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CPL § 30.30(4)(g): Court Congestion Not "Exceptional Circumstance" Excusing Prosecutor's Failure to Be Ready for Trial

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CRIMINAL PROCEDURE LAW

CPL § 30.30(4)(g): Court congestion not "exceptional circumstance" excusing prosecutor's failure to be ready for trial

CPL section 30.30 places the burden upon the prosecutor to be ready for trial within certain prescribed time limits.[28] Absent "exceptional circumstances," failure to be ready justifies dismissal of an action upon timely motion by the defendant.[29] It had been un-

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[28] CPL § 30.30(1) (Supp. 1979-1980) provides:

> Except as otherwise provided in subdivision three, a motion [for dismissal of information or indictment] must be granted where the people are not ready for trial within:
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> (a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony;
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> (b) ninety days of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months and none of which is a felony;
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> (c) sixty days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of not more than three months and none of which is a crime punishable by a sentence of imprisonment of more than three months;
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> (d) thirty days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a violation and none of which is a crime.

Id.

The genesis of the statute may be found in a criminal defendant's right to a speedy trial, a guarantee fundamental to the common law tradition of England, *see* Magna Carta, 25 Edw. 1, c. 29 (1297), and the United States. *See* Dickey v. Florida, 398 U.S. 30, 37-38 (1970); Smith v. Hooey, 393 U.S. 374, 383 (1969); United States v. Ewell, 383 U.S. 116, 120 (1966); U.S. CONST. amend. VI. The right is made applicable to the states through the fourteenth amendment. Klopfer v. North Carolina, 386 U.S. 213, 222 (1967); People v. Garcia, 51 App. Div. 2d 329, 331, 381 N.Y.S.2d 271, 273 (1st Dep't 1976), *aff'd mem.*, 41 N.Y.2d 861, 362 N.E.2d 260, 393 N.Y.S.2d 709 (1977). Notably, the Supreme Court has declined to provide uniform guidelines for the implementation of the right, leaving it to the states to formulate individual rules consistent with constitutional standards. *See* Barker v. Wingo, 407 U.S. 514, 523 (1972).

CPL section 30.30 was enacted to facilitate prompt disposition of criminal actions. Memorandum of State Executive Department, Crime Control Council, *reprinted in* [1972] N.Y. Laws 3259 (McKinney). It was believed that the promotion of swift and certain punishment would serve as an effective deterrent to crime. *Id.; see* People v. Mollette, 87 Misc. 2d 236, 241, 383 N.Y.S.2d 817, 822 (Sup. Ct. Bronx County 1976). Additionally, the facilitation of speedy trials would insulate defendants from prolonged imprisonment and obviate the anxiety and suspicion which may derive from unprosecuted accusations of crime. People v. Johnson, 38 N.Y.2d 271, 275-76, 342 N.E.2d 525, 528, 379 N.Y.S.2d 735, 740 (1975).

[29] CPL § 30.30(1) (Supp. 1979-1980). The presence of "exceptional circumstances" may affect a defendant's 30.30 ready trial right in two ways. Under CPL section 30.30(3)(b), a

clear whether docket congestion[30] is an exceptional circumstance excusing delay which would otherwise require dismissal.[31] Recently, however, in *People v. Brothers*,[32] the Court of Appeals held that "court congestion does not excuse the People's failure to be ready for trial,"[33] but indicated in dicta that a subsequent plea of guilty may operate as a waiver of the statutory entitlement to dismissal.[34]

The defendant in *Brothers* was arrested on New Year's Day,

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defendant's motion to dismiss may be denied where the People were ready for trial within the time specified but exceptional circumstances subsequently rendered the People unready. CPL § 30.30(3)(b) (Supp. 1979-1980). Further, CPL section 30.30(4)(g) provides that the period of delay occasioned by exceptional circumstances extends the time within which the prosecutor must be ready for trial. CPL § 30.30(4)(g) (Supp. 1979-1980).

What constitutes "exceptional circumstances" excusing prosecutorial delay is a discretionary determination by the court made on a case-by-case basis. *See, e.g.*, People v. Washington, 43 N.Y.2d 772, 773-74, 372 N.E.2d 795, 795, 401 N.Y.S.2d 1007, 1008 (1977) (ongoing narcotics investigation is not exceptional circumstance); People v. Goodman, 41 N.Y.2d 888, 889, 362 N.E.2d 615, 616, 393 N.Y.S.2d 985, 986 (1977) (assault victim's unavailability is exceptional circumstance); People v. Rice, 67 App. Div. 2d 817, 817, 413 N.Y.S.2d 55, 56 (4th Dep't 1979) (replacement of first district attorney in case and subsequent electoral defeat of his successor is exceptional circumstance); People v. Hall, 61 App. Div. 2d 1050, 1051, 403 N.Y.S.2d 112, 113 (2d Dep't 1978) (nervous breakdown of stenographer in grand jury proceeding is exceptional circumstance); People v. Scaccia, 55 App. Div. 2d 444, 446, 390 N.Y.S.2d 743, 745 (4th Dep't 1977) (lack of scheduled trial term following indictment is exceptional circumstance).

[30] Docket congestion results primarily from the volume of cases funneled into the criminal justice system. In 1971, it was estimated that the average caseload per judge in New York City was 4,054. In 1977, the number had risen to 5,338 cases. There were 77 judges sitting in the criminal courts in 1971, but only 63 in 1977. Wilkins, *New York City Criminal Courts Hard-Pressed by Heavy Caseload*, N.Y. Times, April 21, 1978, § 2, at 4, col. 5. *See generally* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 127-28 (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 31-32 (1967).

[31] Some courts have held that docket congestion alone or in combination with other factors will excuse delay in complying with the ready trial mandate of CPL section 30.30. *See, e.g.*, People v. Scaccia, 55 App. Div. 2d 444, 446, 390 N.Y.S.2d 743, 745 (4th Dep't 1977); People v. Thomas, 49 App. Div. 2d 694, 694, 370 N.Y.S.2d 763, 764 (4th Dep't 1975); People v. Rivera, 98 Misc. 2d 986, 990, 414 N.Y.S.2d 972, 975 (Sup. Ct. Kings County 1979). Not all courts, however, have found docket congestion sufficient to excuse the unreadiness of the People. *See, e.g.*, People v. Bonterre, 87 Misc. 2d 243, 244, 384 N.Y.S.2d 351, 353 (N.Y.C. Crim. Ct. Bronx County 1976). Previously, the Court of Appeals expressly left open the question of whether or not court congestion represents "exceptional circumstances" under CPL section 30.30. People *ex rel.* Franklin v. Warden, 31 N.Y.2d 498, 502 n.4, 294 N.E.2d 199, 201 n.4, 341 N.Y.S.2d 604, 606 n.4 (1973).

[32] 50 N.Y.2d 413, 407 N.E.2d, 405, 429 N.Y.S.2d 558 (1980), *rev'g*, 69 App. Div. 2d 908, 416 N.Y.S.2d 158 (2d Dep't 1979) (mem.).

[33] 50 N.Y.2d at 415, 407 N.E.2d at 405, 429 N.Y.S.2d at 558.

[34] *Id.* at 418, 407 N.E.2d at 407, 429 N.Y.S.2d at 560.

1975 for driving while intoxicated.[35] He was indicted and arraigned six weeks later in Suffolk County Court.[36] The case appeared on the court calendar for March and again for April.[37] In April, the case was transferred to a "ready reserve" calendar where it remained until January 20, 1976.[38] At that time, it was transferred to the Supreme Court, Suffolk County, and placed on the calendar for February.[39] In March, approximately thirteen months after the indictment, the defendant moved for dismissal under CPL section 30.30.[40] The prosecutor submitted no papers in opposition to defendant's motion[41] but, *sua sponte*, the court introduced statistical data documenting docket congestion in Suffolk County Court.[42] Based upon this data and his personal knowledge of the calendar backlog, the hearing judge denied the defendant's motion, reason-

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[35] *Id.* at 415, 407 N.E.2d at 405, 429 N.Y.S.2d at 558.

[36] *Id.* The indictment consisted of two counts of driving while intoxicated, a class E felony under the Vehicle and Traffic Law. *See* N.Y. VEH. & TRAF. LAW § 1192 (McKinney Supp. 1979-1980). Since the defendant was charged with a felony, he was entitled to have the indictment dismissed, pursuant to the ready trial provision, if the people were not ready for trial within six months. CPL § 30.30(1)(a) (Supp. 1979-1980); *see* note 28 *supra*.

[37] 50 N.Y.2d at 415, 407 N.E.2d at 405, 429 N.Y.S.2d at 558. Although courts in New York have inherent power to regulate their calendars, docket scheduling is left to the discretion of the district attorney. People v. Vincent, 34 App. Div. 2d 705, 706, 309 N.Y.S.2d 690, 692 (3d Dep't), *aff'd*, 27 N.Y.2d 964, 267 N.E.2d 273, 318 N.Y.S.2d 498 (1970); McDonald v. Goldstein, 273 App. Div. 649, 650-51, 79 N.Y.S.2d 690, 693-94 (2d Dep't 1948); People v. Bermudez, 84 Misc. 2d 1071, 1073, 377 N.Y.S.2d 899, 902 (Sup. Ct. N.Y. County 1975); Gleason v. Mullen, 204 Misc. 450, 452, 121 N.Y.S.2d 605, 607 (Sup. Ct. N.Y. County 1953). Generally, a district attorney will place cases on a court calendar according to some type of priority system. Common examples of priority systems include those based on chronological order, *see* People v. Johnson, 38 N.Y.2d 271, 278, 342 N.E.2d 525, 530, 379 N.Y.S.2d 735, 742 (1975), and those based on the severity of the offense committed and the length of defendant's incarceration, *see* People v. Kelly, 38 N.Y.2d 633, 636-37, 345 N.E.2d 544, 546, 382 N.Y.S.2d 1, 3 (1976).

[38] 50 N.Y.2d at 415, 407 N.E.2d at 405, 429 N.Y.S.2d at 558. In Suffolk County, there are three types of court calendars: the conference calendar, the ready reserve calendar, and the ready trial calendar. The conference calendar is a "pretrial" calendar scheduling cases after arraignment for determining their future courses through the system. The ready trial calendar schedules those cases ready for trial. The ready reserve calendar is a "control" calendar which functions to keep track of a particular case. The cases placed on the ready reserve calendar are those cases which, while not yet ready to go to trial, are immediately next in line. Conversation with Court Clerk, Criminal Division, Suffolk County Court (Oct. 15, 1980).

[39] 50 N.Y.2d at 415, 407 N.E.2d at 405, 429 N.Y.S.2d at 559.

[40] *Id.* The defendant also moved for dismissal under CPL section 30.20, a statutory codification of the constitutional right to a speedy trial. *Id.;* CPL § 30.20 (Supp. 1979-1980).

[41] 50 N.Y.2d at 415, 407 N.E.2d at 405, 429 N.Y.S.2d at 559. On oral argument of the defendant's motion to dismiss, the district attorney asserted that he had been ready to proceed to trial as early as April, 1975. *Id.* at 416, 407 N.E.2d at 406, 429 N.Y.S.2d at 559.

[42] *Id.* at 415, 407 N.E.2d at 405-06, 429 N.Y.S.2d at 559.

ing that court congestion coupled with the limited availability of judges was an "exceptional circumstance" excusing prosecutorial unreadiness.[43] The defendant subsequently pleaded guilty and sentence was imposed.[44] The Appellate Division, Second Department, affirmed the judgment of conviction.[45]

On appeal, the Court of Appeals reversed, vacated the conviction, and dismissed the indictment.[46] Judge Jones, writing for the majority,[47] determined initially that placing the case on a "ready reserve" calendar was not a sufficient indication of the prosecutor's readiness to satisfy the requirements of CPL section 30.30.[48] Only a formal communication of readiness by the prosecutor on the record would suffice, according to the majority, to demonstrate readiness for trial.[49] Turning to the issue of whether docket congestion excused the prosecutorial delay, the Court acknowledged that there was "little practical sense" in requiring the prosecutor to prepare his case for trial months in advance for the sole purpose of

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[43] *Id.* at 415, 407 N.E.2d at 406, 429 N.Y.S.2d at 559. It may be surmised that the hearing judge denied the defendant's motion to dismiss in part because the defendant was not incarcerated during the period of delay. While defendants released on bail or on their own recognizance do not forfeit their right to prompt dispositions, preference is given to those cases in which the defendant is incarcerated. CPL § 30.20(2) (Supp. 1979-1980); *see, e.g.*, People v. Kelly, 38 N.Y.2d 633, 636-37, 345 N.E.2d 544, 546, 382 N.Y.S.2d 1, 3 (1976); People v. Artonio, 42 App. Div. 2d 716, 716, 345 N.Y.S.2d 620, 621 (2d Dep't 1973); note 63 *infra*.

[44] 50 N.Y.2d at 415, 407 N.E.2d at 406, 429 N.Y.S.2d at 559.

[45] 69 App. Div. 2d 908, 416 N.Y.S.2d 158 (2d Dep't 1979) (mem.), *rev'd*, 50 N.Y.2d 413, 407 N.E.2d 405, 429 N.Y.S.2d 558 (1980).

[46] 50 N.Y.2d at 418, 407 N.E.2d at 407, 429 N.Y.S.2d at 561.

[47] Joining Judge Jones in the majority were Chief Judge Cooke and Judges Gabrielli, Wachtler, Fuchsberg and Meyer. Judge Jasen dissented in a separate opinion.

[48] 50 N.Y.2d at 416, 407 N.E.2d at 406, 429 N.Y.2d at 559.

[49] *Id.* (citing People v. Hamilton, 46 N.Y.2d 932, 388 N.E.2d 345, 415 N.Y.S.2d 208 (1979)). In *Hamilton*, the defendant suffered a delay of 1 year and 13 days between the filing of the felony complaint and the date the People were prepared to go to trial. 46 N.Y.2d at 933, 388 N.E.2d at 345, 415 N.Y.S.2d at 209. The prosecutor contended that the delay was occasioned by the need to investigate the crime further. Additionally, he asserted that he had been ready to proceed to trial on an earlier date. *Id.* at 933, 388 N.E.2d at 345-46, 415 N.Y.S.2d at 209. The Court found neither to be supported by the record. According to the Court, in order to render the statute inoperative, "the People must communicate readiness for trial to the court *on the record* when ready to proceed." *Id.* at 933, 388 N.E.2d at 346, 415 N.Y.S.2d at 209 (emphasis added). The Court determined that it was "insufficient, as a matter of law, to inform the court of such a claim for the first time in an affidavit submitted in response to a motion to dismiss the indictment." *Id.* (citation omitted). Similarly, the *Brothers* majority rejected as insufficient the prosecutor's protestations of prior readiness asserted for the first time on argument of the defendant's motion to dismiss. 50 N.Y.2d at 416, 407 N.E.2d at 406, 429 N.Y.S.2d at 559.

making a good faith declaration of readiness.[50] Nevertheless, noting that the statute unequivocally required only that the People be ready for trial within the prescribed period, not that the trial occur therein,[51] the majority rejected docket congestion as an "exceptional circumstance" which would excuse prosecutorial unreadiness under section 30.30.[52] In dictum, however, the Court indicated that a defendant's plea of guilty may waive his right to a dismissal under the statute.[53]

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[50] 50 N.Y.2d at 417-18, 407 N.E.2d at 407, 429 N.Y.S.2d at 560.

[51] *Id.* at 417, 407 N.E.2d at 407, 429 N.Y.S.2d at 560. The *Brothers* majority noted that while the statute ambiguously referred to the "people's" readiness, the Court of Appeals had earlier held that an examination of the legislative history of the provision clearly indicated that the district attorney, and not the State of New York, was the primary object of the statute's readiness mandate. *Id.* at 417, 407 N.E.2d at 406-07, 429 N.Y.S.2d at 560 (quoting People *ex rel.* Franklin v. Warden, 31 N.Y.2d 498, 294 N.E.2d 199, 341 N.Y.S.2d 604 (1973)). Consequently, the Court maintained that the statute should not be read as requiring the availability of court facilities. 50 N.Y.2d at 417, 407 N.E.2d at 407, 429 N.Y.S.2d at 560. In People *ex rel.* Franklin v. Warden, 31 N.Y.2d 498, 294 N.E.2d 199, 341 N.Y.S.2d 604 (1973), quoted extensively by the *Brothers* Court, the defendants had been detained prior to trial for more than six months due to their inability to post bail. *Id.* at 500, 294 N.E.2d at 200, 341 N.Y.S.2d at 605. Although the district attorney was ready for trial within the statutory periods, calendar congestion and the lack of court facilities prevented him from proceeding. *Id.* at 500, 294 N.E.2d at 200, 341 N.Y.S.2d at 605-06. The defendants contended that CPL section 30.30 should be construed to require "not only that prosecutor be ready but that court facilities also be available." *Id.* at 501, 294 N.E.2d at 201, 341 N.Y.S.2d at 606. Rejecting the defendants' contention, the *Franklin* Court asserted that such a construction would "fly in the face of the clear intention of the Legislature" to reject the so-called "prompt trial" rule. *Id.* at 502, 294 N.E.2d at 201, 341 N.Y.S.2d at 606.

The prompt trial rule which had been promulgated by the Administrative Board of the Judicial Conference provided for dismissal of a criminal action "if the cause [had] not been brought to trial" within the designated time periods. [1980] 22 N.Y.C.R.R. §§ 29.1-.7. Accordingly, docket congestion, the lack of court facilities, and any other institutional delay would trigger a dismissal. *Id.* Prior to its effective date, however, the legislature expressly superseded the rule by conditioning dismissal upon prosecutorial unreadiness alone. Ch. 184, § 2, [1972] N.Y. Laws 1019. For an excellent discussion of the evolution of CPL section 30.30, see CPL § 30.30, commentary at 52 (Supp. 1979-1980).

[52] 50 N.Y.2d at 418, 407 N.E.2d at 407, 429 N.Y.S.2d at 560.

[53] *Id.* Although declining to decide the issue since it had not been raised on appeal, *accord*, People v. Lomax, 50 N.Y.2d 351, 354-55 n.1, 406 N.E.2d 793, 794 n.1, 428 N.Y.S.2d 937, 938 n.1 (1980), the Court warned the defendants that they risk waiving their 30.30 right by pleading guilty "even if [such plea is] conditionally expressed (short possibly of a court sanctioned agreement for preservation)." 50 N.Y.2d at 418, 407 N.E.2d at 407, 429 N.Y.S.2d at 560. The Court reasoned that since a defendant's right to a dismissal under CPL section 30.30 is distinct from his constitutional right to a speedy trial and merely legislative in origin, a plea of guilty may act as a waiver of the statutory right. *Id.* The Court drew analogous support for this proposition from People v. Dodson, 48 N.Y.2d 36, 396 N.E.2d 194, 421 N.Y.S.2d 47 (1979), a case which involved the interrelationship between the "previous prosecution" provisions of CPL section 40.20 and the fifth amendment mandate prohibiting double jeopardy. The Court of Appeals in *Dodson* held that a statutory previous prosecution

Judge Jasen dissented, contending that the People were ready for trial within the period prescribed by CPL section 30.30.[54] In the dissent's view, placing the case on the "ready reserve" calendar sufficed to communicate the prosecutor's readiness for trial on the record.[55] Thus, Judge Jasen concluded, it was unnecessary to address the question of whether court congestion was an "exceptional circumstance" excusing lack of readiness.[56]

By stating definitively that docket congestion does not extend the time within which the district attorney must be ready for trial under section 30.30, the *Brothers* decision resolves an inconsistency in the application of the statute.[57] In the wake of *Brothers*, the prosecutor must communicate his readiness for trial within the prescribed period or risk dismissal under the statute, irrespective of his awareness that the trial of the case will be delayed indefinitely due to calendar backlog.[58] While this strict interpretation of section 30.30 seems to exalt form over substance,[59] it nevertheless appears consonant with legislative intent.[60]

Additionally, *Brothers* further distinguishes the "ready trial right" in CPL section 30.30 from the "constitutional speedy trial right" codified in section 30.20. Generally, a plea of guilty does not waive a defendant's 30.20 constitutional right.[61] By intimating that

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claim "must be duly preserved if there is to be appellate review." *Id.* at 38, 396 N.E.2d at 195, 421 N.Y.S.2d at 47. Accordingly, the Court determined that a plea of guilty without a prior or contemporaneous objection based on the statutory claim would be deemed a waiver. *Id.* at 39, 396 N.E.2d at 195, 421 N.Y.S.2d at 48.

[54] 50 N.Y.2d at 419, 407 N.E.2d at 408, 429 N.Y.S.2d at 561 (Jasen, J., dissenting).

[55] *Id.* at 419, 407 N.E.2d at 408, 429 N.Y.S.2d at 561 (Jasen, J., dissenting). According to the dissent "[w]hat more reliable expression of readiness should we require of the District Attorney than having a case calendared 'ready' for trial and placed on the 'ready reserve calendar' to follow other ready cases calendared earlier but not reached due to court congestion." *Id.*

[56] *Id.*

[57] Previously, some courts had considered the unavailability of court facilities and prosecutorial readiness as factors which might justify trial delay under CPL section 30.30. *See* note 31 *supra.*

[58] *See* notes 50-52 and accompanying text *supra.*

[59] *See* 50 N.Y.2d at 418, 407 N.E.2d at 407, 429 N.Y.S.2d at 560.

[60] *See* note 51 *supra.* While the genesis of CPL section 30.30 in some measure was in response to a need to deal with calendar congestion, *see* Memorandum of State Executive Department, Crime Control Council, *reprinted in* [1972] N.Y. Laws 3259 (McKinney), this concern did not find its way into the statute. Rather, CPL section 30.20, the codification of the constitutional speedy trial right, is the vehicle by which a defendant's rights to a prompt adjudication will be protected, notwithstanding court backlog. *See* People *ex rel.* Franklin v. Warden, 31 N.Y.2d 498, 294 N.E.2d 199, 341 N.Y.S.2d 604 (1973).

[61] *See, e.g.,* People v. Rathbun, 48 App. Div. 2d 149, 152, 368 N.Y.S.2d 317, 321 (3d

an opposite result would obtain under section 30.30, the Court suggests that a different inquiry is required under each provision for the purpose of determining waiver.[62] It is likely, therefore, that a constitutional objection to undue trial delay remains cognizable[63]

Dep't 1975); People v. Haymes, 47 App. Div. 2d 587, 588, 363 N.Y.S.2d 382, 383-84 (4th Dep't 1975); *cf.* People v. Blakley, 34 N.Y.2d 311, 314, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 461-62 (1974); People v. Wallace, 26 N.Y.2d 371, 374, 258 N.E.2d 904, 905, 310 N.Y.S.2d 484, 486 (1970); People v. Henderson, 20 N.Y.2d 303, 305-06, 229 N.E.2d 422, 423-24, 282 N.Y.S.2d 734, 736-37 (1967) (guilty plea does not constitute waiver under predecessor statute to CPL section 30.20).

The nature of the conduct necessary to establish that defendant has waived his right to a speedy trial has not been delineated clearly. Prior to the Supreme Court decision in Barker v. Wingo, 407 U.S. 514, 524-31 (1972), the traditional constitutional doctrine of waiver espoused by lower federal and state courts was the demand rule. *See, e.g.*, United States v. Maxwell, 383 F.2d 437, 441 (2d Cir. 1967), *cert. denied*, 389 U.S. 1037 (1968); Mathies v. United States, 374 F.2d 312, 314 n.1 (D.C. Cir. 1967); Chinn v. United States, 228 F.2d 151, 153 (4th Cir. 1955); Pines v. District Court, 233 Iowa 1284, 1287, 10 N.W.2d 574, 581 (1943); *see* Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 ALA. L. REV. 265, 277-80 (1972). *See generally* Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1601-10 (1965). Under this doctrine, a criminal defendant's right to a speedy trial was deemed waived if not demanded during the period of delay. United States v. Maxwell, 383 F.2d 437, 441 (2d Cir. 1967). The purpose of the doctrine was to prevent a defendant from claiming constitutional infringement when he had acquiesced in the delay tacitly by his silence. *See* Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 853 (1957). In *Barker*, however, the Supreme Court rejected the use of the demand rule doctrine as a condition precedent to an undue delay claim, and relegated it to being but one of the factors to be considered in speedy trial cases. 407 U.S. at 528. Notably, New York courts had earlier abandoned the demand rule. *See, e.g.*, People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955). In *Prosser*, the Court determined that it was the duty of the prosecutor to ensure a speedy trial notwithstanding defendant's failure to assert such right. *Id.* at 358, 130 N.E.2d at 895. Failure to pursue the right as part of trial strategy, however, may be deemed a conscious abandonment and waiver of a defendant's rights both under sections 30.20 and 30.30. *See* People v. Rodriquez, 50 N.Y.2d 553, 558, 407 N.E.2d 475, 477, 429 N.Y.S.2d 631, 633 (1980).

[62] A valid waiver of a constitutional right may be effectuated if done knowingly and voluntarily. *See* People v. Adams, 38 N.Y.2d 605, 607, 345 N.E.2d 318, 319, 381 N.Y.S.2d 847, 848 (1976); People v. White, 32 N.Y.2d 393, 399, 298 N.E.2d 659, 663, 345 N.Y.S.2d 513, 518 (1973). While the strict standard would appear applicable to the speedy trial right which, although expressed statutorily, has constitutional underpinnings, *see generally* People v. Johnson, 38 N.Y.2d 271, 342 N.E.2d 525, 379 N.Y.S.2d 735 (1975), it would appear inapplicable to the ready trial right which is completely legislative in origin. *See* People v. Brothers, 50 N.Y.2d at 418, 407 N.E.2d at 407, 429 N.Y.S.2d at 560; People v. Dodson, 48 N.Y.2d 36, 39, 396 N.E.2d 194, 195, 421 N.Y.S.2d 47, 48 (1979); note 64 *infra*.

[63] In determining whether a defendant's constitutional right to a speedy trial has been infringed, federal courts generally balance four principal factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972); *see* United States v. Carcini, 562 F.2d 144, 148 (2d Cir. 1977); White v. Henderson, 467 F. Supp. 96, 98 (S.D.N.Y. 1979). The New York courts use a similar test, balancing five factors: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that

despite a waiver of the ready trial right by a plea of guilty.[64] It is submitted, however, that until the Court of Appeals determines whether or not a plea of guilty waives the right to dismissal under CPL section 30.30, defense counsel wishing to preserve the statutory claim for undue trial delay would be well advised to raise the objection prior to or contemporaneous with a guilty plea.[65] Failure to do so may preclude appellate review of the statutory claim.

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the defense has been impaired by reason of the delay." People v. Taranovich, 37 N.Y.2d 442, 445, 335 N.E.2d 303, 306, 373 N.Y.S.2d 79, 82 (1975); *accord,* People v. Dean, 45 N.Y.2d 651, 659, 384 N.E.2d 1277, 1281, 412 N.Y.S.2d 353, 357-58 (1978); People v. Rivera, 98 Misc. 2d 986, 988-89, 414 N.Y.S.2d 972, 974 (Sup. Ct. Kings County 1979). Although the implementation of the balancing test generally lies within the discretion of the individual court, certain guidelines have been enunciated by the Supreme Court:

> The length of delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. . . . [T]he length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.
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> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker v. Wingo, 407 U.S. 514, 530-31 (1972) (footnotes omitted).

[64] In two recent cases the Court has indicated that there may be situations in which a constitutional or constitutionally based remedy remains despite a waiver of a statutory claim. In People v. Dodson, 48 N.Y.2d 36, 396 N.E.2d 194, 421 N.Y.S.2d 47 (1979), the defendant had conceded that her claim of previous prosecution was of statutory and not constitutional dimension. *Id.* at 38-39, 396 N.E.2d at 195, 421 N.Y.S.2d at 48. The Court, finding that there had been a waiver of the statutory claim, nevertheless suggested that had a constitutional objection been raised instead, it would not have been subject to the same infirmity. *Id.* at 39, 396 N.E.2d at 195, 421 N.Y.S.2d at 48. Similarly, in People v. Rodriquez, 50 N.Y.2d 553, 407 N.E.2d 475, 429 N.Y.S.2d 631 (1980), although finding that a defendant could waive both his constitutional and statutory speedy trial rights by abandonment as part of a trial strategy, the Court nonetheless indicated that evidence sufficient to establish waiver of the constitutionally founded remedy contained in CPL section 30.20 might be greater than that needed to demonstrate relinquishment of the purely statutory remedy of section 30.30. 50 N.Y.2d at 558, 407 N.E.2d at 477, 429 N.Y.S.2d at 633.

[65] As *Brothers* makes clear, a plea of guilty may waive a defendant's right under CPL section 30.30 notwithstanding a timely objection. *See* note 53 *supra.* It is submitted moreover, that even in the absence of a guilty plea, the failure to raise the objection to undue trial delay until appeal may constitute waiver.