Case Western Reserve Law Review

Volume 71 | Issue 1 Article 10

2020

The Speedy Trial Clause and Parallel State-Federal Prosecutions

Ryan Kerfoot

— Note —

The Speedy Trial Clause and Parallel State-Federal Prosecutions

Contents

Introduction

The Sixth Amendment guarantees that "[i]n all criminal pros–ecutions, the accused shall enjoy the right to a speedy and public trial . . . ."[1] The Supreme Court has lauded this right to a speedy trial as one of the most fundamental guaranteed by the Constitution.[2] To Christopher Ray Myers, however, this fundamental right probably seemed like a hollow farce. By the time the Ninth Circuit filed its opinion in the case of *United States v. Myers*[3] on July 22, 2019, Myers had been between state and federal custody for four years.[4] The State of Washington initially indicted Myers in May 2015 for assaulting a

1. U.S. CONST. amend. VI.

2. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

3. 930 F.3d 1113 (9th Cir. 2019).

4. *Id.* at 1113, 1117–18.

police officer when he fired a gun during a struggle with a sheriff's deputy,[5] but Myers' use of a firearm as a prior felon with fifteen felony convictions[6] caught the attention of the federal authorities, prompting a federal indictment for unlawful possession of a firearm.[7] The federal authorities decided to delay the federal criminal proceedings until after the state criminal proceedings concluded.[8]

Myers' state criminal prosecution ended in a plea agreement made in January 2017.[9] When Myers appeared before the federal district court for the beginning of the federal proceedings against him, he immediately moved to dismiss his federal case on Sixth Amendment speedy trial grounds.[10] Citing cases from the Fourth and Sixth Circuits, the district court denied the motion on the grounds that delaying to avoid a parallel prosecution with the State of Washington was a valid reason for the federal government to delay the federal proceedings against Myers.[11] The court rejected Myers' argument that the federal government's decision to delay the proceedings required a heightened standard laid out by the Tenth Circuit.[12] On appeal, the Ninth Circuit reversed, adopting the heightened standard that the district court had rejected, and remanded back to the district court.[13]

Cases like *Myers* raise an important dilemma about delaying proceedings in order to avoid burdensome concurrent state and federal prosecutions while still maintaining the accused's constitutional right to a speedy trial. Although the Supreme Court recognizes that the government's legitimate reason for delay may not violate the speedy trial right if the overall balance of factors tips in favor of the govern–ment,[14] the Court has yet to provide guidance on whether avoiding parallel prosecutions is always a legitimate reason under this test.

5. *Id.*

6. *Man Accused of Shooting at Spokane County Deputy Has Lengthy Criminal History*, KHQ-Q6 NEWS (Feb. 6, 2015), https://www.khq.com/news/man-accused-of-shooting-at-spokane-county-deputy-has-lengthy/article_3c9a55d4-8d2b-57ed-adaf-7f202191e28a.html [https://perma.cc/SBS9-EX79].

7. *Myers*, 930 F.3d at 1117.

8. *Id.* at 1118.

9. *Id.*

10. *Id.*

11. United States v. Myers, No. 2:15-CR-00045-JLQ, 2017 WL 2469617, at *3 (E.D. Wash. June 7, 2017) (citing United States v. Thomas, 55 F.3d 144, 150–51 (4th Cir. 1995), United States v. Schreane, 331 F.3d 548, 555 (6th Cir. 2003)).

12. *Myers*, 2017 WL 2469617, at *3.

13. *Myers*, 930 F.3d at 1121, 1123.

14. *See* Barker v. Wingo, 407 U.S. 514, 531–32 (1972).

Different United States Courts of Appeals have reached divergent conclusions on this issue. Some circuits, like the Sixth Circuit, have ruled that delaying federal proceedings to allow "another sovereign" to finish its prosecution is "without question" a valid reason for the federal government to delay proceedings.[15] Other circuits, including the Ninth Circuit in *Myers*, disagreed with this bright-line rule, preferring an ad hoc approach where the district court has to consider the nature and circumstances of the situation to determine whether the decision to delay weighs in favor of the federal government.[16]

This Note will argue that the ad hoc approach developed by the Tenth Circuit, and recently adopted by the Ninth, is the better method for determining whether a pending state proceeding is a valid reason for the federal government to delay a prosecution. Unlike the *carte blanche* given to the federal government by the bright-line rules in the Fourth and Sixth Circuits, the ad hoc approach allows the district court to consider the circumstances of each case, thus allowing for a fairer administration of criminal justice. This in turn makes the ad hoc approach more consistent with the purpose of the Speedy Trial Clause and with Supreme Court precedent. Part I of this Note will analyze the history and purpose of the Speedy Trial Clause, including the Supreme Court's precedent, to provide the context in which this circuit split exists. Part I will conclude that the Speedy Trial Clause is unique in criminal procedure in that it is necessarily context-based, because both the accused and society in general have unique and often opposing interests in seeing the accused fairly and efficiently prosecuted. Part II will discuss some of the interests underlying the Speedy Trial Clause that are particularly relevant to parallel prosecutions. The discussion in Part II will focus on three judicially recognized interests: maintaining the separation of federal and state courts, attorney due diligence, and logistical costs. These interests will frame the discussion of each circuit's approach in Part III. Finally, Part III will look at the two approaches to determine how they work in practice and how those approaches address the competing interests discussed in Part II. Part III will argue that the ad hoc approach, unlike the bright-line rule, permits the district court to consider the possible convenience of a parallel prosecution, avoiding situations where a parallel prosecution was

15. *Schreane*, 331 F.3d at 555; *see also Thomas*, 55 F.3d at 150; United States v. Brown, 325 F.3d 1032, 1035 (8th Cir. 2003).

16. *Myers*, 930 F.3d at 1121; *see also* United States v. Seltzer, 595 F.3d 1170, 1178 (10th Cir. 2010); United States v. Ellis, 622 F.3d 784, 791 (7th Cir. 2010). The Third Circuit has its own outlier bright-line rule that a state proceeding is a neutral reason that always tips against the government. United States v. Battis, 589 F.3d 673, 680 (3d Cir. 2009). This Note will not discuss this approach in detail because much of the discussion focuses on the problem with bright-line rules generally in speedy trial cases.

perfectly reasonable but the federal government opted not to for unnecessary reasons. Part IV will then apply facts from four hypotheticals to the ad hoc approach to demonstrate how the district court can use the ad hoc approach to allow parallel prosecutions when the circumstances allow it.

I. BACKGROUND OF THE SPEEDY TRIAL CLAUSE

With roots dating back to twelfth-century England, the speedy trial right is an integral part of the Anglo-American legal heritage.[17] Although often attributed to the Magna Carta,[18] the earliest known reference to a speedy trial right was the Assize of Clarendon promulgated by King Henry II in 1166.[19] The Assize was primarily a set of procedural rules that created a rudimentary right to an evidentiary hearing before a jury for those accused of committing certain crimes.[20] Paragraph four of the Assize mandated that sheriffs who caught a robber, murderer, or thief promptly notify the nearest judge and in turn required the judge to inform the sheriff where the judge would try the accused criminal.[21]

A more explicit guarantee to a speedy trial right came fifty years after the Assize of Clarendon when King John signed the Magna Carta in 1215.[22] The Magna Carta states far more clearly than the Assize, "[t]o no one will we refuse or delay right or justice."[23] Edward Coke in his famous *Institutes* held this particular provision to be fundamental

17. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) ("[The right to a speedy trial] has its roots at the very foundation of our English law heritage."); *see also* Kristin Saetveit, Note, *Beyond* Pollard*: Applying the Sixth Amendment's Speedy Trial Right to Sentencing*, 68 STAN. L. REV. 481, 485 (2016).

18. *See Klopfer*, 386 U.S. at 223.

19. *See* Saetveit, *supra* note 17, at 485, 486.

20. *Id.* at 485–86; 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 76 (3d ed. 1922).

21. Assize of Clarendon 1166, 12 Hen. 2., para. 4 (Eng.), *reprinted in* 2 ENGLISH HISTORICAL DOCUMENTS 408 (David C. Douglas & George W. Greenaway eds., 1953) ("And when a robber or murderer or thief or receiver of them has been arrested . . . , if the justices are not about to come speedily enough into the county where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them . . . .").

22. *See* Saetveit, *supra* note 17, at 485, 486 (citing MAGNA CARTA para. 40 (1215), https://www.bl.uk/collection-items/magna-carta-1215).

23. MAGNA CARTA para. 40 (1215), https://www.bl.uk/collection-items/magna-carta-1215.

to the "law and custome of England."[24] The framers of the Constitution in turn took inspiration from Coke's treatise.[25] By the time the Constitutional Convention convened in Philadelphia in 1787, four of the future states had already adopted some form of a speedy trial right in their constitutions.[26] At the Constitutional Convention, James Madison proposed adding the speedy trial right to what would eventually become the Bill of Rights without controversy.[27]

Despite the Framers' holding the speedy trial right in such high regard, there was very little legal development of the right in the courts during the first century under the Constitution.[28] Federal courts generally did not try to enforce the speedy trial right because of the perceived lack of standards that courts could use to assess whether a defendant's speedy trial right was violated.[29] In 1905, *Beavers v. Haubert*[30] was the first Supreme Court case that addressed the Speedy Trial Clause.[31] The *Beavers* Court considered whether the Speedy Trial Clause protected the defendant from a successive prosecution by a different state.[32] While finding that Beavers undoubtedly had a speedy trial right, the Court did not consider that right to be "unqualified and

24. Saetveit, *supra* note 17, at 486; 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (London, 1817) (1643).

25. Saetveit, *supra* note 17, at 486. As an example, John Rutledge, the second Chief Justice of the United States, considered Coke's *Institutes* to be "almost the foundation of our law." *Id.* (quoting CATHERINE DRINKER BOWEN, THE LION AND THE THRONE 514 (1957)). Although he did not take part in the Constitutional Convention, Thomas Jefferson also spoke highly of Coke's treatise once referring to the first part of the *Institutes* as "the universal elementary book of law students." *Id.* (quoting CHARLES WARREN, HISTORY OF THE AMERICAN BAR 174 (1911)).

26. MD. CONST. of 1776, art. A, § 19; PA. CONST. of 1776, § 9; VT. CONST. of 1777, ch. I, § 10; VA. BILL OF RIGHTS of 1776, § 8, *all reprinted in* THE FEDERAL AND STATE CONSTITUTIONS AND OTHER ORGANIC LAWS OF THE UNITED STATES (Benjamin Perley Poole comp., 2d ed. 1972). Although not guaranteeing a right to a speedy trial in criminal prosecutions, the early constitutions of both Massachusetts and New Hampshire guaranteed the right to relief in civil actions "without delay." *See* MASS. CONST., pt. 1, art. XI (adopted 1780) and N.H. CONST., art. 1, § 14 (adopted 1784), *both reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra*.

27. Saetveit, *supra* note 17, at 486.

28. *See* Brian P. Brooks, Comment, *A New Speedy Trial Standard for* Barker v. Wingo*: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. CHI. L. REV. 587, 589 (1994).

29. *Id.*

30. 198 U.S. 77 (1905).

31. Brooks, *supra* note 28, at 589.

32. *Beavers*, 198 U.S. at 86.

absolute" given the circumstances.[33] Justice McKenna, writing for the majority, described the speedy trial right as a right that must be "relative" based on the case's circumstances and one that could not ultimately be used to prevent the prosecution of "other offenses."[34] Specifically, the Court reasoned that Beavers could not be tried at the same time in both New York and the District of Columbia, so his speedy trial rights had to give way to the "practical administration of justice."[35]

While *Beavers* was the first case to recognize that competing interests underlay the Speedy Trial Clause, *Beavers* only recognized a general societal interest in "public justice" without providing specific interests courts were bound to consider when deciding whether the accused's speedy trial right was violated.[36] Federal courts in the period between *Beavers* and *Barker v. Wingo*[37] identified a number of interests that they chose to consider when deciding whether a speedy trial violation occurred.[38] One commentator identifies four general interests that the federal courts recognized in the years leading up to *Barker*: (1) providing incentives for defense counsel and prosecutors to act diligently,[39] (2) discouraging purposeful or oppressive imprisonment,[40] (3) ensuring the orderly conduct of proceedings and not just mere speed of the judicial process,[41] and (4) preventing actual prejudice to the defendant.[42]

Barker came in 1972 as a response to calls from the lower courts and legal scholars advocating a uniform speedy trial test.[43] The Supreme Court adopted a balancing test in which a court weighs the conduct of the prosecution and defense.[44] The *Barker* test itself set forth four factors that the lower courts were to use to determine whether the

33. *Id.*

34. *Id.* at 87 ("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. It cannot be claimed for one offense and prevent arrest for other offenses.").

35. *Id.* at 86–87.

36. *Id.*; *see also* Brooks, *supra* note 28, at 590.

37. 407 U.S. 514 (1972).

38. Brooks, *supra* note 28, at 590.

39. *Id.* (citing Hedgepeth v. United States, 364 F.2d 684, 687 (D.C. Cir. 1966)).

40. *Id.* (citing United States v. Ewell, 383 U.S. 116, 120 (1966)).

41. *Id.* (citing Smith v. United States, 360 U.S. 1, 10 (1959)).

42. *Id.* (citing Williams v. United States, 250 F.2d 19, 21 (D.C. Cir. 1957)).

43. *Id.*

44. Barker v. Wingo, 407 U.S. 514, 529–30 (1972).

government or defendant had a stronger interest in the matter.[45] Those factors are (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted the speedy trial right, and (4) the prejudice to the defendant.[46] The Court stated that the test inherently required the lower courts to make its ruling on an "*ad hoc* basis."[47] Regarding how to apply the balancing factors, the Court stated:

> We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.[48]

By adopting its *Barker* balancing test, the Court explicitly rejected two bright-line rules.[49] The first was a "specified time" rule where a criminal defendant would be entitled to a trial within a specified period of time.[50] The alternative proposal was a "demand-waiver rule" where the defendant would be required to make a specific demand for a speedy trial, or else they would waive the speedy trial right.[51] The Court rejected both of these proposed rules as being too "inflexible" to adequately protect the fundamental right to a speedy trial.[52] A further part of the *Barker* Court's rationale in adopting the balancing test rather than a rigid rule was the nature of the speedy trial right itself. Referring back to its prior decision in *Beavers*, Justice Powell's majority opinion, supported by an almost unanimous Court,[53] reasoned that because the accused's speedy trial right competed with society's inter–

45. *Id.* at 530–32.

46. *Id.* at 530.

47. *Id.*

48. *Id.* at 533.

49. *Id.* at 530–32.

50. *Id.* at 523.

51. *Id.* at 524–25.

52. *Id.* at 529–30.

53. Justice White filed a concurring opinion which Justice Brennan joined. *Id.* at 536 (White, J., concurring). While agreeing with the Court's overall conclusion, Justice White wrote separately to stress that the defendant's personal interest in a speedy trial should always prevail when the government's interest in delaying the proceeding is "crowded dockets and prosecutorial caseloads." *Id.* at 537–38.

ests, the analysis of the speedy trial right had to be made within the "particular context of the case."[54]

The Court's opinion in *Barker* also suggests that the same level of "ad hoc analysis" is required for the second factor, the reason for delay, which is the factor at the center of the current circuit split.[55] Justice Powell considered this factor to be centered around the government's reason for delay rather than the defendant's reason.[56] Furthermore, the Court addressed the legitimacy of the government's reason in assessing this factor.[57] Deliberate attempts by the government to delay a proceeding in order to hinder the defense naturally weigh heavily against the government. Neutral reasons like "overcrowded courts" still weigh against the government, but to a lesser extent than bad faith reasons because the government bears the ultimate responsibility for such circumstances.[58]

II. INTERESTS IN SPEEDY PARALLEL PROSECUTIONS

From the Supreme Court decisions in both *Beavers* and *Barker*, it is apparent that the speedy trial right and the *Barker* test itself are not meant to be governed by inflexible rules but rather must be amenable to the competing interests in preventing delay in any given case. Those interests are fundamentally a balancing act between the interests of the

54. *Id.* at 522 (majority opinion). Although this Note focuses on the constitutional implications of delayed federal prosecutions, it is worth briefly mentioning the statutory speedy trial scheme. Two years after the decision in *Barker*, Congress attempted to create clearer speedy trial standards by passing the Speedy Trial Act. Brooks, *supra* note 28, at 602–03. Under the Speedy Trial Act, district courts are required to bring a criminal case to trial within seventy days following the initial indictment subject to many "tolling" exceptions. 18 U.S.C. § 3161(a), (c)(1), (h) (2018). One such exception is a period of delay "resulting from trial with respect to other charges against the defendant." *Id.* § 3161(h)(1)(B). At least two circuit courts have ruled that district courts have the *discretion* to exclude all the time the defendant spent in state custody. *See* United States v. Bigler, 810 F.2d 1317, 1320 (5th Cir. 1987) ("The federal trial judge . . . has discretion to include all of the time spent in state custody because of state proceedings."); United States v. Lopez-Espindola, 632 F.2d 107, 110 (9th Cir. 1980) ("There is undoubtedly a degree of discretion involved in ascertaining the nature of those [state] proceedings which fall within the 'other proceedings' language of the statute.") (emphasis omitted). Regardless of the statutory scheme, federal courts addressing the specific kind of delay in this Note's discussion still conduct the separate *Barker* constitutional analysis. *See, e.g.*, United States v. Thomas, 55 F.3d 144, 147–50 (4th Cir. 1995).

55. *Barker*, 407 U.S. at 530–31.

56. *Id.*

57. *Id.*

58. *Id.*

accused being protected by an ancient fundamental right and society's competing interests in the accused's effective prosecution. In formulating either the bright-line rule or the ad hoc approach at the center of this Note's discussion, each circuit court has provided a number of interests that it considers essential to the speedy trial analysis in these types of cases. This section will discuss three of the more commonly cited interests: maintaining a judicial separation between the federal-state sovereigns, prosecutorial diligence, and logistical concerns.

A. Federal-State Separation

Maintaining a separation between the state and federal court systems is the key interest that the circuit courts adopting the bright-line rule have quoted. The bright-line rule originated in the Fourth Circuit in *United States v. Thomas*.[59] The Fourth Circuit's reasoning was simple: federalism. The court found that a pending state prosecution was an "obvious reason" for delaying a federal prosecution because "to [rule] otherwise would be to mire the state and federal systems in innumerable opposing writs, . . . and generally to throw parallel federal and state prosecutions into confusion and disarray."[60] The court ended its second factor analysis there, holding that the government's "plausible reason" tipped the second factor against the defendant.[61] Three years later in *United States v. Grimmond*,[62] the Fourth Circuit again addressed the issue of delaying a federal proceeding because of two pending state proceedings and in its ruling made more explicit its commitment to preserving federalism when adopting a bright-line rule. The court stated: "When a defendant violates the laws of several different sovereigns, . . . at least one sovereign, and perhaps more, will have to wait its turn at the prosecutorial turnstile. Simply waiting for another sovereign to finish prosecuting a defendant is without question a valid reason for delay."[63]

There is some indication to suggest that the current Supreme Court would err on the side of keeping the dual sovereigns separate.[64] That said, the Court's precedent regarding concurrent jurisdiction and parallel proceedings does not show as clear of a commitment to complete federal-state separation when a federal court is choosing whether or not to exercise its jurisdiction—at least in the realm of civil

59. *See Thomas*, 55 F.3d at 150.

60. *Id.* at 150–51.

61. *Id.* at 150.

62. 137 F.3d 823 (1998).

63. *Id.* at 828.

64. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1964, 1966 (2019) (maintaining the dual-sovereign exception in double jeopardy law despite extensive scholarship against maintaining the exception).

procedure. Abstention is a judicially created doctrine in federal courts that allows a district court to exercise its discretion in postponing or abstaining entirely from exercising its jurisdiction when the court shares jurisdiction with the state.[65] Virtually every form of abstention exists as a means for the federal court to yield authority to the state tribunal in the interests of federalism.[66] Although mostly a creature of civil procedure, the Supreme Court has applied the abstention doctrine to criminal proceedings as well.[67]

Although abstention is within the discretion of the district court, the court may only exercise its discretion to abstain in narrow circumstances.[68] Justice Brennan, writing for the majority in *Colorado River Water Conservation District v. United States*, held that the district court's abstention decision was error in that case because "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule."[69] Quoting a prior decision, Justice Brennan wrote:

> The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the *exceptional circumstances* where the order to the parties to repair to the State court would serve an important countervailing interest.[70]

65. 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 122.03 (3d ed. 1999).

66. *Id.* § 122.04; *see also* James Bedell, Note, *Clearing the Judicial Fog: Codifying Abstention*, 68 CASE W. RSRV. L. REV. 943, 945–46 (2018).

67. *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

68. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (citing County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188–89 (1959)).

69. *Id.* at 813.

70. *Id.* (quoting *Mashuda*, 360 U.S. at 188–89) (emphasis added). It is worth mentioning that there is some question about whether the *Colorado River* "exceptional circumstances" test has been abrogated. *See* Capitol Indem., Corp. v. Haverfield, 218 F.3d 872, 874 (8th Cir. 2000) (citing Wilton v. Seven Falls Co., 515 U.S. 277, 289–90 (1995)). Belief that *Colorado River* has been abrogated centers around the Court's decision in *Wilton v. Seven Falls*, where the Court ruled that *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942), rather than *Colorado River* applied to cases where the district court was exercising its discretion in making *declaratory judgements*. *Wilton*, 515 U.S. at 289–90. In cases where the issue is simply whether the court should exercise its concurrent jurisdiction, federal courts routinely use the *Colorado River* "exceptional circumstances" test. *See, e.g.*, Blank River Servs., Inc. v. Towline River Serv., Inc., 395 F. Supp. 3d 589, 599–603 (W.D.

The Court continued its analysis by presenting three general categories where the district court may take the extraordinary step of abstaining from exercising its jurisdiction.[71] First, the district court may exercise its discretion to abstain when the case presents a federal constitutional issue that might either be mooted or interpreted differently by the state court in a parallel proceeding.[72] Second, abstention might be appropriate in cases where the federal court would have to resolve a difficult question of state law better handled by the state courts.[73] Third, and particularly relevant to the present discussion, in criminal cases, abstention may be appropriate when federal jurisdiction was invoked to restrain state criminal proceedings based on the Court's prior ruling in *Younger v. Harris*.[74]

The Court has stated that deferral of a federal proceeding based on a parallel state proceeding must be based on some kind of exceptional circumstance.[75] Both liberal and conservative justices have repeatedly written in subsequent cases that the Court's precedent establishes that the mere existence of a state proceeding is not enough to justify the federal court's deferral of jurisdiction.[76] In *Sprint Communications v. Jacobs*, the Court explicitly rejected an interpretation of its precedent that broadly precluded the federal courts from exercising concurrent jurisdiction, instead favoring an interpretation that constrained the

Pa. 2019) (using *Colorado River* to decide whether to exercise concurrent jurisdiction); United States v. Esposito, 371 F. Supp. 3d 288, 297–300 (M.D. La. 2019) (same). *See also* Josue Caballero, Note, Colorado River *Abstention Doctrine in the Fifth Circuit: The Exceptional Circumstances of a Likely Reversal*, 64 BAYLOR L. REV. 277, 277–78 (2012) (discussing how the Fifth Circuit often reverses decisions by the district courts to abstain under *Colorado River*).

71. *Colo. River*, 424 U.S. at 814.

72. *Id.* (citing *Mashuda*, 360 U.S. at 189).

73. *Id.* at 815 (citing Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959)).

74. *Id.* at 816 (citing Younger v. Harris, 401 U.S. 37, 42 (1971)).

75. New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 368 (1988).

76. *See* Growe v. Emison, 507 U.S. 25, 32 (1993) ("[F]ederal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter, and when that happens a federal court generally need neither abstain (*i.e.,* dismiss the case before it) nor defer to the state proceedings . . . .") (demonstrating the conservative support for this precedent as authored by Justice Scalia); Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013) ("Parallel state-court proceedings do not detract from [the obligation to hear and decide a case].") (demonstrating the liberal support for this precedent as authored by Justice Ginsburg).

district court's discretion to cases with an exceptional circumstance.[77] Therefore, although the district court may be able to defer to a state proceeding when the interests of federalism call for doing so, that rule is by no means an absolute rule requiring the district court to defer whenever a state proceeding exists. Instead, Supreme Court precedent suggests that some form of analysis is required on a case-by-case basis to determine if there is a compelling reason for the court to delay exercising its jurisdiction.

B. Prosecutorial Diligence

Another speedy trial interest identified by the courts over the years has been the interest in seeing prosecutors exercise their due diligence in bringing cases to trial. *Hedgepeth v. United States*[78] was one of the first cases to identify this interest and further provides an interesting fact pattern that is analogous to this discussion. The prosecutor in *Hedgepeth* asked for a two-month continuance in order to try Hedgepeth and his co-defendant together.[79] The prosecutor did not provide any other reason besides that he preferred doing it in one trial.[80] The D.C. Circuit ultimately decided that there was no speedy trial violation because two months was not significant but stated in dicta that the prosecutor should have been more prompt in bringing a trial.[81] The court explicitly stated: "It must be borne in mind that the prosecution, not the defense, is charged with bringing a case to trial. The Government may not 'sit back' and then argue that defendant's inaction conclusively waived his right to a speedy trial."[82]

In 1970, the Supreme Court adopted the D.C. Circuit's reasoning in *Dickey v. Florida*.[83] In *Dickey*, the Court held that the defendant's speedy trial right was violated when the state court refused to allow his immediate prosecution in Florida, partially because the defendant was "unavailable" for trial in Florida since he was serving a federal sentence.[84] The Court emphasized that the speedy trial right is grounded in the hard reality that "fresh claims" are better than "stale claims," especially in criminal law.[85] The Court reasoned pragmatically that sometimes delays are inevitable due to overcrowded dockets or

77. *Sprint Commc'ns*, 571 U.S. at 81–82.

78. 364 F.2d 684 (D.C. Cir. 1966).

79. *Id.* at 686–87.

80. *Id.*

81. *Id.* at 688–89.

82. *Id.* at 687–88.

83. 398 U.S. 30 (1970).

84. *Id.* at 32, 37.

85. *Id.* at 37.

lack of judges, but convenience to the state alone was not a valid reason to delay the defendant's trial.[86] The Court later in *Strunk v. United States*[87] stated that holding the government to account for delays in the court system was meant to reaffirm the Court's prior ruling in *Dickey* against prosecutorial convenience as a valid reason for delay.[88]

C. Logistical Concerns

Courts on both sides of the circuit split have expressed concerns about the logistical practicality of holding a parallel state-federal proceeding. The Fourth Circuit stated as one of its reasons for adopting the bright-line rule was that parallel proceedings would "increase inmate transportation back and forth between the state and federal systems with consequent additional safety risks and administrative costs."[89] The Tenth Circuit in adopting the ad hoc approach expressed similar concerns, finding that the government's reason was not justified because it made no showing that transporting the defendant five blocks to the federal courthouse would be burdensome on the government.[90] The Supreme Court itself recognized society's concerns in the economic cost of a delayed proceeding in *Barker*, stating that a lengthy detention of the accused is costly because of the amount of money the state has to spend to keep the accused imprisoned.[91]

The cost per inmate of keeping a prisoner in state jail while awaiting trial is, however, wildly different depending on the state. In 2015, the cost per inmate varied between $14,780 in Alabama and $69,355 in New York.[92] Therefore, the state's interest in keeping costs low during the pretrial phrase is different depending on how expensive keeping that prisoner available for trial would be.

III. PRACTICAL EFFECT OF EACH CIRCUIT'S APPROACH

Although the Supreme Court mandates that the accused's speedy trial right be weighed in the context of these competing interests, the circuits' approaches to a delayed federal proceeding differ starkly. The

86. *Id.* at 38.

87. 412 U.S. 434 (1973).

88. *Id.* at 436–37.

89. United States v. Thomas, 55 F.3d 144, 150 (4th Cir. 1995).

90. United States v. Seltzer, 595 F.3d 1170, 1178 (10th Cir. 2010).

91. Barker v. Wingo, 407 U.S. 514, 520–21 (1972).

92. *Prison Spending in 2015*, VERA: THE PRICE OF PRISONS, https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending (last accessed Jan. 17, 2020) [https://perma.cc/L4GL-6HU2].

circuit split for purposes of this discussion revolves around the second *Barker* factor, the reason for the delay. The circuits essentially differ in the level of deference given to the federal government's decision to delay the proceeding until the conclusion of the state's case. The earliest cases addressing this issue in the Fourth Circuit adopted a bright-line approach where delaying to avoid a parallel prosecution is always a valid reason requiring no further analysis from the court.[93] However, more recently, circuit courts have declined to follow the original bright-line rule and instead require more analysis to determine whether the federal government had a legitimate reason to avoid a parallel prosecution. This amounts to essentially an ad hoc analysis within the *Barker* overall ad hoc test.[94] It is important to look at how both tests work in practice and how that practice fits within the speedy trial jurisprudence discussed above.

A. Bright-Line Rule

The Fourth Circuit in *United States v. Thomas*[95] was the first circuit to adopt the bright-line rule. Thomas was in county jail facing various state charges related to evading arrest and killing a bicyclist while fleeing in his car when the federal government issued an indictment for drug charges.[96] Thomas was not arraigned in federal court until two years later.[97] The Fourth Circuit stated that, in addition to the other reasons the government provided for the delay in formally beginning the pretrial proceedings, the government had an obvious reason for the delay in that it had to wait for the state proceedings to conclude.[98]

The Sixth Circuit's holding in *United States v. Schreane*[99] provides a little more context for how the circuit courts apply the bright-line rule. *Schreane* involved two delays in the pre-federal proceedings, one of which was caused by the federal government waiting for state proceedings to conclude.[100] Although the court's opinion stressed that this reason alone does not make the whole delay automatically permissible,

93. *See, e.g.*, *Thomas*, 55 F.3d at 150–51 (finding that a delay caused by a state proceeding was an "obvious reason" for delaying the defendant's federal prosecution, without specific analysis into the practicality of a parallel prosecution).

94. *See, e.g.*, *Seltzer*, 595 F.3d at 1178.

95. 55 F.3d 144.

96. *Id.* at 147.

97. *Id.*

98. *Id.* at 150–51.

99. 331 F.3d 548 (6th Cir. 2003).

100. *Id.* at 554–55.

the court held that delaying for the conclusion of a state prosecution is a "valid reason" and thus a factor in favor of the government.[101] The application of this rule is therefore simple; a delay caused by the government waiting for the conclusion of a state proceeding is a valid reason that weighs in favor of the government in a *Barker* second-factor analysis. The court offered no further analysis into the circumstances of that potential parallel proceeding, only whether or not the concurrent state proceeding exists.

The obvious problem with this approach is that it ignores the Supreme Court's emphasis on considering the case in its "particular context."[102] The Sixth Circuit's rule considers *only one* aspect of the government's reasoning—whether there was a state proceeding happening at the same time the federal government wanted to pursue a prosecution. For this rule to be remotely contextual, other aspects of the problems caused by doing state and federal parallel proceedings would have to exist in every case. This is far from accurate. By the Fourth and Sixth Circuits' own logic, the bright-line rule is necessary to avoid confusion and disarray in parallel federal and state prosecutions,[103] yet it makes no provision for defendants like the one in *United States v. Seltzer* whose state charges were completely unrelated to their federal charges, making confusion in the law unlikely.[104] The rule emphasizes the increased administrative costs of transporting a prisoner from state custody to federal court but provides no leeway for a defendant sitting in state custody for months without a hearing in a jail five blocks from the federal courthouse.[105] According to the Supreme Court, context matters in these cases, but the bright-line rule ignores most of the context surrounding the case when the court reaches its decision.

The bright-line rule also wholly ignores why the context is so important to speedy trial cases and why the Supreme Court adopted a balancing test rather than a bright-line rule in the first place. The Speedy Trial Clause is "generically different" from any other procedural right because not only does the defendant have an interest in the speed of a prosecution—society does as well.[106] The bright-line rule effectively limits the district court to considering only whether or not a state proceeding exists, regardless of any other circumstances of the case, instead of conducting the balancing analysis that Supreme Court

101. *Id.* at 555.

102. Barker v. Wingo, 407 U.S. 514, 522 (1972).

103. *Thomas*, 55 F.3d at 150–51.

104. *See* United States v. Seltzer, 595 F.3d 1170, 1178 (10th Cir. 2010).

105. *See id.*

106. *Barker*, 407 U.S. at 519.

precedent requires. If, for example, a defendant faces both state and federal charges but is factually innocent,[107] society would have a strong interest in seeing that defendant fairly and quickly adjudicated both for the sake of justice and to prevent an innocent person's stay in prison.[108] If having a parallel federal and state proceeding is otherwise reasonable, society would benefit from having those proceedings occur sooner rather than later in order to limit the innocent person's stay in jail and prevent an innocent person from pleading guilty.[109] The bright-line rule does not allow for a nuanced analysis of context, only permitting the district court to consider whether there is a state proceeding and, if so, commanding the court to end its analysis of the second *Barker* factor there.

The whole basis for the circuit courts' adherence to this rule, in the interests of federalism, further contradicts Supreme Court precedent on concurrent proceedings. As discussed above, the Court's concurrent-jurisdiction precedents establish that federal courts must err on the side of exercising their jurisdiction rather than deferring it.[110] Only in exceptional circumstances can the district court exercise discretion to defer adjudicating the matter until the state court finishes its proceeding.[111] The bright-line rule does not allow the district court to even consider the circumstances of the state court proceeding to determine whether abstaining from having parallel proceedings is an exceptional circumstance in the first place.[112] Instead, it simply assumes that there is an exceptional circumstance and allows the district court to defer the exercise of its jurisdiction just because a state proceeding exists.

B. Ad Hoc Approach

On the other side of the circuit split, the Tenth Circuit in *United States v. Seltzer* was the first court of appeals to outline an ad hoc approach in contradiction to the bright-line rules that came before it.[113] Instead of deferring automatically to the government's decision to delay

107. *See* Peter A. Joy & Kevin C. McMunigal, *Innocent Defendants Pleading Guilty*, 30 CRIM. JUST. 45, 45 (2015) (discussing how innocent defendants are sometimes charged due to prosecutorial "tunnel vision").

108. *See Barker*, 407 U.S. at 520–21 (recognizing society's interest in fair procedure and limiting pretrial detention).

109. *See* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 174–75 (2014) (explaining that innocent defendants charged with relatively minor crimes are more likely to plead guilty in order to get out of jail).

110. *See supra* Part II-A.

111. Sprint Commc'ns., Inc. v. Jacobs, 571 U.S. 69, 78 (2013).

112. *See supra* Part III-A.

113. 595 F.3d 1170, 1177–78 (10th Cir. 2010).

because of a state proceeding, the court instead decided to scrutinize the decision.[114] The court focused on three distinct aspects of the case that convinced it that a parallel proceeding would have been possible. First, the accused in *Seltzer* was facing state drug charges which were completely unrelated to his federal counterfeiting charges.[115] This fact, in the Tenth Circuit's view, counseled against the conflicting assertions by both the state and federal courts that a parallel prosecution would lead to confusion in the law.[116] Second, the court found that because the federal courthouse in Grand Junction, Colorado, where the defendant would be federally prosecuted, was only five blocks from the county jail where the defendant was being held, transporting him to the federal courthouse for his federal proceeding would not have been "logistically cumbersome."[117] Lastly, the court found that the relative simplicity of the charges against the defendant made the burden of conducting a parallel prosecution for the federal government very light in comparison to a more complicated case.[118]

The Ninth Circuit in *Myers*, on the other hand, confined its analysis to a single test: whether there was such a factual overlap in the state and federal charges that a concurrent prosecution would create "administrative hurdles and safety concerns."[119] Although it seems like a starkly different test than the one put forward by the Tenth Circuit in *Seltzer*, the Ninth Circuit's test in practice looks remarkably similar to the *Seltzer* approach. On remand, the district court took the Ninth Circuit's test and extensively analyzed whether a parallel prosecution would have been "logistically cumbersome."[120] While society has an interest in speedy prosecution—and therefore whether a parallel prosecution would be logistically cumbersome—this is not the only societal interest.[121] Therefore, it is best to view the Ninth Circuit's test as yet another factor that falls under a broader, multi-factor test.

Put in more general terms, the ad hoc approach considers a number of factors, including whether there was an overlap in the state and federal charges, whether parallel proceedings would have been logistically cumbersome, and whether the government would have been

114. *Id.* at 1177–79.

115. *Id.* at 1178.

116. *Id.*

117. *Id.*

118. *Id.* at 1178–79.

119. United States v. Myers, 930 F.3d 1113, 1121 (9th Cir. 2019).

120. *See* United States v. Myers, No. 2:15-cr-0045-SMJ-1, 2020 WL 475822, at *4–5 (E.D. Wash. Jan. 29, 2020) (analyzing the government's asserted "administrative hurdles" of a parallel prosecution, such as the coordination of discovery, witnesses, evidence, and experts).

121. *See* United States v. Thomas, 55 F.3d 144, 150 (4th Cir. 1995); *see also supra* Part II-C.

unduly burdened by a parallel prosecution, before the district court can determine whether the reason for delay was truly valid and could weigh in favor of the government. The ad hoc approach does not automatically assume, as the bright-line rule does, that parallel state and federal proceedings are unreasonable but instead takes into consideration the unique circumstances of the case to determine whether the government was justified in waiting. This already does far more in considering the context as the Supreme Court mandated in *Barker* than the bright-line rule does.

IV. HYPOTHETICALS

Although the ad hoc approach is more consistent with the purpose of the Speedy Trial Clause and more generally with the Supreme Court's precedent, critics of interest-balancing approaches may still argue that a bright-line rule is appropriate. If, for instance, district courts applying the ad hoc approach always found the government's delay justified, requiring heightened judicial scrutiny over the decision to delay would needlessly complicate the judicial process.[122] To counter these concerns, this Note will put forward four hypotheticals: the first will present a case where delay is clearly necessary; the second, a case where delay is clearly unnecessary; the third, a more ambiguous case where delay may be appropriate; and the fourth, another ambiguous case where delay may be appropriate for some of the proceedings but not for others.

This Note will then take on the role of a district court judge and apply the facts of the hypotheticals to a number of factors to consider why or why not delay may be appropriate. The discussion will be framed around the three broad factors discussed in *Seltzer*'s ad hoc test: (1) overlap in state and federal charges, (2) logistical concerns, and (3) burden on the federal government.[123] The discussion of logistical concerns will further address the Ninth Circuit's factor, factual overlap creating administrative hurdles.[124]

A. First Hypothetical—Clear Case for Delay

Octavio Alpha, a felon with a prior violent felony conviction, runs a multi-state fraud scheme from his home in Nevada. Alpha and two accomplices, Jesse White and Walter Pinkman, steal personal informa–

122. *See* Andrew McLetchie, Note, *The Case for Bright-Line Rules in Fourth Amendment Jurisprudence: Adopting the Tenth Circuit's Bright-Line Test for Determining the Voluntariness of Consent*, 30 HOFSTRA L. REV. 225, 228 (2001) ("The advocates of bright-line rules essentially believe that the rules provide easy to follow guidelines for law enforcement, defense lawyers, prosecutors, and judges alike.").

123. *Seltzer*, 595 F.3d at 1178–79.

124. *Myers*, 930 F.3d at 1121.

tion from the Dark Web and use the stolen information to forge driver's licenses and other documents. Alpha, White, and Pinkman then use those forged documents to secure financing from banks, credit unions, and retailers to purchase expensive items like vehicles, clothing, and cell phones. They start the scheme in Nevada but expand to Utah and California.

Alpha and Pinkman are pulled over in Utah for a routine traffic stop after purchasing cell phones in California as part of their scheme. In a subsequent search of Alpha's car, the officer discovers a gun in a backpack in the backseat. Utah state prosecutors initially charge Alpha with being a felon in possession of a firearm.[125] California state prosecutors also bring a wire fraud charge[126] against Alpha for his recent fraudulent purchase of cell phones in California.

After an FBI investigation, the federal prosecutors in Nevada realize that Alpha is the ringleader of a multi-state scheme and bring an indictment against him charging him with wire fraud[127] and being a felon in possession.[128] The federal prosecutors also bring similar indictments against Pinkman and White. White, however, is currently in jail awaiting trial for unrelated Colorado state charges. The federal prosecutors decide to delay the proceedings against Alpha until his state proceedings in Utah and California conclude and until White becomes available to testify against Alpha.

The first factor in the *Seltzer* ad hoc analysis is whether there is any overlap of state and federal charges. The Tenth Circuit's analysis is limited to whether the state and federal charges are the same or similar in order to avoid "conflicting motions or assertions in the different courts."[129] In Alpha's case, there are multiple overlaps that can create conflicts. Alpha is facing two concurrent state and federal charges for being a felon in possession and for wire fraud. Any one of these concurrent charges creates the possibility of conflicting rulings that can lead to confusion. Taking the concurrent felon-in-possession charges as an example, the fact that police officers found the firearm in a backpack raises issues about whether or not the government has enough evidence that Alpha "possessed" the firearm without proof that the backpack belonged to him. The outcome of the court's ruling may depend on in

125. UTAH CODE ANN. § 76-10-503 (2017).

126. CAL. PENAL CODE § 538.5 (2011).

127. 18 U.S.C. § 1343 (2018).

128. 18 U.S.C. § 922(g) (2018).

129. *See* United States v. Seltzer, 595 F.3d 1170, 1178 (10th Cir. 2010) (finding no overlap because the state charge was for drug possession while the federal charge was for counterfeiting); *see also* United States v. Medina, 918 F.3d 774, 788–89 (10th Cir. 2019) (finding an overlap because the defendant had both state and federal felon-in-possession charges).

which court Alpha is pleading his case.[130] A parallel proceeding therefore carries the potential that any ruling would conflict with the rulings of the other court, a concern justifying delay of the federal proceeding.

The second factor in the *Seltzer* test is whether parallel prosecutions would be logistically cumbersome.[131] The logistical and administrative hurdles in Alpha's case would be immense considering the multiple state prosecutions and potential number of victim-witnesses spread out over three states for the fraud charges. The cost and time alone to transport Alpha from state custody in either Utah or California to a federal courthouse in Nevada would be enough to justify a delay.[132] The administrative ordeal to arrange a parallel proceeding with the same witnesses, experts, and physical evidence, however, would be an even further justification for delaying the federal proceeding.[133]

The third factor in the *Seltzer* test, burden on the federal government, focuses on one distinct issue: the complexity of the federal government's case.[134] If, for example, the federal government's case is more complicated and requires more time to effectively prosecute, it is, in the Tenth Circuit's view, reasonable for the federal government to defer to the state, and delay, in order to avoid conflict.[135] That is the situation here. The federal prosecutors are prosecuting Alpha for a multi-state financial fraud scheme that covers potentially hundreds of witnesses and thousands of evidentiary documents.[136] It would not be mere convenience for the federal prosecutors to want to delay the proceeding when the evidence they need to prosecute their case is located in far-flung state courts. It would instead be justifiable for the

130. *Compare* State v. Lucero, 350 P.3d 237, 243 (Utah Ct. App. 2015) (holding that the government did not have sufficient evidence that the defendant constructively possessed a firearm in a backpack within the defendant's reach in a co-occupied car), *with* United States v. Benford, 875 F.3d 1007, 1016 (10th Cir. 2017) (holding that the government had sufficient evidence that the defendant constructively possessed a firearm in a backpack at his cohabited apartment).

131. *Seltzer*, 595 F.3d at 1178.

132. *See Medina*, 918 F.3d at 789 (finding delay justified because the defendant was in custody in multiple states facing state charges for 300 days before the federal government could get custody of him).

133. *See* United States v. Myers, No. 2:15-cr-0045-SMJ-1, 2020 WL 475822, at *4–5 (E.D. Wash. Jan. 29, 2020) (finding that the difficulty in coordinating the government's witnesses and evidence for parallel proceedings in the same judicial district weighed this *Barker* factor slightly in favor of the government).

134. *Seltzer*, 595 F.3d at 1178–79.

135. *Id.*

136. *See Medina*, 918 F.3d at 789 (finding that a multi-state financial fraud prosecution justified delaying the start of federal proceeding).

federal government to want to delay the federal proceedings against Alpha in order to ensure access to the large amount of testimonial evidence they need to prosecute their case.

B. Second Hypothetical—Clear Case for Parallel Prosecutions

Cleveland police pull over Tom Beta in a routine traffic stop. The officer smells marijuana and searches the car finding a small amount of marijuana. A week later, Secret Service agents execute a search warrant on Beta's home in Cleveland suspecting a counterfeiting operation and find bags full of counterfeited dollar bills. Ohio state prosecutors charge Beta with drug possession,[137] while the U.S. Attorney brings a federal indictment for counterfeiting U.S. currency.[138] Since Beta does not have a prior criminal history and is not deemed a flight risk, the judge decides to release Beta on bail. The federal prosecutors want to delay the counterfeiting proceeding until Ohio finishes its drug possession prosecution.

Unlike the first hypothetical, there is no overlap in the state and federal charges against Beta. Ohio has to prove in its drug possession prosecution that Beta knowingly possessed a controlled substance.[139] The United States on the other hand has to prove that Beta, with intent to defraud, counterfeited "any obligation or other security of the United States."[140] The state does not need to use any evidence of the counter–feiting that the federal government will use in its case and vice versa. Therefore, any evidentiary ruling made in one case will not conflict with the rulings in the other case because none of the evidence will be the same. In other words, there is little risk involved in holding parallel proceedings because there is little opportunity for either court to make contradictory rulings that would intrude on the other court's authority.

Also, unlike the first hypothetical, there are few logistical concerns that justify delay. Beta has been released on bail, so the federal government does not need to transport him from state custody, only schedule his court date. While there might be some concern that his federal court dates will overlap with his state court dates, it is certainly an easier problem to deal with than a defendant in a completely different state in state custody. Furthermore, there will be no problem scheduling witnesses or getting access to physical evidence because none of it will be the same in either proceeding. Beta's state and federal

137. OHIO REV. CODE § 2925.11(A) (West 2019).

138. 18 U.S.C. § 471 (2012).

139. OHIO REV. CODE § 2925.11(A) (West 2019); *see also* OHIO JURY INSTR. § 525.11 (OHIO JUD. CONF. 2020).

140. 18 U.S.C. § 471 (2018). *See also* 2 KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE & INSTRUCTIONS § 32.03 (6th ed. 2020).

charges arise out of different factual events with different officers making the search and collecting different physical evidence.

Finally, the federal government's case is not complex. It is prosecuting a single defendant on a single charge of counterfeiting for an operation that was done locally in Beta's home in Ohio.[141] None of the government's witnesses are already tied up in Beta's state proceeding since they were not there. Unlike a more complicated, multi-state case, the federal government would not be overly burdened with a parallel prosecution. Delay would simply be done out of convenience rather than any legitimate concern.

C. Third Hypothetical—Unclear Case

Police officers in Tucson, Arizona, arrest defendant Jazmine Carter after she sells methamphetamine to a DEA informant. During the arrest, Carter punches one of the arresting officers in the jaw. The Arizona state prosecutor charges her with aggravated assault against a peace officer,[142] while the U.S. Attorney in Tucson brings a federal indictment against her for drug trafficking.[143] The federal government wants to delay the drug trafficking proceeding until after the state's aggravated assault proceedings conclude.

The state and federal charges against Carter do not overlap. Both crimes are distinct, requiring the government to prove completely different elements. To sustain Carter's conviction under the criminal statute, the federal prosecutor would have to prove two essential elements: (1) Carter "knowingly and intentionally distributed" meth–amphetamine, and (2) "at the time of such distribution, the defendant knew that the substance distributed" was methamphetamine.[144] In comparison, the Arizona state prosecutor has to prove two essential elements: (1) Carter committed an assault, and (2) the assault was aggravated because the defendant knew or had reason to know the person assaulted was a peace officer.[145] In terms of evidence, the federal prosecutor only has to rely on evidence of the drug buy itself, while the state prosecutor has to rely primarily on the events following the buy, namely the escape and the punching of the officer, to prove the elements of assault. This makes conflicting rulings in the different courts unlikely because the relevant evidence in both cases will be different. Even if

141. *See* United States v. Seltzer, 595 F.3d 1170, 1178–79 (10th Cir. 2010) (finding that a counterfeiting charge against a single defendant was not so compli–cated that a parallel prosecution was infeasible).

142. ARIZ. REV. STAT. ANN. §§ 13-1203(A)(1), 13-1204(A)(8)(a) (2020).

143. 21 U.S.C. §841(a)(1) (2018).

144. O'MALLEY ET AL., *supra* 140, § 64.03.

145. REVISED ARIZ. JURY INSTRUCTIONS—CRIMINAL § 12.04 (STATE BAR OF ARIZ. 2016).

the state prosecutor were to admit evidence of the drug buy to prove intent,[146] that evidence would be admitted under an entirely different rule than the federal court. If either the state or federal court were to make a ruling on the admissibility of the evidence, it would have no effect on the parallel proceeding.

Logistical concerns are where this case becomes less certain. Assuming Carter is kept at the Pima County Adult Detention Complex, the distances between the jail and the state and federal courthouses are both under three miles, and it take roughly ten minutes to get to either courthouse by motor vehicle.[147] Therefore, transporting Carter to her federal proceeding would be reasonable.[148] One problem, however, would be the availability of witnesses. Both the state aggravated assault case and the federal drug trafficking case would require testimony from the officers involved in Carter's arrest. On the other hand, considering the long felony case-processing times in the Pima County prosecutor's office,[149] there is a distinct possibility that the state prosecution will take long enough to make scheduling a parallel federal prosecution, at the very least, feasible.[150] The point is that every case is unique. Some cases take longer than others and some have untenable scheduling conflicts. Courts following the bright-line rule do not take those diff–erent circumstances into account. Finally, the burden on the federal government would again be light considering the simplicity of the

146. *See* ARIZ. R. EVID. 404(b) (allowing for the admission of prior bad-act evi–dence to prove a defendant's intent).

147. *Compare Driving Directions from Pima County Adult Detention Complex to Pima County Superior Court*, GOOGLE MAPS, https://www.maps.google.com (follow "Directions" hyperlink; then search starting point field "Pima County Adult Detention Complex" and search destination field "Pima County Superior Court") [https://perma.cc/T8ZG-3GH4], *with Driving Directions from Pima County Adult Detention Complex to James A. Walsh Federal Courthouse*, GOOGLE MAPS, https://maps.google.com (follow "Directions" hyperlink; then search starting point field "Pima County Adult Detention Complex" and search destination field "James A. Walsh Federal Court–house") [https://perma.cc/GW5H-TH6K].

148. *See* United States v. Myers, No. 2:15-cr-0045-SMJ-1, 2020 WL 475822, at *4 (E.D. Wash. Jan. 29, 2020) (finding that transport to a federal courthouse "within miles" of a detention center potentially made parallel prosecution reasonable).

149. Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 286 n.122 (2011) (citing Kim Smith, *Why Wheels of Justice Roll Slowly in Tucson*, ARIZ. DAILY STAR (Dec. 26, 2006), https://www.tucson .com/news/local/why-wheels-of-justice-roll-slowly-in-tucson/article_6d800 46e-c561-5b72-b3ba-767d4bf1cacc.html [https://perma.cc/39WJ-EC4V]).

150. *See Myers*, 2020 WL 475822, at *5 (finding that a parallel federal proceeding was possible because the state proceedings took longer than anticipated).

federal charges against Carter. Carter is a single defendant and not a member of a wider drug trafficking conspiracy.

D. Fourth Hypothetical—Another Unclear Case

Police in Toledo, Ohio, arrive at the home of John Delta to execute an arrest warrant for trafficking heroin. Delta is able to jump out the window to evade arrest. He runs down the street and steals a car at gunpoint from a passing motorist. Delta then drives across the border into Michigan. Michigan police pursue Delta in a high-speed chase near Monroe, Michigan. Delta loses control of his vehicle and hits a passing bicyclist, killing him. Michigan prosecutors charge Delta with first-degree murder based on his killing a person during the perpetration of a controlled substance offense.[151] The prosecutors back in Ohio charge Delta with grand theft auto.[152] The U.S. Attorney then brings a federal indictment against him for drug trafficking.[153] The federal prosecutors want to delay until Delta's Michigan and Ohio state prosecutions have concluded.

This hypothetical presents a unique problem where delay is definitely appropriate for the Michigan charge but may not be appropriate for the Ohio charge. Considering overlap of charges, while there is no overlap between the elements of grand theft auto and drug trafficking,[154] the Michigan state prosecutor would have to prove Delta was engaged in drug trafficking as the underlying felony in order to sustain a first-degree murder conviction under a felony-murder theory.[155] The Michigan prosecutor would likely want to introduce much of the same evidence as the federal prosecutors in Toledo, creating a situation where different courts can make different rulings regarding the admissibility of the evidence. Therefore, in the interest of avoiding confusion, the federal government has a legitimate reason to delay for the Michigan proceeding but less so for the dissimilar Ohio state charge. The burden on the federal government, however, would be relatively light during a federal prosecution because it is dealing with a single defendant, not engaged in a major conspiracy.

This case, however, raises several logistical dilemmas. Although Toledo and Monroe are relatively close to each other, under a thirty-

151. MICH. COMP. LAWS § 750.316(1)(b) (2020); People v. Gillis, 712 N.W.2d 419, 426 (Mich. 2006) (holding that a killing committed during an attempt to escape was done in perpetration of the felonious act).

152. OHIO REV. CODE § 2913.02(B)(5) (West 2019).

153. 21 U.S.C. §841(a)(1) (2018).

154. *Compare* OHIO REV. CODE § 2913.02(B)(5) (West 2019) *with* 21 U.S.C. § 841(a)(1) (2018).

155. *See* MICH. COMP. LAWS § 750.316(1)(b) (2020).

minute drive,[156] the fact that the Michigan charge is a first-degree murder charge changes the logistics. Murder charges are inherently complex, requiring more deference to the state to effectively complete its murder prosecution.[157] If the federal government were to continually transfer Delta to another jurisdiction during such a complex prosecution, it would likely be a detriment to the state's ability to effectively prosecute.[158] The availability of witnesses and evidence would also create problems. The Michigan prosecutors would need many of the same witnesses and evidence as the federal prosecutors, because they would have to prove Delta was engaging in drug trafficking in order to sustain his first-degree murder conviction. If there is going to be a parallel prosecution, coordinating these witnesses and evidence could be difficult and therefore could be a legitimate reason for delay.[159] A parallel prosecution in Ohio, however, would not present these same issues. A grand theft auto charge is not as complex as a first-degree murder charge, and although there may be some overlap in witnesses, especially the police officers needed to prove intent and opportunity, key witnesses will not overlap, such as the person whose car Delta stole. Since the grand theft auto took place in Ohio, the witnesses involved would also most likely be in Ohio. In other words, delay would be justified in waiting for Michigan's prosecution to end but may not be justified for Ohio's prosecution.

CONCLUSION

The Speedy Trial Clause requires flexibility. It is a right fundamental to the American system of justice and yet must remain amenable to numerous interests at play in any given criminal prosecution. No two cases are alike, and the interests underlying all of them will necessarily be different as well. Therefore, the right should not be governed by an inflexible rule that ignores the differences of a case. It must be governed by one that allows the district court to use its discretion to determine whether a delay is reasonable. Even if a parallel proceeding creates a burden, that burden will never be the same in any given case, and thus, like every other factor in the speedy trial analysis, should be considered within the case's context. State and federal

156. *Driving Directions from Toledo, Ohio to Monroe, Michigan*, GOOGLE MAPS, https://www.maps.google.com (follow "Directions" hyperlink; then search starting point field "Toledo, Ohio" and search destination field "Monroe, Michigan") [https://perma.cc/EKQ5-XBY3].

157. United States v. Nixon, 919 F.3d 1265, 1272 (10th Cir. 2019).

158. *Id.* at 1271.

159. United States v. Myers, No. 2:15-cr-0045-SMJ-1, 2020 WL 475822, at *4 (E.D. Wash. Jan. 29, 2020).

proceedings are no different. Sometimes the state may have a strong interest in prosecuting a defendant without a parallel federal pro–ceeding, but other times it may not. When the district court again decides Christopher Ray Myers' fate, it should keep in mind that this five-year long prosecution should have ended sooner if the federal government had only started the proceedings earlier. But the federal government delayed, simply because it was more convenient to wait. A fundamental right deserves more scrutiny than that.

Ryan Kerfoot[†]

† J.D. Candidate, 2021, Case Western Reserve University School of Law. The author would like to thank Professor Emeritus Jonathan L. Entin for his help and insight in writing this Note. Additional thanks to the Volume 71 editors for their careful edits. This Note is dedicated to the author's grandfather, who passed away during its writing.