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Speedy Trial Within the Circuit

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privation of fundamental rights."[127] This holding of the Second Circuit is in direct conflict with the views expressed by the majority in *Sostre*. As the majority in a three-judge court, the *Sostre* dissent disregarded the trend of argument as developed in *Sostre*. However, in light of *Sostre*, the *Rodriguez* holding is not an insurmountable obstacle to the definite trend toward use of section 1983 by state prisoners.

Contemplating the prison environment and the status of the prisoner in relation to his superiors, it is difficult to understand how the court in *Sostre* can look so naively on prison practices. Prison officials are merely men. Due to the closed environs, their task is more difficult that that of most men. However, this should not exculpate them from the scrutiny which the courts apply to other institutions within our society. The man in prison has rights guaranteed by our constitutional system. The walls of a prison do not create immunity for prison authorities. In this closed society it is clear that a prisoner's rights can easily be violated without detection. Therefore, especially in light of recent occurrences in our prisons, the courts in exercising their constitutional duty, should venture more often and more closely into the depths of our penal system.

SPEEDY TRIAL WITHIN THE CIRCUIT

The right to a speedy trial is of ancient origin.[128] Today the right has distinct constitutional[129] and statutory[130] bases. Although ineffectual

127 451 F.2d at 732 (citing authorities); Judge Waterman dissented on the basis of the district court decision. *Id.* at 733.

128 The right to a speedy trial was recognized at least as far back as the Magna Carta (1215) which stated: "To no one will we sell, to no one deny or delay right or justice." United States v. Provoo, 17 F.R.D. 183, 196 (D. Md.), *aff'd* 350 U.S. 857 (1955). The Assize of Clarendon, written in 1166, provides evidence of the early recognition of speedy justice:

> [A]nd when a robber or murderer or thief or receiver of them has been arrested, . . if the justices are not about to come *speedily* enough into the country where they have been taken, let the sheriffs send word to the nearest justice . . . and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices.

2 ENG. HIST. DOCUMENTS 408 (1953) (emphasis added), *quoted in* Klopfer v. United States, 386 U.S. 213, 223 n.9 (1966).

129 The sixth amendment provides for a fair and speedy trial in all criminal prosecutions. This sixth amendment right as implemented by the fourteenth amendment was held applicable to the states in *Klopfer v. North Carolina*, 386 U.S. 213 (1966).

130 FED. R. CRIM. P. 48(b) provides:

> [i]f there is *unnecessary* delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer the district court, or if there is *unnecessary* delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint. (emphasis added).

It has been held that Rule 48(b) by providing for dismissal because of "unnecessary delay" goes beyond the sixth amendment by allowing a court to exercise its discretion

for many years, through judicial mandate the right has become more meaningful today.

The major deterrent to an implementation of the right to a speedy trial within the Second Circuit has been the adherence to the "demand rule" as enunciated in *United States v. Lustman*[131] which requires that the defendant press for trial. This rule is rationalized by calling a speedy trial a "personal right" which may be waived by action inconsistent with its assertion.[132] Although the "demand rule" has been often criti-

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in dismissing indictments for want of prosecution where the defendant's constitutional rights have not been violated. Hanrahan v. United States, 348 F.2d 363, 368 (D.C. Cir. 1965); Mann v. United States, 304 F.2d 394, 398 (D.C. Cir.), *cert. denied*, 371 U.S. 896 (1962); 8A, J. MOORE, FEDERAL PRACTICE ¶ 48.03[1] (1968); *cf.* Pollard v. United States, 352 U.S. 354, 368 (1957) (Warren, C.J., dissenting). Although the grounds for dismissal under Rule 48(b) are broader than the constitutional right of speedy trial, a Rule 48(b) dismissal does not foreclose further prosecution. Mann v. United States, 304 F.2d 394, 398 (D.C. Cir.), *cert. denied*, 371 U.S. 896, 898 (1962); 8A J. MOORE, FEDERAL PRACTICE, ¶ 48.03[1] (1968). It has also been said that Rule 48(b) provides for enforcement of the right given by the sixth amendment to a speedy trial. Pollard v. United States, 352 U.S. 354, 361 n.7 (1957).

Application of this Rule is problematic, for the "unnecessary" standard is too broad. For a discussion of this issue, *see* note 143, *infra*.

[131] 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958). This "demand rule," discussed in note 134 *infra*, has been criticized by judges within the Second Circuit as being inconsistent with the constitutional guarantee. *See* United States v. Dillon, 183 F. Supp. 541, 543 (S.D.N.Y. 1960).

In a more recent case, Judge Tenney, expressed his opinion regarding the right to a speedy trial, disagreeing with his colleagues who adhere to the "demand rule":

> Once a defendant has been demonstrably prejudiced by an inexcusably long delay occasioned by the prosecution, it would seem naive and insensible to suggest that because he has not affirmatively moved for a speedy trial he has impliedly waived his right thereto.

United States v. Haggett 438 F.2d 396, 401 (2d Cir. 1971), *quoting* United States v. Stone, 319 F. Supp. 364, 367 (S.D.N.Y. 1970).

This view is particularly interesting when compared with a decision Judge Tenney authored one year prior to *Haggett* but after the *Dickey* decision by the Supreme Court. In that opinion he stated:

> it would be an abdication of its judicial responsibility to attempt reversal of appellate authority on an identical issue, by giving retroactive application to recent dicta set forth by the Supreme Court.

Maxwell v. United States, 319 F. Supp. 269, 271 (S.D.N.Y. 1970).

For a compilation of other federal jurisdictions which have adhered to the "demand rule," *see* Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1602 n.76 (1965) [hereinafter *Lagging Right*].

[132] *Lagging Right*, *supra* note 131, at 1602. In addition, the rule is justified on the theory that silence is inconsistent with the assertion of the right which presupposes that delay always benefits the accused. The doctrine is essentially a formulation of policy, since it guards against freeing possibly guilty defendants without trial. *Id.*

It seems difficult to accept the proposition that a defendant's failure to demand a trial may constitute a waiver of such constitutional rights. A justice of the Supreme Court has noted that:

> 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.

Dickey v. Florida, 398, U.S. 30, 49 (1970) (Brennan, J. concurring).

Thus the extensive use of the waiver fiction in the speedy trial area is incongruous with its application to other constitutional rights, since courts have traditionally defined

cized,[133] it remains, for the time being,[134] the established policy regarding speedy trial delay in the Second Circuit.[135]

Within the concept of speedy trial there exist the problems of

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"waiver" as an *intentional* relinquishment of a *known* right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added). Moreover, the Court has espoused the policy of "indulg[ing] every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

133 The basis of this criticism is that the "demand rule" offers no viable choice to a criminal defendant. *Lagging Right* at 1610. For cases criticizing the rule, *see* note 132 *supra.*

Exceptions to the requirement of demand by defendant for a speedy trial include: (1) where defendant had no knowledge of the pending charges, and (2) where defendant was powerless to assert his right because of imprisonment, ignorance, and lack of legal advice. *See* Pitts v. North Carolina, 395 F.2d 182 (4th Cir. 1968).

It has been noted that the requirement of a demand "stresses that the right to a speedy trial is not designed as a sword for defendant's escape, but rather as a shield for his protection." Note, *The Right to a Speedy Criminal Trial,* 57 COLUM. L. REV. 846, 853 (1957). However, in criticism of the rule, one court stated that

> it is difficult to accept that interests so fundamental and so pervasive as those served by the right to a speedy trial are enforceable by judicial sanctions only at the behest of defendants who take the relatively unlikely step of demanding an early trial.

United States v. Mann, 291 F. Supp. 268, 274 (1968). (citation omitted). For further criticism of the "demand rule," see note 139 *infra.*

134 The Second Circuit has consistently followed the "demand rule" requiring the defendant to actively seek a speedy disposition of his case, or be deemed to have waived such a right. *See,* United States v. Haggett, 438 F.2d 396 (2d Cir.), *cert. denied,* 402 U.S. 946 (1971); United States v. Parrott, 425 F.2d 972 (2d Cir. 1970); United States v. Aberson, 419 F.2d 820 (2d Cir. 1970); United States v. Roberts, 408 F.2d 360 (2d Cir. 1969); United States v. Maxwell, 383 F.2d 437 (2d Cir. 1967), *cert. denied,* 389 U.S. 1043 (1968); United States v. Lustman, 258 F.2d 475 (2d Cir.), *cert. denied,* 358 U.S. 880 (1958). While the Supreme Court, in Dickey v. Florida, 398 U.S. 30 (1970), seemingly rejected this rule, subsequent cases in the Second Circuit suggest that no judicial abdication of the rule has occurred.

135 As of this writing the decisional law in the Second Circuit remains unchanged. The latest Second Circuit case, United States v. Haggett, 438 F.2d 396 (2d Cir. 1971) affirms the adherence to the "demand rule" despite the *Dickey* decision. However, it appears that the Rules Regarding Prompt Disposition of Criminal Cases issued by the Circuit Council of the Second Circuit, will reverse the trend of decisional law relating to speedy trial inquiries and specifically to the requirement of demand. Appendix, 28 U.S.C.A. (Supp. 1971). *See generally* Comment, *Speedy Trials and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases,* 71 COLUM. L. REV. 1058 (1971). For a detailed study of these Rules, effective July 5, 1971. see Note, *A Look at the New Second Circuit Rules for the Prompt Disposition of Criminal Cases,* 56 MINN. L. REV. 73 (1971). *See also* note 144 *infra.*

136 In analyzing the concept of "delay," consideration must be given to at least three basic factors: the source of the delay, the reasons for it, and whether the delay prejudiced interests protected by the speedy trial clause. Dickey v. Florida, 398 U.S. 30, 48 n.12 (1970).

The delay the defendant alleges clearly must go beyond the ordinary lapse of time between indictment and trial to be constitutionally violative. As the Court noted:

> in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution, are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect upon the rights of the accused and upon the ability of society to protect itself.

United States v. Ewell, 383 U.S. 116, 120 (1965).

delay[136] and prejudice.[137] In past cases, commencing with *Beavers v. Haubert*[138] and culminating in *Dickey v. Florida*,[139] the Supreme Court has studied these problems. Its 1970 decision in *Dickey* seemingly provides a contradiction to the "demand rule" of the Second Circuit. However, the Second Circuit has upheld the "demand rule" in the face of this dictum of the Supreme Court.[140]

It was not until *United States ex rel. Frizer v. McMann*,[141] that the

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It is well recognized that although a defendant has a right to a speedy trial, all that is required is that the pace of government proceedings be reasonable under all circumstances. United States v. Kaufman 311 F.2d 695 (2d Cir. 1963). *See also* Pollard v. United States, 352 U.S. 354 (1957). Recent cases outside the Second Circuit, however, have adopted an approach that places responsibility for prosecution on the law enforcement agencies, so that where unusual delay is not attributable to special circumstances it is constitutionally violative. Importantly, the Court in *Dickey* also applied stricter standards to prosecution-caused delay. Additionally, a few cases have held that delay solely caused by court congestion can be constitutionally violative of the speedy trial guarantee.

137 In regard to trial delay, the need for defendant to establish that he has been prejudiced by such delay, as a condition precedent to dismissal of his charges is unsettled. One court has held that prejudice is irrelevant when there is undue delay, United States v. Lustman, 258 F.2d 475 (2d Cir. 1958). Other courts have viewed prejudice as one of the definitional elements of unconstitutional delay, but differ on the question of who should have the burden of proving its existence. For a discussion of "prejudice" within trial delay *see Lagging Right* at 1591. Apparently, there are three schools of thought regarding the requirement of prejudice. These schools hold: (1) that it is incumbent upon the accused to make a showing of prejudice; (2) prejudice is presumed and necessarily follows from long delay; (3) when delay is substantial, the prosecution must prove that the accused suffered no serious prejudice beyond that resulting from ordinary and inevitable delay. *See* cases cited in *Lagging Right* at 1592 nn.26-28.

138 198 U.S. 77 (1905). This was the first case balancing an individual's right to a speedy trial with the rights of the public justice. In *Beavers*, the Supreme Court held that the right of a speedy trial is "necessarily relative."

In effect, the Court's decision placed individual rights subordinate to the welfare of the State.

139 398 U.S. 30 (1970). After tracing the development of the right of speedy trial, the Court focussed its attention on the "demand rule" of the Second Circuit. The Court questioned the view that an accused loses his right to a speedy trial by silence or inaction on three grounds. First, the view lacks a realistic understanding of the effect of delay. While the Court admitted that some defendants may welcome delay, it countered that

> an accused may just as easily object to delay for its prolongation of the time in which he must live in uncertainty, carrying the emotional and financial burdens of accusation, and possessing the conditioned freedom of a potential felon.

Id. at 49 (Brennan, J., concurring). Second, it is based on a concept of waiver in direct contravention to precedent. Third:

> it is possible that the implication of waiver from silence or inaction misallocates the burden of ensuring a speedy trial. The accused has no duty to bring on his trial. He is presumed innocent until proved guilty; arguably, he should be presumed to wish to exercise his right to be tried quickly, unless he affirmatively accepts delay.

Id. at 49-50 (Brennan, J., concurring).

140 United States v. Haggett, 438 F.2d 396 (2d Cir. 1971). *See also* Maxwell v. United States, 319 F. Supp. 269 (S.D.N.Y. 1970).

141 437 F.2d 1309 (2d Cir. 1970). In this case the defendant was incarcerated in one jurisdiction while charges were pending against him in another jurisdiction. Although

Second Circuit seized the opportunity to espouse an urgent need for uniform guidelines for the disposition of criminal cases. This "need" crystalized into a reality by the Circuit Council of the Second Circuit's promulgation of nine rules relating to speedy trials.[142] These rules supplement decisional law quantitatively in determining what constitutes unnecessary delay.[143] Furthermore, these rules resolve the controversy

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defendant's habeas corpus petition was denied, the court's appraisal of the right of speedy trial referred to *Dickey* wherein it is stated that:

> [t]he right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality on the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendants right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases.

Dickey v. Florida, 398 U.S. 30, 37 (1970).

By "condoning" trial delay, courts have unknowingly divested themselves of important powers. In regard to this it has been noted that:

> [o]ne of the most undesirable results of the delay in the trial of an offense is that the power to determine consequences of conviction is transferred from the judicial to the prosecuting or police authorities. The court is thus deprived, at the relevant time and under relevant circumstances, of the opportunity to determine whether sentence, in case of conviction on the deferred charge, should be suspended or imposed concurrently, or consecutively with sentence which the convict is serving in another jurisdiction.

Schindler, *Inter Jurisdictional Conflict and the Right to a Speedy Trial*, 35 CIN. L. REV. 179, 182 (1966).

142 *See* Appendix, 28 U.S.C.A. (Supp. 1971). These rules encompass: priorities in scheduling criminal cases, cases involving incarcerated defendants, maximum periods in which time the government must be ready for trial, exclusions from the computation of the period of delay, "demand rule" and waiver, and other related subjects. The need for such rules is exemplified by the statements accompanying the Rules wherein it is stated:

> [t]he public interest requires disposition of criminal charges with all reasonable dispatch. The deterrence of crime by prompt prosecution of charges is frustrated whenever there is a delay in the disposition of a case which is not required for some good reason. The general observance of law rests largely upon a respect for the process of law enforcement. When the process is slowed down by repeated delays in the disposition of charges for which there is no good reason, public confidence is seriously eroded.

Id. at 7.

143 Rule 4 provides that:

> in all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time . . . and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

Id. at 2.

This provides a definite time period, *i.e.*, six months, within which the government must proceed to trial unless there is a showing of special circumstances by the prosecuting attorney. *Id.* at 2-4. This is indeed a great innovation when viewed in light of the vague standard of unnecessary delay in Rule 48(b) of the FED. R. CRIM. P.

It has been noted that Rule 48(b) is:

> susceptible of being manipulated to justify delay and defeat the spirit of the right to a speedy trial. The major difficulty with the standard of unnecessary delay is that no one can tell if a particular defendant is being denied a speedy trial without a judicial pronouncement. For this reason it is suggested that the

regarding the "demand rule" in favor of the defendant, while at the same time requiring him to actively move for discharge.[144]

These rules provide a viable means whereby a defendant in a criminal prosecution may implement his constitutional right to a speedy trial. While Justice Brennan has suggested that many of the basic questions about the scope and context of the speedy trial guarantee remain to be resolved,[145] it is hopeful that implementation of and adherence to the new rules will accomplish this purpose within the jurisdiction of the Second Circuit.

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malleable standard of a speedy trial should be replaced by a more explicit federal standard requiring the accused to be brought to trial within a definite time limit.

Lagging Right at 1618.

It now appears that the Second Circuit is leading the way for federal legislation which explicitly determines what constitutes a "delay" that is constitutionally violative of the defendant's right to speedy trial.

144 Rule 8 provides that:

> [a] demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. However, failure of a defendant to move for discharge prior to plea of guilty or trial shall constitute waiver of such rights. . . .

Appendix, 28 U.S.C.A. (Supp. 1971).

This rule effectively reverses the policy of the Second Circuit regarding the requirement of a demand by defendant.

145 Dickey v. Florida, 398 U.S. 30, 56 (Brennan, J. concurring).