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Unavoidable Necessities: How COVID-19 and Ali v. Commonwealth Illustrate the Need for a New Balancing Test for Speedy Trial Right Claims

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COMMENTS

UNAVOIDABLE NECESSITIES: HOW COVID-19 AND *ALI V. COMMONWEALTH* ILLUSTRATE THE NEED FOR A NEW BALANCING TEST FOR SPEEDY TRIAL RIGHT CLAIMS

TABLE OF CONTENTS

INTRODUCTION

The COVID-19 pandemic is still an ever-present phenomenon in the United States.[1] Since the pandemic began in March 2020, over one million Americans have died as a result of this disease.[2] During that time period, the pandemic impacted the everyday lives of Americans and the institutions we depend on.[3] The judicial system in particular was affected by COVID-19. In Virginia, the Supreme Court of Virginia declared a judicial emergency in response to the pandemic.[4] As a result of this judicial emergency, the trials of many criminal defendants were postponed for an indefinite period of time.[5] This resulted in many criminal defendants languishing in jail during the pandemic.[6] Many of these defendants, in Virginia and other states, have challenged their subsequent convictions, arguing that their Sixth Amendment right to a speedy trial was violated when their trials were not allowed to move forward.[7] These challenges have been met with little to no success. On May 31, 2022, the Court of Appeals of Virginia decided a case, *Ali v. Commonwealth*,[8] that sought to bring clarity to the law of the Commonwealth relating to speedy trial rights and COVID-19.

This Comment reviews the *Ali* decision, the history of speedy trial jurisprudence, and the continued impact of *Barker v. Wingo*.[9] In *Barker*, the Supreme Court of the United States set out a four-factor balancing test for analyzing a defendant's speedy trial claim. The court in question looks at the facts of the case and analyze the following: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice suf-

1. As of March 29, 2023, the total number of cases of COVID-19 in the United States is 104,137,196. *COVID Data Tracker Weekly Review*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/ [https://perma.cc/M5CX-H7G9].

2. *COVID Data Tracker*, CDC, https://covid.cdc.gov/covid-data-tracker/#datatracker-home [https://perma.cc/FT8L-QQJV].

3. *See, e.g.,* Michael S. McIntosh & Lauren M. Bridenbaugh, *Virginia Issues "Stay at Home" Executive Order*, LITTLER (March 30, 2020), https://www.littler.com/publication-press/publication/virginia-issues-stay-home-executive-order [https://perma.cc/C6E5-FSYE] (discussing impact of Governor Northam's Executive Order 55 on Virginia residents).

4. Order Declaring a Judicial Emergency in Response to COVID-19 Emergency 1-2 (Va. Mar. 16, 2020).

5. *See id.*

6. *See infra* notes 98–103 and accompanying text.

7. *See, e.g.,* Callender v. State, No. C-02-CR-19-002678, 2021 Md. App. LEXIS 1010, at *1–*2 (Md. Ct. Spec. App. Nov. 18, 2021); United States v. Barela, No. 1:20-cr-01228, 2021 U.S. Dist. LEXIS 225307, at *6 (D.N.M. Nov. 21, 2021).

8. 75 Va. App. 16, 42–45, 872 S.E.2d 662, 675–77 (2022).

9. 407 U.S. 514 (1972).

fered by the defendant.[10] Once the court has completed this analysis, it balances these factors and determines if the defendant's right to a speedy trial had been violated.

Courts have followed this balancing approach for the last fifty years. However, this Comment illustrates how COVID-19 and previous natural disasters have shown that courts should no longer follow the *Barker* four-factor test. Instead, this Comment proposes a similar, but different test: the Unavoidable Necessities Test. Under this test, the government has the burden to show that it was not responsible for an intentional or negligent action that led to the defendant's trial being delayed. If the government intentionally or negligently caused the delay in the defendant's trial, the court would compare the intrinsic importance of the delay, the length of the delay, and its potential for prejudice to the defendant in determining whether the defendant's speedy trial right was violated.

I. HISTORY OF THE SPEEDY TRIAL RIGHT

The right of a criminal defendant to a speedy trial has its roots in early Anglo-American history and society. This principle was first considered and articulated in the Assize of Clarendon of 1166.[11] In this document, the King of England, Henry II, declared his desire for criminal cases to be brought before the King's justices without delay.[12] This declaration of a trial without undue delay was not principally for the benefit of the criminal defendant. Instead, during this period of time, the Assize of Clarendon was mainly used to benefit the King and his progeny.[13] It was not until the signing of the Magna Carta in 1215 that the speedy trial focus centered on the criminal defendant instead of the King.[14] This change occurred because of the broad language used in Chapter 40 of the Magna Carta.[15] In this chapter, King John promised his subjects, at least those within the landed gentry, that neither he nor his followers would "deny or delay right or justice" to them.[16]

10. *Id.* at 530.

11. THE ASSIZE OF CLARENDON (1166), *reprinted in* DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS 69–71 (1999).

12. *Id.* at 70.

13. Natalia Nicolaidis, *The Sixth Amendment Right to a Speedy and Public Trial*, 26 AM. CRIM. L. REV. 1489, 1490 (1989).

14. *See id.* at 1489–90.

15. *See* MAGNA CARTA (1215), *reprinted in* DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS 80–88 (1999).

16. *Id.* at 85.

The Magna Carta did not define "right" or "justice." However, over time, these terms were broadly construed to include justice within the legal system.[17] Therefore, the criminal defendant should also not have justice denied to him or her. Justice for the criminal defendant meant having his or her case heard promptly and without delay. This principle became a staple of the thirteenth century English legal system.[18] However, this principle did not last. Beginning in the fifteenth century and continuing into the sixteenth century, this principle "became dormant."[19] It remained in this state until Sir Edward Coke reinvigorated the right in the seventeenth century.[20]

Through Coke's direct influence, the right to a speedy trial began to be viewed as one of the liberties of English citizens, both in England and in its American colonies.[21] By the time of the American Revolution, the former British American colonies were declaring that the speedy trial right was a right accorded to citizens of their respective states.[22] Upon the completion of the American Revolution and the implementation of a new government for the United States of America, a new founding charter, the United States Constitution, was written in 1787.[23] Many of the Founding Fathers were wary of voting for the Constitution.[24] One of the reasons for this wariness was the fact that the Constitution did not contain a Bill of Rights.[25] After several years of negotiations, the United

17. *See* Nicolaidis, *supra* note 13, at 1489–90.

18. *See* EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 n.8 (Brooke 5th ed. 1797).

19. Nicolaidis, *supra* note 13, at 1490.

20. *Id.* In his multi-volume legal treatise, The Institutes of the Laws of England, Coke discussed in detail the historical basis for the right to a speedy trial. COKE, *supra* note 18, at 45 nn.8–9.

21. *See* Nicolaidis, *supra* note 13, at 1492 n.31. Pennsylvania became the first colony to include the criminal defendant's right to a speedy trial in its founding legal charter. WILLIAM PENN, FRAME OF GOVERNMENT OF PENNSYLVANIA art. VII (May 5, 1682), https://avalon.law.yale.edu/17th_century/pa04.asp [https://perma.cc/A3MS-XT7T] ("That all pleadings, processes and records in courts, shall be short, and in English, and in an ordinary and plain character, that they may be understood, and justice speedily administered.").

22. Nicolaidis, *supra* note 13, at 1494 n.45; GEORGE MASON, VA. DECLARATION OF RIGHTS art. 8 (1776) (noting "[t]hat in all capital or criminal prosecutions a man hath a right to . . . a speedy trial by an impartial jury"); *see also* Darren Allen, Note, *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 CAMPBELL L. REV. 101, 103–04 (2004).

23. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 27–28 (2005); MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 238 (2016).

24. KLARMAN, *supra* note 23, at 546, 552.

25. *Id* at 549.

States Bill of Rights was ratified in 1791.[26] Included in this Bill of Rights, located in the Sixth Amendment, was the right of a criminal defendant to a speedy trial.[27]

II. HISTORY OF SPEEDY TRIAL RIGHT BEFORE THE SUPREME COURT OF THE UNITED STATES

From its inception in 1791 to the mid-twentieth century, the Supreme Court did not review a significant case dealing with the speedy trial right of a federal criminal defendant under the Sixth Amendment.[28] During this time little development in speedy trial rights jurisprudence took place. The Court briefly delved into the meaning of the speedy trial clause in the Sixth Amendment in the 1905 case of *Beavers v. Haubert*.[29] In that case, the Court for the first time explained that the speedy trial right was relative and dependent on the circumstances of each case.[30] Therefore, the right was, according to the Court, consistent with delays.[31] The right also did not preclude "public justice," the balancing of the speedy trial right with societal and governmental interests in a criminal trial.[32]

Commentators in analyzing this decision have concluded that the lasting influence of *Beavers* was to ensure the perspective that the speedy trial right "was not as important as other procedural rights accorded criminal defendants through the Bill of Rights."[33] Lower courts also began to view the speedy trial in a similar fashion. The right to a speedy trial began to be treated as flexible and

26. G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME 1: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 181 (2012).

27. U.S. CONST. amend. VI.

28. *See* Nicolaidis, *supra* note 13, at 1495–96.

29. 198 U.S. 77 (1905).

30. *Id.* at 87.

31. *Id.*

32. *Id.*; *see also* ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 159 (1992). In 1925, the Court of Appeals for the Eighth Circuit explained why it was important to balance the defendant's speedy trial right with public justice, an explanation that is as timely today as it was at the time it was given:

> Speed in trying accused persons is not of itself a primal and separate consideration. Justice, both to the accused and to the public, is the prime consideration. Such speed is merely an important element or attribute of justice. If either party is forced to trial without a fair opportunity for preparation, justice is sacrificed to speed. But when both parties have had fair opportunity for preparation, then either has a legal right to demand a trial as soon as the orderly conduct of the business of the court will permit.

Frankel v. Woodrough, 7 F.2d 796, 798 (8th Cir. 1925).

33. GARCIA, *supra* note 32, at 159.

context-dependent, leading courts to do away with it in certain circumstances. Essentially, the speedy trial right after *Beavers* began to be viewed as more of "a privilege rather than a right."[34]

Little else was done in terms of speedy trial rights jurisprudence until the mid-1960s.[35] The Earl Warren-led Supreme Court finally turned its attention to the speedy trial right in its decision in *United States v. Ewell*.[36] In *Ewell*, the Court found that the speedy trial right was an "important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[37] However, the Court refused to create a requirement to bring a defendant to trial within a certain period of time. The Court explained that "[a] requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself."[38] Echoing *Beavers*, the Court noted that the speedy trial right was relative, depends on the circumstances of each case, and does not preclude the rights of public justice.[39]

A year after deciding *United States v. Ewell*, the Supreme Court again had a speedy trial violation claim before it in *Klopfer v. North Carolina*.[40] Analyzing the history of the speedy trial right previously discussed,[41] the Court for the first time in its history recognized the speedy trial right of a criminal defendant as a fundamental right.[42] The Court incorporated the right to a speedy trial under the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment.[43] Now *all* criminal defendants had the right to a speedy trial. One commentator viewed the

34. *Id.* (quoting FRANCIS HOWARD HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 61 (Greenwood Press 1969) (1951)).

35. *See* Nicolaidis, *supra* note 13, at 1495–96.

36. 383 U.S. 116 (1966).

37. *Id.* at 120.

38. *Id.*

39. *Id.*

40. 386 U.S. 213 (1967).

41. See *supra* notes 11–27 and accompanying text.

42. *Klopfer*, 386 U.S. at 223, 226 ("The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution.")

43. G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME III: 1930–2000, at 562 (2016); PAUL MARCUS, DAVID K. DUNCAN, TOMMY MILLER, AND JOËLLE ANNE MORENO, THE RIGHTS OF THE ACCUSED UNDER THE SIXTH AMENDMENT 1 (3d ed. 2021).

Klopfer v. North Carolina decision as an "infusion of life" into the speedy trial right.[44]

This infusion of life created new questions for the Court: (1) when did the speedy trial right attach to the criminal defendant? and (2) what would be the proper remedy for a speedy trial right violation?[45] Shortly after *Klopfer*, the Court answered one of these questions and was able to move towards an answer for the other.[46] With regard to the first question, the Court determined that the right to a speedy trial would only attach after a defendant was charged or arrested for a crime.[47] Regarding the second question, the Court in *Dickey v. Florida* dismissed the charges of the defendant for a speedy trial violation.[48] At the time, the Court did not say this was required in every case, but the Court eventually took this position three years later.[49]

Dickey is not just notable for being a precursor to the Court's decision in *Strunk v. United States* regarding remedies for speedy trial violations. It is also notable for Justice Brennan's concurring opinion, which, as one commentator remarked, sought "to provide a more coherent framework" for speedy trial jurisprudence.[50] Justice Brennan believed that there were two issues involved in speedy trial jurisprudence: "those concerned with when during the criminal process the speedy-trial guarantee attaches . . . and . . . those concerned with the criteria by which to judge the constitutionality of the delays to which the right does attach."[51] For Justice Brennan, the speedy trial clause of the Sixth Amendment was "intended" to protect individual criminal defendant's interests, including their interest in being spared "those penalties and disabilities—incompatible with the presumption of innocence—that may spring from delay in the criminal process."[52] He, however, noted

44. GARCIA, *supra* note 32, at 160.

45. The second question was first articulated by Justice John Marshall Harlan in in his concurring opinion in *Smith v. Hooey*. 393 U.S. 374, 384 (1969) (Harland, J., concurring).

46. *See* GARCIA, *supra* note 32, at 162–63.

47. United States v. Marion, 404 U.S. 307, 313 (1971); MARCUS ET AL., *supra* note 43, at 2. Attachment of the speedy trial right was further clarified by the Court a few years after the *Marion* opinion. The Court found that the right attached prior to indictment. Dillingham v. United States, 423 U.S. 64, 65 (1975).

48. 398 U.S. 30, 37–38 (1970).

49. *See* Strunk v. United States, 412 U.S. 434, 439 (1973).

50. GARCIA, *supra* note 32, at 161.

51. *Dickey*, 398 U.S. at 41 (Brennan, J., concurring).

52. *Id.* Justice Brennan, citing *Ewell* and *Klopfer*, explained that the penalties and disabilities he was noting included undue and oppressive incarceration prior to trial, anxiety

that society has several interests involved in speedy trial jurisprudence as well, including effective prosecution of criminal cases and preventing defendants who are at large from committing other criminal acts.[53]

After discussing when he thought the right to a speedy trial should attach, Justice Brennan moved to his government delay analysis. He quickly discussed his views on deliberate governmental delay,[54] and whether silence on part of the defendant equals a waiver of their right to a speedy trial,[55] before turning to what he thought constituted a reasonable delay and what did not.[56] For Justice Brennan, a deliberate act done by the government to delay the defendant's trial was unjustifiable, as was any act that the government took that was objectively "purposeful or oppressive."[57] Justice Brennan then used this thought process and applied it to government delay that he viewed as "unnecessary."[58] An unnecessary delay could come about due to either intentional or negligent action on the part of the government.[59]

For Justice Brennan, the question of determining an unnecessary delay was to determine whether than delay was reasonably avoidable.[60] Justice Brennan, in concluding what delay is reasonably avoidable and what delay is not, would consider "the intrinsic importance of the reason for the delay" and "the length of the delay

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and concern accompanying public accusation, public scorn, deprivation employment, and curtailment of speech, associations and participation in unpopular causes. *Id.* at 41–42.

53. *Id.* at 42.

54. *Id.* at 46 (noting "[d]eliberate governmental delay designed to harm the accused, however, constitutes abuse of the criminal process" and "lessens the deterrent value of any conviction obtained").

55. Justice Brennan rejected the view that the defendant's speedy trial claim should be denied because he chose to remain silent. In *Dickey*, he articulated three reasons why he rejected this view: (1) it "rests on what may be an unrealistic understanding of the effect of delay"; (2) "the equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake"; and (3) "the implication of waiver from silence or inaction misallocates the burden of ensuring a speedy trial." *Id.* at 48–50. Regarding the first point, Justice Brennan observed that some courts had held to the mistaken belief that delay inherently benefitted the accused. Justice Brennan rejected this view and noted that "delay does not inherently benefit the accused any more than it does the prosecution." *Id.* at 49. Regarding the second point, Justice Brennan believed that affirmative action was needed to waive a fundamental right, but not to preserve that right. *Id.* at 49–50. Concerning the third point, he noted that the accused is not responsible for bringing himself to trial; rather, it is the responsibility of the prosecution to bring the accused to trial. *Id.* at 50.

56. *Id.* at 51–52.

57. *Id.* at 51 (quoting Pollard v. United States, 352 U.S. 354, 361 (1957)).

58. *Dickey*, 398 U.S. at 52.

59. *Id.* at 51.

60. *Id.* at 52.

and its potential for prejudice to interests protected by the speedy-trial safeguard."[61] Brennan's last note on government delay is especially prudent to the subject of this Comment. He observed that "[f]or a trivial objective, almost any delay could be reasonably avoided" and that for lengthy delays, even those "in the interest of realizing an important objective, would be suspect."[62]

The rest of Justice Brennan's concurrence in *Dickey v. Florida* details his belief that establishing prejudice in a speedy trial claim can be unsatisfactory because, in most cases, "concrete evidence of prejudice is often not at hand."[63] He also questioned having a defendant show prejudice in a speedy trial claim because a defendant did not have to show prejudice in regard to his other Sixth Amendment rights.[64] To Justice Brennan, a denial of any of the rights protected by the Sixth Amendment leads to the logical conclusion that the defendant has been prejudiced.[65] This assumption of prejudice is necessary because otherwise "constitutional rights will be denied without remedy."[66] Justice Brennan concludes that once a defendant has shown that he was denied a "rapid prosecution," the Court should assume that he had been prejudiced by that delay.[67]

Justice Douglas, citing Justice Brennan's concurrence in *Dickey*, put this view forward in his own concurring opinion in *United States v. Marion*.[68] Justice Douglas noted, as Justice Brennan did

61. *Id.*

62. *Id.*

63. *Id.* at 53.

64. *Id.* at 54. A defendant need not show prejudice in a claim based on a defendant's Sixth Amendment right to a public trial. *See* Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944) (finding that defendant need not show actual prejudice when a court fails to admit jurors to defendant's trial). In considering whether the defendant has been adequately informed of the charges against him or her, as required by the Sixth Amendment, the court does not appear to consider evidence of prejudice. Alan L. Schneider, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 493–94 n.131 (1968) (first citing United States v. Seeger, 303 F.2d 478 (2d Cir. 1962); and then citing United States v. Lattimore, 215 F.2d 847 (D.C. Cir. 1954)). In a claim focusing on his or her right Sixth Amendment right to counsel, a criminal defendant is not required to show prejudice to his or her case. Schneider*, supra*, at 495 n.131 (citing Hamilton v. Alabama, 368 U.S. 52 (1961)); United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006) ("Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.").

65. *Dickey*, 398 U.S. at 54–55 ("Because potential substantial prejudice inheres in the denial of any of these safeguards, prejudice is usually assumed when any of them is shown to have been denied.")

66. *Id.* at 55. Justice Brennan also noted that "[p]rejudice is an issue, as a rule, only if the government wishes to argue harmless error." *Id.*

67. *Id.*

68. 404 U.S. 307, 334 (1971) (Douglas, J., concurring).

in *Dickey*, that he would determine the reasonableness of a delay caused by the government by analyzing whether that delay was necessary.[69] To Justice Douglas, as to Justice Brennan, an unnecessary delay, where intentional or negligent in nature, was still unjustifiable.[70]

The respective concurrences of Justice Brennan and Justice Douglas somewhat influenced the way the Supreme Court viewed the speedy trial right. The delay portion of Justice Brennan's analysis in *Dickey*, also used by Justice Douglas in *Marion*, was included in a new Supreme Court balancing test that was articulated in the 1972 decision *Barker v. Wingo*.[71] This test would balance four factors to consider whether the accused's speedy trial claim would be successful: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice suffered by the defendant.[72]

The Court found that the length of the delay would be a triggering mechanism to the rest of the balancing test.[73] If the length of the delay was not presumptively prejudicial then the Court could stop its analysis before reaching the other factors.[74] If the accused was able to show that the length of delay was presumptively prejudicial, then the Court would begin to analyze the reason for the delay.

Under this portion of the *Barker* test, a "deliberate attempt to delay the trial" by the prosecution with the goal to "hamper the defense" would weigh "heavily against the government."[75] However, a "neutral reason such as negligence or overcrowded courts" would weigh "less heavily" in the analysis, but that reason would be "considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."[76] Additionally, the Court noted that there could be a valid reason for a delay in bringing the accused to trial.[77]

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69. *Id.*
70. *Id.*
71. *See* 407 U.S. 514, 530 n.30 (1972).
72. *Id.* at 530.
73. *Id.*
74. *Id.*
75. *Id.* at 531.
76. *Id.*
77. The Court explained that a missing witness for the prosecution or defense could give rise to a valid delay under this framework. *Id.*

After reviewing the reason for the delay, the Court would review whether the defendant asserted his right to a speedy trial. The Court emphasized that the "more serious the deprivation" is on the defendant, the more he is likely to complain about his speedy trial rights being violated.[78] In this scenario, "[t]he defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right."[79] If a defendant failed to assert his speedy trial right "that failure . . . will make it difficult for [him] to prove that he was denied a speedy trial."[80]

Lastly, if the other three factors were met, the Court would analyze whether there was prejudice to the defendant in denying his speedy trial right. Prejudice would be "assessed in the light of the interests of defendants which the speedy trial right was designed to protect."[81] These three interests were the following: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired.[82] The Court noted that the most important of these interests was limiting the possibility that the defense would be impaired by the delay.[83] However, it also explained that none of the prejudice factors were "necessary or sufficient" to finding that a defendant's speedy trial rights had been violated.[84] These prejudice factors are merely "related" to one another and will have to be considered in addition to the circumstances of each case.[85]

Upon completing this four-part analysis, should the case require it, the Court will balance the four factors and decide whether the defendant's right to a speedy trial had been violated. This balancing approach to speedy trial jurisprudence has been the law of the land for the last fifty years. Many state courts, including those in Virginia, when analyzing constitutional speedy trial claims, have used the *Barker* framework.[86]

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78. *Id.*
79. *Id.* at 531–32
80. *Id.* at 532.
81. *Id.*
82. *Id.*
83. *Id.* ("[T]he most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.").
84. *Id.* at 533.
85. *Id.*
86. *See infra* Part V.

III. NOTABILITY OF *BARKER* TEST AND ITS CONTINUED USE AND INFLUENCE

The *Barker* test is notable for several reasons. The test constituted a rejection in part of Justice Brennan's views on speedy trial jurisprudence. The Court rejected Justice Brennan's views in *Dickey* on the defendant asserting his speedy trial rights.[87] Under *Barker*, a criminal defendant would have to take affirmative action to preserve his fundamental right to a speedy trial. If he remained silent or did not take action, then that silence or inaction would be weighed against him during his speedy trial claim. The *Barker* test also focuses on the ability of the accused to show he was prejudiced by the delay in his trial. This inclusion of the defendant having to show prejudice in his claim is directly in contrast with Justice Brennan's view that evidence of concrete prejudice is almost never at hand.

The *Barker* test as a whole is also notable because the Supreme Court has rejected similar "balancing" tests in other contexts. For example, the Court created a balancing test in *Ohio v. Roberts* when dealing with confrontation right claims under the Sixth Amendment.[88] Under this test, when "a hearsay declarant is not present for cross-examination at trial," the hearsay statement is "admissible only if it bears adequate 'indicia of reliability.'"[89] The Court stated that in some cases it could determine reliability through inference, especially "where the evidence falls within a firmly rooted hearsay exception" or if the statements bear "particularized guarantees of trustworthiness."[90] Decades later, the Supreme Court, in *Crawford v. Washington*, reversed course and found that this "reliability" standard was too "malleable."[91] The Court found that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[92] In essence, the Court declared that the defendant's Confrontation Right under the Sixth Amendment could not be set aside just because certain hearsay is reliable.

87. *See supra* notes 78–80 and accompanying text.
88. 448 U.S. 56, 66 (1980).
89. *Id.* at 66.
90. *Id.*
91. 541 U.S. 36, 60 (2004).
92. *Id.* at 68–69.

Considering *Crawford*, it is surprising that the Court continues to adhere to the *Barker* test. Indeed, by continuing to adhere to the *Barker* test, both the federal government and the states are signaling that a defendant's Sixth Amendment right to a speedy trial is a privilege, or at the very least a second-citizen's right. This is especially true if we consider the continued use of *Barker* in speedy trial claims that arose out of the COVID-19 pandemic.

IV. COVID-19 AND *BARKER*

The spread of COVID-19 began in early 2020.[93] It started in Wuhan, China before spreading across the world and affecting life on the global scale.[94] The World Health Organization declared COVID-19 to be a pandemic on March 11, 2020.[95] Since the beginning of the pandemic, over one million Americans have died, either directly or indirectly because of the disease.[96]

Not surprisingly, COVID-19 had a severe impact on the criminal justice system of the United States. Some appellate courts adapted to the changing environment caused by COVID-19 by hearing oral arguments via video-conferencing.[97] However, at the trial court level, the administration of justice in the United States essentially ceased. Many courts delayed trials and hearings.[98] Some of these delays lasted until the summer of 2020, while others lasted longer.[99] During this time, courthouses were closed down as well.[100] These delays and closures did not mean that cases and claims ceased coming to the courts. It just meant that courts closed down and did not hear these cases and claims. As a result, the judicial backlog of cases grew ever larger.[101] The growing backlog also led

93. *A Timeline of COVID-19 Developments in 2020*, AJMC (Jan. 1, 2021), https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020 [https://perma.cc/EKL3-8BNE].

94. *Id.*

95. *Id.*

96. *COVID Data Tracker*, *supra* note 2.

97. *See State Court Closures in Response to the Coronavirus (COVID-19) Pandemic Between March and November, 2020*, BALLOTPEDIA, https://ballotpedia.org/State_court_closures_in_response_to_the_coronavirus_(COVID-19)_pandemic_between_March_and_November,_2020 [https://perma.cc/ND6S-CKJE] (Nov. 4, 2020).

98. David W. Austin & Mark E. Wojcik, Amer. Bar Ass'n Crim. Section, *Criminal Justice in a Time of Pandemic*, *in* THE STATE OF CRIMINAL JUSTICE 2020 103 (Mark E. Wojcik ed., 2020); *see also* Order Declaring a Judicial Emergency in Response to COVID-19 Emergency, *supra* note 4, at 1–2.

99. Austin & Wojcik, *supra* note 98, at 103.

100. *Id.*

101. THOMSON REUTERS INST., THE IMPACTS OF THE COVID-19 PANDEMIC ON STATE & LOCAL COURTS STUDY 2021: A LOOK AT REMOTE HEARINGS, LEGAL TECHNOLOGY, CASE

to hundreds, if not thousands, of criminal defendants languishing in pretrial incarceration during a pandemic without the ability to have their cases heard.[102]

It took some time for the United States to get the pandemic under control, or at least under enough control to allow jury trials to resume.[103] For example, Alabama did not resume having in-person jury trials until mid-September 2020.[104] Other states, like Alaska and Massachusetts, delayed criminal trials until the fall and winter of 2020.[105] Many criminal defendants moved to dismiss their cases for violations of their rights to a speedy trial since their cases were not heard in a timely fashion due to the pandemic.[106] Most courts, upon reviewing a speedy trial claim, used the *Barker* test to determine whether the defendant's speedy trial right was in act violated. Using *Barker*, these courts found that the delay caused by COVID-19 was justifiable and out of the government's control.[107] Therefore, most of these motions were unsuccessful.[108] Defendants would find very little success in appealing these decisions as well.[109] A recent decision by the Court of Appeals of Virginia is illustrative of the continuing influence and use of the *Barker* test in analyzing speedy trial claims.

A. *COVID-19,* Barker*, and Virginia*

On May 31, 2022, the Court of Appeals of Virginia published its opinion in the case of *Ali v. Commonwealth*.[110] Ali had been arrested in October 2019 on a charge of malicious wounding.[111] Ali

BACKLOGS, AND ACCESS TO JUSTICE 4 (2021), https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/white-papers/covid-court-report_final.pdf [https://perma.cc/QM6Q-Y72W].

102. *Id.*; Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. L. REV. ONLINE 59, 72 (2020).

103. *See State Court Closures in Response to the Coronavirus (COVID-19) Pandemic Between March and November, 2020*, *supra* note 97.

104. *Id.*

105. *Id.* Alaska resumed misdemeanor jury trials in November 2020, but did not resume felony jury trials until early 2021. *Id.*

106. *See e.g.*, United States v. Morgan, 493 F. Supp. 3d 171, 189 (W.D.N.Y. 2020).

107. *See e.g.*, State v. Rodriguez, No. 1811005093, 2021 Del. Super. LEXIS 270, at *7–13, 18 (Del. Super. Ct. Mar. 30, 2021); United States v. Barela, 20-cr-01228, 2021 U.S. Dist. LEXIS 225307, at *14 (D.N.M. Nov. 21, 2021).

108. *See e.g.*, Rodriguez, 2021 Del. Super. LEXIS 270, at *18 ; Barela, 2021 U.S. Dist. LEXIS 225307, at *40.

109. *See e.g.*, State v. Brown, 964 N.W.2d 682, 688, 694 (Neb. 2021).

110. 75 Va. App. 16, 872 S.E.2d 662 (2022).

111. *Id.* at 27, 872 S.E.2d at 667.

was denied bail.[112] A preliminary hearing for Ali's case was set, but it was continued several times.[113] In March 2020, the district court certified the charge of malicious wounding to the grand jury.[114] Subsequently, on March 16, 2020, an indictment for Ali came from the grand jury.[115]

The same day Ali's indictment took place, the Supreme Court of Virginia issued its first judicial emergency order in response to the COVID-19 pandemic.[116] In this order, the supreme court restricted trials and non-emergency proceedings in the Commonwealth from moving forward.[117] To be able to resume jury trials, circuit courts had to receive written approval from the supreme court on a plan that would detail how the circuit would conduct their trials safely during the pandemic.[118] A few days after this order from the supreme court was released, Ali's attorney withdrew from the case.[119] A month later, a status hearing for Ali took place and his jury trial was set for August 2020.[120] Ali agreed that his speedy trial rights had been tolled since his last attorney had withdrawn from the case.[121] However, he noted that he was objecting to the continuance of his case from that date forward.[122] In July 2020, the August trial date was continued to October 2020 over Ali's objection.[123] The court justified this continuance on the continuing prevalence of the COVID-19 pandemic.[124]

In September 2020, the Fairfax County Circuit Court received approval from the supreme court on its written plan to resume jury trials.[125] Ali's case, in order to implement the jury trial plan, was continued until November 9, 2020.[126] By this time, Ali had put forward a motion to dismiss his case based on a violation of his "con-

112. *Id.*
113. *Id.*
114. *Id.* at 27, 872 S.E.2d at 668.
115. *Id.*
116. *See* Order Declaring a Judicial Emergency in Response to COVID-19 Emergency, *supra* note 4.
117. *Ali*, 75 Va. App. at 27, 872 S.E.2d at 668.
118. *Id.* at 27–28, 872 S.E.2d at 668.
119. *Id.* at 28, 872 S.E.2d at 668.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*

stitutional and statutory speedy trial" rights.[127] This motion was denied and Ali's trial started on November 9, 2020, a year after his arrest for malicious wounding.[128] During trial, Ali again put forward his motion to dismiss based on a violation of his speedy trial rights.[129] Again, this motion was denied.[130] After hearing all of the evidence, the jury found Ali guilty of the lesser-included offense of unlawful wounding and recommended that he serve five years in prison.[131]

Ali appealed the circuit court's denial of his motion to dismiss.[132] The Court of Appeals of Virginia first reviewed Ali's statutory speedy trial argument.[133] The court noted that it gave "deference to the trial court's factual findings but reviews legal issues *de novo*, including questions regarding the proper construction of a statute[,]" in this case Virginia's speedy trial statute, Code of Virginia section 19.2-243.[134] The court concluded that Ali's statutory speedy trial rights were not violated, finding in part that the provisions of the speedy trial statute did not apply because the "failure to try the accused was caused . . . [b]y a natural disaster."[135]

Additionally, the court reasoned that the Chief Justice of the Supreme Court of Virginia had the statutory authority "to declare a 'judicial emergency' in the event of 'a disaster, as defined in Code [section] 44-146.16,' when that disaster 'substantially endangers or impedes' certain specified 'operation[s] of a court.'"[136] Finding that the COVID-19 pandemic fit within the definition of "disaster" under Code section 44-146.16, the court of appeals then reviewed the judicial emergency orders of the Supreme Court of Virginia.[137] The court of appeals determined that the supreme court had restricted jury trials, subject to the defendant's constitutional, not statutory, speedy trial rights.[138] Therefore, the court of appeals concluded

127. *Id.*
128. *Id.*
129. *Id.* at 29, 872 S.E.2d at 668.
130. *Id.*
131. *Id.* at 28–29, 872 S.E.2d at 668.
132. *Id.* at 29, 872 S.E.2d at 668.
133. *Id.*, 872 S.E.2d at 669.
134. *Id.* at 29, 872 S.E.2d at 669.
135. *Id.* at 30–31, 872 S.E.2d at 669–70 (alteration in original) (citing VA. CODE ANN. § 19.2-243(7) (Repl. Vol. 2015)).
136. *Id.* at 30, 872 S.E.2d at 669 (alteration in original) (citing VA. CODE ANN. § 17.1-330(A) (Repl. Vol. 2020)).
137. *Id.* at 30–31, 872 S.E.2d at 669.
138. *Id.* at 31, 872 S.E.2d at 670.

that the trial court had not erred in ruling that Ali's statutory speedy trial right had not been violated.[139]

The court of appeals then turned its review to Ali's constitutional speedy trial rights claim.[140] The court, under traditional Virginia appellate review standards, reviewed Ali's constitutional claims *de novo*.[141] The court observed that under federal law and Virginia law, the right to a speedy trial is a fundamental right.[142] It also noted that the speedy trial right under the Sixth Amendment to the United States Constitution and the Virginia Constitution are "coextensive."[143] The court, adhering to the reasoning in *Barker v. Wingo*, then went on to explain that speedy trial analysis is "sometimes 'consistent with delays.'"[144] It then reviewed Ali's case using the *Barker* four factor test.[145]

Using the length of delay in Ali's case, the Court of Appeals of Virginia determined that the trial court was correct when it found that Ali's pretrial delay of one year was presumptively prejudicial under *Barker*.[146] The court, in analyzing the reason for the presumptive prejudicial delay in this case, reviewed the timeline of Ali's case and concluded that eleven months of the delay were attributable to the Commonwealth.[147] Of these eleven months, three were "attributable to the Commonwealth as a result of the pandemic, and about eight months . . . occurred in the ordinary course of the administration of justice."[148]

Upon this finding, the court assessed whether the delay attributed to the Commonwealth was justifiable under *Barker*.[149] Recognizing the three different reasons for delay under *Barker*, the court

139. *Id.*

140. *Id.* at 33, 872 S.E.2d at 671.

141. *Id.*

142. *Id.* at 34, 872 S.E.2d at 671.

143. *Id.*

144. *Id.* (quoting Barker v. Wingo, 407 U.S. 514, 522 (1972)). The Court of Appeals of Virginia detailed why the speedy trial right analysis is consistent with delays. It noted: "[a] key difference between the right to a speedy trial and other constitutional rights afforded an accused is that a supposed 'deprivation' of the speedy trial right 'does not per se prejudice the accused's ability to defend himself' and 'may [actually] work to [his] advantage.'" *Id.* (alteration in original) (quoting *Barker*, 407 U.S. at 521).

145. *Id.* at 35–52, 872 S.E.2d at 671–80.

146. *Id.* at 35–36, 872 S.E.2d at 672.

147. *Id.* at 41–42, 872 S.E.2d at 675.

148. *Id.* The court assumed without deciding much of the time period that eventually made up the eight months of ordinary business administration. *See id.* at 37–38, 40–41, 872 S.E.2d at 672–75.

149. *Id.* at 42, 872 S.E.2d at 675.

concluded that "the pandemic justified appropriate delay under the third category, which encompasses 'valid' reasons for delay that are not directly attributable to the government."[150] It also noted that the delay in Ali's case "did not involve either intentional harm or negligence toward the defendant."[151] The court reasoned that "the pandemic made it unsafe for all witnesses and other trial participants to come to court for a period of time, rendering them justifiably absent to protect their 'health and safety.'"[152] Therefore, the trial court was correct in finding that the delay due to the pandemic was valid and "outside the Commonwealth's control."[153] The court of appeals also determined that the other eight months of ordinary business administration was valid and unavoidable.[154]

Looking at the second-to-last factor of the *Barker* test, the court concluded that the defendant's assertion of his right to a speedy trial deserved less weight in the *Barker* analysis because he did not assert the right until the pandemic had "severely limited the possibility that he could be tried promptly."[155] Turning to its prejudice analysis, the court reviewed Ali's argument that he had been prejudiced by the delay in his trial. Ali argued that his incarceration throughout the pretrial period was "oppressive" and "limited his ability to interact" with his new lawyer.[156] He also argued his pretrial detention was difficult because of the pandemic-related restrictions at the center at which he was held.[157] Ali specifically mentioned that he was unable to adequately prepare his defense because of his inability to have access to the law library at the detention center.[158] The court of appeals found this example, and others given by Ali to the trial court,[159] insufficiently recorded by the

150. *Id.* at 43, 872 S.E.2d at 675 (citing Barker v. Wingo, 407 U.S. 514, 531 (1972)). The court noted that several other courts have come to the same conclusion when confronted with a speedy trial claim in light of the COVID-19 pandemic. *Id.* at 43–44, 872 S.E.2d at 675–76 (citing United States v. Smith, 494 F. Supp. 3d 772, 783 (E.D. Cal. 2020); State v. Brown, 964 N.W.2d 682, 692-93 (Neb. 2021)).

151. *Ali*, 75 Va. App. at 43, 872 S.E.2d at 675.

152. *Id.* at 44, 872 S.E.2d at 676 (citing United States v. Morgan, 493 F. Supp. 3d 171, 190, 219 (W.D.N.Y. 2020)).

153. *Ali*, 75 Va. App. at 45, 872 S.E.2d at 676.

154. *Id.* at 45, 872 S.E.2d at 676–77.

155. *Id.* at 46, 872 S.E.2d at 677.

156. *Id.* at 49, 872 S.E.2d at 678.

157. *Id.* at 49, 872 S.E.2d at 679.

158. *Id.*

159. *Id.* at 50, 872 S.E.2d at 679 n.18. At trial, Ali had alleged that his pretrial incarceration had "caused him 'worry' and 'panic' in part because he was 'in a situation' during the pandemic that was '[not] completely safe.'" *Id.* (alteration in original) Ali also alleged that "the inmates had 'been unable to leave their cells,' 'call their lawyers,' 'have contact

evidence in the record and did not provide sufficient proof of specific prejudice.[160]

Considering all of the *Barker* factors together, the court found that, like his statutory right to a speedy trial, Ali's constitutional right to a speedy trial was not violated.[161] Therefore, the court affirmed his conviction.[162]

V. APPLYING THE UNAVOIDABLE NECESSITIES TEST TO *BARKER* AND *ALI*

As *Ali* demonstrates, *Barker* is still alive and well. In doing so, *Ali* also demonstrates the continued view that the speedy trial right is actually a privilege rather than a right. This must change. The *Barker* test is too malleable, and the result is the speedy trial right as a second-citizen's right, or rather second-citizen's privilege. Indeed, one need only look at the *Barker* decision itself to see this point exemplified. The Court somehow concluded that a five-year period between the defendant's arrest and his trial was not a violation of the defendant's speedy trial right. This, I argue, is the definition of a malleable balancing test that the Court and other courts should replace with a test that will actually protect a criminal defendant's constitutionally protected right to a speedy trial. This new test is not necessarily new. In fact, it in part predates the *Barker* test and is centered around Justice Brennan's concurrence in *Dickey v. Florida* and Justice Douglas's concurrence in *United States v. Marion*.

Justice Brennan's concurrence in *Dickey* put forward a potential test to review when a government delay is reasonable, a viewpoint that Justice Douglas relied on in his concurrence in *Marion*.[163] This test, as mentioned previously, would focus on whether the government delay was unnecessary.[164] Justice Brennan thought that one

meeting[s] with their lawyer[s],' or 'be visited by family and friends.'" *Id.* (alterations in original). The Court of Appeals of Virginia found that Ali "did not, however, offer evidence to prove these allegations or explain any *specific* ways in which these alleged limitations impaired his ability to prepare his defense." *Id.* (emphasis in original).

160. *Id.* at 49–50, 872 S.E.2d at 678–679 (holding that "these very general limitations asserted by the appellant do not meet the standard for proving the required degree of prejudice with regard to any of the three interests identified in *Barker*.").

161. *Id.* at 52–53, 872 S.E.2d at 680.

162. *Id.* at 53, 872 S.E.2d at 680.

163. Dickey v. Florida, 398 U.S. 30, 52 (1970) (Brennan, J., concurring); United States v. Marion, 404 U.S. 307, 334 (1971) (Douglas, J., concurring).

164. *Dickey*, 398 U.S. at 52.

could determine the reasonableness of the governmental delay by comparing "the intrinsic importance of the reason for the delay, and . . . the length of the delay and its potential for prejudice to interests protected by the speedy-trial safeguard."[165] Justice Brennan reasoned that in cases of "trivial" objectives, "almost any delay could be reasonably avoided."[166] He also noted that a "'lengthy delay, even in the interest of realizing an important objective, would be suspect.'"[167]

Therefore, the test I propose for future speedy trial claims is the Unavoidable Necessities Test. In order to apply this test, the court would first have to determine if there was a delay in bringing the defendant to trial. The court would then only apply this test if the delay was due to an intentional or negligent act taken or not taken by the government. Once these threshold requirements are met, the court would compare the importance of the delay, the length of the delay, and its potential for prejudice.[168] If the delay, whether intentionally or negligently caused by the government, was unnecessary then the speedy trial claim of the defendant should be upheld. Under this test, unlike *Barker*, the defendant would not have to assert his right to a speedy trial or show actual prejudice to his case. As Justice Brennan observed in *Dickey v. Florida*, affirmative action to preserve a fundamental right should not be required and evidence of prejudice is "often not at hand."[169]

To illustrate this test, I will apply it to the facts of *Barker* and then *Ali*. In *Barker*, the prosecution intentionally delayed Barker's trial until it could get a conviction of one of Barker's cohorts.[170] Once it got the cohort's conviction, the prosecution brought Barker to trial. Under the Unavoidable Necessities Test, we first start our analysis with determining whether there was a delay and whether it was intentional or negligent. In this case, there was an intentional delay on the part of the government in bringing Barker to

165. *Id.* Justice Douglas cited this exact language in his concurrence in *Marion*. *Marion*, 404 U.S. at. 334.

166. *Dickey*, 398 U.S. at 52.

167. *Id.*

168. I argue that there is inherent prejudice involved in every criminal case for the defendant. The social stigmatization, economic hardships, and personal anxiety on the part of the accused is inherent when one is accused, arrested, and charged with a crime. For more information on the stigmatization of criminal defendants, exonerees, and those accused of criminal acts, see Isabella M. Blandisi, Kimberley A. Clow & Rosemary Ricciardelli, *Public Perceptions of the Stigmatization of Wrongly Convicted Individuals: Findings from Semi-Structured Interviews*, 20 QUALITATIVE REP. 1881 (2015).

169. *Dickey*, 398 U.S. at 53.

170. Barker v. Wingo, 407 U.S. 514, 516 (1972).

trial because the government wanted to obtain the conviction of Barker's cohort before trying Barker himself. Next, we turn to analyze the intrinsic importance of the reason for the delay. In Barker's case, the importance of the delay was, as noted previously, to obtain the conviction of Barker's cohort.

Thirdly, we look at the length of the delay and its potential for prejudice. In *Barker*, the length of the delay was over five years.[171] What is the potential for prejudice in a five-year period? The defendant could face the potential of several forms of prejudice, including to his social relationships, his freedom of movement, economic hardship, and anxiety caused by public accusation of a crime, among others.[172] The court would also have to take into account possible memory lapses of witnesses to the defendant's crime.[173] However, under this test, Barker would not have to show actual prejudice, but rather the court would analyze the possibility and potential of prejudice along the lines mentioned in the previous two sentences.

Lastly, the court would compare these factors and if, under the facts of the case, the delay was deemed unnecessary, the court would find for the defendant's speedy trial claim. Under the Unavoidable Necessities Test, Barker's right to a speedy trial claim would likely be successful. The intrinsic importance of getting the conviction of Barker's cohort simply does not weigh more than the length of Barker's delay and the potential for prejudice to Barker due to that delay. Such a delay would be unquestionably unnecessary. *Barker* would be a straightforward application of the Unavoidable Necessities Test. *Ali* would be a much closer call, as would all cases coming before a court due to the delay caused by COVID-19.

In *Ali*, the defendant's jury trial did not take place until November 2020, over a year after his arrest.[174] Therefore, under the Unavoidable Necessities Test, the first part in our analysis is already determined. Ali's case involved a delay in bringing his case to trial.

171. *Id.* at 533.
172. Berry v. State, 93 P.3d 222, 237 (Wyo. 2004).
173. *Barker*, 407 U.S. at 532.
174. *Ali v. Commonwealth*, 75 Va. App. 16, 28, 872 S.E.2d 662, 668 (2022).

A. *Intentional or Negligent Action Leading to Delay*

However, to be able to apply the Unavoidable Necessities Test, we must determine if the delay was due to intentional or negligent action on the part of the government. The Court of Appeals of Virginia found that the delay resulting from the COVID-19 pandemic and that the ordinary course of business administration in Ali's case did not illustrate intentional or negligent action on the part of the government.[175] The court's conclusion with respect to intentional delay is supported in the record. There is nowhere in the record where the prosecution acted with the intent to delay Ali's trial. However, just because the prosecution did not intentionally delay Ali's trial does not mean that their actions were not negligent and did not lead to the delay. Some commentators have argued that courts were negligent in not preparing for a pandemic-like event or natural disaster.[176] I agree.

The United States legal system has experienced numerous "natural disasters" and pandemics in its long history. For example, the Spanish Influenza began in March 1918 and affected over 25 million Americans, with 550,000 dying from the disease.[177] In response, courts closed down and remained closed until the disease had relatively abated.[178] Two other influenza pandemics occurred during the twentieth century; one in 1957 and the other in 1968.[179] Fear of an Avian Flu pandemic led the federal government to release guidelines "urging courts to plan for continued operations during a pandemic, should one arise."[180]

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175. *Id*., 75 Va. App. at 45, 872 S.E.2d at 676–77.

176. Sara Hildebrand & Ashley Cordero, *The Burden of Time: Government Negligence in Pandemic Planning as a Catalyst for Reinvigorating the Sixth Amendment Speedy Trial Right*, 67 VILL. L. REV. 1, 31 (2022).

177. George B. Huff Jr., *Federal Courts Prepare for Pandemic Influenza*, THE FED. LAW., June 2007, at 41, https://www.fedbar.org/wp-content/uploads/2007/06/mainstory-jun07-pdf-1.pdf [https://perma.cc/2B68-L8T6]; Stephen Pate, *Law in a Time of Pandemic: How Texas Courts and Lawyers Responded to the Pandemic of 1918-1920*, STATE BAR OF TEX.: TEX. BAR BLOG (Apr. 20, 2020), https://blog.texasbar.com/2020/04/articles/coronavirus/law-in-a-time-of-pandemic-how-texas-courts-and-lawyers-responded-to-the-pandemic-of-1918-1920/ [https://perma.cc/UZ88-JT7T].

178. Pate, *supra* note 177.

179. Edwin D. Kilbourne, *Influenza Pandemics of the 20th Century*, 12 EMERGING INFECTIOUS DISEASES 9, 9 (2006).

180. Hildebrand & Cordero, *supra* note 176, at 4. These guidelines called on local court officials "to anticipate the range of issues and situations that may arise [in a pandemic] and delineate in advance how they will be addressed. These include the potential impact on constitutional rights, including the right to have a speedy trial. . . ." AMERICAN UNIVERSITY & BUREAU OF JUSTICE ASSISTANCE, GUIDELINES FOR PANDEMIC EMERGENCY PREPAREDNESS

One of the suggestions put forward by the federal government to the courts was regarding the use of technology in their proceedings. The government noted that courts should consider the "technological and other capabilities needed to continue operations, including possible measures that will need to be instituted to limit face-to-face interactions and rules that will need to be drafted to provide for remote proceedings."[181] Through it all, the courts must remember "[c]riminal laws must continue to be enforced, personal rights and liberties must continue to be protected, cases must be adjudicated, and controversies resulting from pandemic conditions must be addressed."[182]

In Virginia, the Pandemic Flu Preparedness Commission was created "to ensure, in the event of a pandemic, that the Judicial Branch" completed "its mission to provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of law and to protect all rights and liberties guaranteed by the United States and Virginia constitutions."[183] In 2017, the Supreme Court of Virginia released a Bench Book, prepared by the Pandemic Flu Preparedness Commission, that focused on how to keep courts open during a pandemic.[184] The Bench Book noted:

> The courts have a vital function to play in maintaining the rule of law in the Commonwealth. The public relies on the courts to remain open to resolve disputes and protect the rights of people, while also protecting the health of its employees and those who visit the courthouse. The judiciary must do its best to ensure that the courts handle their essential functions to the greatest degree possible, even during the adverse situation a virulent pandemic would create.[185]

The benchbook explained that, under Virginia law, electronic video and audio communication could be used in criminal proceedings, specifically in "appearances before a magistrate, intake officer or, prior to trial, before a judge to determine bail and appointment of counsel."[186] It does not appear to apply to the actual trial itself. Yet,

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PLANNING: A ROAD MAP FOR COURTS 9–10 (2007), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/Pandemic_Road_Map.pdf [https://perma.cc/R7BF-JTPQ].

181. AMERICAN UNIVERSITY & BUREAU OF JUSTICE ASSISTANCE, *supra* note 180, at 15.

182. *Id.* at 10.

183. WESTBROOK J. PARKER, SUP. CT. OF VA.'S PANDEMIC FLU PREPAREDNESS COMM'N, PANDEMIC INFLUENZA BENCH BOOK FOR VIRGINIA'S COURT SYSTEM, viii (July 2017), https://www.vacourts.gov/programs/pfp/benchbook.pdf [https://perma.cc/9R24-P79R].

184. *Id.*

185. *Id.* at xii.

186. SUP. CT. OF VA.'S PANDEMIC FLU PREPAREDNESS COMM'N, *supra* note 183, at 7-9 (citing VA. CODE ANN. § 19.2-3.1 (Cum. Supp. 2022)).

the whole issue with speedy trial right claims deals with the fact that the actual trial has not occurred due to delay. Of course, a pandemic, like COVID-19, would impact the ability of the court to conduct jury trials, but as the benchbook notes, "the constitutional rights to a speedy trial and an impartial jury will require courts to continue to perform this function."[187]

The Virginia legal system could have prepared for the pandemic by expanding the use of technology in certain hearings to allow virtual jury trials. In May 2020, Texas became one of the first states to have a virtual jury trial, just two short months into the pandemic.[188] In this civil trial, the virtual jurors went through *voire dire*, heard from witnesses, and saw exhibits,[189] actions a juror would do in both criminal and civil in-person jury trials. Texas was able to implement this virtual jury system in two months. Ali's trial was continued in March 2020 because of COVID-19, and his jury trial did not actually occur until November 2020. Some commentators have argued that virtual jury trials are constitutionally questionable and should not be considered "outside of extreme circumstances"[190] I agree that several questions remain about the constitutionality of virtual criminal jury trials, such as the defendant's Sixth Amendment right to confront the witnesses against him or her.[191] However, if a defendant is willing to have a virtual criminal trial, it is negligent for the state not to give that defendant the option of a virtual trial. To not give the defendant that option runs the risk of negligently delaying the defendant's trial.

Therefore, by not adequately preparing for a pandemic-like event and not exploring virtual criminal jury trials—at the very least giving Ali the option of having a virtual criminal jury trial—

187. *Id.* at 7-2.

188. *First Remote Jury Trial Shows Potential for Widespread Use*, NAT'L CTR. FOR STATE CTS. (May 20, 2020), https://www.ncsc.org/newsroom/at-the-center/2020/may-20 [https://perma.cc/D4FE-LBM3].

189. *Id.*

190. Phillip C. Hamilton, *The Practical and Constitutional Issues with Virtual Jury Trials in Criminal Cases*, AM. BAR ASS'N (Feb. 26, 2021), https://www.americanbar.org/groups/litigation/committees/criminal/articles/2021/spring2021-practical-and-constitutional-issues-with-virtual-jury-trials-in-criminal-cases/ [https://perma.cc/FAE2-HQBP].

191. The Supreme Court has found that "face-to-face confrontation is not an absolute constitutional requirement." Maryland v. Craig, 497 U.S. 836, 857 (1990). The Court noted that face-to-face confrontation could be "abridged only where there is a 'case-specific finding of necessity.'" *Id.* at 857–58 (internal citation omitted). While there was no specific finding of necessity in the *Ali* case, a defendant in a similar case could argue that the spread of COVID-19 required a specific finding of necessity by the court. The defendant would then have an argument that a necessity finding would require the case, as a whole, to be tried virtually.

the government was negligent in delaying Ali's trial. The court of appeals was incorrect when it stated that the delay due to COVID-19 and ordinary business administration was not negligent. The government had a duty to give Ali a speedy trial and through its negligent action Ali's right was potentially violated. Therefore, we can apply the Unavoidable Necessities Test and move to the next portion of the analysis: the intrinsic importance of the delay.

B. *Intrinsic Importance for the Delay*

Since the delay in Ali's trial was arguably due to negligent action on the part of the government, under the Unavoidable Necessities Test, we next turn to analyze the intrinsic importance of the reason for the delay. In Ali's case, the court found the government responsible for eleven months of the thirteen-month delay.[192] Three months of the eleven-month delay were due to COVID-19.[193] Therefore, for this three-month period of time, the intrinsic importance of delay was to prevent the spread of COVID-19. The intrinsic importance of the other eight months of delay was the ordinary course of the administration of justice.

C. *Length of Delay and Potential for Prejudice*

We then turn in our analysis to the length of the delay and its potential for prejudice. In *Ali*, the length of the delay was just over one year.[194] What is the potential for prejudice in a one-year period? Ali, and other defendants in a similar situation, could face several forms of prejudice, most of which are inherent when one is

192. Ali v. Commonwealth, 75 Va. App. 16, 42, 875 S.E.2d 662, 675 (2022).

193. I would argue that the government was responsible for the delay of Ali's trial from April 23, 2020, until his trial commenced on November 9, 2020. However, the court of appeals, in analyzing specific time periods during the delay, concluded that several months of the delay were due to the ordinary course of business administration. *Id.* at 40–42, 872 S.E.2d at 675 ("To decide this case on the best and narrowest ground, we need not determine whether the delay from May 6th to the first scheduled trial date of August 10th is attributable to the pandemic or to the ordinary course of the administration of justice. Instead, we merely assume that this ninety-six-day period occurred in the ordinary course of the administration of justice.") I disagree with this labeling because the Judicial Emergency Order of May 6th "barred all jury trials for a period of weeks and then permitted their resumption *only pursuant to an approved plan* for the particular circuit involved." *Id.* at 40, 872 S.E.2d at 675 (emphasis added). The court even notes that "Fairfax County had not received approval to resume jury trials by August 10, the first date for which the appellant's trial had been set." *Id.* Therefore, the evidence fails to support the court's conclusion that the delay from May 6 to August 10 was due to ordinary business administration. Rather it supports the conclusion that the delay was due to the pandemic.

194. *Id.* at 41, 872 S.E.2d at 675.

accused of a crime. These include, but are not limited to, restrictions on the defendant's liberty, disruption of employment, depletion of his financial resources, curtailment of his associations and social relationships, and anxiety caused by public accusation of a crime.[195] This is especially true when one considers these potential forms of prejudice in light of the pandemic.[196] Additionally, the pandemic presents another potential form of prejudice for Ali and other defendants: the potential death of witnesses due to COVID-19.[197]

D. *Comparison*

Lastly, the court would compare these factors and, if under the facts of the case, the delay was unnecessary, the court would find for the defendant's speedy trial claim. The intrinsic value of negating the spread of COVID-19 is a valid value judgment. The Supreme Court found that stopping the "spread of COVID-19 is unquestionably a compelling interest" on the part of the government.[198] Yet, the intrinsic importance of negating the spread of COVID-19 is lessened when one considers the negligent action, or rather inaction, of the government in Ali's case. The government failed to adequately prepare for a pandemic-like event, like COVID-19,[199] despite the fact that there have been three influenza pandemics in the last one hundred years.[200] Additionally, the government was negligent in not exploring a virtual criminal jury trial for Ali.[201]

The intrinsic importance of the delay is also lessened when you consider the length of Ali's delay and the potential for prejudice to his case. As mentioned in the previous section, Ali waited over a year for his trial to commence. During this time, especially in light of the COVID-19 pandemic, one in Ali's position would face the possibility of extensive prejudice to his or her case.[202] While the intrinsic importance factor is favorable to the government, the other three factors arguably favor Ali, therefore, the court would likely

195. *See* Berry v. State, 93 P.3d 222, 237 (Wyo. 2004).
196. *See supra* notes 158–60 and accompanying text.
197. *COVID Data Tracker*, *supra* note 2.
198. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020).
199. *See supra* Part VI, section A.
200. *See supra* notes 176–79 and accompanying text.
201. *See supra* Part VI, section A.
202. *See supra* Part VI, section C.

find that the delay in Ali's trial was unnecessary and avoidable. While this case is a much closer call than Barker's case, the court, under the Unavoidable Necessities Test, would likely find for Ali's speedy trial claim and dismiss the case against him.

VI. BENEFITS OF THE UNAVOIDABLE NECESSITIES TEST

The Unavoidable Necessities Test has several benefits for both criminal defendants and society in general. One of the most significant benefits of this test is that it gives judges less discretion in deciding what constitutes a speedy trial violation than the current *Barker* framework. If the intrinsic importance of the government-caused delay does not outweigh the length of the delay and the potential for prejudice to the defendant, the court must find for the defendant.

The Unavoidable Necessities test also, importantly, shifts the burden of proving a speedy trial claim from the defendant. Under this test, the government has the burden to show that it was not responsible for an intentional or negligent action that led to the defendant's trial being delayed. This burden-shifting promotes governmental accountability, a societal goal of ensuring justice within the United States legal system.

Additionally, the Unavoidable Necessities test benefits defendants by not requiring them to assert a fundamental right that they are afforded by the United States Constitution. In implementing this test in place of *Barker*, a court would require only affirmative actions by the defendant to waive the right to a speedy trial, not affirmative actions to preserve that fundamental right. The Unavoidable Necessities Test would further benefit defendants by recognizing the fact that evidence of prejudice is not always at hand. Defendants need not show actual evidence of prejudice. Instead, this test focuses on the length of the delay and the potential for prejudice relating to that delay.

CONCLUSION

English common law history and the early history of the United States support the viewpoint that the defendant's right to a speedy trial was a fundamental right of English citizens. However, starting in the early twentieth century, that right, through the implementation of the malleable *Barker* test, was turned into a mere privilege for criminal defendants by the Supreme Court and state

courts following the Supreme Court's lead. This is especially true when we review speedy trial claims brought due to the COVID-19 pandemic. For the defendant's speedy trial right to properly be viewed as a fundamental right, a new test must be used to evaluate speedy trial claims. This Comment suggests that the Unavoidable Necessities Test, unlike the current *Barker* test, would meet this goal.

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