

2016

## Demanding a Speedy Trial: Re-Evaluating the Assertion Factor in the *Baker v. Wingo* Test

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### Recommended Citation

Seth Osnowitz, *Demanding a Speedy Trial: Re-Evaluating the Assertion Factor in the Baker v. Wingo Test*, 67 Case W. Rsrv. L. Rev. 273 (2016)

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DEMANDING A SPEEDY TRIAL:  
RE-EVALUATING THE  
ASSERTION FACTOR IN THE  
*BARKER V. WINGO* TEST

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INTRODUCTION

In 1977, Jerry Hartfield, a black man with an IQ of fifty-one, was charged with raping and murdering a white woman.<sup>1</sup> A jury quickly sentenced Hartfield to death, but he appealed.<sup>2</sup> Three years later, the

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1. Andrew Cohen, *Held Without Retrial for 11,800 Days, Texas Inmate Still Waits for Justice*, THE ATLANTIC (Jan. 7, 2013), <http://www.theatlantic.com/national/archive/2013/01/held-without-retrial-for-11-800-days-texas-inmate-still-waits-for-justice/266865/> [https://perma.cc/6ZWM-MJFB].

2. *Id.*

Texas Court of Criminal Appeals unanimously reversed Hartfield's conviction because the jury was tainted.<sup>3</sup> While Hartfield awaited trial, the governor of Texas—with encouragement by prison officials—commuted Hartfield's sentence from the death penalty to life in prison.<sup>4</sup> At that point, Hartfield's state-appointed attorney ceased representing Hartfield.<sup>5</sup> Although Hartfield was entitled to a new trial, he proceeded to spend twenty-three years in prison until a fellow inmate noticed the mistake.<sup>6</sup>

The inmate told Hartfield that he should have received a new trial when his case was reversed.<sup>7</sup> Hartfield then began filing pro se petitions for a writ of habeas corpus in district court.<sup>8</sup> In response, the court appointed a public defender to help with the case.<sup>9</sup> Hartfield—with aid from his attorney—then began petitioning for a writ of habeas corpus in state court and was eventually denied by the Texas Court of Appeals in 2014.<sup>10</sup> Hartfield argued that the thirty-four year pretrial delay caused by governmental negligence violated his constitutional right to a speedy trial.<sup>11</sup> The trial court concluded that the delay was extraordinary, that it was caused by governmental negligence, and that the thirty years of pretrial incarceration prejudiced the defendant, but it refused to find that a speedy trial violation had occurred because Hartfield's twenty-three years of acquiescence weighed heavily against him.<sup>12</sup> Again, Hartfield appealed.<sup>13</sup>

On appeal, the state argued, “While the *Barker* balancing test contains few if any absolutes, Appellant's twenty-three year delay in

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3. *Id.*

4. Deborah Hastings, *Texas Inmate Must Stay in Prison, Despite Conviction Being Overturned in 1980*, N.Y. DAILY NEWS (Apr. 18, 2014, 1:50 PM), <http://www.nydailynews.com/news/national/texas-inmate-conviction-overturned-1980-behind-bars-article-1.1761084> [https://perma.cc/MZ9M-Y9SL].

5. *Id.*

6. Michael Gracyzk, *Jerry Hartfield Should Be Freed After Being Wrongfully Locked Up For Decades: Lawyers*, THE HUFFINGTON POST (Feb. 14, 2014, 5:22 PM), [http://www.huffingtonpost.com/2014/02/14/jerry-hartfield\\_n\\_4791122.html](http://www.huffingtonpost.com/2014/02/14/jerry-hartfield_n_4791122.html) [https://perma.cc/5JWU-RLMD].

7. *Id.*

8. *See Ex parte Hartfield*, 442 S.W.3d 805, 807 (Tex. App. 2014) (denying pretrial habeas relief).

9. *Id.* at 810.

10. *Id.* at 817.

11. Amended Brief for Appellant at 3, *Ex parte Hartfield*, 442 S.W.3d 805 (Tex. App. 2014) (No. 13-14-00238-CV).

12. *Ex parte Hartfield*, 442 S.W.3d 805, 811 n.5 (Tex. App. 2014).

13. *Id.* at 811.

invoking his right to a new and speedy trial comes close to absolutely barring a finding that the right to speedy trial was violated during the relevant period.”<sup>14</sup> The court acknowledged that Hartfield’s case may have been the longest gap in any speedy trial case<sup>15</sup> but refused to reach the issue because of procedural technicalities.<sup>16</sup> On remand, Hartfield was reconvicted of crimes he allegedly committed over three decades prior.<sup>17</sup> Hartfield’s case demonstrates a major flaw with speedy trial jurisprudence.<sup>18</sup> It is unjust to deny an ignorant and unrepresented defendant his constitutional right just because he was unaware of his duty to demand it from the court.

This Note argues that courts’ misapplication of the “assertion factor” in the *Barker* speedy trial test has created problems in speedy trial jurisprudence.<sup>19</sup> Courts’ reliance on the “assertion factor” has fostered an unfair bias against dismissal of speedy trial cases in lower courts, allowed the courts to apply doctrine discredited by the U.S. Supreme Court, and distorted the intention of the constitutional right to a speedy trial. This Note proposes that courts can solve these problems by eliminating the assertion factor from speedy trial analysis. Instead, courts should apply a three-part test composed of the remaining *Barker* factors.

This Note begins in Part I with a discussion of the historic background and policy considerations of the constitutional speedy trial right. Part II explains the *Barker* test and the assertion factor’s role. Part III addresses problems created by the *Barker* test’s assertion factor. Part IV discusses some potential ways of reinterpreting the *Barker* test in order to mitigate the problems addressed in Part III.

## I. BACKGROUND AND POLICY OF SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL

The right to a speedy trial has a long history and deep-rooted policy concerns for protecting the accused from unwanted harms caused by

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14. State’s Brief at 53, *Ex parte Hartfield*, 442 S.W.3d 805 (Tex. App. 2014) (No. 13-14-00240-CR) (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972)).
  15. *Hartfield*, 442 S.W.3d at 808.
  16. *Id.* at 813 (“In other words, an alleged violation of a defendant’s Sixth Amendment right to a speedy trial cannot be raised by pretrial habeas because a ruling on such an issue is not entitled to interlocutory review.”).
  17. Matt Ford, *The Retrial of a Texas Man Imprisoned Despite an Overturned Conviction*, THE ATLANTIC (Aug. 20, 2015), <http://www.theatlantic.com/national/archive/2015/08/the-retrial-of-a-texas-man-imprisoned-despite-his-overturned-conviction/401876/> [https://perma.cc/492A-TM3W].
  18. Hartfield’s case was resolved on the habeas issue, so the Court never discussed the speedy trial issue. *Hartfield*, 442 S.W.3d at 817.
  19. See *infra* Part III.B (discussing the *Barker* test).

pre-trial incarceration.<sup>20</sup> Courts have tried to balance those harms with concerns for the difficulties prosecutors face in bringing defendants to trial.<sup>21</sup> Balancing these concerns caused courts to form policies that make it extremely difficult for defendants to find relief for speedy trial violations.

A. *History of Speedy Trial Jurisprudence*

On its face, the Sixth Amendment sets simple guidelines for protecting the criminally accused: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”<sup>22</sup> Despite centuries of speedy trial jurisprudence, however, courts have provided little guidance for determining what constitutes a “speedy trial” and when a defendant’s constitutional right is violated.<sup>23</sup> One reason for the lack of clarity is the trifling legislative history of the right.<sup>24</sup> Scholars claim that history provides little explanation of why the framers decided to include the language in the Bill of Rights or of the framers’ intended application.<sup>25</sup> Consequently, historic English trial rights have been used to interpret the language in the Sixth Amendment.<sup>26</sup> Considering the importance of history, the U.S. Supreme Court held, “the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage.”<sup>27</sup>

The constitutional framers’ most direct legislative influence on rights of the accused was the Habeas Corpus Act of 1679.<sup>28</sup> Yet, the timing concerns of the Habeas Corpus Act of 1679 focused on curing the problem of unlawfully detained prisoners, so it is unclear whether

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20. See *infra* Part II (discussing the history and policy concerns).
21. See *Barker v. Wingo*, 407 U.S. 514, 527–30 (1972) (explaining the need for a balancing test).
22. U.S. CONST. amend. VI.
23. See *infra* Part III (discussing application of the *Barker* test).
24. See SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 161–67 (Jack Stark ed., 2006) (explaining the historical origins of the right to a speedy trial).
25. *Id.* at 166–67.
26. *Id.*; see also Alan L. Schneider, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 484 (1968) (“This paucity of historical data makes it difficult to ascertain the intent of the framers when they enacted the federal speedy-trial guarantee. Given this fact, it seems reasonable to construe the guarantee in light of the common-law sources from which the framers derived their legal education.”).
27. *Klopper v. North Carolina*, 386 U.S. 213, 223 (1967).
28. *Id.*

the act provided the foundation for the broader language of the Sixth Amendment.<sup>29</sup> Scholars theorize that the inspiration for the framers to include the right to a speedy trial in the Bill of Rights may have come from the work of Sir Edward Coke.<sup>30</sup> Coke's influential seventeenth-century treatise "endors[ed] the principle that a right to speedy disposition was a significant component of justice."<sup>31</sup> However, Coke was one of the only voices emphasizing the need for speedy trials at the time, making it unclear how much English parliament thought about these concerns when it enacted the Habeas Corpus Act of 1679.<sup>32</sup> Therefore, the full extent of Coke's ideas over the language of the Sixth Amendment remains unclear.<sup>33</sup>

One clue about the policy interests behind the speedy trial language of the Sixth Amendment is a record of the majority of state delegates rejecting a proposed amendment to the language by Representative Burke of South Carolina.<sup>34</sup> Burke proposed language that would allow a defendant to delay trial if needed to help his case,<sup>35</sup> but the vast majority of delegates rejected Representative Burke's proposal on the theory that the established processes of the justice system would be sufficient to ensure defendants' ability to make their cases.<sup>36</sup> Therefore, the founders may have intended the speedy trial clause to be minimally intrusive.

Despite the ambiguous origins of the right to a speedy trial, the United States Supreme Court has managed to establish some guidelines for Sixth Amendment speedy trial jurisprudence. In *Klopfer v. North Carolina*,<sup>37</sup> the petitioner was indicted for criminal trespass, but never convicted because of a mistrial.<sup>38</sup> After his trial was postponed, Klopfer

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29. See 31 Car. 2, c. 2 (1679) ("For the prevention whereof and the more speedy Reliefe of all persons imprisoned for any such criminall or supposed criminal Matters . . .").

30. HERMAN, *supra* note 24, at 164; see *Klopfer*, 386 U.S. at 225 ("Coke's Institutes were read in the American Colonies by virtually every student of the law. Indeed, Thomas Jefferson wrote that at the time he studied law (1762-1767), 'Coke Lyttleton was the universal elementary book of law students.' And to John Rutledge of South Carolina, the Institutes seemed 'to be almost the foundation of our law.' To Coke, in turn, Magna Carta was one of the fundamental bases of English liberty." (footnotes omitted)).

31. HERMAN, *supra* note 24, at 162.

32. *Id.* at 163-64.

33. *Id.* at 164-67.

34. *Id.* at 166-67.

35. *Id.*

36. *Id.* at 167.

37. 386 U.S. 213 (1967).

38. *Id.* at 217.

petitioned the court to ascertain when his case would be heard.<sup>39</sup> At that point, the state prosecutor asked for a “*nolle prosequi* with leave,” a local rule that allowed a defendant to go free but obligated him to return to trial at an undetermined future date.<sup>40</sup> The Supreme Court found North Carolina’s *nolle prosequi* rule “clearly denie[d] the petitioner the right to a speedy trial,” which the Court declared was fundamental.<sup>41</sup> Therefore, the Court held that the Sixth Amendment right to a speedy trial applies to the states through the Fourteenth Amendment.<sup>42</sup>

One of the earliest cases to address how to apply the right to a speedy trial was *Beavers v. Haubert*.<sup>43</sup> In *Beavers*, the defendant faced two separate indictments under federal attempted bribery statutes, but did not comply with a removal warrant requiring him to appear in a different district than the one in which the case originated.<sup>44</sup> On appeal, the U.S. Supreme Court considered how speedy trial rights should be applied to a defendant facing multiple charges.<sup>45</sup> Instead of making a hard ruling of when and how the right to a speedy trial attaches, the *Beavers* court considered the circumstances surrounding the defendant and made a ruling based on balancing the defendant’s needs and the practical concerns of local courts in managing the proceedings.<sup>46</sup> The Court held, “The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.”<sup>47</sup> *Beavers* demonstrates why courts have had difficulty setting firm guidelines on when and how to apply the right to a speedy trial. Since the right of a speedy trial is necessarily relative, courts examine the circumstances surrounding each individual case in order to determine whether a lengthy pre-trial delay was reasonable.

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39. *Id.* at 218.

40. *Id.*

41. *Id.* at 222–23 (“We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, ‘We will sell to no man, we will not deny or defer to any man either justice or right’; but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166).” (footnote omitted)).

42. *Id.* at 222.

43. 198 U.S. 77 (1905).

44. *Id.* at 78.

45. *Id.* at 86.

46. *Id.* at 87.

47. *Id.*

Despite the ad hoc considerations prescribed in *Beavers*, the U.S. Supreme Court has managed to set some parameters on applying the right to a speedy trial. For instance, the Court determined that the meaning of “accused” in the Sixth Amendment requires some formal action by the government, and thus the right to a speedy trial attaches upon the arrest of a criminal defendant.<sup>48</sup> Further, the Court held that only periods where charges are pending should count toward a speedy trial violation in cases involving multiple proceedings and reinstatements.<sup>49</sup> The Court has also held that the only adequate remedy for a speedy trial violation is dismissal.<sup>50</sup> However, Chief Justice Burger reasoned, “[p]erhaps the severity of that remedy has caused courts to be extremely hesitant in finding a failure to afford a speedy trial. Be that as it may, we know of no reason why less drastic relief may not be granted in appropriate cases.”<sup>51</sup> The innate need for balancing competing interests in criminal cases, and the strict remedy of dismissal, has made courts reluctant to grant relief to defendants and led to inconsistent decisions in lower courts.<sup>52</sup> This has caused a great deal of pain and confusion for defendants seeking relief for speedy trial violations.

*B. Policy Considerations and the “Demand-Waiver Rule”*

The Supreme Court has emphasized concern for harms to defendants caused by waiting for trial,<sup>53</sup> but has held that courts need to balance those concerns with concerns for allowing the criminal justice

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48. See *United States v. Marion*, 404 U.S. 307, 321 (1971) (“Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest.” (footnote omitted)).
49. HERMAN, *supra* note 24, at 219; see *United States v. Loud Hawk*, 474 U.S. 302, 317 (1986) (holding that delay attributable to interlocutory appeals did not count for defendants’ speedy trial claim).
50. See *Strunk v. United States*, 412 U.S. 434, 438 (1973) (“The remedy for a violation of this constitutional right has traditionally been the dismissal of the indictment or the vacation of the sentence.”).
51. *Id.* Legal scholars have criticized dismissal as a remedy for speedy trial violations. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 98–100 (1997) (discussing how dismissal does not properly relieve innocent defendants and grants a windfall to guilty defendants).
52. See HERMAN, *supra* note 24, at 230 (“The reluctance of courts to invoke the ‘severe remedy’ of dismissal unquestionably has an impact on the willingness of courts to find a constitutional violation . . .”).
53. *United States v. Ewell*, 383 U.S. 116, 120 (1966) (“This guarantee is 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.”).



system time to function properly.<sup>54</sup> Unfortunately, the balance is not always easy to strike and can result in defendants waiting long periods of time prior to trial, and being deprived of their constitutional right.<sup>55</sup> Although there is clearly a need to be practical when creating criminal prosecution policy, speedy trial jurisprudence has heavily distorted the meaning of the constitutional language prescribing the right.

The plain meaning and courts' interpretations of the Sixth Amendment suggest that the right only applies to defendants who are formally "accused," which the Court interpreted to mean arrested.<sup>56</sup> According to Akhil Amar, the right to a speedy trial was intended to protect defendants specifically because they are accused.<sup>57</sup> Once a person is formally accused, that person faces the harms of being detained and having their reputation damaged.<sup>58</sup> The speedy trial clause was likely intended to mitigate these harms, especially for the falsely accused.<sup>59</sup> Further, the right protects innocent defendants from being detained indefinitely by a tyrannical government that refuses to hold trial. Yet, when applying the right to a speedy trial, courts have consistently balanced the interests of the public, the defendant, and the criminal justice system.<sup>60</sup> This pragmatic approach to determining whether speedy trial rights are violated is somewhat necessary, given the wide range of complications involved in criminal prosecution.<sup>61</sup> Therefore, these concerns led to the creation of flexible speedy trial tests

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54. *United States v. Marion*, 404 U.S. 307, 313 (1971).
55. *See supra* INTRODUCTION (discussing the case of Jerry Hartfield).
56. *Marion*, 404 U.S. at 313 ("On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused . . ."); AMAR, *supra* note 51, at 102–03 (discussing how the Sixth Amendment is "accusation-based").
57. AMAR, *supra* note 51 at 102.
58. *Id.* at 102–03.
59. *See Dickey v. Florida*, 398 U.S. 30, 41 (1970) ("It is intended to spare an accused those penalties and disabilities—incompatible with the presumption of innocence—that may spring from delay in the criminal process.").
60. *See supra* Part II.A (detailing the ambiguous reasons the framers included the language in the Bill of Rights and courts' historical application of the right).
61. *See Dickey*, 398 U.S. at 43 ("A criminal prosecution has many stages, and delay may occur during or between any of them."); *see also* H. Richard Uviller, *Barker v. Wingo: Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1384 (1972) ("[D]elay-provoking circumstances are rarely related to the nature of the charges alone.").

that consider various facets of a defendant's case.<sup>62</sup> The benefit of a flexible test comes with the cost of eliminating the guarantee of the right to a speedy trial. For example, by applying a balancing test, a court can find that the length of delay between a defendant's arrest and trial is so long that the defendant has not "enjoyed the right to a speedy and public trial," but not grant relief because there are preemptive countervailing interests.<sup>63</sup> Additionally, courts share Representative Burke's concerns over the dangers of a criminal justice system that moves too swiftly.<sup>64</sup> For example, in *United States v. Ewell*,<sup>65</sup> the U.S. Supreme Court held, "[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. Therefore . . . '[t]he right of a speedy trial is necessarily relative.'"<sup>66</sup> Courts' concerns for these underlying policy considerations and desire to stay true to the Constitution have led to inconsistent speedy trial jurisprudence.

The Court's declaration that the right to a speedy trial is fundamental led to fear of defendants who acquiesce to—or intentionally cause—procedural delays while awaiting trial and then subsequently claim to have their speedy trial right violated.<sup>67</sup> This concern likely helped form what courts have termed the "demand doctrine," or "demand-waiver rule."<sup>68</sup> Under the "demand-waiver rule," if a defendant does not make a timely demand for a speedy trial, the defendant waives his or her constitutional right.<sup>69</sup> The "demand-waiver rule" was intended to prevent guilty defendants who benefit from trial delays from using the constitutional right to get their cases dismissed based

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62. See *Barker v. Wingo*, 407 U.S. 514, 525–33 (1972) (describing the demand-waiver rule and creating a balancing test).
63. See *State v. Parker*, 296 P.3d 54, 62 (Ariz. 2013) (denying speedy trial violation despite a three-year and nine-month delay between arrest and trial because the pretrial incarceration did not prejudice the defendant's case).
64. *United States v. Ewell*, 383 U.S. 116, 120 (1966).
65. 383 U.S. 116 (1966).
66. *Id.* at 120.
67. See *Barker*, 407 U.S. at 526 ("[C]ourts that have applied the demand-waiver rule have relied on the assumption that delay usually works for the benefit of the accused and on the absence of any readily ascertainable time in the criminal process for a defendant to be given the choice of exercising or waiving his right.").
68. Different jurisdictions refer to the rule as either "demand-waiver rule" or the "demand doctrine." This Note will use the term "demand-waiver rule." See e.g., *United States v. Sanchez*, 361 F.2d 824, 825 (2d Cir. 1966) ("Moreover, the right to a speedy trial *after* arrest or indictment is deemed waived unless promptly asserted."); *United States ex rel. Pizarro v. Fay*, 353 F.2d 726, 727 (2d Cir. 1965) (holding the same).
69. *Sanchez*, 361 F.2d at 825.

on a technicality.<sup>70</sup> However, the rigidity of the “demand-waiver rule” allowed courts to unjustly deny deserving defendants the full benefits of right to a speedy trial. In the seminal case, *Barker v. Wingo*,<sup>71</sup> the U.S. Supreme Court addressed this problem.

## II. THE *BARKER* TEST AND DEFENDANTS’ ASSERTION OF THE RIGHT TO A SPEEDY TRIAL

In *Barker v. Wingo*, the Supreme Court rejected the rigid demand-waiver rule, but still emphasized the need to consider defendants’ assertion of the right to a speedy trial.<sup>72</sup> Promoting this policy, the Court established a four-factor balancing test that has become the quintessential test courts apply when determining whether defendants have been deprived of the constitutional right to a speedy trial.<sup>73</sup> This conflicting ideology has led to inconsistent application of the *Barker* test by lower courts, and created difficulties for defendants trying to find relief for speedy trial violations.

### A. Rejection of the “Demand-Waiver Rule”

In *Barker*, the defendant was indicted along with Silas Manning for beating an elderly couple to death with a tire iron.<sup>74</sup> The state found it necessary to use Manning’s testimony in order to convict Barker, so it had the court schedule Barker’s trial to occur after Manning’s.<sup>75</sup> However, over the course of four years, the state brought five trials before convicting Manning due to two hung juries, an illegal search, and a venue change.<sup>76</sup> Meanwhile, the state made sixteen motions for continuance to postpone Barker’s trial, while awaiting Manning’s conviction.<sup>77</sup> At his trial, Barker moved to dismiss the indictment, arguing that his constitutional right to a speedy trial had been violated.<sup>78</sup> The trial court

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70. See Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 853 (1957) (“This ‘demand doctrine’ stresses that the right to speedy trial is not designed as a sword for defendant’s escape, but rather as a shield for his protection. The courts reason that requiring demand will accomplish this purpose since it will lead toward trial on the merits and not to a technical evasion of the charge. A strong minority, however, rejects the ‘demand doctrine’ . . .”).

71. 407 U.S. 514 (1972).

72. *Id.* at 528.

73. See *id.* at 527–30 (explaining the need for a four-factor balancing test).

74. *Id.* at 516.

75. *Id.*

76. *Id.* at 516–17.

77. *Id.* at 517.

78. *Id.* at 518.

denied the motion and the Sixth Circuit affirmed based on the “demand-waiver rule.”<sup>79</sup> On review, the U.S. Supreme Court affirmed Barker’s conviction because Barker did not demonstrate he wanted a trial, but rejected the “demand-waiver rule” as being “insensitive to a right . . . deemed fundamental.”<sup>80</sup> The Court reasoned that fundamental rights require an affirmative action to trigger waiver, and the “demand-waiver rule” negated this requirement.<sup>81</sup> In addition, the rigid adherence to a “demand-waiver rule” would force some defendants to make a choice whether to accept some possibly advantageous delay at the cost of forgoing later relief for a speedy trial violation.<sup>82</sup> According to Justice Powell, this would put the government at a significant advantage.<sup>83</sup>

After rejecting the “demand-waiver rule” for being too unfair to criminal defendants, the *Barker* Court emphasized the importance of balancing interests in determining whether a defendant’s right to a speedy trial has been violated.<sup>84</sup> The Court reasoned that there are societal interests in providing speedy trials, separate from rights of the accused.<sup>85</sup> Justice Powell concluded that societal interests in speedy trials include: limiting the backlog of cases in urban courts, preventing persons released on bond from having the opportunity to commit other

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79. *Id.*

80. *Id.* at 529–30.

81. *Id.* at 525 (“Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court’s pronouncements on waiver of constitutional rights.”).

82. *See id.* at 527 (“It is also noteworthy that such a rigid view of the demand-waiver rule places defense counsel in an awkward position. Unless he demands a trial early and often, he is in danger of frustrating his client’s right. If counsel is willing to tolerate some delay because he finds it reasonable and helpful in preparing his own case, he may be unable to obtain a speedy trial for his client at the end of that time.”). The American Bar Association also advocated for rejecting the demand-waiver rule, claiming it unfairly impacts defendants. *Id.* at 528 n.28 (“The American Bar Association also rejects the rigid demand-waiver rule: ‘One reason for this position is that there are a number of situations, such as where the defendant is unaware of the charge or where the defendant is without counsel, in which it is unfair to require a demand . . . . Jurisdictions with a demand requirement are faced with the continuing problem of defining exceptions, a process which has not always been carried out with uniformity . . . . More important, the demand requirement is inconsistent with the public interest in prompt disposition of criminal cases. . . . [T]he trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge.’”).

83. *Id.* at 527–28.

84. *Id.* at 530.

85. *Id.* at 519.

crimes, mitigating temptation for the accused to jump bail and escape, and reducing the monetary costs of lengthy pre-trial detention.<sup>86</sup> Powell also considered harm to defendants:

The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, 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.<sup>87</sup>

However, the *Barker* Court considered that a delay may actually work to a defendant's advantage by weakening the prosecution's case, and held that a delay does not per se prejudice the accused's ability to defend himself.<sup>88</sup> Based on these notions, the *Barker* Court created the balancing test that has become a common standard courts apply when determining whether defendants are deprived of the constitutional right to a speedy trial.<sup>89</sup>

#### *B. Overview of the Barker Test*

In *Barker*, the Court considered the circumstantial nature of speedy trial violations and determined that applying an ad hoc balancing test is best way of ensuring justice.<sup>90</sup> In creating the test, Justice Powell determined four factors the court would consider.<sup>91</sup> The four factors—which this Note refers to as the “*Barker* factors”—are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his or her right, and (4) prejudice to the defendant.<sup>92</sup> In his opinion,

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86. *Id.* at 519–20.

87. *Id.* at 532–33.

88. *Id.* at 521.

89. *Id.* at 530.

90. *Id.*

91. *Id.*

92. *Id.*

Justice Powell was clear about leaving room for discretion when deciding future speedy trial cases.<sup>93</sup> Further, the opinion contradictorily rejected the “demand-waiver rule” because it unfairly prejudiced defendants, while holding that defendants must clearly show they wanted a speedy trial in order to take advantage of the right.<sup>94</sup>

The consequence of the Barker court’s broad language and conflicting ideas has been widely varying application of the *Barker* test.<sup>95</sup> Courts generally only dismiss cases for speedy trial violations if three of the four *Barker* factors weigh in favor of a defendant.<sup>96</sup> Yet, “[t]he complex nature of the *Barker v. Wingo* balancing test makes it impossible to evaluate the courts’ results for consistency.”<sup>97</sup> Commentators have expressed a variety of concerns about how courts misapply the *Barker* factors to the detriment of defendants.<sup>98</sup> While there are numerous legitimate concerns, this Note narrowly focuses on the third factor of the test, considering the consequences of allowing courts to use the nature of defendants’ assertion of the right to a speedy trial in determining whether to dismiss cases.

*C. The Defendant’s Assertion of His or Her Right to a Speedy Trial*

In *Barker*, Justice Powell cautioned that the “demand-waiver rule” could lead to an “automatic, *pro forma* demand made immediately after the appointment of counsel . . . .”<sup>99</sup> However, Justice Powell was clear that the Court still believes that defendants have a responsibility to demand the right to a speedy trial.<sup>100</sup> He reasoned that including the defendant’s assertion or failure to assert his or her right as a factor in

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93. *See id.* at 536 (“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.”).

94. *See id.* at 528–36 (rejecting the demand-waiver rule, but then holding that the defendant’s lack of effort to demand trial should be heavily weighed against him).

95. *See* 21A AM. JUR. 2D *Criminal Law* § 933 (2016) (discussing a variety of cases involving applications of the *Barker* test); *see also infra* Part IV (discussing some of these cases in detail).

96. HERMAN, *supra* note 24, at 223.

97. *Id.* at 222.

98. *Id.*

99. *Barker v. Wingo*, 407 U.S. 514, 528 (1972) (“The result in practice is likely to be either an automatic, *pro forma* demand made immediately after appointment of counsel or delays which, but for the demand-waiver rule, would not be tolerated. Such a result is not consistent with the interests of defendants, society, or the Constitution.”).

100. *Id.* (“We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right.”).

the balancing test would promote fairness by giving the court flexibility.<sup>101</sup>

It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. “It would also allow a court to weigh the *frequency* and *force* of the objections as opposed to attaching significant weight to a purely *pro forma* objection.”<sup>102</sup>

Further, Justice Powell made it clear that the court wanted to maintain constitutional principles and precedent that require defendants to take an affirmative action in order to waive fundamental rights protected by the Constitution.<sup>103</sup> However, he distinguished the right to a speedy trial from other fundamental rights: “[T]he right to a speedy trial is unique in its uncertainty as to when and under what circumstances it must be asserted or may be deemed waived.”<sup>104</sup> Adding to the confusion, the Court stressed, “[t]he defendant’s assertion of his speedy trial right, then, is entitled to strong evidentiary weight . . . that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.”<sup>105</sup> The contradictory language of the *Barker* opinion has led to inconsistency, confusion, and abuse by lower courts in decisions regarding speedy trial violations.

Courts have interpreted the *Barker* test to mean that defendants must make a “reasonable assertion” of a right to a speedy trial.<sup>106</sup> Courts determine whether a defendant has made a “reasonable assertion” by considering the circumstances surrounding the case. Courts consider whether the defendant is represented by legal counsel, whether the defendant communicates with her counsel, whether counsel makes a formal demand or complaint, what form the demand complaint is in, and if the defendant makes a demand to the court *pro se*.<sup>107</sup> Effectively, courts attempt to determine how badly a defendant wanted a speedy trial based on the form of her invocation of the right. For example, courts give a great deal of weight to objections to prosecutors’ motions

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101. *Id.* at 528–29.

102. *Id.* at 529 (emphasis added).

103. *Id.*; *supra* text accompanying note 76.

104. *Barker*, 407 U.S. 514 at 529.

105. *Id.* at 531–32.

106. *See Gov’t of Virgin Islands v. Pemberton*, 813 F.2d 626, 629 (3d Cir. 1987) (finding the defendant was obligated to make a “reasonable assertion of his speedy trial right” in light of *Barker v. Wingo*).

107. BRIAN R. MEANS, *POSTCONVICTION REMEDIES* § 38:7 (2016); 23 C.J.S. *Criminal Procedure and Rights of Accused* § 803 (2016).

for continuance.<sup>108</sup> Courts have also determined that a defendant can assert the right to a speedy trial either by communication to prosecution, or communication to the court, but give more weight to communications made directly to the court.<sup>109</sup> Courts are generally more flexible when deciding cases in which a defendant has articulated a demand without the assistance of counsel.<sup>110</sup> For example, the Third Circuit Court of Appeals held that a defendant's repeated requests to secure counsel, out of fear of losing evidence, was helpful in constituting a demand for a speedy trial.<sup>111</sup>

When deciding whether to acknowledge that a defendant made an assertion, courts look at the context of "the assertion" and decide whether the defendant really desired to be tried promptly.<sup>112</sup> In *State v. Rachie*,<sup>113</sup> the district court found that the defendant made a clear demand for a speedy trial, but the Minnesota Court of Appeals reversed because the demand was not on the record.<sup>114</sup> In *State v. Washington*,<sup>115</sup> the North Carolina Court of Appeals considered a defendant's demands for forensic evidence testing as evidence of informally asserting his right

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108. See *United States v. Frye*, 489 F.3d 201, 211 (5th Cir. 2007) ("An assertion of that right is a demand for a speedy trial, which will generally be an objection to a continuance or a motion asking to go to trial."); see also *Laws v. Stephens*, 536 F. App'x 409, 413 (5th Cir. 2013) (finding defendant "insufficiently and inconsistently asserted his speedy-trial rights" as "[h]e concurrently signed an 'Agreed Setting' form and took other actions suggesting that he was not, in fact, ready for trial" (citing *Millard v. Lynaugh*, 810 F.2d 1403, 1406 (5th Cir. 1987))); *United States v. Villalobos*, 560 F. App'x 122, 127 (3d Cir. 2014) (noting that although the defendant raised the issue of his right to a speedy trial both through motions and in court, "[r]epeated assertions of the right do not, however, balance this factor in favor of a petitioner when other actions indicate that he is unwilling or unready to go to trial" (quoting *Hakeem v. Beyer*, 990 F.2d 750, 764 (3d Cir. 1993))).

109. See *Prince v. Alabama*, 507 F.2d 693, 703 (5th Cir. 1975) ("We interpret these rulings as an indication that the courts should take a liberal view of convict-defendants' attempts to contact the prosecutors and courts in other jurisdictions regarding charges pending against them there.").

110. HERMAN, *supra* note 24, at 228.

111. *Douglas v. Cathel*, 456 F.3d 403, 418 (3d Cir. 2006) ("[H]is well-documented efforts to secure counsel are properly viewed as part and parcel of his efforts to assert his Sixth Amendment right to a speedy trial.").

112. See *United States v. Litton Sys., Inc.*, 722 F.2d 264, 271 (5th Cir. 1984) (rejecting the notion that a letter from defense counsel dissolving an agreement to suspend further action in criminal case proceedings during settlement negotiations asserted defendant's right to a speedy trial).

113. 427 N.W.2d 253 (Minn. Ct. App. 1988).

114. *Id.* at 257.

115. 665 S.E.2d 799 (N.C. Ct. App. 2008).



to a speedy trial.<sup>116</sup> Because the defendant's complaints about testing were coupled with a subsequent formal request for speedy trial, the court weighed the assertion factor in the defendant's favor.<sup>117</sup> However, the same court distinguished *Washington* in *State v. Williams*<sup>118</sup> by holding that a motion for discovery does not evidence assertion of the right to a speedy trial when the state does not delay the trial to collect evidence.<sup>119</sup>

In *Adams v. State*,<sup>120</sup> the Supreme Court of Mississippi acknowledged that the defendant's counsel expressed that the defendant's speedy trial right may have been violated, but nonetheless decided, "if anything, [the defendant] asserted a right to an instant trial."<sup>121</sup> The *Adams* court seemed to differentiate between moving for a speedy trial and moving to dismiss for lack of a speedy trial.<sup>122</sup> Further, courts consider the timing and form of a defendant's request for speedy trial.<sup>123</sup> For example, in *United States v. Henson*,<sup>124</sup> the First Circuit held that a letter sent to the district court prior to any formal charges being filed against the defendant was not sufficient to be considered evidence of asserting the right to a speedy trial.<sup>125</sup> In *State v. O'Brien*,<sup>126</sup> the Ohio Supreme Court held that the defendant, who waived his right to a speedy trial under state law, was not entitled to Sixth Amendment speedy trial relief because he did not make formal written objections to the prosecution's continuances.<sup>127</sup>

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116. *Id.* at 808.

117. *Id.*

118. 207 N.C. App. 266 (N.C. Ct. App. 2010).

119. *Id.* at \*5 ("[W]hen there is no indication that the State delayed the trial in order to collect discoverable material, we will not interpret a defendant's motion for discovery as an assertion of his right to a speedy trial.>").

120. 583 So. 2d 165 (Miss. 1991).

121. *Id.* at 169.

122. *Id.*

123. See *United States v. Henson*, 945 F.2d 430, 438 (1st Cir. 1991) (noting that a defendant did not assert his Sixth Amendment rights when, prior to any charges being filed against him, he submitted a letter to the court requesting a speedy disposition); see also *State v. O'Brien*, 516 N.E.2d 218, 221 (Ohio 1987) (holding that after a defendant agrees in writing to waive his rights to a speedy trial, he will not be entitled to a dismissal for a speedy trial unless he "files a formal written objection to any further continuances and makes a demand for trial . . .").

124. 945 F.2d 430 (1<sup>st</sup> Cir. 1991).

125. *Id.* at 438-39.

126. 516 N.E.2d 218 (Ohio 1987).

127. *Id.* at 221.

In addition, courts are willing to acknowledge unorthodox assertions of speedy trial rights, but have a high threshold for deciding to weigh the factor in favor of the defendant.<sup>128</sup> For instance, a court may acknowledge a motion to dismiss as demonstrating a defendant's desire for a speedy trial but will not weigh the assertion factor in the defendant's favor if the motion is not sufficiently vigorous.<sup>129</sup> The Texas Court of Appeals even held, "[a] request for a dismissal instead of a speedy trial weakens his claim because it shows a desire to have no trial instead of a speedy trial."<sup>130</sup> The Sixth Circuit has considered bail requests as evidence of defendants asserting the right to a speedy trial.<sup>131</sup> Yet, the court only weighed the assertion factor in the defendant's favor because the bail requests were coupled with a series of forceful demands.<sup>132</sup> In sum, courts have a large degree of discretion in deciding what constitutes an assertion of the right to a speedy trial, and even more discretion in deciding how to weigh the assertion factor when applying the *Barker* test.

*D. Weighing the Assertion Factor*

When applying the *Barker* test, courts consider the evidence for each factor independently and decide which factors weigh in favor, or against the defendant.<sup>133</sup> Generally, the standard of review for a speedy

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128. *Cf. Henson*, 945 F.3d 430 at 438–39 (holding that a letter sent before federal charges had been lodged against a defendant did not carry enough weight to find assertion).

129. *See Gov't of Virgin Islands v. Pemberton*, 813 F.2d 626, 628–29 (3d Cir. 1987) (finding that the defendant's motion to dismiss did not relieve him of his duty "to make a reasonable assertion of his speedy trial right"). *See also* *Phillips v. State*, 650 S.W.2d 396, 401 (Tex. Crim. App. 1983) (citation omitted) ("Although a motion to dismiss notifies the State and the court of the speedy trial claim, a defendant's motivation in asking for dismissal rather than a prompt trial is clearly relevant, and may sometimes attenuate the strength of his claim.").

130. *Parkerson v. State*, 942 S.W.2d 789, 791 (Tex. App. 1997) (citations omitted). *See also* *United States v. Frye*, 489 F.3d 201, 212 (5th Cir. 2007) (citing *Barker v. Wingo*, 407 U.S. 514, 534–35 (1972)) ("A motion for dismissal is not evidence that the defendant wants to be tried promptly.").

131. *See Cain v. Smith*, 686 F.2d 374, 384 (6th Cir. 1982) ("We hold that a demand for reasonable bail is the functional equivalent of a demand for a speedy trial.").

132. *Id.* at 384 ("Cain forcefully raised the speedy trial right on at least five different occasions.").

133. *See Glover v. State*, 792 A.2d 1160, 1167 (Md. 2002) ("[O]ur independent constitutional appraisal of the petitioner's speedy trial claims begins most effectively with a factor-by-factor approach.").

trial right violation turns on whether three Barker factors “weigh heavily in the defendant’s favor.”<sup>134</sup> However, the *Barker* opinion’s emphasis on ad hoc considerations gives courts full discretion to decide which factors support the defendants and how much weight to give to each individual factor.<sup>135</sup> Further, the Fifth Circuit has stated that, “[m]ere assertion of the speedy trial right is not enough for this factor to weigh in a defendant’s favor.”<sup>136</sup> Depending on the circumstances, a court may find that the defendant needed to make continuous demands for trial starting immediately after arrest, or that a single demand made at a reasonable time was sufficient.<sup>137</sup> This wide range of discretion effectively gives defendants no guidance on whether their demands will be sufficient for the court and impedes criminal defense strategy.<sup>138</sup>

When deciding whether to weigh the assertion factor in the defendant’s favor, courts often examine the vigor and timeliness of the defendant’s assertion.<sup>139</sup> However, courts’ liberal analysis of the timeliness and vigor of a defendant’s speedy trial demands can make the assertion factor so malleable that it becomes meaningless.<sup>140</sup> For example, in *Glover v. State*,<sup>141</sup> the Maryland Court of Special Appeals found that although the defendant demanded a speedy trial two months after his indictment and then again one year later, the defendant’s failure to demand a speedy trial following an additional postponement of his case demonstrated an insufficient assertion of his right to a speedy trial, so

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134. *United States v. Rojas*, 812 F.3d 382, 410 (5th Cir. 2016) (“The court can presume prejudice if the first three factors weigh heavily in the defendant’s favor; if they do not, the defendant must show actual prejudice.”).

135. HERMAN, *supra* note 24, at 222.

136. *United States v. Parker*, 505 F.3d 323, 329 (5th Cir. 2007).

137. *See Johnson v. State*, 975 S.W.2d 644, 651 (Tex. App. 1998) (explaining that the assertion factor would have weighed more heavily in defendant’s favor had she persistently demanded her right to a speedy trial). *See also Williams v. State*, 610 S.E.2d 32, 34 (Ga. 2005) (noting that the defendant’s demand for a speedy trial made six months after indictment would have weighed in his favor if not for subsequent action by defendant’s counsel).

138. HERMAN, *supra* note 24, at 223. *See* Christopher S. Elmore, *Glover v. State: A Misinterpretation and Misapplication of the Barker Speedy Trial Balancing Test Results in the Weakening of a Criminal Defendant’s Right to a Prompt Trial*, 62 MD. L. REV. 573 (2003) (discussing how the Maryland courts misapplied the Barker test).

139. *See Glover v. State*, 792 A.2d 1160, 1170 (Md. 2002).

140. *See id.* (deciding that the assertion factor did not weigh in favor of the defendant despite multiple attempts to demand a speedy trial).

141. 792 A.2d 1160 (Md. 2002).

that the assertion factor did not weigh in his favor.<sup>142</sup> The court reasoned that Glover should have objected to the pre-trial delays sooner.<sup>143</sup> Although the Maryland Court of Appeals disagreed with the weight the lower court placed on the factor,<sup>144</sup> the court nevertheless affirmed the decision because the delay did not “unduly prejudice[] the defendant.”<sup>145</sup>

In some cases, courts have bifurcated vigorousness and timeliness when analyzing the defendant’s assertion of the right to a speedy trial.<sup>146</sup> For example, in *Johnson v. State* the court held that although the defendant made a timely request for a speedy trial, the assertion factor did not weigh heavily in the defendant’s favor because the defendant’s demand was not sufficiently vigorous.<sup>147</sup> The *Johnson* Court based its decision on the fact that the defendant did not make subsequent persistent demands for trial after her initial timely request.<sup>148</sup>

Further, some courts have refused to weigh the assertion factor in favor of the defendant—despite the defendant expressing a clear demand for trial—because of technicalities.<sup>149</sup> For example, in *State v. Spivey*,<sup>150</sup> the North Carolina Supreme Court held that the defendant made a prompt assertion of his right to a speedy trial, but the assertion factor did not weigh in his favor because the defendant acted pro se despite having competent legal representation.<sup>151</sup>

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142. *Id.* at 1170.

143. *Id.*

144. *See id.* (“While we agree that, upon learning that the third postponement resulted in a six-month delay . . . the petitioner could have, and probably should have, immediately asserted his right to a speedy trial, we must disagree with the excessive weight the Court of Special Appeals places on this facet of the case.”).

145. *Id.* at 1172.

146. *See Zamorano v. State*, 84 S.W.3d 643, 651–52 (Tex. Crim. App. 2002) (footnotes omitted) (“This late assertion, had no subsequent motion been filed, might well have undercut his Sixth Amendment claim. But appellant’s second attempt to seek a speedy trial, which came less than two months after the trial court denied his initial motion, evidenced his persistence. This is not a case where appellant never asked for a hearing.”).

147. *See Johnson v. State*, 975 S.W.2d 644, 651 (Tex. App. 1998) (citation omitted) (“The failure to invoke the right earlier does not amount to waiver, but because Appellant did not persistently assert her right to a speedy trial, we did not weigh this factor heavily in her favor.”).

148. *Id.*

149. *See State v. Spivey*, 579 S.E.2d 251, 256 (N.C. 2003) (noting, first, that the defendant’s assertion through pro se was improper, but even so, “the assertion of the right, by itself, did not entitle him to relief”).

150. 579 S.E.2d 251 (N.C. 2003).

151. *Id.* at 256.

In addition, courts often tie the nature of defendants' speedy trial demands in with other factors in the *Barker* test.<sup>152</sup> For example, courts have considered a defendant's failure to make an early demand for speedy trial as demonstrating lack of prejudice faced by the defendant.<sup>153</sup> A court may reason that a defendant who does not make an early demand for speedy trial relief is not really seeking a speedy trial.<sup>154</sup> This type of reasoning is problematic not only because it results in courts erroneously finding that defendants acquiesced to delays, but also because it makes the assertion factor superfluous.

Authors have written about many societal interests in providing defendants with speedy trials beyond those considered in the *Barker* balancing test.<sup>155</sup> Although concepts such as governmental needs and victims' relief provide good rationales for creating policy, the Constitution does not confer a duty on the court to consider these concerns.<sup>156</sup> Furthermore, it is important to reflect on tradition and history. Courts have always weighed governmental, societal, and defendants' interests when considering the scope of the Sixth Amendment right to a speedy trial.<sup>157</sup> Keeping these concerns in mind, this Note analyzes how courts should determine whether to grant criminal defendants relief for speedy trial right violations, and attempts to provide a modified test that allows for necessary considerations, yet stays true to the intent of the Sixth Amendment.

### III. PROBLEMS CREATED BY THE ASSERTION FACTOR

By including the assertion factor in the *Barker* test, the Supreme Court intended to preserve the defendant's obligation to make some

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152. See *Ex parte Anderson*, 979 So. 2d 777, 781 (Ala. 2007) (citation omitted).

153. *Id.*

154. *State v. Rachie*, 427 N.W.2d 253, 257 (Minn. Ct. App. 1988).

155. See HERMAN, *supra* note 24, at 208 ("The Court has settled on the idea that the Sixth Amendment right serves three purposes for defendants—preventing undue restraint on liberty, undue anxiety and disruption of one's life because of pending charges, and undue impairment of the ability to defend against the charges . . ."); see also Mary Beth Ricke, Note, *Victims' Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 WASH. U. J.L. & POL'Y 181, 184 (2013) (arguing that speedy trial helps victims get relief from timely convictions); Tobias Weiss, *The Federal Speedy Trial: Speedy Injustice?*, 56 CONN. B.J. 245, 246–47 (1982) (arguing that the Speedy Trial Act benefits the government by catching unprepared defendants off-guard).

156. See U.S. CONST. amend. VI (stating broad rights of the accused in a criminal trial).

157. See *supra* Part I.A. (discussing the history of speedy trial jurisprudence).

kind of demand for a speedy trial.<sup>158</sup> Despite the Court's good intentions, the factor created several problems in speedy trial jurisprudence. Courts' general resistance to dismissing cases and inconsistent opinions in the lower courts places an unfair burden on defendants who suffer lengthy pre-trial delays. In addition, courts may find improper demands to be dispositive in cases and effectively apply the demand-waiver rule. Further, the assertion factor has allowed courts to deny speedy trial violations in the vast majority of cases, and thus not enforce the guaranteed protections intended by the Constitution.

A. *Unfair Burden on Criminal Defendants*

The flexibility of the *Barker* test leaves defendants at the mercy of a court's discretion. A court can find that a defendant made a timely demand for a speedy trial, was prejudiced by the delay, did not personally cause the delay, but deny dismissal because the defendant did not sufficiently and vigorously assert his right.<sup>159</sup> Courts essentially have the power to determine whether a defendant *actually* wanted a speedy trial, and decide that to be dispositive. There is no limit to what a court can consider sufficiently vigorous or timely, and defendants' failures to make timely and vigorous demands are not always due to acquiescence to the delay.<sup>160</sup> For example, an insolvent defendant may be represented by an overworked public defender who does not have time to pay close attention to the case, and consequently does not make vigorous assertions for her client's right to a speedy trial.<sup>161</sup> Thus, through no fault of the defendant, the court may deny that there has been a speedy trial violation because of the apparent failure by the defendant to properly assert his right to a speedy trial.

For example, consider the case of Jerry Hartfield.<sup>162</sup> The court denied Hartfield his constitutional right to a speedy trial just because he

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158. *See* *Barker v. Wingo*, 407 U.S. 514, 528 (1972).

159. HERMAN, *supra* note 24, at 222. *See Ex parte Hartfield*, 442 S.W.3d 805, 811 n.5 (Tex. Crim. App. 2014) (describing how the trial court weighed the *Barker* factors).

160. *See* Ford, *supra* note 17.

161. *See* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1281 (2002) ("Public defender offices are chronically understaffed and cannot pay enough to retain experienced attorneys. Lawyers appointed from private practice are paid far below market rates and often face unrealistically low fee caps. Consequently, poor defendants represented under either system often receive substandard representation: Attorneys lack the time and resources to mount the kind of defense any informed, paying client would expect.").

162. *See supra* notes 1–17 and accompanying text (describing the facts of Jerry Hartfield's criminal prosecution and petition for writ of habeas corpus).

failed to demand it during his twenty-three years of incarceration.<sup>163</sup> The court was well aware of Hartfield's mental incompetency and lack of legal representation during his prison sentence, yet the court still weighed the assertion factor heavily against Hartfield.<sup>164</sup> This brings to light a glaring flaw with the current state of speedy trial jurisprudence. Courts are disregarding the hardships faced by defendants navigating a complex criminal justice system, with harsh consequences. Courts require defendants to make appropriately timed and sufficiently clear invocations of the right to a speedy trial, despite inconsistent and unclear standards for what courts consider to be proper demands.<sup>165</sup> Besides, courts do not seem to care whether defendants are aware of the duty, or capable of properly asserting the right to a speedy trial.

Why should defendants bear the burden of properly asking the state for a constitutional right? How can the court decide whether a defendant really wants a speedy trial? Is a defendant's demand for a speedy trial not sufficient in itself? One explanation for courts' variable applications of the assertion factor is reluctance to dismiss charges.<sup>166</sup> Because the United States Supreme Court has set minimal guidelines for applying the *Barker* factors, courts are free to use the assertion factor as an excuse for denying dismissal.<sup>167</sup> Often, the facts of a case dictate that certain *Barker* factors clearly weigh in favor of or against a defendant.<sup>168</sup> Therefore, courts rely on the malleability of the assertion factor to decide against defendants in close cases.

For instance, a defendant may have suffered a sufficiently lengthy delay from arrest to trial, been prejudiced by the delay, and found case law showing these factors must be weighed in the defendant's favor. However, the reason for the delay may be something that the court considers neutral. If the court applies a general rule of dismissal when three of the four *Barker* factors weigh in favor of the defendant, then the assertion factor becomes very important. A court that is convinced of a defendant's guilt, or is generally hesitant to dismiss a case, will try to find a way to weigh the assertion factor against the defendant. Since the standard for what constitutes a sufficient demand for a speedy trial

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163. *Ex parte* Hartfield, 442 S.W.3d 805, 813, 817 (Tex. Crim. App. 2014).

164. *Id.* at 811 n.5.

165. *See supra* Part II.C–D (discussing how courts apply the *Barker* test's assertion factor and how to consider assertions when weighing the *Barker* factors).

166. *See* HERMAN, *supra* note 24, at 222 (noting that a hesitation to dismiss is possibly implicit in language of *Barker*, *Macdonald*, and *Loud Hawk*).

167. *See supra* Part II (discussing the application of the *Barker* test).

168. *See supra* Part II.D (discussing how courts weigh the *Barker* factors).

is unclear, courts are free to weigh the assertion factor based on whatever criteria they see fit.<sup>169</sup>

For example, in *Boseman v. State*,<sup>170</sup> the Georgia Supreme Court denied the defendant's motion to dismiss for a speedy trial right violation despite the defendant waiting for trial in custody for twenty-seven months.<sup>171</sup> The court found that the delay was sufficiently long, and the reason for the delay should weigh in the defendant's favor.<sup>172</sup> Also, the court "assume[d] that the 27 month delay, standing alone, was oppressive."<sup>173</sup> However, with relatively no discussion, the court did not weigh the assertion factor in favor of the defendant because he waited twenty-seven months to file a motion to dismiss.<sup>174</sup> Despite the lengthy delay and presumed prejudice, the court denied the defendant's motion to dismiss because there was "no impairment to his defense."<sup>175</sup>

This type of reasoning contradicts the U.S. Supreme Court's decisions in *Barker* and *Klopfer*.<sup>176</sup> In *Barker* and *Klopfer*, the Court stressed the importance of considering the inherent harms defendants suffer because they are awaiting trial.<sup>177</sup> Respecting the essential holdings of those decisions, courts should work to guarantee the right to a speedy trial in order to eliminate the serious harms that pre-trial delays cause criminal defendants. Apparently, this is not the case.<sup>178</sup> Ambiguous standards for what constitutes a sufficiently vigorous or timely assertion—and the omnipresent argument of defendants acquiescing to delays—make the assertion factor an excuse for courts to unjustly refuse to dismiss cases. Courts' efforts to avoid dismissal place an unfair burden on criminal defendants. The Supreme Court seems to support this pervasive injustice because of its unwillingness to clarify the *Barker* test.<sup>179</sup>

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169. *Id.*

170. 438 S.E.2d 626 (Ga. 1994).

171. *Id.* at 629.

172. *Id.* at 628–29.

173. *Id.* at 629.

174. *Id.*

175. *Id.*

176. *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972); *Klopfer v. State*, 386 U.S. 213, 222 (1967).

177. *Barker*, 407 U.S. at 532–33; *Klopfer*, 386 U.S. at 222.

178. See HERMAN, *supra* note 24, at 220 (explaining how courts generally never dismiss cases for speedy trial right violations).

179. See *id.* at 207–12 (explaining that there has not been a Supreme Court case addressing speedy trial issues since *Barker*).



B. Courts Applying the “Demand-Waiver” Rule

At first blush, the *Barker* court’s rejection of the rigid “demand-waiver rule” and call for the weighing of the assertion factor seemed to allow courts additional means for granting defendants relief in speedy trial cases.<sup>180</sup> However, Justice Powell’s emphasis on considering the frequency and force of speedy trial assertions effectively gave courts enough latitude to find the factor to be either determinative or inconsequential.<sup>181</sup> Courts consider a defendant’s failure to make timely or frequent demands as demonstrating acquiescence to the delay and find that the delay was reasonable.<sup>182</sup> This reasoning is problematic because it overlooks inherent harms defendants suffer while awaiting trial and ignores situations where a defendant may fail to invoke the right to a speedy trial due to ignorance or factors beyond the defendant’s control.<sup>183</sup>

In light of the *Barker* opinion’s emphasis on considering the frequency and force of demands, courts are free to determine whether the effort a defendant makes to demand a speedy trial should be given heavy consideration.<sup>184</sup> This creates situations where the nature of defendants’ speedy trial demands may be dispositive in cases where defendants are not actually acquiescing to delays.<sup>185</sup> Therefore, the court may functionally return to the “demand-waiver rule” by treating a defendant’s inability to demand a speedy trial as essentially waiving the defendant’s Sixth Amendment right.<sup>186</sup> In fact, courts have done this.<sup>187</sup>

In *State v. Spivey*, the North Carolina Supreme Court found that a four-and-half year delay was sufficiently long to weigh in favor of the defendant, and since a congested docket caused the delay, the second

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180. *Barker*, 407 U.S. at 528–30.

181. HERMAN, *supra* note 24, at 227.

182. *See Ex parte Anderson*, 979 So. 2d 777, 781 (Ala. 2007) (holding that a defendant’s lack of demand demonstrated a lack of prejudice to the defendant).

183. *See supra* Part II.B (quoting Justice Powell describing the harms defendants suffer while awaiting trial); Part II.D (discussing how courts weight the assertion factor against defendants who do not make technically sound demands for speedy trial).

184. *Barker*, 407 U.S. at 529.

185. *See supra* Part II (discussing harms to defendants waiting a long period for trial).

186. *See* Darren Allen, Note, *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 CAMPBELL L. REV. 101, 112 (2004) (suggesting that some courts have applied pre-*Barker* precedent and turned the assertion factor into what could resemble the demand-waiver rule).

187. *State v. Spivey*, 579 S.E.2d 251, 256 (N.C. 2003).

*Barker* factor was neutral—but slightly in favor of the defendant.<sup>188</sup> The court reasoned that the delay was long enough to be presumptively prejudicial, and that the defendant suffered some prejudice from the unavailability of a witness.<sup>189</sup> However, the court found that the assertion prong of the *Barker* test weighed against the defendant, despite the fact that the defendant made a pro se motion for dismissal one year after his arrest and defendant’s counsel again moved to dismiss less than two years later.<sup>190</sup> The court reasoned that the defendant did not have the right to be represented by counsel and appear pro se, so the initial motion to dismiss would not weigh in the defendant’s favor.<sup>191</sup> Therefore, the court held the defendant did not make a sufficiently timely or vigorous assertion and the defendant’s constitutional right to a speedy trial was not violated.<sup>192</sup> Spivey essentially waived his right to a speedy trial by electing to file his initial motion pro se instead of through his attorney.

Allowing courts to apply discretion to that effect was undoubtedly not Justice Powell’s intention in writing the *Barker* opinion, nor what the constitutional framers had in mind when they enacted the Sixth Amendment. The framers thought that trial delays were problematic enough to merit the codifying a right to a speedy trial and the Court has held this right to be fundamental. Upholding this fundamental and important right should not be left to the whims of lower court judges.

### C. *Distortion of the Right to a Speedy Trial*

In addition to causing unjust results in cases where defendants’ speedy trial rights are violated, the assertion factor of the *Barker* test impacts the nature of the right to a speedy trial itself. In *Barker*, Justice Powell noted, “speedy trial is unique.”<sup>193</sup> Powell further established that his speedy trial right analysis was meant to “comport[] with constitutional principles.”<sup>194</sup> This conflicting ideology in the *Barker* opinion has created inconsistency in speedy trial jurisprudence and distorted the meaning of the right to a speedy trial.<sup>195</sup> There is nothing in the

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188. *Id.* at 255.

189. *Id.*

190. *Id.* at 256.

191. *Id.*

192. *Id.* at 257. The state made arguments along similar lines in *Hartfield*, claiming that the Hartfield’s pro se requests for relief were not assertions. See Brief of Appellee at 53, *Ex parte Hartfield*, 442 S.W.3d 805 (Tex. Crim. App. 2014) (No. 13-14-00240-CR) (arguing that the defendant’s failure to assert the right to a speedy trial comes close to barring relief).

193. *Barker v. Wingo*, 407 U.S. 514, 529 (1972).

194. *Id.*

195. HERMAN, *supra* note 24, at 222.

Constitution that signals the need to treat the right to a speedy trial different from other constitutional rights.<sup>196</sup> Yet, courts treat the right to a speedy trial idiosyncratically.<sup>197</sup> For instance, courts distinguish the Sixth Amendment right to a speedy trial from the Sixth Amendment right to counsel.<sup>198</sup> Courts have interpreted the right to counsel clause as guaranteeing indigent defendants legal representation in criminal cases, unless a defendant affirmatively waives the right.<sup>199</sup> Conversely, courts require defendants to demand their right in order to obtain the benefit of a speedy trial, and making demands does not guarantee that defendants will receive that benefit.<sup>200</sup>

The dissonance between the language in the Sixth Amendment and courts' application of the right is problematic because it distorts the values embedded in the Bill of Rights. The Bill of Rights was meant to protect the population from oppression by ensuring certain rights. When courts create conditions on those rights, the guarantee of protection is lost. David Sklansky has argued that the court has treated the Constitution's criminal procedure rights not as "negative rights," but as "quasi-affirmative rights."<sup>201</sup> According to Sklansky, quasi-affirmative rights are "affirmative constitutional conditions on actions that, realistically, the government cannot entirely forego."<sup>202</sup> This means that some constitutional rights, like the right to a speedy trial, require the government to take some kind of action, but only if conditions require the action.<sup>203</sup> These rights are different from "negative rights" that prevent the government from taking action, such as the Fourth Amendment's protection from unreasonable searches and seizures.<sup>204</sup> Courts' application of the *Barker* test's assertion factor fosters the speedy trial right's quasi-affirmative nature. Courts grant the right to a speedy trial conditionally, depending on how and when defendants ask for the right. Further, the flexibility of the *Barker* test allows courts to create nearly impossible conditions for defendants to prove speedy-trial-right violations, which begs the question of whether the Sixth

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196. U.S. CONST. amend. VI.

197. HERMAN, *supra* note 24, at 210–11.

198. *Id.* at 211.

199. *Id.* at 150.

200. *See supra* Part II.D (discussing how defendants must make "timely" and "vigorous" demands for speedy trial).

201. Sklansky, *supra* note 161, at 1230.

202. *Id.* at 1234.

203. *Id.*

204. *Id.*

Amendment actually guarantees the accused the right to a speedy trial.<sup>205</sup>

Sklansky suggests that the reason that courts have developed quasi-affirmative rights is hesitation to create demand for systematic reform.<sup>206</sup> Imposing affirmative obligations on the government would place additional burden on governmental entities trying to perform those obligations and create demand from citizens that the government perform those obligations in an effective and efficient manner. On the other hand, establishing that a right is quasi-affirmative allows the courts to set parameters that define the right. These parameters create conditions on when courts may grant constitutional rights—like the right to a speedy trial—which allow the courts more room to deny that violations occurred.<sup>207</sup> However, narrowing parameters and increasing freedom to deny violations comes with the cost of diminishing the protections contained in the Constitution. In the case of speedy trial rights, courts' affirmative restraints have gone too far and placed an unconstitutional and unjust burden on criminal defendants.

#### IV. IMPROVING THE TEST

Scholars agree that the *Barker* test needs be re-calibrated.<sup>208</sup> Justice Powell's vague and unforceful language in the *Barker* opinion did not yield its intended results.<sup>209</sup> Since *Barker*, courts have dismissed an extremely low number of cases for speedy trial right violations,<sup>210</sup> and numerous authors have expressed concerns over state courts applying the *Barker* test with unjust results.<sup>211</sup> Yet, flexibility is necessary to

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205. See *supra* Part II (discussing what courts consider proper assertions and how they weigh the assertion factor).

206. See Sklansky, *supra* note 161, at 1286 (“It is not that judges refuse to impose affirmative obligations on the government, but rather that they decline to meddle in the overall operation of the criminal justice system.”).

207. See *generally id.* (discussing conditional rights and courts' unwillingness to grant rights that are quasi-affirmative).

208. See HERMAN, *supra* note 24, at 208 (“[A]s Professor Uviller suggested, a court truly interested in deterring or punishing prosecutorial bad faith would recalibrate the factors in *Barker v. Wingo*.”); see also Uviller, *supra* note 61, at 1382–89 (critiquing the *Barker* test).

209. See Uviller, *supra* note 61, at 1389–99 (analyzing the *Barker* test).

210. HERMAN, *supra* note 24, at 231.

211. See Lewis LeNaire, Comment, *Vermont v. Brillon: Public Defense and the Sixth Amendment Right to a Speedy Trial*, 35 OKLA. CITY U. L. REV. 219, 219 (2010) (discussing whether the actions of a public defender causing a delay in trial should weigh against the government, or against the defendant being represented); see also Kaitlyn Roach, Note, *The Sixth Amendment Right to a Speedy Trial: Sentenced to the Mississippi Gallows: Johnson v. State*, 32 MISS. C. L. REV. 205, 224–28 (2013) (discussing how Mississippi

account for the nuances in criminal prosecution.<sup>212</sup> Therefore, an effective and palatable means of curing the problems created by the *Barker* test would be for courts to reinterpret the test by eliminating the assertion factor and applying the remaining three factors: (1) the length of the delay, (2) the reason for the delay, and (3) prejudice to the defendant.<sup>213</sup>

Under the current *Barker* test, the assertion factor is superfluous. Applying a three-factor test, courts would not lose any ability to make effective decisions on speedy trial right violations because of the flexibility allowed by the other three factors.<sup>214</sup> Courts could easily analyze defendants' lack of effort to demand speedy trial rights as a reason for the delay, or as showing a lack of prejudice to the defendant. In fact, courts have done this on occasion.<sup>215</sup> Therefore, the proposed test would not cause much disruption in speedy trial decisions, while creating positive change.

The proposed test would positively impact the criminal justice system in three ways. First, the three-factor test would increase dismissal rates and put pressure on the government to implement systematic changes that would improve the criminal justice system. Second, a three-factor test would create more consistency in speedy trial jurisprudence and effectively put an end to the "demand-waiver rule." Finally, the proposed test would remove the burden of requiring defendants to demand the constitutional right to a speedy trial and restore the intended meaning of the language in the Sixth Amendment.

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courts have not granted speedy trial rights and have misapplied the law); Allen, *supra* note 186, at 112–13 (contending that the court applied the *Barker* test to effectively return to the "demand-waiver rule").

212. See *Barker v. Wingo*, 407 U.S. 514, 529–30 (1972) (explaining the importance of an ad hoc balancing test).

213. See *infra* Part IV.B.

214. In an article written shortly after the *Barker* decision, Professor Uviller makes a similar argument. See Uviller, *supra* note 61, at 1391 ("In the absence of a waiver, evinced in the customary way, the Court should have moved to a consideration of the other factors.").

215. See *Ex parte Anderson*, 979 So. 2d 777, 783 (Ala. 2007) ("Anderson's own conduct in waiting 22 of those 25 months before first asserting his right to a speedy trial, and then seeking a continuance, suggests, absent some contrary explanation, that Anderson did not consider the delay to be prejudicial."); see also *Lewis v. State*, 469 So. 2d 1291, 1294 (Ala. Crim. App. 1984) ("The fact that Blake did not assert his right to a speedy trial prior to November 1982, tends to suggest that he either acquiesced in the delays or suffered only minimal prejudice prior to that date.").

A. *Improving the Criminal Justice System*

In *Barker*, Justice Powell noted how governmental negligence and overcrowded dockets should be considered in speedy trial cases.<sup>216</sup> However, Justice Powell considered that these are more “neutral reason[s]” for delays and should be given less weight than delays intentionally caused by the parties.<sup>217</sup> Despite the tepidness in this part of the *Barker* opinion, courts have considered overcrowded dockets and scheduling problems as being attributable to government negligence, thus weighing in favor of defendants.<sup>218</sup> The fact that judges can take control and “order a case assigned for trial”<sup>219</sup> adds further support for defendants’ speedy trial claims because it weakens the position that delays were outside of government control.

Since governmental negligence is a common cause of pre-trial delays, courts often fall back on the assertion factor in order to deny dismissal. For example, in *Adams v. State*,<sup>220</sup> the Mississippi Supreme Court refused to weigh the *Barker* factors in favor of the defendant.<sup>221</sup> The court acknowledged that the delay was caused by governmental negligence, and that the defendant’s counsel denied acquiescing to the delays.<sup>222</sup> However, the court denied dismissal because a scheduling conflict with the defendant’s counsel contributed to the delay and the defendant did not properly assert his speedy trial right.<sup>223</sup> Under the proposed three-part test, the *Adams* Court would have difficulty refusing dismissal. Conceding that the length of delay was sufficient and that the defendant was prejudiced, the court would only have the “reason for delay” factor to weigh against the defendant. The *Adams* Court would be forced to take a harder look at the governmental negligence that caused the delay. In order to deny dismissal, the court would need to rely on the fact that the defendant contributed to the delay, although the effect was minor.<sup>224</sup> Therefore, the court would have little grounds to deny dismissal and the decision would be vulnerable on appeal.

Further, under the proposed test, courts would no longer be able to claim that defendants are not prejudiced by delays because they failed

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216. *Barker*, 407 U.S. at 531.

217. *Id.*

218. *Epps v. State*, 345 A.2d 62, 74 (Md. 1975).

219. *Id.*

220. 583 So. 2d 165 (Miss. 1991).

221. *Id.* at 170.

222. *Id.*

223. *Id.* at 169–70.

224. *Id.* at 170.

to make sufficiently vigorous and timely demands for speedy trial.<sup>225</sup> Since there is strong policy against dismissals, the government would have to resort to other means to avoid speedy trial violations. The desire to avoid dismissals would create an incentive for the government to mitigate pre-trial delays by making the criminal justice system more efficient. An analogy can be drawn to justifications for the exclusionary rule for evidence obtained in violation of the Fourth Amendment.<sup>226</sup> Evidence obtained from an unconstitutional search and seizure is excluded from the record in order to deter undesired police practices.<sup>227</sup> The rationale is that if fewer criminals are convicted when police violate the Fourth Amendment, then police will stop unconstitutional practices.<sup>228</sup> In fact, the exclusionary rule has been shown to be effective in creating more professional police practices.<sup>229</sup> Although courts have moved towards only applying the exclusionary rule in cases of egregious violations, courts could apply a similar remedy to Sixth Amendment speedy-trial-right violations.<sup>230</sup> If courts dismiss more speedy trial cases, then prosecutors will have an incentive to end the behaviors and policies that cause egregious delays.<sup>231</sup> There is a concern of misplacing the incentive because prosecution is not always responsible for delays. However, judges could address that concern by appropriately weighing the “reason for the delay” factor when deciding cases. Additionally, there is no way of knowing how effective an increased dismissal rate would be in creating real systematic changes. Ideally, the government would be forced take a hard look at the criminal justice system and find ways to make lasting improvements.

Problematically, however, systematic reform would require a great deal of work and expense. With so many moving parts involved in the criminal justice system, policy makers would need to conduct a great

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225. *See* *State v. Fischer*, 744 N.W.2d 760, 770 (N.D. 2008) (holding that because defendant did not assert his speedy trial right until a year after his arrest, the defendant was not prejudiced by the delay).

226. *See* *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (discussing the importance of the exclusionary rule).

227. *Id.* at 656.

228. *Id.*

229. *See* *Hudson v. Michigan*, 547 U.S. 586, 598 (2006) (“Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.”).

230. *See id.* at 591 (“Suppression of evidence, however, has always been our last resort, not our first impulse.”).

231. *See* *Dickey v. Florida*, 398 U.S. 30, 45 (1970) (“[S]o far as society’s interest in the effective prosecution of criminal cases is concerned, delay on the government’s part need not impair its ability to prove the defendant’s guilt beyond a reasonable doubt.”).

deal of analysis before making any adjustments. Before deciding what changes to make, the government would need to determine what needs to be fixed, what can be fixed, and the costs associated with implementing the solutions.<sup>232</sup> Given a limited budget, prosecutors could consider a cost-benefit analysis in order to decide what changes to make.<sup>233</sup> The government would have to consider the associated costs and benefits of pretrial delays, and how to weigh them against one another.<sup>234</sup> Even if the legislators can create a good policy plan, the government still faces political pressure and public backlash. Courts undoubtedly feel uncomfortable imposing these hardships on the government.<sup>235</sup>

Further, courts may feel that it is the job of the legislature to initiate systematic changes because the legislature controls the funding that fuels the criminal justice system.<sup>236</sup> The legislature sets a budget that determines the number of prosecutors, police officers, and judges.<sup>237</sup> If the legislature is pressured by the courts to grant or deny funding, then effectively the courts have influenced policy. Also, judges have incentives to avoid putting pressure on the legislature because the legislature determines the judges' salaries.<sup>238</sup> Presumably, spending public money to benefit criminal defendants awaiting trial would not be pop-

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232. See John Roman, *Cost-Benefit Analysis of Criminal Justice Reforms*, NAT'L INST. OF JUSTICE (Sep. 11, 2016), <https://www.nij.gov/journals/272/pages/cost-benefit.aspx> [<https://perma.cc/2U3T-5UTS>] (discussing the complications involved with cost-benefit analysis of criminal justice reform).

233. See *id.* (explaining that cost-benefit analyses in criminology compare the costs and benefits of proposed programs with the costs and benefits of current programs and that policymakers could use these comparisons to determine whether new approaches will be beneficial from a budgetary perspective).

234. An example of a systemic problem is underfunded public defender programs. Many states have a large backlog of cases because there are insufficient funds to support enough public defenders to efficiently resolve cases. See Debbie Elliot, *Need A Public Defender In New Orleans? Get In Line*, NPR (Feb. 4, 2016, 4:59 AM), <http://www.npr.org/2016/02/04/465452920/in-new-orleans-court-appointed-lawyers-turning-away-suspects> [<https://perma.cc/J4RR-TASC>] (explaining the problems caused by underfunded public defender programs).

235. See Sklansky, *supra* note 161, at 1284 (“The general aversion courts feel toward affirmative rights may be especially pronounced in this context because courts would not just be ordering states to do things that cost money, but would be directly compelling expenditures.”).

236. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997).

237. *Id.*

238. See 28 U.S.C. § 5 (2012) (explaining that judges' salaries are determined by statute).



ular. However, a more efficient system could foster many societal benefits. For instance, a more efficient criminal justice system would mitigate the costs of detaining defendants awaiting trial.<sup>239</sup> Defendants moving swiftly through the criminal justice system would allow jails to free up space and potentially save local communities large amounts of money.<sup>240</sup> Moreover, although systemic changes may be costly, budget concerns should not be favored over the protection of constitutional rights. The government needs to be accountable for its actions and abide by constitutional principles.

*B. Eliminating the “Demand-Waiver Rule” and  
Increasing Consistency in Opinions*

A three-factor test would more effectively fulfill the *Barker* Court’s intention of eliminating the “demand-waiver rule.”<sup>241</sup> Under the three-factor test, courts would have a difficult time denying relief to defendants who suffer long pre-trial delays, but do not make demands for a speedy trial. Courts would still be free to consider defendants’ failures to demand in conjunction with the other factors, but they would lose the ability to make a supposedly failed assertion dispositive. In order to deny dismissal, a court would have to show that a defendant’s lack of effort to demand a speedy trial was part of the reason for the delay, or demonstrated a lack of prejudice to the defendant. Similarly, prosecutors would have to show that a defendant benefited from failing to assert the right to a speedy trial. Placing this burden on the prosecution would eliminate the presumption that defendants waived the constitutional right by not making a proper assertion. This argument is supported by Justice Brennan’s concurrence in *Dickey v. Florida*.<sup>242</sup> In his concurrence, Brennan discusses how the Court has moved toward a presumption against waiver.<sup>243</sup> Brennan then reasons that the right to speedy trial is decidedly fundamental, and asks the question, “can it be

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239. Cf. Christian Henrichson, Joshua Rinaldi & Ruth Delaney, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, VERA INST. OF JUSTICE 24 (May 2015) (describing the enormous community costs of local incarceration).

240. See *id.* (“The only way localities can safely reduce the costs incurred by jail incarceration is to limit the number of people who enter and stay in jails.”).

241. See *Barker v. Wingo*, 407 U.S. 514, 529–30 (1972) (“We, therefore, reject both of the inflexible approaches—the fixed-time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which we have deemed fundamental.”); see also *Dickey v. Florida*, 398 U.S. 30, 49 (1970) (Brennan, J., concurring) (“[T]he 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.”).

242. 398 U.S. 30, 50 (1970).

243. *Id.* at 49.

that affirmative action by an accused is required to preserve—rather than to waive—the right?”<sup>244</sup> Justice Brennan was addressing the flaws of the “demand-waiver rule,” but the same rationale can apply to the effect of the assertion factor in the *Barker* test. If the presumption of waiver is fundamentally unconstitutional, then why continue weighing defendants’ inaction against them?

Additionally, the proposed test would create more consistency in speedy trial jurisprudence and better equip defendants attempting to prove speedy trial right violations. The proposed test would accomplish this by eliminating confusion over what constitutes a proper assertion of the right to a speedy trial and what should be considered sufficiently “vigorous” or “timely.”<sup>245</sup> Courts would still be able to consider the vigorousness and timeliness of assertions, but as part of the analysis of the remaining factors. Therefore, improved doctrines and patterns of reasoning may emerge from case law. For example, courts could consider defendants’ failures to object to multiple continuances made by prosecution as evidence that the “reason for delay” factor should weigh in favor of the state. Courts could also consider the reasons for a defendant’s failure to object to a motion for continuance and decide whether the defendant actually benefited or acquiesced to the delay. If a defendant did take advantage of the continuances, then the court could either weigh “the prejudice to the defendant” factor in favor of the state, or find the “reason for the delay” factor neutral if the delays were partially caused by government negligence. The three-part test would take away an unfair advantage given to the state and lead to more just speedy trial jurisprudence.

### *C. Restoring the Constitutional Right*

A speedy trial test without the assertion factor would make decisions more consistent with the original intent of the Sixth Amendment.<sup>246</sup> For example, consider a case like that of Jerry Hartfield, where an incarcerated defendant is awaiting a trial that never happens.<sup>247</sup> The government allows a defendant to slip through the cracks, and due to indigence and mental incompetence, the defendant is completely unaware of his rights.<sup>248</sup> When addressing the defendant’s speedy trial right violation claim, the court would apply the proposed three-factor test. Assuming that the length of the delay was sufficient to create a pre-

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244. *Id.* at 50 (emphasis omitted).

245. *See supra* Part II.D (discussing how courts weigh the assertion factor).

246. *See supra* Part I.A (discussing the historical background of speedy trial jurisprudence).

247. *See supra* notes 1–17 and accompanying text (discussing facts of Jerry Hartfield).

248. *Id.*

sumption in favor of the defendant, the court would only have to consider the reason for the delay and whether the defendant was prejudiced by the delay. Under the basic facts of *Hartfield*—assuming no other procedural problems—the reason for the delay would be a combination of governmental negligence, the defendant’s incompetence and lack of counsel, and possibly minor prosecutorial malfeasance. In light of these facts, the court would have a hard time not weighing the reason for the delay in favor of the defendant. Additionally, the court would have difficulty weighing the prejudice factor in favor of the government; *Hartfield*’s case was delayed so long that evidence was lost, and key witnesses were unavailable.<sup>249</sup> A court properly following the proposed test would almost certainly dismiss the case.

Further, courts would lose the ability to refuse to dismiss cases when defendants fail to meet the vague requirements of the assertion factor and defendants would lose the burden of proving they really wanted a speedy trial. This is undoubtedly more consistent with the Sixth Amendment’s guarantee that “the accused shall enjoy the right to a speedy and public trial.”<sup>250</sup> Under the proposed test, courts would guarantee defendants are protected against the harms of waiting long periods for trial, without imposing the undue burden of properly asking.

A three-factor test may be problematic because the court would theoretically be letting more criminals go free, opening up a variety of potential hazards for society. However, The U.S. Supreme Court has stated that the government is responsible for bringing the accused to trial.<sup>251</sup> A test without the assertion factor would hold the government accountable for that responsibility and still allow courts to prevent undeserving defendants from taking advantage of the system. For example, courts have considered acquiescence to delay as demonstrating a lack of prejudice to the defendant.<sup>252</sup> Expanding jurisprudence along those lines would allow courts to restore the fundamental principles of the constitutional right to a speedy trial by providing greater protection to the accused. Unfortunately, this may give the court the difficult task of defining what a constitutionally speedy trial really means. In order to promote justice, courts should be prepared to meet the challenge.

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249. Ford, *supra* note 17. It is possible that losing evidence would favor the defendant, but without clear indication of what that evidence would show the court must either weight the factor in favor of the defendant, or render the factor neutral.

250. U.S. CONST. amend. VI.

251. *See* *Barker v. Wingo*, 407 U.S. 514, 527 (1972) (“A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process.”).

252. *Ex parte Anderson*, 979 So. 2d 777, 781 (Ala. 2007).

## CONCLUSION

Justice Powell unquestionably had good intentions for including “assertion of the right to a speedy trial” as a factor in *Barker* test. The factor has allowed courts to favor defendants who make a great deal of effort in seeking trial and to disfavor defendants who wish to take advantage of the system. However, the assertion factor is not only unnecessary to speedy trial right analysis, it is also problematic in application. Due to unclear standards, courts use the assertion factor to deny dismissal in cases where defendants’ constitutional rights are violated. The *Barker* test’s assertion factor has also caused courts to deviate from the intended meaning of the Sixth Amendment. Removing the assertion factor from speedy trial analysis would allow courts to restore the intention behind, and meaning of, the Sixth Amendment, mitigate unjust decisions, and ideally lead to improvements in the criminal justice system.

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