



A Defendant's Right to a Speedy Trial — Texas Law

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SOURCES OF LAW

Three sources of law guarantee a speedy trial for a criminal defendant in Texas: (1) the Sixth Amendment to the United States Constitution; (2) Article I, § 10 of the Texas Constitution; and (3) Article 1.05 of the Texas Code of Criminal Procedure. The Sixth Amendment states, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." ¹ The Texas Constitution and the Texas Code of Criminal Procedure describe this right using identical language: "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury." ² Since none of these sources specifies what constitutes speedy, or what the appropriate remedy for a non-speedy trial is, federal and Texas case law elaborate.

THE BARKER STANDARD

Although the Texas right to a speedy trial exists independently of the federal guarantee, the Texas Court of Criminal Appeals has held that a balancing test identical to the one established by the United States Supreme Court in *Barker v. Wingo* ³ is to be used in determining whether a defendant has been denied his state constitutional right to a speedy trial. ⁴ Under *Barker*, the court weighs four factors: (1) whether delay before trial was uncommonly long; (2) whether the government or the criminal defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether the defendant suffered prejudice as the delay's result. ⁵ The burden on the parties is a sliding one. While the state has the burden of justifying the length and cause of the delay, the defendant has the burden of proving the assertion of the right and showing prejudice. The defendant's burden of proof on these two factors varies inversely with the state's degree of culpability for the delay. Thus, the greater the state's bad faith or official negligence and the longer its actions delay a trial, the less a defendant must show actual prejudice or prove diligence in asserting his right to a speedy trial. ⁶

Texas courts have held that none of the four factors is either a necessary or a sufficient condition to the finding of a deprivation of the right to a speedy trial, ⁷ and that no one factor possesses "talismatic qualities." ⁸ Instead, the factors must be considered together, along with any other relevant circumstances, and courts must engage in "a difficult and sensitive balancing process" in each individual case. ⁹ This balancing requires the court to first evaluate each factor in terms of whether it weighs against the state, or against the defendant, and second to evaluate how its findings on the four factors combine.

Because the sole form of relief for violation of a defendant's right to a speedy trial is full dismissal of the charges, ¹⁰ courts are understandably reluctant to find that the right has been violated. The burden on the defendant is therefore an especially high one, and courts often deny relief where the defendant has failed to show all four factors weigh in his or her favor.

The Length of the Delay

Attachment of the Right and Triggering of the Inquiry. The right to a speedy trial attaches once a person becomes an accused -- that is, once he is arrested and held to answer a criminal charge, or once he is charged by a formal indictment or information. ¹¹ The delay between arrest or charge and the actual trial must be significant before any of the other factors will even be considered. "The length of the 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."¹² The standard for what constitutes a delay sufficient to trigger an inquiry is whether "the interval between accusation and trial has crossed the threshold dividing 'ordinary' from 'presumptively prejudicial' delay."¹³

In one instance, a delay of four months was found to be insufficient.¹⁴ LaFave & Israel and some court opinions suggest the trigger is set after a delay of eight months.¹⁵ Other court opinions hold that a delay "approaching one year" is sufficient to trigger a speedy trial inquiry.¹⁶ It is safe to say that if eight to twelve months have passed since the defendant's arrest, most judges will find that sufficient time has passed to trigger an inquiry into whether the defendant's right to a speedy trial was violated.

Prejudicial Delay. Once the length of the delay is sufficient to trigger an inquiry, a second step is performed. In *Zamorano*, the Texas Court of Criminal Appeals explained:

If the accused shows that the interval between accusation and trial has crossed the threshold dividing "ordinary" from "presumptively prejudicial" delay, a court must then consider the extent to which that delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.

This second inquiry is significant to the speedy trial analysis because "the presumption that pretrial delay has prejudiced the accused intensifies over time." Thus, any speedy trial analysis depends first upon whether the delay is more than "ordinary"; if so, the longer the delay beyond that which is ordinary, the more prejudicial that delay is to the defendant.¹⁷

Here, too, the length of the delay is relevant, but undefined. The United States Supreme Court has refused to determine what length of delay constitutes a violation of the right, finding "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months."¹⁸ The Court held that "[t]he States, of course, are free to prescribe a reasonable period consistent with constitutional standards,"¹⁹ but neither the Texas Legislature nor the Texas courts have prescribed a specific period.²⁰ Further, the courts consider the type of case when evaluating the delay. Thus, a complex RICO case will be allowed to drag on for far longer than a simple DWI case will.²¹ Other contextual conditions are to be considered as well. Presumably, an event such as Hurricane Katrina would increase the permissible delay.²²

Generally, the delay must be very long indeed before the courts will consider a speedy

trial to have been denied. Accompanying this article is a table of Court of Criminal Appeals opinions which illustrate how long a delay has been considered, and how the court has ruled. In each of these cases, the threshold question of whether the delay was long enough to trigger a *Barker* analysis was met. The only cases in which the court held that a speedy trial was *not* granted, and accordingly granted some relief, are the first three in the table. Many more cases could have been added to this table, all of which found that the defendant *was* granted a speedy trial under one of the four factors.

Some of the cases found that a speedy trial was granted, even when astonishingly long intervals passed between arrest and trial — including almost four and one-half years for a DWI²³ and over eight years for speeding.²⁴ Yes, speeding. In that case, the defendant — an attorney — faced a fine of \$22. The case was set for trial and reset several times, and eventually tried a full eight years after the initial arrest. He was found guilty. Four months later, the defendant filed a motion to dismiss on the grounds that he had been denied a speedy trial — three months after the deadline to file an appeal. During the eight years while the case was pending, the defendant (who appeared to have represented himself) discarded his own file on the case. The

¹U.S. CONST. amend. VI.

²TEX. CONST. art. I, § 10; TEX. CODE CRIM. P. § 1.05.

³*Barker v. Wingo*, 407 U.S. 514 (1972).

⁴*Deeb v. State*, 815 S.W.2d 692, 704 (Tex. Crim. App. 1991); see also *Cantu v. State*, 253 S.W.3d 273, 281 n.16 (Tex. Crim. App. 2008); *Zamorano v. State*, 84 S.W.3d 643, 648 (Tex. Crim. App. 1992).

⁵*Zamorano*, 84 S.W.3d at 648.

⁶*Cantu*, 253 S.W.3d at 280-81.

⁷*Barker*, 407 U.S. at 533.

⁸*Zamorano*, 84 S.W.3d at 648.

⁹*Id.*

¹⁰*Barker*, 407 U.S. at 522.

¹¹*United States v. Marion*, 404 U.S. 307, 321 (1971).

¹²*Barker*, 407 U.S. at 530; see also *Zamorano*, 84 S.W.3d at 648 (citing *Barker*).

¹³*Zamorano*, 84 S.W.3d at 649.

¹⁴*Cantu*, 253 S.W.3d at 281.

¹⁵2 LaFave & Israel, *Criminal Procedure* § 18.2(b) (1984) (courts generally hold that any delay of eight months or longer is presumptively unreasonable and triggers speedy trial analysis); accord *Massey v. State*, No. 01-02-01329-CR, 2004 WL 2307418, at *1 (Tex. App.—Houston [1st Dist.] Oct. 14, 2004, no pet.) (mem. op.).

¹⁶*Bryan v. State*, No. 04-06-00147-CR, 2007 WL 1133216, at *2 (Tex. App.—San Antonio Apr. 18, 2007, no pet.) (mem. op.) (quoting *Shaw v. State*, 117 S.W.3d 883, 889 (Tex. Crim. App. 2003)).

¹⁷*Zamorano*, 84 S.W.3d at 649 (quoting *Doggett v. United States*, 505 U.S. 647, 652 (1992)).

¹⁸*Barker*, 407 U.S. at 523.

¹⁹*Id.*

²⁰*Webb v. State*, 36 S.W.3d 164, 172 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (citing *Hull v. State*, 699 S.W.2d 220, 221 (Tex. Crim. App. 1985) (en banc)) ("There is, however, no *per se* length of delay that automatically constitutes a violation of the right to a speedy trial.").

²¹*Barker*, 407 U.S. at 531 ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.").

²²*Id.* at 530-31 (Given the "imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.").

²³*Harlan v. State*, 975 S.W.2d 387 (Tex. App.—Tyler 1998, pet. ref'd).

court's irritation with the defendant-lawyer who discarded the file on his own case was clear, and this case is unlikely to be used to justify similarly long delays. This is an unusual case, but it illustrates an important point: courts look to all of the circumstances and not just to any single factor, even when that factor is an alarmingly long delay in trying an exceedingly simple charge.

The take-home message is that, even with a delay sufficient to trigger an inquiry, only very rarely does the court find, on balance, that the defendant was denied the right to a speedy trial. The length of time between arrest and trial, standing alone, is almost never sufficient for a court to find that the right to a speedy trial was denied; instead, strong findings for the defendant with respect to the other factors are required to obtain relief.

The Reason for the Delay

The Texas Court of Criminal Appeals has explained, "Related to length of delay is the reason the government assigns to justify the delay."²⁵ The burden of excusing delay rests with the State.²⁶ The state typically will parse the time which has passed since the arrest and show how much of the delay was caused by the defendant. Any portion of the delay that can be attributed to the defendant — seeking a continuance, filing

motions, seeking pre-trial evaluations of fitness to be tried, declaring "not ready," failing to appear in court, etc. — will be weighed against the defendant, regardless of how legitimate those reasons are. It is not the case that a defendant waives his or her right to a speedy trial by seeking a continuance; such a rule "would make a defendant's right to a speedy trial forfeitable due to unforeseeable events."²⁷

Once any portion of the delay which can be attributed to the defendant is subtracted from the whole delay, the state has the burden to justify the remaining period of delay. The courts assign different weights to different reasons. At one extreme, a finding of a "bad-faith delay" by the state will, in theory, render relief almost automatic. However, it is almost never the case that the defendant can show that the state exhibited bad faith. A crowded docket is interpreted as neutral, in the sense that it does not show bad faith, but because the state is responsible for clearing the docket, it is also considered to be a factor weighing against the government, but less heavily than a bad-faith delay.²⁸ "A defendant has no duty to bring himself to trial, and the primary burden rests upon the courts and the prosecution to insure that cases are brought to trial."²⁹ A finding of mere negligence will not become "automatically tolerable simply because the accused cannot

demonstrate exactly how it has prejudiced him."³⁰ Where no reason is supplied by the state, but the state announced that it was "ready" to proceed at trial, this factor does not weigh for or against either the defendant or the state.³¹ At the other extreme, "[i]f the delay is attributable in whole or in part to the defendant, it may constitute a waiver of his speedy trial claim."³²

Reasons provided by the state which have been accepted by the courts include: (1) a one-month interval between indictment and first trial, because "the State [is] entitled to a reasonable period in which to prepare its case";³³ (2) the complexity of the case;³⁴ (3) medical, personal, and professional problems or conflicts for critical parties,³⁵ such as the illness of the ex-sheriff who was in charge of the investigation;³⁶ (4) a missing witness;³⁷ (5) insufficient turnout to form a jury;³⁸ (6) good-faith negotiations resulting in a failed plea agreement;³⁹ and (7) difficulty transporting the defendant between facilities.⁴⁰ Reasons provided by the state which have been rejected by the courts include: (1) seeking to gain some tactical advantage over defendants or to harass them;⁴¹ (2) taking three years to obtain a translation of a video in Spanish, because "Spanish speakers and interpreters in San Antonio, Texas, are hardly rare";⁴² (3) defendant's frequent address changes, where the state could not prove

²⁴*Ex parte Beech*, 591 S.W.2d 502 (Tex. Crim. App. 1979).

²⁵*Barker*, 407 U.S. at 531.

²⁶*State v. Greenlee*, Nos. 12-06-00309-CR & 12-06-00310-CR, 2007 WL 2460045, at *5 (Tex. App.--Tyler Aug. 31, 2007, pet. ref'd) (mem. op.).

²⁷*Zamorano*, 84 S.W.3d at 650 n.31.

²⁸*Barker*, 407 U.S. at 531; *State v. Smith*, 76 S.W.3d 541, 548 (Tex. App.--Houston [14th Dist.] 2002, pet. ref'd) ("A more neutral reason such as negligence or overcrowded courts should be weighed less heavily against the State.").

²⁹*Smith*, 76 S.W.3d at 549 (citing *Barker*, 407 U.S. at 527).

³⁰*Doggett*, 505 U.S. at 656-57.

³¹*Bryan*, 2007 WL 1133216, at *4.

³²*State v. Munoz*, 991 S.W.2d 818, 822 (Tex. Crim. App. 1999).

³³*Shoemaker v. State*, No. 13-04-149-CR, 2006 WL 2521626, at *8 (Tex. App.--Corpus Christi 2006, pet. ref'd) (mem. op.).

³⁴*Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App. 1992).

³⁵*Zamorano*, 84 S.W.3d at 650 n.31.

³⁶*Barker*, 407 U.S. at 534.

³⁷*Id.* at 531.

³⁸*Stock v. State*, 214 S.W.3d 761, 766 n.2 (Tex. App.--Austin 2007, no pet.).

³⁹*Id.*

⁴⁰*Phillips v. State*, No. 06-03-00106-CR, 2004 WL 299279, at *2 (Tex. App.--Texarkana Feb. 18, 2004, no pet.) (mem. op.).

⁴¹*Barker*, 407 U.S. at 531 n.32.

⁴²*Zamorano*, 84 S.W.3d at 650.

⁴³*Smith*, 76 S.W.3d at 548-49.

⁴⁴*Barker*, 407 U.S. at 527-30.

⁴⁵*Munoz*, 991 S.W.2d at 825 (citing *Barker*, 407 U.S. at 528-29).

⁴⁶*Beech*, 591 S.W.2d at 504.

⁴⁷*Cantu*, 253 S.W.3d at 283.

⁴⁸*Barker*, 407 U.S. at 536.

⁴⁹*Adkins v. State*, No. 2-01-288-CR, 2003 WL 1524138, at *4 (Tex. App.--Fort Worth Mar. 24, 2003, pet. ref'd) (opinion on refusing appellant's petition for discretionary review).

⁵⁰*Zamorano*, 84 S.W.3d at 651.

⁵¹*Barker*, 407 U.S. at 531.

that defendant failed to inform the court of his current address;⁴³ and (4) a crowded court docket. The key lesson for the attorney representing a criminal defendant is that actions taken by the defense which delay trial, for any reason, ultimately weaken an assertion that the defendant was denied a speedy trial. Evidence that the state caused the delay for unjustifiable reasons will strengthen the claim.

Asserting the Right

Barker explicitly rejected the rule that a defendant waives his speedy trial claim when he has not demanded one.⁴⁴ Nevertheless, a defendant is still responsible for asserting or demanding his right to a speedy trial.⁴⁵ Failure to assert the right to a speedy trial can be fatal to a

claim that no such trial was granted:

[W]e deem it significant that petitioner never asserted his right to a speedy trial during this [8-year] period of time Indeed, it may well be that petitioner's failure to prosecute his right to a trial de novo in County Court was a knowing and deliberate decision, motivated by a strategical tactic to maximize the chance that his case would never come to trial.⁴⁶

Although the courts have stated that none of the factors is necessary, this factor appears to be not only necessary, but central. As one court said, "[T]he failure to diligently seek a speedy trial supports the hoary lawyer's adage, 'Never tried, never convicted.'"⁴⁷ The *Barker* Court's opinion makes clear how critical this factor is:

We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted ex parte. But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial.⁴⁸

Further, the manner in which this right is asserted can count against the defendant. A defendant who moves for dismissal on the grounds that his right to a speedy trial has been violated can be viewed by the court as seeking *no* trial, rather than a *speedy* trial, and this can be held against him.⁴⁹ For the attorney asserting that his or her client's right to a speedy trial was violated, this is a thin line to navigate. The Texas Court of Criminal Appeals, in *Zamorano*, explained this factor:

Whether and how a defendant asserts his speedy trial right is closely related to the other three factors because the strength of his efforts will be shaped by them. Therefore, the defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. Conversely, a failure to assert the right makes it difficult for a defendant to prove that he was denied a speedy trial.⁵⁰

Case law suggests that some judges have conflated this factor with the prejudice factor. Courts assume that "[t]he more serious the deprivation, the more likely a defendant is to complain."⁵¹ The Court of Criminal Appeals in *Shaw*, for example, explained that:

[A] defendant's failure to make a timely demand for a speedy trial indicates strongly that he did not really want one and that he was not prejudiced by not having one. [Further,] the longer the delay becomes, the more likely it is that a defendant who really wanted a speedy trial would take some action to obtain one. [Thus,] a defendant's inaction weighs more heavily against a violation the longer the delay becomes.⁵²

So how can a defendant seek a speedy trial? The following means have been accepted by courts: (1) letters and documented phone calls, to the court or to

Case	Type of Case	Length of Delay	Disposition
<i>Zamorano v. State</i> , 84 S.W.3d 643 (Tex. Crim. App. 2002)	DWI	4 years	speedy trial denied
<i>Chapman v. Evans</i> , 744 S.W.2d 133 (Tex. Crim. App. 1998)	delivery of a controlled substance	2 years and 6 months	speedy trial denied
<i>Turner v. State</i> , 545 S.W.2d 133 (Tex. Crim. App. 1976)	felony theft	2 yrs and 3 months	speedy trial denied
<i>Harris v. State</i> , 827 S.W.2d 949 (Tex. Crim. App. 1992)	capital murder	13 months	speedy trial not denied
<i>State v. Greenlee</i> , 2007 WL 2466045 (Tex. App.--Tyler Aug. 31, 2007, pet. ref'd)	misdemeanor possession	13 months	speedy trial not denied
<i>Deeb v. State</i> , 815 S.W. 2d 692 (Tex. Crim. App. 1991)	conspiracy to commit capital murder	15 months	speedy trial not denied
<i>Bryan v. State</i> , 2007 WL 1133216 (Tex. App.--San Antonio Apr. 18, 2007, no pet.)	possession of drug paraphernalia	18 months	speedy trial not denied
<i>Webb v. State</i> , 36 S.W.3d 164 (Tex. App.--Houston [14 th Dist.] 2000, pet. ref'd)	aggravated sexual assault	20 months	speedy trial not denied
<i>Massey v. State</i> , 2004 WL 2307418 (Tex. App.--Houston [1 st Dist.] Oct. 14, 2004, no pet.)	aggravated robbery	28 months	speedy trial not denied
<i>Phillips v. State</i> , 2004 WL 299279 (Tex. App.--Texarkanna Feb. 18, 2004, no pet.)	Assault (of corrections officer)	28 months	speedy trial not denied
<i>Adkins v. State</i> , 2003 WL 1524138 (Tex. App.--Fort Worth Mar. 24, 2003, pet. ref'd)	possession with intent to deliver	32 months	speedy trial not denied
<i>State v. Smith</i> , 76 S.W.3d 541 (Tex. App.--Houston [14 th Dist.] 2002, pet. ref'd)	burglary and attempted aggravated assault	over 3 years	speedy trial not denied
<i>Harlan v. State</i> , 975 S.W.2d 387 (Tex. App.--Tyler 1998, pet. ref'd)	DWI	4 years and 5 months	speedy trial not denied
<i>Ex parte Beech</i> , 591 S.W.2d 502 (Tex. Crim. App. 1979)	Speeding	8 years	speedy trial not denied

the prosecution; (2) intervention by others, such as the state attorney general or administrative assistants at the institution where the defendant is confined;⁵³ and (3) motion for a speedy trial.⁵⁴ Most important for the defendant is this rule: "If a defendant asserts his speedy trial right but requests a dismissal instead of a trial, his claim will be attenuated."⁵⁵ The courts definitely look to the defendant's actions to determine if he truly wants a speedy trial. In other words, to preserve the right to move for dismissal for failure to grant a speedy trial, the defendant must actively seek a speedy trial, resist state attempts to delay a trial, and *not* seek dismissal until many months, or possibly even years, have passed.

Prejudice

Prejudice is assessed in light of the interests of defendants, which the speedy trial right was designed to protect. The United States Supreme Court has identified three such interests: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired.⁵⁶ Some

appellate courts review the "prejudice" element under a burden-shifting approach. "The defendant has the burden to make a prima facie showing of some prejudice. The burden then shifts to the State to show that the accused suffered no serious prejudice."⁵⁷ Even where this method is not specifically identified, assertions of prejudice by the defendant are considered in light of counter-arguments by the state.⁵⁸

Incarceration. The first interest — to prevent oppressive pretrial incarceration — is fairly straightforward. A defendant is generally not found to be prejudiced when the defendant would be incarcerated for an independent reason;⁵⁹ but there is good support for the argument that, even in this situation, the defendant is prejudiced by failure to bring him to trial. The United States Supreme Court, in *Smith v. Hooley*, said:

At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is

suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.

And while it might be argued that a person already in prison would be less likely than others to be affected by "anxiety and concern accompanying public accusation," there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large.⁶⁰

Courts often weigh the "prejudice" factor against the state when the defendant loses or limits his ability to serve two concurrent sentences, or faces other limits

⁵²*Shaw*, 117 S.W.3d at 890; *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003).

⁵³*Turner v. State*, 545 S.W.2d 133, 138 (Tex. Crim. App. 1976).

⁵⁴*Id.*

⁵⁵*Adkins*, 2003 WL 1524138, at *4.

⁵⁶*Barker*, 407 U.S. at 532.

⁵⁷*Phillips*, 2004 WL 299279, at *2 (citing *Harris*, 489 S.W.2d at 308).

⁵⁸*Zamorano*, 84 S.W.3d at 654 ("It is true that the only evidence appellant offered to demonstrate his anxiety was his own testimony. However, because the State did not challenge appellant's testimony, it is at least some evidence of the type of 'anxiety' that the Supreme Court considers under the prejudice prong of *Barker*.").

⁵⁹*Greenlee*, 2007 WL 2460045, at *6 ("There is no evidence that Appellee would not have been justifiably incarcerated the entire time regardless of his misdemeanor charges.").

⁶⁰*Smith v. Hooley*, 393 U.S. 374, 378 (1969).

⁶¹*Turner*, 545 S.W.2d at 139 ("[H]e was deprived of the possibility of receiving a sentence at least partially concurrent with his federal sentence while more than two years of that sentence passed by. Additionally, the detainer that was placed on him by the authorities of this State may well have prejudiced his opportunity for clemency, pardon, parole or to be a trusty.").

⁶²*See, e.g., Smith*, 76 S.W.3d at 551 ("[T]here was no oppressive incarceration in this case. Appellee testified he only had to stay in jail overnight before his bond was posted. It is undisputed that but for that single night, appellee remained free on bond during the time before trial.").

⁶³*Barker*, 407 U.S. at 532.

⁶⁴*See, e.g., Zamorano*, 84 S.W.3d at 654 ("The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go 'whithersoever he will.' The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes.").

⁶⁵*Id.*

⁶⁶*Harlan*, 975 S.W.2d at 391. *But see Zamorano*, 84 S.W.3d at 654 ("The court of appeals dismissed the main source of appellant's anxiety as 'his fear of conviction.' Even assuming that the court of appeals correctly characterized the source of appellant's anxiety, the sword of Damocles weighs no less merely because the source of anxiety is appellant's fear of conviction and the resultant as-yet-unknown punishment. Here, the length of the delay itself supports an inference of actual prejudice.").

⁶⁷*Zamorano*, 84 S.W.3d at 652.

⁶⁸*Doggett*, 505 U.S. at 655-66; *accord Greenlee*, 2007 WL 2460045, at *4.

⁶⁹*Harlan*, 975 S.W.2d at 391 (quoting *Harris*, 489 S.W.2d at 308).

⁷⁰*Smith*, 76 S.W.3d at 553; *accord Adkins*, 2003 WL 1524138, at *4 ("Appellant's counsel made only the bare assertion at the pretrial hearing that it was 'pretty hard to get witnesses together . . . after all this time.' The fact that it might have been difficult to procure witnesses, however, does not equate to those witnesses being unavailable. Even assuming that witnesses were unavailable, appellant did not inform the trial court of who those witnesses were, how their testimony would have been relevant, and what efforts he had made to get them to trial.").

⁷¹*Barker*, 407 U.S. at 522.

on his ability to obtain relief, due to his pre-trial incarceration.⁶¹ This interest typically does not apply to a defendant who has been released on bond or on his or her own recognizance.⁶² This does not prevent the defendant from successfully arguing that the costs of being out on bond are immaterial, however. Such an argument can be folded into the second interest — to minimize anxiety and concern of the accused. In *Barker*, the Court explained that “even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.”⁶³

Anxiety. Medical evidence of anxiety will be well received (e.g. requiring a prescription for anti-anxiety medication, or receiving counseling, during the period between arrest and trial and not prior to the arrest).⁶⁴ Additionally, the anxiety interest can be expanded to include many other forms of prejudice, such as the financial burden to the defendant, loss of a job or a demotion, and the requirement to report regularly while released on bail.⁶⁵ Presumably, other burdens could be shown: (1) difficulty obtaining childcare; (2) loss of opportunity to travel (particularly if the travel were work related or to attend the funeral of a family member, rather than a jaunt to the Caribbean); (3) requirement to travel significant distances to appear in court repeatedly; and (4) loss of social standing in community, etc.

Courts, however, can be singularly unsympathetic to the stressful effects of a pending trial, as some opinions show:

Appellant did not offer evidence, apart from his testimony, to demonstrate such anxiety, and, as noted above, we are inclined to conclude that his level of anxiety was not great, given the fact that he never pursued his pretrial motions nor asserted his right to a speedy trial during the more than four years leading up to trial. In fact, the unavoidable inference is that Appellant’s main source of anxiety was his fear of almost certain conviction; but we may also infer that the delay provided Appellant with his only relief from that anxiety because it gave him hope that the case would be dismissed on speedy trial grounds.⁶⁶

Unfair Trial. Of the three interests, the interest in a fair trial is the most important. However the courts have again and again held that “a defendant’s claim of a speedy trial violation need not necessarily

demonstrate prejudice to his ability to present defensive matters.”⁶⁷ Further, courts recognize that significant delays can affect the fairness of a trial in ways which cannot be demonstrated with evidence, and are often willing to assume that the defendant’s right to a fair trial was, in some unspecified way, impaired by a long delay.

Though time can tilt the case against either side . . . one cannot generally be sure which of them it has prejudiced more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, . . . it is part of the mix of relevant facts, and its importance increases with the length of delay.⁶⁸

Still, there are explicit ways in which to demonstrate that an unfair trial will result from the failure to grant a speedy trial. For example, the defendant can show that the long delay in bringing her case to trial has resulted in the loss of witnesses on her behalf. Courts often require more than the bare assertion that witnesses are unavailable, and instead place a significant burden on the defendant:

Appellant testified at the hearing that he could not remember some of the key events of the night of his arrest, nor could he recall the names of certain witnesses to his arrest and incarceration, including police officers and others who were present at the jail on the night of his arrest. He further alleged that one of the two occupants of his car on the night of the arrest had moved away and that he had no way of locating the man.

In order for Appellant’s inability to locate witnesses to amount to “some showing of prejudice,” Appellant must demonstrate “that the witnesses are unavailable, that their testimony might be material and relevant to his case, and that he has exercised due diligence in his attempt to find them and produce them for trial.”⁶⁹

Similarly, the Court of Criminal Appeals has stated that when a defendant asserts that his own memory of the events in question had faded, he “is required to show that any lapses of memory are in some way significant to the outcome of the case.”⁷⁰ For counsel representing a criminal

defendant, prejudice is best shown through extensive documentation. Counting on the court to understand that mere delay is prejudicial *per se* is inadequate, and it is fair to assume that the state will challenge any unsupported assertions.

REMEDY

The United State Supreme Court, in *Barker*, seemed to sigh as it explained:

The amorphous quality of the right [to a speedy trial] leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.⁷¹

Because this remedy is so extreme, courts are reluctant to find that a defendant has been denied the right to a speedy trial. Consequently, the balancing of the four factors that courts engage in is heavily skewed in favor of the state.

CONCLUSION

When arguing that a client’s right to a speedy trial has been violated, and that the remedy of dismissal is appropriate, it is important for defense counsel to emphasize a fundamental aspect of the American justice system: *it is the state’s burden to prove guilt.* If the state cannot even bring the defendant to trial, it has failed to meet that burden, and the defendant should be released from the restraints on his liberty because of an untried indictment. The right to a speedy trial is so fundamental that it appears in the Bill of Rights, the Texas Constitution, and a state statute, and formed an integral part of the eighteenth grievance listed in “The unanimous Declaration of the thirteen united States of America.” Severe as the remedy may be, the right to a speedy trial is fundamental, and sometimes a court needs to be reminded of this.



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