the refusal by the Court to apply the speedy trial guarantee allows the prosecution to "proceed methodically to build its case while the prospective defendant proceeds to lose his."[34]

The Supreme Court has repeatedly held that one of the purposes of the speedy trial clause of the sixth amendment is to limit the possibilities that lengthy delay will impair the ability of the accused to defend himself.[35] To restrict the protections of the clause to one who is arrested or formally accused, however, may be no more than to extol form over substance, since the potential defendant's ability to prepare an adequate defense rests upon the same critical factors whether he be actually accused or not.[36] Consider the situation involving the individual whose arrest or accusation is delayed for a lengthy period of time while the prosecuting authority "methodically

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[30] *Id.* at 331 (Douglas, J., concurring). *See* Note, 43 N.Y.U. L. REV. 772, 775 (1968).

[31] *See id.*

[32] *See id.; see also* Nickens v. United States, 323 F.2d 808, 823 (D.C. Cir. 1963) (Wright, J., concurring).

[33] *See* 404 U.S. at 331 (Douglas, J., concurring).

[34] *Id.* (Douglas, J., concurring).

[35] *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 532 (1972); Smith v. Hooey, 393 U.S. 374, 378 (1969); United States v. Ewell, 383 U.S. 116, 121 (1966).

[36] *See* Note, *Justice Overdue—Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95, 100 (1952).

. . . build[s] its case."[37] If that individual has no knowledge that he has been under investigation during that extended time period since he is alleged to have committed the offense, his ability to adequately prepare his defense has been prejudiced, at least to the extent that his memory of the events surrounding the offense has faded. In addition, the probability of his securing witnesses with clear recollections of those events has been substantially diminished or made impossible. On the other hand, had the defendant been put on notice of the ongoing criminal proceeding at an earlier stage he could have been honing his memory of the events and preparing his witnesses while their memories were still fresh. Because of the manner in which the speedy trial clause is presently interpreted, the defendant who remained unaccused during the delay could not seek the protections of its constitutional guarantee, even though his ability to mount a defense has been prejudiced to a greater extent than that of the defendant who was duly accused. Moreover, the defendant who had been an "accused" during the period of prosecutorial delay in proceeding to trial, would at least have the benefit of the application of the balancing test enunciated by the Supreme Court in *Barker v. Wingo*,[38] in an attempt to have the indictment dismissed.

A PROPOSED SOLUTION: APPLYING THE *BARKER* TEST

Barker v. Wingo was a post-accusation delay case involving a hiatus in excess of five years between arrest and trial.[39] Recognizing the impossibility of making a precise determination as to when the right to a speedy trial has been denied,[40] the Court outlined a balancing test in which the conduct of both the prosecution and the defense are weighed. According to the *Barker* approach, four factors are to be assessed in determining whether a particular defendant has been deprived of his right to speedy trial: the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.[41]

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[37] *Marion*, 404 U.S. at 331 (Douglas, J., concurring).

[38] 407 U.S. 514 (1972).

[39] 407 U.S. at 516–18.

[40] *Id.* at 521. In writing for the Court, Justice Powell reasoned that "[w]e cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." *Id.*

[41] *Id.* at 530. In formulating this four-factor test, the *Barker* Court specifically noted the concurring opinion of Justice Brennan in Dickey v. Florida, 398 U.S. 48 (1970), which was a pre-accusation delay case. 407 U.S. at 530 n.30. In *Dickey*, Justice Brennan put forth three factors for consideration; the source of the delay, the reason for it, and whether the delay prejudiced the interests protected by the right. 398 U.S. at 48. The Court in *Barker* stated that "there is little difference between his approach and the one we adopt today." 407 U.S. at 530 n.30.

When a defendant who suffers delay after formal accusation has the benefit of the *Barker* test to invoke the protections of the sixth amendment, it is illogical not to apply the same test to the potential defendant who has suffered even greater prejudice as a result of a pre-accusation delay.[42] If the result of balancing the factors comes out in favor of the defendant, the indictment must be dismissed.[43] To cloak the dismissal remedy in the trappings of the sixth amendment when the defendant is in a post-accusation delay situation, while, at the same time, to deny the remedy for identical or greater prejudice in a pre-accusation delay situation, is to be blind to the fact that the *Barker* balancing test also provides all of the necessary criteria to find a fifth amendment due process violation warranting dismissal. The arbitrary labeling of the delay "pre" or "post" accusation masks the real issue. A motion to dismiss criminal charges due to impermissible delay by the prosecution must be considered in a reasonable manner to protect all the constitutional rights of the defendant who asserts prejudice flowing from the alleged delay.

The *Marion* test for a due process violation may be subsumed in the broader *Barker* balancing test. Certainly a court examining the "reasons for delay" would consider whether the delay was "intentional on the part of the government to gain a tactical advantage over the defendant." The prejudice to be exposed would be apparent and identical under either test. Moreover, application of the *Barker* test to pre-accusation delay situations, and the resultant search for sufficient evidence of a due process violation, would allow the court to exercise its considerable discretion as fact-finder to support the decision whether or not to dismiss. Thus, if the court found that the "reason for delay" in a pre-accusation situation would be sufficient to cause dismissal if it occurred in a post-arrest situation, but did not

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[42] It would be impossible to rigidly apply all four *Barker* factors to a pre-accusation delay situation since the defendant could never assert his right to a speedy trial prior to being formally accused or arrested. However, the Supreme Court has rejected a rigid application of the test, noting:

> We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with the full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Moore v. Arizona, 414 U.S. 25, 26 (1973) (quoting *Barker*, 407 U.S. at 533).

[43] *See* Strunk v. United States, 412 U.S. 434, 440 (1973).

stem from "intentional delay to gain a tactical advantage,"[44] it could still grant a defendant's motion to dismiss.[45]

In *United States v. Barket*,[46] the Eighth Circuit noted that there is no clearly developed test for judging the reasonableness of pre-accusation delay comparable to that for assessing whether the defendant was prejudiced by the delay. Because there is no predetermined standard, that court utilized the *Barker* balancing test.[47] After finding substantial prejudice to the defendant,[48] the court in *Barket* felt that it was not necessary to find governmental misconduct in the form of tactical delay, as required by the *Marion* test. Instead, the court asserted that the defendant had encountered "governmental negligence rendering the delay unreasonable," finding that such "conduct adds an additional factor favoring [the defendant] in the Fifth Amendment balance."[49] Thus, the Eighth Circuit applied the *Barker* test in a pre-accusation delay situation to find a due process violation sufficient to warrant dismissal of the indictment.[50]

In *United States v. Shaw*,[51] the Fifth Circuit aligned its due process analysis with the language of *Barker*'s balancing test when it stated that "[o]ur due process analysis must focus on factors such as the length of the delay, the reason for the delay, and the prejudice

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[44] In *Lovasco*, the Court broadened the *Marion* test beyond "tactical" delay to include "prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay could impair the ability to mount an effective defense." 431 U.S. at 795 n.17.

[45] *See* United States v. Barket, 530 F.2d 189 (8th Cir.), *reh. denied, cert. denied*, 429 U.S. 917 (1976).

[46] 530 F.2d 189 (8th Cir. 1976).

[47] *Id.* at 193.

[48] *Id.* During the forty-seven month delay between the alleged commission of the offenses, making an unlawful political contribution and misapplying bank funds, and the filing of the indictment, six witnesses, who the defendant claimed would have materially aided his defense, died before the case could be tried. *Id.*

[49] *Id.* at 195.

[50] *But see* United States v. Hood, 593 F.2d 293 (8th Cir. 1979). In *Hood*, the defendant appealed a conviction for interstate transportation of stolen goods, contending that the government's unreasonable delay in filing charges against him had violated his sixth amendment right to speedy trial. *Id.* at 295. The court, in affirming the conviction, cited the Supreme Court's 1977 decision in *Lovasco*, for the principle that the sixth amendment's speedy trial clause was not applicable to preindictment delay. *Id.* at 296. Rather, the court applied the *Marion* doctrine that unreasonable pre-accusation delay, together with resultant prejudice to the defendant, may constitute a violation of the due process clause of the fifth amendment. *Id.* It was stated that "[i]n each case, the reasonableness of the delay must be balanced against any resultant prejudice to the defendant." *Id. See* United States v. Weaver, 565 F.2d 129, 131 (8th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978).

[51] 555 F.2d 1295 (5th Cir. 1977).

which the delay may have caused the accused."[52] After accepting the findings of the district court that the defendant was somewhat prejudiced by the delay,[53] the *Shaw* court examined the reasons for the prosecution's actions in delaying the return of the indictment for twenty-eight months after the completion of the alleged criminal conduct. The court sought to determine whether those actions violated " 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.' "[54] The court held that since the twenty-eight month delay was necessary for investigatory purposes, there was no due process violation.[55] Conspicuous by its absence in the *Shaw* opinion is any reference to the "intentional delay to gain tactical advantage" prong of the *Marion* test. Thus, in this pre-accusation delay case, the Fifth Circuit has chosen to apply a standard which assimilated the post-accusation delay *Barker* test in an attempt to find a due process violation.[56] More recently, in *United States v. Stoddart*,[57] the Tenth Circuit remanded a pre-accusation delay case to the district court with explicit direction that the criteria enunciated in *Barker* be applied.[58]

In *United States v. Mays*,[59] the Ninth Circuit determined that a finding of intentional delay on the part of the government is not a prerequisite to raising the protections of the due process clause,[60] and noted that the *Marion* Court specifically intended not to make any absolute test in that regard.[61] The *Mays* opinion set forth a due process test which attempted to balance the factors in the individual situation.[62] Again, the *Barker* equation was the foundation upon

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[52] *Id.* at 1299.

[53] *Id.*

[54] *Id.*

[55] *Id.* The court analyzed the investigative delay in light of the Supreme Court's opinion in *Lovasco* which held that, "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." 431 U.S. at 796. *See* United States v. Medina-Arellano, 569 F.2d 349, 353 (5th Cir. 1978), for the Fifth Circuit's application of *Lovasco* to a situation involving allocation of prosecutorial resources as the reason given for delay.

[56] *But see* United States v. Blevins, 593 F.2d 646 (5th Cir. 1979); United States v. Parker, 586 F.2d 422 (5th Cir. 1979). In *Blevins*, the Fifth Circuit noted the inapplicability of the sixth amendment's speedy trial clause to cases where there has been no arrest or accusation. *Id.* at 647. The court addressed the fifth amendment considerations and held that since the prejudice defendant complained of was "speculative at best," he failed to show actual prejudice as required by the due process test enunciated in *Marion* and *Lovasco*. *Id.*

[57] 574 F.2d 1050 (10th Cir. 1978).

[58] *Id.* at 1053.

[59] 549 F.2d 670 (9th Cir. 1977).

[60] *Id.* at 676–77.

[61] *Id.* at 677.

[62] *Id.*

which the analysis was based, as the court determined that the factors to be considered are "actual prejudice resulting from the delay,"[63] "the length of the delay"[64] and "the reason for the delay."[65] Hence, the Ninth Circuit has also applied the post-accusation delay *Barker* test to a pre-accusation delay situation in order to find a due process violation. In doing so, the *Mays* court specifically rejected any necessity for proving intentional delay and required, instead, that the prosecution justify the delay if the defendant has proven actual prejudice.[66]

When utilized at all, the *Marion* due process inquiry has proven difficult to apply, and the federal courts have been inconsistent in their application.[67] The trouble arises in construing whether the elements of actual prejudice and intentional prosecutorial delay for an improper purpose were meant by the *Marion* formula to be conjunctive or disjunctive in articulating the proper standard for finding impermissible delay.[68] Some circuits have read the *Marion* test conjunctively, determining that a dismissal is authorized on due process grounds upon a showing by the defendant of actual prejudice to his

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[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *See id.* at 681 (Ely, J., dissenting). Judge Ely did not dissent from the formulation of the majority test utilizing the *Barker* equation to find a due process violation. His disagreement centered on the majority's rejection of the district court's findings of actual prejudice which occurred during a four and one-half year delay. Subsequent cases have indicated that the Ninth Circuit employs similar guidelines in weighing permissible delay in both post-accusation and pre-accusation settings. In the post-accusation delay case of Tucker v. Wolff, 581 F.2d 235 (9th Cir. 1978), the court applied the *Barker* test, considering such factors as the length of the delay, the reason for the delay, the defendant's assertion of the right, and resulting prejudice to the defense. In the pre-accusation case of United States v. Titus, 576 F.2d 210 (9th Cir. 1978), the court utilized the same balancing test as discussed in *Mays*. *Id.* at 211–12.

It is interesting to note that the *Barker* test has been applied in yet another way to find a due process violation. In Sims v. Sielaff, 563 F.2d 821 (7th Cir. 1977), the Seventh Circuit held that a parolee's claim that the delay preceding his final revocation hearing violated due process, when that hearing otherwise comported with due process, must be judged by the standards suggested in *Barker* v. *Wingo* and the cases following it. *Id.* at 828.

[67] *See generally* United States v. Alderman, 423 F. Supp. 847 (D. Md. 1976), for a detailed analysis of the *Marion* test as it had been applied in each circuit as of the date of that decision.

[68] *See* United States v. Mays, 549 F.2d at 675. More recently, cases from the Second Circuit have indicated that no court has been presented with the precise issue of whether both elements must be shown in order to prove a due process violation. United States v. Vispi, 545 F.2d 328, 332 n.4 (2d Cir. 1977); United States v. Crisona, 440 F. Supp. 24, 26 (S.D.N.Y. 1977). In United States v. Hillegas, 578 F.2d 453, 460 (2d Cir. 1978), however, the Second Circuit set forth what would seem to be a much broader due process standard of simply substantial prejudice to the defendant as the grounds for obtaining a dismissal of the indictment based upon pre-accusation delay.

defense *and* that the government's purpose for the delay was to gain an unfair tactical advantage.[69] Other circuits which have applied the *Marion* test disjunctively, that is, as requiring either substantial actual prejudice *or* intentional governmental delay to gain a tactical advantage, have adopted a balancing approach similar to the *Barker* test, in which courts weigh three factors—the length of the delay, actual resultant prejudice to the defendant, and the government's reasons for the delay.[70]

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[69] *See, e.g.*, United States v. Gliss, 594 F.2d 1374 (10th Cir. 1979); United States v. Stinson, 594 F.2d 982, 984 (4th Cir. 1979); United States v. Nadmall, 591 F.2d 548, 550 (10th Cir. 1979); United States v. Revada, 574 F.2d 1047, 1048 (10th Cir. 1978); United States v. Swainson, 548 F.2d 657, 663 (6th Cir. 1977); United States v. Alderman, 423 F. Supp. 847 (D. Md. 1976). *See also* United States v. Partyka, 561 F.2d 118 (8th Cir. 1977). In *Partyka*, the Eighth Circuit altered the language of the *Marion* standard to eliminate the words "intentional" and "substantial," and stated that "it must appear that the delay was unreasonable and that it was prejudicial to the defendant in the presentation of his defense." *Id.* at 122. This more expansive reading of the Supreme Court's *Marion* analysis exemplifies the trend toward isolating the *Marion* test to a point where it is not applied if the analyzing court can instead find a due process violation by invoking the *Barker* test.

[70] *See, e.g.*, United States v. King, 593 F.2d 269, 272 (7th Cir. 1979); United States v. Parker, 586 F.2d 422 (5th Cir. 1979); United States v. Titus, 576 F.2d 210, 211–12 (9th Cir. 1978); United States v. Pallan, 571 F.2d 497, 500 (9th Cir.), *cert. denied*, 436 U.S. 911 (1978); United States v. Wiggins, 566 F.2d 944, 945 (5th Cir. 1978); United States v. Rice, 550 F.2d 1364, 1369 (5th Cir. 1977). Furthermore, courts within both the Fifth and the Ninth Circuits have recognized that within their jurisdictions confusion exists over the question whether the *Marion* elements are to be construed conjunctively or disjunctively. *See* United States v. Mays, 549 F.2d 670, 675–76 & nn.6–7 (9th Cir. 1977); United States v. Passman, 465 F. Supp. 736, 740 (W.D. La. 1979).

While there has been no clear resolution in the Third Circuit of the issue of the proper application of the *Marion* test, *see* United States v. United States Gypsum Co., 550 F.2d 115 (3d Cir. 1977), at least one district court has recently applied the test conjunctively, noting that "[n]ot only must defendant demonstrate that he suffered actual prejudice, he must also show that the government used the delay solely to gain tactical advantage over him." United States v. Molt, 444 F. Supp. 491, 499 (E.D. Pa. 1978). *See generally* Note, *Government May Appeal from Successful Defense Motion for Midtrial Dismissal Unrelated to Guilt or Innocence*, 9 SETON HALL L. REV. 579, 598–99 nn. 150–55 (1978).

The District of Columbia Circuit has developed a unique line of *Marion* cases applying a stricter standard to pre-accusation delay in cases involving narcotics offenses where the only evidence against the defendant comes from the uncorroborated testimony of undercover agents. United States v. Jones, 524 F.2d 834, 839–41 (D.C. Cir. 1975); Robinson v. United States, 459 F.2d 847, 851–54 (D.C. Cir. 1972). This approach, stemming from Ross v. United States, 349 F.2d 210, 212–13 (D.C. Cir. 1965), requires the government to diligently attempt to notify the accused of the impending accusation, as a "rough rule of thumb," once four months have elapsed since the undercover agent's detection of the crime, unless further delay is necessary to preserve the agent's cover in an ongoing investigation. *Robinson*, 459 F.2d at 852. Although based upon due process considerations, the dismissal of the charges pursuant to the *Ross* approach is granted not upon constitutional grounds, but on the basis of the circuit's supervisory power over criminal trials. *See Jones*, 524 F.2d at 840.

It seems clear that in identifying a violation based upon either the due process clause or the speedy trial clause, actual prejudice to the accused is the threshold criterion.[71] The nature of prejudice which may be shown has been recognized as either the impairment of the accused's ability to defend himself on the merits,[72] or personal prejudice disruptive of the defendant's life.[73] The Supreme Court has recognized that prejudice arising from delay during periods prior to, as well as after, formal accusation may be personal in nature and worthy of the same considerations as prejudice which impairs a defendant's ability to defend his case on the merits.[74] On numerous occasions the Court has indicated that physical, emotional and financial stress are factors to be considered in a determination of prejudice arising from delay.[75]

The major obstacles which confront the defendant who moves for dismissal of the criminal charges against him on the ground of pre-accusation delay involve the problems of proving actual substantial prejudice. There is little doubt that the burden of proving prejudice is on the defendant,[76] and that the proof must not be conjectural or speculative, but definite.[77] For a defendant who is a victim of pre-accusation delay, the difficulty in proving actual prejudice to a defense on the merits multiplies as the length of the delay increases.

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[71] United States v. Lovasco, 431 U.S. 783, 790 (1977). *See* United States v. West, 568 F.2d 365, 367 (5th Cir. 1978); United States v. Jackson, 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975); United States v. Crisona, 440 F. Supp. 24, 26 (S.D.N.Y. 1977).

[72] *See, e.g.*, United States v. Juarez, 561 F.2d 65 (7th Cir. 1977).

[73] United States v. Dreyer (Appeal of Goldsmith), 533 F.2d 112 (3d Cir. 1976); United States v. Brown, 520 F.2d 1106 (D.C. Cir. 1975).

[74] In *Marion*, the Court recognized that

> The major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

404 U.S. at 320. Also, in *Barker* the Court recognized that an accused is "disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." 407 U.S. at 533.

[75] *See, e.g.*, Moore v. Arizona, 414 U.S. 25, 27 (1973); Strunk v. United States, 412 U.S. 434, 439 (1973); Dickey v. Florida, 398 U.S. 30, 41–43 (1970) (Brennan, J., concurring); Smith v. Hooey, 393 U.S. 374, 379 (1969); Klopfer v. North Carolina, 386 U.S. 213, 222 (1967).

[76] United States v. Lovasco, 431 U.S. at 790; United States v. West, 568 F.2d 365, 367 (5th Cir. 1978); United States v. Mays, 549 F.2d 670, 677–78 (9th Cir. 1977); United States v. Quinn, 540 F.2d 357, 361 (8th Cir. 1976). *Contra*, United States v. Barket, 530 F.2d 189, 196 (8th Cir. 1976).

[77] United States v. Marion, 404 U.S. 307, 325 (1971); United States v. Medina-Arellano, 569 F.2d 349, 353 (5th Cir. 1978); United States v. Wiggins, 566 F.2d 944, 946 (5th Cir. 1978).

The most common claims are that pre-accusation delay has resulted in faded memories for the defendant and witnesses he might wish to call to aid in his defense,[78] or that during the period of delay, the testimony of an exculpating witness has been lost due to the death of that witness.[79] Other claims of prejudice might allege such detriments as lost opportunity to have concurrent sentences imposed[80] or consideration for youthful offender treatment,[81] being subjected to derogatory publicity,[82] or potential misidentification by a government witness.[83] These claims may all be categorized as prejudicial to the defense rather than personal prejudice to the defendant.

Marion teaches that the statute of limitations specifies "a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."[84] Thus, logic would indicate that as the period of pre-accusation delay approaches the statutory limit, the presumption of prejudice, although still rebuttable, would increase. In *Dickey*, Justice Brennan focused on that problem when he reasoned that the defendant's "failure of memory and his inability to reconstruct what he did not remember virtually precluded his showing in what respects his defense might have been more successful if the delay had been shorter."[85] Although the specificity with which prejudice must appear diminishes as the length of the delay increases,[86] the difficulty of carrying the burden of proving actual prejudice multiplies dramatically, as is evidenced by the infrequency with which the burden is met.[87] When the inability of defendants to meet the burden of proving actual prejudice is coupled

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[78] *Marion*, 404 U.S. at 310; United States v. Quinn, 540 F.2d 357, 359 (8th Cir. 1976).

[79] *Lovasco*, 431 U.S. at 785; *Barket*, 530 F.2d at 196.

[80] United States v. Matlock, 558 F.2d 1328, 1330 (8th Cir. 1977).

[81] United States v. Roberts, 515 F.2d 642, 644 (2d Cir. 1975).

[82] United States v. Mandel, 415 F. Supp. 1033, 1054 (D. Md. 1976); United States v. Shafer, 384 F. Supp. 480, 482 (N.D. Ohio 1974).

[83] United States v. Jones, 524 F.2d 834, 837 (D.C. Cir. 1975).

[84] 404 U.S. at 322.

[85] Dickey v. Florida, 398 U.S. 30, 53–54 (1970) (Brennan, J., concurring). Justice Brennan went on to state that "[i]n a very real sense, the extent to which he was prejudiced by the Government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice." *Id.*

[86] United States v. Naftalin, 534 F.2d 770, 773 (8th Cir. 1976).

[87] *See* United States v. West, 568 F.2d 365, 366 (5th Cir. 1978), where Judge Rubin notes that the motion for dismissal was denied in every one of the thirty-three pre-accusation delay cases decided in the Fifth Circuit since *Marion* was decided by the Supreme Court, because the court could not find actual prejudice caused by the delay. *Id.* If the Fifth Circuit can be considered as a representative sample of what the other circuits are finding on this type of motion, it is safe to assume that very few defendants are able to meet the burden of proof.

with the near impossiblity of proving intentional delay by the government,[88] it is evident that the test for the extent of permissible pre-accusation delay set forth by the Supreme Court in *Marion* is weighted heavily, if not entirely, in favor of the prosecution. Moreover, to allow *Marion* to remain the standard for determining a due process violation in a pre-accusation delay situation is to condone the potential for increased prosecutorial abuse following the implementation of the Speedy Trial Act of 1974.[89]

THE SPEEDY TRIAL ACT: A REMEDY FOR POST-ACCUSATION DELAY

It was at least in part as a response to the Supreme Court's decision in *Barker*,[90] where the Court refused to interpret specific time limits into the sixth amendment right to speedy trial, that Congress enacted the Speedy Trial Act of 1974,[91] designed to establish specific time limitations between a criminal suspect's arrest and trial.[92] The Act was a legislative response to the inability of the federal judiciary to adequately safeguard through decisional law the rights inherent in the sixth amendment's guarantee of a speedy criminal trial.[93] Although the courts had been applying the *Barker* test,[94] Congress be-

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[88] *See* United States v. Mays, 549 F.2d 670, 676 (9th Cir. 1977).

[89] *See* note 5 *supra*.

[90] *See* notes 38–41 *supra* and accompanying text.

[91] 18 U.S.C. §§ 1361 *through* 3174 (West Cum. Supp. 1979).

[92] As the time limitations in the Act existed prior to the amendments of 1979, the government would have been compelled to bring the defendant to trial within 60 days of the arraignment. 18 U.S.C. § 3161(c). The arraignment was to have taken place within ten days of the last to occur—the defendant's indictment or first appearance within the charging district. *Id.* If the defendant's arrest was prior to indictment, the formal charges were to have been lodged within thirty days of the defendant's arrest. 18 U.S.C. § 3161(b). These provisions were to have become effective July 1, 1979. 18 U.S.C. § 3163(c). As part of the 1979 amendments to the Act, however, the effective date for the dismissal sanctions for violation of the time limitations was suspended until July 1, 1980, and there was a merger of the 10-day indictment-to-arraignment and the 60-day arraignment-to-trial intervals into a single 70-day indictment-to-trial interval. *See* 125 CONG. REC. H46913 (daily ed. July 31, 1979) (remarks of Rep. Gudger). With the 30-day arrest-to-indictment limit kept intact, the 1979 amendments left unchanged the basic structure of the Act providing for a 100-day period between arrest and trial. 125 CONG. REC. H6914 (daily ed. July 31, 1979) (remarks of Rep. Rodino).

[93] H.R. REP. NO. 93-1508, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7401, 7402. In *Barker*, the Court had recognized that specific time limitations within which a defendant should be brought to trial would clarify the sixth amendment guarantee. The Court refrained from attempting to establish specific guidelines, however, since they were rightly of the belief that this is properly a legislative task. 407 U.S. at 523. Thus, the Supreme Court implicitly invited congressional action toward the passage of speedy trial legislation.

[94] *See* notes 38–41 *supra* and accompanying text.

lieved that this approach "provid[ed] no guidance to either the defendant or the criminal justice system," but rather was "in effect, a neutral test which reinforc[ed] the legitimacy of delay."[95]

Clearly the Speedy Trial Act is aimed at eliminating the personal and procedural disabilities which accrue to a defendant awaiting trial.[96] Of equal concern during the legislative hearings, however, were the potential benefits to society in general that the Act would engender.[97] It was recognized that a defendant awaiting trial is a financial and administrative burden upon the public and the criminal justice system, as well as a potential danger to the community.[98] Statistics were presented, indicating that those defendants who are released pending trial and must then wait long periods of time for trial are likely to commit additional crimes during that period.[99] It

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[95] H.R. REP. NO. 93-1508, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7405.

[96] *See* notes 72–83 *supra* and accompanying text.

[97] The Supreme Court in *Barker v. Wingo* had directly addressed the societal interests in the speedy trial of accused criminal defendants when it stated that the public's interest "exists separate from, and at times in opposition to, the interests of the accused." 407 U.S. at 519. Furthermore, Chief Justice Burger recognized in Strunk v. United States, 412 U.S. 434 (1973), that "[t]he public interest, in a broad sense, as well as the constitutional guarantee, commands prompt disposition of criminal charges." 412 U.S. at 439 n.2. *See also* United States v. MacDonald, 435 U.S. 850, 862 (1978).

[98] In *Barker*, Justice Powell explained these societal burdens and public dangers in greater detail:

> The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system. In addition, persons released on bond for lengthy periods awaiting trial have opportunity to commit other crimes . . . . Moreover, the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape. Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.
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> If an accused cannot make bail, he is generally confined . . . in a local jail. This contributes to the overcrowding and generally deplorable state of those institutions. Lengthy exposure to these conditions "has a destructive effect on human character and makes rehabilitation of the individual offender much more difficult." At times the result may even be violent rioting. Finally, lengthy pretrial detention is costly. The cost of maintaining a prisoner in jail varies from $3 to $9 per day, and this amounts to millions across the Nation. In addition, society loses wages which might have been earned, and it must often support families of incarcerated breadwinners.

407 U.S. at 519–21 (footnotes omitted).

[99] H.R. REP. NO. 93-1508, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7409. The National Bureau of Standards offered statistical data showing that of 426 defendants released pending trial during a 4-week period in 1968, 47, or 11%, were re-arrested. Other alarming data regarding the recidivism rate of defendants on pre-trial release included "an increased propensity to be re-arrested when released more than 280 days, [and] an increased propensity of persons classified as dangerous . . . to be re-arrested in the period from 24 weeks to 8 weeks prior to trial. . . ." *Id.*

was Congress' recognition of these public interests which eventually led to the enactment of the Speedy Trial Act.[100]

The judicial response to the stringent time provisions that will operate when the Act becomes fully effective[101] has been mixed. While some judges recognize the need for such legislation to remedy "excessive and inexcusable delay in bringing a defendant to trial,"[102] the specific time limitations and sanctions have met with an unwelcome reception from the criminal justice system.[103] In April 1979, at the request of the Justice Department, Congress initiated amendatory action to postpone the effective date of the Act's dismissal sanction.[104] The Justice Department and others involved in the criminal justice system had expressed concern that if the dismissal sanctions became effective on July 1, 1979, as was then scheduled, then approximately 17% of all pending federal criminal cases would be dismissed.[105] In 1978, that reportedly would have amounted to 5,174 dismissals by virtue of the operation of the Act's sanctions.[106] Congress eventually rejected proposals that would have both enlarged the permissible pre-trial intervals and postponed the effective date of the Act's sanctions even further,[107] when it became apparent that the rate of dismissals that would otherwise result was not likely to be as serious as first believed.[108] In their final form, the 1979 amend-

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[100] The Preamble to the statute is unequivocal: "An Act to assist 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." Pub. L. No. 93-619, 88 Stat. 2026 (1975). The legislative history of the Act declares the above-quoted section as being the "purpose of th[e] bill." 1974 U.S. CODE CONG. & AD. NEWS 7404.

[101] *See* note 92 *supra*.

[102] United States v. Vispi, 545 F.2d 328, 330 (2d Cir. 1976).

[103] *See, e.g.*, United States v. Bullock, 551 F.2d 1377, 1382 (5th Cir. 1977); United States v. Martinez, 538 F.2d 921, 923 (2d Cir. 1976); United States v. Howard, 440 F. Supp. 1106, 1109 (D. Md. 1977); Misner, *Delay, Documentation and the Speedy Trial Act*, 70 J. OF CRIM. L. & CRIMINOLOGY 215, 223–24 (1979); Fraser, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 676 (1976).

[104] As the original effective date of the Act approached, the concern increased among federal law enforcement authorities that the stringent time limits and the implementation of the resulting dismissal sanctions for the government's noncompliance with those limits would "create a burden which the system [could not] sustain." 125 CONG. REC. S4329 (daily ed. April 10, 1979) (remarks of Sen. Kennedy). On the same day, Congressman Rodino introduced the same legislation into the House. 125 CONG. REC. H2217 (daily ed. April 10, 1979) (remarks of Rep. Rodino).

[105] 125 CONG. REC. S4329 (daily ed. April 10, 1979) (remarks of Sen. Kennedy).

[106] *Id.*

[107] *See* note 92 *supra*.

[108] *See* 125 CONG. REC. S8009, 8012, 8025 (daily ed. June 19, 1979) (remarks of Sen. Biden and Sen. Thurmond).

ments to the Act provided for the suspension of the effective date of the dismissal sanctions only until July 1, 1980, although it is not at all clear that the official concern over the possible effects of the implementation of the ultimate sanction has abated.[109]

CONCLUSION

It appears evident that the final implementation of the Speedy Trial Act will cause a greater incidence of pre-accusation delay, because the statute has effectively eliminated the adjudicative process from the determination of what is unreasonable post-indictment delay.[110] The protections of the speedy trial clause are likely to be less frequently invoked, since the dismissal sanctions of the Act provide the ultimate remedy for a defendant who has suffered impermissible post-accusation delay. On the other hand, the defendant who is the victim of pre-accusation delay has no statutory protection to invoke. Instead, he faces the virtual Sisyphean task of meeting the burden of proof inherent in the *Marion* test as it is presently construed.

Once the dismissal sanctions of the Speedy Trial Act become effective, prosecutorial delay will inevitably take place prior to formal accusation, and defendants will be forced to meet the burdens of the *Marion* test to make out a case of intentional prosecutorial delay and concomitant actual prejudice sufficient to warrant a dismissal for what is no less a denial of the right to speedy trial. Since prosecutors will be fearful of the effect of the Act's stringent constraints and penalties once criminal proceedings are initiated by formal accusation, indictments and arrests will be delayed until all possible contingencies in the case are examined and all weaknesses remedied. There will inevitably be no formal accusation until the government's investigation is completed and the case almost totally prepared for trial. If the government is investigating a potential defendant for criminal offenses committed several months or even years before, even though the potential defendant has no knowledge that he is about to be formally

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[109] *See generally id.* at 8011–26. *See also* 65 A.B.A.J. 1497, 1499 (1979).

[110] In fact, in United States v. Howard, 440 F. Supp. 1106 (D. Md. 1977), one judge viewed the stringent time limits prescribed by the Act as constituting "an unconstitutional legislative encroachment on the judiciary" and violative of the doctrine of separation of powers. 440 F. Supp. at 1109. For similar reasons, the court in United States v. Martinez, 538 F.2d 921 (2d Cir. 1976), noted in passing that it viewed the Act as constitutionally suspect. *Id.* at 923.

accused of a crime, when the indictment is issued he will be required to be brought to trial within seventy days.[111] Therefore, this defendant will be forced to prepare his defense within that limited time frame, while the prosecution will have had those months or years of its extended investigation plus seventy days to prepare its case. Yet a defendant in such a situation would be hard-pressed to meet the burdens of the *Marion* test in attempting to prove that the extent and effect of the pre-accusation delay constituted a due process violation. With the *Marion* burden so great, it is urged that the delicate balancing test of *Barker* be made applicable to pre-accusation delay situations in order to neutralize the inherent advantage inuring to the government by the effect of the Speedy Trial Act. The delicate discretionary judgment of the trial court in balancing the factors of the *Barker* standard on a case-by-case basis would be the most effective safeguard of the defendant's constitutional rights which might otherwise be violated by unreasonable pre-accusation delay.

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[111] *See* note 92 *supra*.