Chapter 15

Defense Motions To Advance or for a Continuance; Motions To Dismiss for Want of Prosecution; Speedy Trial Motions

§ 15.01 DEFENSE MOTIONS TO ADVANCE THE DATE OF A PRETRIAL HEARING OR THE TRIAL

If the respondent is not detained pending trial, counsel will ordinarily not want to advance the date of pretrial hearings or the trial. It is usually in the respondent's interest to delay proceedings as much as possible because that will give the respondent a longer period of time in which to amass a record of good behavior and favorable community adjustment that can be cited at disposition to avoid a sentence of incarceration.

If the respondent is detained pending trial, counsel will have attempted at arraignment to set the trial for the earliest possible date that affords sufficient time for pretrial preparation. See § 4.14 *supra.* Thus counsel will rarely have reason to seek advancement of a case that is going to trial. However, if a detained client has decided to plead guilty, there is no reason to wait for a trial date that is weeks away in order to enter the plea. Counsel should advance the case so that the plea can be entered immediately. This procedure avoids needless preadjudication detention time, which, in most jurisdictions, is not credited to the sentence if the respondent is sentenced to incarceration. And in cases in which the plea may result in the client's being released pending disposition, an advancement of the plea date can bring about the respondent's early release.

In order to advance a case, counsel should secure the prosecutor's agreement to an advancement and to a particular date. Counsel then should contact the clerk of the court (or, as appropriate, the clerk of the judge who is presiding over the case), inform the clerk that the defense wishes to advance the date and that the prosecutor has consented, and request that the clerk calendar the case on the agreed-upon date.

§ 15.02 DEFENSE CONTINUANCES

Practice varies with regard to whether applications for continuances of pretrial hearings and of trial are required to be made in writing, on notice, in advance of the proceeding sought to be continued or whether they may be made orally on the date when the matter is listed. If local practice is receptive to continuance requests on the day of the hearing or trial, this course of action is ordinarily advised so that, in the event that the prosecutor also is not ready on the day of the hearing or trial, counsel can take advantage of the prosecutor's lack of readiness to seek dismissal for want of prosecution (see § 15.03 *infra*) or dismissal on speedy trial grounds (see § 15.04 *infra*).

If, on the other hand, there is any risk that a day-of-trial continuance request may be denied, counsel is ordinarily advised either to move in writing in advance or to inform the

prosecutor in advance of counsel's intention to move for a continuance. The prosecutor should be asked to join in, or to consent to, the defense motion. Joint continuance motions and motions noted "no opposition" are granted routinely in many courts, although this is less likely if the juvenile court statute or local court rules establish a strict time-line for trials (see § 15.04(a) *infra*). Even if the prosecutor is unwilling to agree, defense counsel is at least in the posture of having informed the prosecutor and having given him or her the opportunity to call off prosecution witnesses; a defense motion for continuance made in court without advance notice to the prosecutor may be regarded with suspicion and irritation by the judge, who will undoubtedly know that last-minute pleas of "not prepared" can be used as a tactic to discourage prosecution witnesses, once dragged needlessly into court, from appearing the next time that the case is called.

The trial judge ordinarily has exceedingly broad discretion to grant or to deny continuances. *See, e.g., Morris v. Slappy,* 461 U.S. 1, 11-12 (1983); *United States v. Cronic,* 466 U.S. 648, 659-62 (1984); *State v. Salazar*, 2007-NMSC-004, 141 N.M. 148, 152 P.3d 135 (2007); *Gonzales v. State*, 303 Ark. 537, 798 S.W.2d 101 (1990); *State v. Graham*, 2022-Ohio-1140, 2022 WL 997899 (Ohio App. 2022). However, the discretion is not absolute, *see*, *e.g.*, *Lee v. Kemna*, 534 U.S. 362 (2002), and defense counsel seeking a continuance over the opposition of the prosecutor should protect the record by a detailed statement of reasons (by affidavit, unless local practice permits oral representations in open court): for instance, recent appointment and lack of opportunity to prepare; unavailability of a witness; or need to appear in another court.

If counsel is being rushed so quickly at any stage that s/he has inadequate opportunity to prepare, s/he should set out the circumstances with particularity in an application for a continuance invoking not only the general equities of the situation but also the respondent's federal and state constitutional rights to effective assistance of counsel and to a fair trial. Denials of ample time for defense preparation have been held to violate these guarantees. *See, e.g., Powell v. Alabama,* 287 U.S. 45 (1932); *Hawk v. Olson,* 326 U.S. 271 (1945); *Megantz v. Ash,* 412 F.2d 804 (1st Cir. 1969); *Rastrom v. Robbins,* 440 F.2d 1251 (1st Cir. 1971); *Moore v. United States,* 432 F.2d 730, 735 (3d Cir. 1970) (en banc); *Twiford v. Peyton,* 372 F.2d 670 (4th Cir. 1967); *Hintz v. Beto*, 379 F.2d 937 (5th Cir. 1967); *Garland v. Cox,* 472 F.2d 875 (4th Cir. 1973); *MacKenna v. Ellis,* 263 F.2d 35, 41-44 (5th Cir. 1959); *Davis v. Johnson,* 354 F.2d 689 (6th Cir. 1966), *aff'd after remand,* 376 F.2d 840 (6th Cir. 1967); *Wolfs v. Britton,* 509 F.2d 304 (8th Cir. 1975); *United States v. King,* 664 F.2d 1171 (10th Cir. 1981); *United States v. Nguyen*, 262 F.3d 998 (9th Cir. 2001); *Randolph v. Secretary Pennsylvania Department of Corrections*, 5 F.4th 362 (3d Cir. 2021); *State v. Johnson*, 2021-NCSC-165, 379 N.C. 629, 634, 866 S.E.2d 725, 729 (2021) ("As defendant's request for a continuance before the trial court raised a constitutional issue, we review de novo the constitutional issue. The constitutional guarantees of assistance of counsel and confrontation of one's accusers and adverse witnesses implicitly provide that 'an accused and his counsel shall have a reasonable time to investigate, prepare[,] and present his defense.' . . . 'To establish a constitutional violation, a defendant must show that he did not have [adequate] time to confer with counsel and to investigate, prepare[,] and present his defense.'"); *Akau v. State*, 144 Hawai'i 159, 439 P.3d 111 (2019); *Commonwealth v.*

Mackrides, 255 A.3d 1269 (Table), 2021 WL 2029820 (Pa. Super. 2021); *People v. Cache*, 2021 WL 5371017 (Cal. App. 2021); *People v. Costan*, 169 A.D.3d 820, 94 N.Y.S.3d 131 (N.Y. App. Div., 2d Dep't 2019) (suppression hearing); *cf. People v. Williams*, 61 Cal. App. 5th 627, 657, 275 Cal. Rptr. 3d 848, 871 (2021); *Conic v. State,* 2021 Ark. App. 185, 624 S.W.3d 322 (2021). "[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guaranty of assistance of counsel cannot be satisfied by mere formal appointment." *Avery v. Alabama,* 308 U.S. 444, 446 (1940) (dictum). *See also In re Gault,* 387 U.S. 1, 33 (1967) (respondent in a delinquency case must receive notice "of the specific charge or factual allegations . . . sufficiently in advance of the hearing to permit preparation"); *In the Matter of John JJ.*, 298 A.D.2d 634, 636, 748 N.Y.S.2d 188, 189-90 (N.Y. App. Div., 3d Dep't 2002) (the respondent in a delinquency case was denied effective assistance of counsel because his lawyer interviewed him for the first time immediately before trial and failed to seek an adjournment to interview witnesses identified by the respondent and his mother). *Cf. People v. Williams*, 61 Cal. App. 5th 627, 657, 275 Cal. Rptr. 3d 848, 871 (2021) (a motion to substitute retained counsel for previously appointed counsel was made on the morning when trial was scheduled to begin and was denied primarily because retained counsel insisted she could not be ready for trial for four months from that date; "we conclude that the trial court erred in permitting expedience to take precedence over Williams's right to be represented by counsel of his choice under the circumstances of this case"); *accord*, *Conic v. State,* 2021 Ark. App. 185, 624 S.W.3d 322 (2021); *and see United States v. Sellers*, 645 F.3d 830, 835 (7th Cir. 2011) (contributing ground); *Daniels v. Woodford*, 428 F.3d 1181, 1206 (9th Cir. 2005) (same); *Powell v. Collins*, 332 F.3d. 376, 396-97 (6th Cir. 2003) (same); *United States v. Nguyen*, 262 F.3d 998 (9th Cir. 2001) (same); *Valle v. State*, 394 So. 2d 1004 (Fla. 1981) (same).

In jurisdictions that afford jury trials in delinquency cases, prejudicial publicity or public hostility that threatens to impair a respondent's constitutional right to trial by an impartial jury may also be urged in support of a motion for "postponement of the trial to allow public attention to subside." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976). "That time soothes and erases . . . [public prejudice] is a perfectly natural phenomenon, familiar to all." *Patton v. Yount*, 467 U.S. 1025, 1034 (1984). See §§ 20.03(a); 28.03(a).

§ 15.03 MOVING FOR DISMISSAL FOR WANT OF PROSECUTION OR OTHER APPROPRIATE RELIEF WHEN THE PROSECUTOR IS NOT READY TO PROCEED AT TRIAL OR A PRETRIAL HEARING

All courts have power to control their dockets and the calendaring of pending cases. This power may be expressly recognized in a state statute or court rule. *See, e.g.*, *State v. Grover*, 112 R.I. 649, 314 A.2d 138 (1974). But, even in jurisdictions having no such statute or rule, the power is an inherent attribute of every court. *State v. Candelaria*, 2008-NMCA-120, 144 N.M. 797, 192 P.3d 792 (N.M. App. 2008); *State, Village of Eden Prairie v. Housman*, 288 Minn. 546, 180 N.W.2d 251 (1970); *Culliver v. State*, 247 Ga. App. 877, 877-79, 545 S.E.2d 392, 394-95

(2001).

A court's control over its own docket includes the prerogative of granting a defense motion to dismiss a case "for want of prosecution" if the prosecutor is not ready to proceed. *See*, *e.g.*, *Walker v. State*, 312 Ga. 640, 864 S.E.2d 398 (2021) ("it has been the law of Georgia for decades (and appears to have been the practice in Georgia courts for much longer) that trial courts have the authority to dismiss criminal cases without prejudice for want of prosecution." *Id*. at 644, 864 S.E.2d at 401. "[D]ismissals with prejudice for want of prosecution are not allowed in criminal cases." *Id*. "[A] trial court's order dismissing a criminal case for want of prosecution, which does not say that it is with prejudice to refiling, . . . [does not] constitute[ ] an impermissible dismissal with prejudice . . . [even when] the applicable statute of limitation has run. . . . [S]uch a dismissal order is without prejudice to refiling, and . . ., to the extent the statute of limitation bars the State from reaccusing the defendant, that consequence flows from the operation of the statute of limitation and not from the dismissal order." *Id*. at 640, 864 S.E.2d 398-99); *Commonwealth v. Joseph*, 27 Mass. App. Ct. 516, 540 N.E.2d 195 (1989); *State v. Grover*, *supra*. Such dismissals are grounded upon the court's discretion, reviewable for abuse, and are treated in most jurisdictions as involving little legal analysis or technical complexity. The question presented is simply whether, considering all of the circumstances of the case – including the extent to which the prosecutor is at fault for being unready; the extent to which the respondent has been harmed or will be harmed if trial is delayed; and the general policies of speedy trial (a policy that has a constitutional base, see § 15.04(b) *infra*) – dismissal is preferable to granting a prosecutorial request for a continuance. "The longer the delay, the greater the presumptive or actual prejudice to the [respondent] . . ., in terms of his [or her] ability to prepare for trial or the restrictions on his [or her] liberty." *United States v. Taylor*, 487 U.S. 326, 339 (1988).

In some jurisdictions, dismissals for want of prosecution *with prejudice* are forbidden (*see*, *e.g.*, *State v. Braunsdorf*, 98 Wis. 2d 569, 297 N.W.2d 808 (Wis. 1980); *Walker v. State*, *supra*); in others, such dismissals may be with or without prejudice, depending on the sort of harm to the respondent that appears (see § 15.04(b) *infra*) and on the general equities of the situation (*see*, *e.g.*, *United States v. Furey*, 514 F.2d 1098 (2d Cir. 1975); *State v. Jones*, 157 Vt. 553, 601 A.2d 502 (1991); *State v. Mageo*, 78 Hawai'i 33, 889 P.2d 1092 (Hawai'i App. 1995)). Obviously, counsel should always seek dismissal with prejudice if such a request is viable. And, if a case is dismissed with prejudice, counsel should ensure that the court file is marked accordingly.

If the prosecution moves for a continuance in the case of a respondent who is detained and if the court denies the respondent's resulting motion to dismiss for want of prosecution, counsel should then make a fall-back request for release of the respondent pending the adjourned trial date. Such a request for modification of the conditions of pretrial detention may ordinarily be entertained by the court at any time. Many judges are inclined to grant such requests, either because they are unwilling to penalize the respondent for the prosecutor's inefficiency or because they reason that the prosecutor's inability to bring in his or her witnesses signals some weakness

in the prosecutor's case and portends the eventual dismissal of the case on its merits or for want of prosecution.

If the prosecutor is not ready to go forward at a pretrial evidentiary hearing on a motion, such as a suppression hearing, the appropriate remedy is a judicial order treating the motion as conceded or forfeited. *See, e.g., People v. Goggans,* 123 A.D.2d 643, 506 N.Y.S.2d 908 (N.Y. App. Div., 2d Dep't 1986), *appeal dismissed,* 69 N.Y.2d 1000, 511 N.E.2d 91 (1987) (affirming trial judge's summary granting of a motion to suppress on the ground that the prosecution's witnesses failed to appear and the prosecutor therefore was not ready to proceed), *accord*, *Commonwealth v. Reeves*, 89 Mass. App. Ct. 1116, 47 N.E.3d 702 (Table), 2016 WL 1273279 (2016).

§ 15.04 MOTIONS TO DISMISS ON SPEEDY TRIAL GROUNDS

In addition to requesting the court to exercise its inherent power to dismiss a case for want of prosecution (see § 15.03 *supra*), counsel should respond to a prosecutorial request for a continuance or to other undue delay in the proceedings (such as a continuance ordered by the court as a result of its crowded docket and inability to reach the case on the scheduled trial date) by moving to dismiss the Petition on the ground that the respondent's rights to a speedy trial have been violated.

The following sections describe the various statutory and constitutional doctrines that can be cited in support of a motion for dismissal on speedy trial grounds.

§ 15.04(a) Statutory Rights to a Speedy Trial

In many jurisdictions the juvenile court statutes specify a timetable for delinquency trials and establish an accelerated schedule for cases in which the respondent is detained pending trial. *See, e.g.,* CAL. WELF. & INST. CODE § 657(a)(1) (2022) (trial within 30 days of filing of Petition; trial of a detained child within 15 days of order of detention); IND. CODE ANN. § 31-37-11-2 (2022) (trial within 60 days of filing of Petition; trial of a detained child within 20 days of filing of Petition); N.Y. FAM. CT. ACT § 340.1 (2022) (trial within 60 days generally; if child is detained, trial must be held within 3 days if the charge is a misdemeanor, within 14 days if the charge is a felony, and within "a reasonable length of time" if the charge is a homicide or a crime that resulted in the victim being incapacitated and unable to attend court).

Statutes of this sort provide a basis for dismissal of a case when pretrial delay has exceeded the statutory time limits as a result of either the prosecution's actions or the judge's crowded docket. *See, e.g., In the Matter of Frank C.,* 70 N.Y.2d 408, 410, 516 N.E.2d 1203, 1203, 522 N.Y.S.2d 89, 89 (1987) ("dismissal of the presentment agency's Petition is mandatory when the statutorily required fact-finding is delayed beyond the time limits delineated in Family Court Act § 340.1"); *In re Russell C.,* 120 N.H. 260, 414 A.2d 934 (1980). *See also, e.g.*, *Zedner v. United States*, 547 U.S. 489, 500-03 (2006) (violation of federal Speedy Trial Act required

dismissal notwithstanding the defendant's prospective waiver of his statutory speedy trial rights because the Act "has no provision excluding periods of delay during which a defendant waives the application of the Act" and because the Act was designed to safeguard not only the defendant's right to a speedy trial but also the public's interest in a speedy trial).

If local caselaw interpreting the speedy trial statute governing adult criminal cases is favorable, counsel can argue that juveniles should be afforded protections at least as stringent. Counsel should be alert, however, to possibilities for arguing that the juvenile speedy trial act manifests a legislative intention to establish more rigorous protections for juveniles. For example, in *In the Matter of Frank* C., the New York Court of Appeals rejected the prosecution's attempt to incorporate into the juvenile statute the adult law's exclusion of delay caused by court congestion. Ruling that the juvenile statute was to be construed strictly to outlaw delay caused by either prosecutorial action or court congestion, the court in *Frank C.* explained that "the 'speedy hearing' provision . . . reflect[s] the significant changes in the legal rights of juveniles that have occurred since the late 1960's . . . [and must be interpreted consistently with the legislatively] stated purpose . . . to assure swift and certain adjudication at all phases of the delinquency proceeding." 70 N.Y.2d at 413, 516 N.E.2d at 1205-06, 522 N.Y.S.2d at 91-92.

§ 15.04(b) Federal and State Constitutional Guarantees of Speedy Trial

Backstopping the common-law and statutory protections against undue trial delay are the constitutional Speedy Trial Clauses, state and federal. These apply to juveniles in delinquency proceedings, *see, e.g., P.V. v. District Court in and for the Tenth Judicial District,* 199 Colo. 357, 609 P.2d 110 (1980); *In the Interest of C.T.F.,* 316 N.W.2d 865 (Iowa 1982); *In re D.H.*, 666 A.2d 462 (D.C. 1995); *In re Thomas J.*, 372 Md. 50, 811 A.2d 310 (2002); *Piland v. Clark County Juvenile Court*, 85 Nev. 489, 457 P.2d 523 (1969); *In the Matter of Benjamin L.*, 92 N.Y.2d 660, 708 N.E.2d 156, 685 N.Y.S.2d 400 (1999); *Commonwealth v. Dallenbach*, 1999 Pa. Super. 101, 729 A.2d 1218 (1999); *State v. Jones*, 521 N.W.2d 662 (S.D. 1994), and, indeed, some courts have concluded that the nature of adolescence and the underlying rehabilitative goals of the Family Court call for applying speedy trial guarantees even more rigorously in juvenile court than in the adult criminal context, *see, e.g.*, *P.V. v. District Court in and for the Tenth Judicial District*, 199 Colo. at 360, 609 P.2d at 112 ("It is our view that the speedy resolution of juvenile proceedings brings about more significant benefits to a child and to society than are accrued through application of speedy trial rules in adult proceedings. Certainly the average juvenile is far more vulnerable to psychological harm during the pretrial period than the average adult would be."); *In the Matter of Benjamin L.*, 92 N.Y.2d at 667, 708 N.E.2d at 160, 685 N.Y.S.2d 404 (reasons for speedy adjudication "are even more compelling in the juvenile context [than in the adult criminal context]" because "a delay in the proceedings may undermine a court's ability to act in its adjudicative and rehabilitative capacities" and because the "nature of adolescence" may render a delay acutely prejudicial for the juvenile and his or her defense); *Commonwealth v. Dallenbach*, 729 A.2d at 1220 ("As the juvenile years are marked with significant changes and rapid development, children experience an acceleration in the passage of time so that, to a juvenile, one year may seem to be five. To ensure successful rehabilitation, the

reformation program (including punishment) must commence within a reasonable time of the child's delinquent act so that the child can comprehend the consequences of his act and the need for reform."). The constitutional guarantees are significant not only in their own right (in that they may provide a more expansive basis for relief than that which is afforded by statutes and common law) but also as expressions of a policy in light of which the speedy trial statutes must be read and the common-law judicial discretion exercised.

The Speedy Trial Clause of the Sixth Amendment to the federal Constitution, which is incorporated into the Fourteenth Amendment and hence made binding on the States by *Klopfer v. North Carolina,* 386 U.S. 213 (1967), guards against three separate injuries that can be suffered by an accused as a result of undue trial delay: (i) prolonged pretrial incarceration; (ii) inconvenience, indignity, and anxiety resulting from the pendency of unresolved charges for a protracted period; and (iii) prejudice to the respondent's ability to present persuasive defensive evidence at trial when the trial is not held promptly in relation to the events at issue. *See, e.g., United States v. Ewell,* 383 U.S. 116, 120 (1966) (Speedy Trial Clause 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"). *Accord*, *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016) (dictum). *See also Doggett v. United States*, 505 U.S. 647, 654 (1992); *Barker v. Wingo,* 407 U.S. 514, 532 (1972); *Dillingham v. United States,* 423 U.S. 64, 65 (1975) (per curiam); *United States v. MacDonald,* 456 U.S. 1, 7-9 (1982); *United States v. Handa*, 892 F.3d 95, 101, 105 (1st Cir. 2018). *See generally* Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525 (1975). The Speedy Trial Clause may thus be invoked to support a demand for trial or for release from confinement or for dismissal of pending charges without prejudice or for outright dismissal of the prosecution with prejudice, as the circumstances make appropriate. *See Klopfer v. North Carolina*, 386 U.S. 213 (1967) (demand for trial); *Braden v. 30th Judicial Circuit Court,* 410 U.S. 484 (1973) (demand for trial); *Smith v. Hooey,* 393 U.S. 374 (1969) (demand for trial or dismissal); *Dickey v. Florida,* 398 U.S. 30 (1970) (dismissal); *Strunk v. United States,* 412 U.S. 434 (1973) (dismissal). State caselaw must be consulted to determine whether the applicable state constitutional provision is also construed as protecting the full range of "speedy trial" concerns that justify these several forms of relief.

The standards that must be met in order to justify the differing forms of relief are obviously different. Each considers, however, both the duration of the delay and its "oppressive" quality, in terms of willful vexatiousness or avoidable negligence of the prosecution on the one hand and harm to the relevant interests of the defense on the other. *See, e.g., United States v. Velazquez*, 749 F.3d 161, 167, 174-86 (3d Cir. 2014); *Petition of Provoo,* 17 F.R.D. 183 (D. Md. 1955), *aff'd per curiam,* 350 U.S. 857 (1955). *Compare Dickey v. Florida*, 398 U.S. 30 (1970), *with Harrison v. United States,* 392 U.S. 219, 221-22 n.4 (1968). State decisions sometimes put a local gloss on the federal Sixth Amendment rules summarized in the following paragraphs. *See*, *e.g.*, *People v. McDonald*, 203 A.D.3d 636, at 636, 165 N.Y.S.3d 66, 67 (N.Y. App. Div., 1st Dep't 2022) ("The court should have granted defendant's motion to dismiss because he was deprived of his constitutional right to a speedy trial. The factors to be weighed in determining

whether there has been a denial of that right are: '(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay,'" citing *People v. Taranovich*, 37 N.Y.2d 442, 335 N.E.2d 303, 373 N.Y.S.2d 79 (1975); "In this case, the pretrial delay of almost six years was unreasonably long, and defendant was incarcerated throughout that time . . . . Defendant did not specifically show that the delay prejudiced the defense, but he 'suffered presumptive prejudice . . . considering the extraordinary length of the delay and the fact that defendant was incarcerated during the entirety of that delay' [citing *People v. Wiggins*, 31 N.Y.3d 1, 95 N.E.3d 303, 72 N.Y.S.3d 6 (2018), where the Court of Appeals wrote that "[w]e analyze constitutional speedy trial claims using the five factors set forth in . . . *Taranovich*, . . . [which] are similar, but not identical, to the factors used in evaluating speedy trial claims under the Federal Constitution" (*id*. at 9-10, 95 N.E.3d at 308, 72 N.Y.S.3d at 6)] . . . . While the charges against defendant were very serious, alleging that he shot two people, killing one and wounding the other, this was a relatively simple case that did not warrant such an extraordinary delay in bringing defendant to trial."). Counsel should therefore make it a practice to invoke state law and federal constitutional law in the alternative when raising speedy-trial claims.

The major factors to be considered in determining whether pretrial delay violates the Sixth Amendment have been described as the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo,* 407 U.S. at 530. *Accord*, *United States v. Black*, 918 F.3d 243 (2d Cir. 2019). *See also Doggett v. United States*, 505 U.S. at 651; *United States v. MacDonald,* 435 U.S. 850, 858 (1978); *United States v. Loud Hawk*, 474 U.S. 302, 313-14 (1986); *United States v. Eight Thousand Eight Hundred and Fifty Dollars,* 461 U.S. 555, 564-69 (1983); *United States v. Valenzuela-Bernal,* 458 U.S. 858, 868-70 (1982) (dictum). "[N]one of the four factors [is] . . . 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." *Barker v. Wingo,* 407 U.S. at 533; *see Moore v. Arizona,* 414 U.S. 25, 26 (1973) (per curiam). Deliberate delaying tactics by a prosecutor seeking to secure some tactical advantage count heavily in favor of finding a Sixth Amendment speedy-trial violation (*see*, *e.g.*, *State v. Johnson*, 330 So.3d 295 (La. 2021); *Hayes v. State*, 298 Ga. App. 338, 680 S.E.2d 182 (2009)), but a violation may be found in the case of prolonged delays that are neither purposeful or even avoidable on the prosecutor's part: "Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated but, as we noted in *Barker v. Wingo,* 407 U.S. 514, 531 (1972), they must 'nevertheless . . . be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.'" *Strunk v. United States, supra*, 412 U.S. at 436. *Cf. Zurla v. State*, 109 N.M. 640, 643-44, 789 P.2d 588, 591-92 (1990), *ruling on another issue modified in State v. Garza,* 146 N.M. 499, 212 P.3d 387 (2009) (citing cases "recognizing an intermediate category of delay for government actions, including failure to take reasonable means to bring a case to trial, that are deemed more culpable than delay due to court congestion and less

culpable than tactical delay" and holding that "[h]ere, the extent to which the state's negligence weighs against it is increased by the length of time during which no attempt was made to locate Zurla and by his early, pro se assertion of his right to a speedy trial. The state failed to inquire as to Zurla's whereabouts despite being put on notice that he was demanding his right to a speedy trial, despite notice of his whereabouts, and despite the simple nature of the charges against him. . . . ¶ We believe that bureaucratic indifference should weigh more heavily against the state than simple case overload, particularly when the defendant has attempted to safeguard his rights.").

Similarly, a showing of actual prejudice to the respondent – such as, for example, the loss of a witness who would have been available to testify for the defense if the case had been brought to trial in a timely manner – strongly supports finding a violation (*see*, *e.g.*, *Epps v. State*, 276 Md. 96, 345 A.2d 62 (1975)) but is not indispensable (*see Moore v. Arizona,* 414 U.S. at 26 ("*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial")). "[T]olerance of . . . official negligence 'varies inversely with its protractedness'" (*Hartfield v. State*, 516 S.W.3d 57, 68 (Tex. App. 2017), quoting *Doggett v. United States*, *supra*, 505 U.S. at 657); in cases of extensive delay, "consideration of prejudice is not limited to the specifically demonstrable[;] . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim" (*id.* at 655). *See also People v. Wiggins*, 31 N.Y.3d 1, 7, 17-18, 95 N.E.3d 303, 306, 314, 72 N.Y.S.3d 1, 7, 17-18 (2018) (a "lengthy delay [of a little more than six years] between defendant's arrest and his eventual guilty plea violated his [state] constitutional right to a speedy trial" even though he did not "demonstrate[ ] any specific impairment to his defense as a result of the extraordinary delay"; "[t]he Supreme Court has stated that 'impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony "can rarely be shown,"'" and "[t]he courts therefore 'generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify'").

Most courts analyze the second *Barker v. Wingo* factor (reason for the delay) by examining each period of delay and determining whether the prosecution, the court, the defense, or some circumstance beyond anyone's control is responsible for it. *See*, *e.g., State v. Barnes*, 431 S.C. 66, 846 S.E.2d 389 (S.C. App. 2020); *State v. Ochoa*, 2017-NMSC-031, 406 P.3d 505 (N.M. 2017); *York v. State*, 334 Ga. App. 581, 780 S.E.2d 352 (2015); *State v. Urdahl*, 2005 WI App 191, 286 Wis. 2d 476, 704 N.W.2d 324 (Wis. App. 2005); *State v. Dwyer*, 78 Hawai'i 367, 893 P.2d 795 (1995); *Ogle v. Superior Court*, 4 Cal. App. 4th 1007, 6 Cal. Rptr. 2d 205 (1992). "Delays sought by [defense] counsel are ordinarily attributable to the defendants they represent" but this "general rule . . . is not absolute": "Delay resulting from a systemic 'breakdown in the public defender system' . . . could be charged to the State." *Vermont v. Brillon*, 556 U.S. 81, 85, 94 (2009) (dictum); *and see Boyer v. Louisiana*, 569 U.S. 238, 241, 246 (2013) (Sotomayor, J., joined by Ginsburg, Breyer and Kagan, JJ., dissenting from the dismissal of a writ of *certiorari* as improvidently granted) (in adjudicating a 6th Amendment speedy trial claim, a "delay caused by a State's failure to provide funding for an indigent's defense must count against the State, and

not the accused": "Where a State has failed to provide funding for the defense and that lack of funding causes a delay, the defendant cannot reasonably be faulted."); *State v. Stock*, 2006-NMCA-140, 140 N.M. 676, 683, 147 P.3d 885, 892 (N.M. App. 2006) (affirming a trial court order dismissing charges against a defendant incarcerated for more than three years without trial: "the district court blamed the delay on the fact that the public defenders' office was severely overburdened. As we have noted, the district court was of the view that it was 'humanly impossible for lawyers to practice law under the conditions that we're asking them to practice law.' To the extent that delays can be blamed on the overburdened system, that also cannot be held against Defendant."); *State v. Noel*, 2013-1218 (La.App. 4 Cir. 10/1/14), 151 So.3d 706, 712 (La. App. 2014), *writ denied* ("Result correct"), 2014-2193 (La. 6/1/15), 171 So.3d 266 (La. 2015) ("The state is charged with the ultimate responsibility for providing the defendant with a speedy trial. Thus, we find it appropriate for the State to bear the fault of the delay when lack of funding by the state legislature prevents effective assistance of counsel. As such, it can be said that the delay in prosecution in this case is attributable to the State."); *Boyer v. Vannoy*, 863 F.3d 428, 444-45 (5th Cir. 2017) (dictum) ("[T]he majority of the delay was caused by funding problems. This lack of funding should have been weighed against the state. Instead of doing so, the state appellate court found that 'the progression of the prosecution was "out of the State's control,["]' and noted 'there [was] nothing before this court to suggest that the State acted to delay the trial to gain any advantage.' This failure misapplied Supreme Court precedent."); *Phan v. State*, 290 Ga. 588, 591-92, 723 S.E.2d 876, 880 (2012) (dictum) ("The determination as to the existence of a 'systemic breakdown' in the public defender system . . . 'becomes part of the balance in determining whether a speedy trial violation has occurred' under the well established framework of *Barker v. Wingo* . . . ."); *State v. Hunsberger*, 418 S.C. 335, 348, 794 S.E.2d 368, 375 (2016) ("The State's desire to have Alex testify against Barnes [the shooter in a murder in which Alex Hunsberger was an accomplice] . . . did not, under the circumstances present here, justify the delay in Alex's trial. Further, that the State placed a higher priority on strengthening its case against Barnes than on bringing Alex's case to trial cannot, alone, justify the delay of Alex's trial. The purpose of the right to a speedy trial is to vindicate a defendant's and society's interest in a speedy resolution of cases. . . . This purpose is not served when the constitutional right of a low priority defendant is sacrificed in hopes that defendant will help the State in a higher priority trial."); *United States v. Tigano*, 880 F.3d 602, 606 (2d Cir. 2018) (delays of almost seven years resulting from "poor trial management and general indifference at every level toward this low-priority defendant in a straightforward case" produced an "extreme instance of a Sixth Amendment violation," although the protraction "was the result of countless small choices and neglects, none of which was individually responsible for the injustice suffered by Tigano"); *United States v. Myers*, 930 F.3d 1113, 1120-22, 1123 (9th Cir. 2019) ("Three of our sister circuits have adopted a rule that the government has a valid reason to delay federal prosecution when the defendant is subject to concurrent state proceedings. . . .¶ By contrast, the Tenth Circuit and Seventh Circuit have adopted an ad hoc approach to evaluating delays caused by concurrent state proceedings. In considering the government's 'desire to complete the state proceedings on unrelated drug charges before continuing with federal charges,' the Tenth Circuit stated 'that awaiting the completion of another sovereign's prosecution may be a plausible reason for delay in some circumstances, but that does not necessarily mean that it is a justifiable excuse in every

case.' . . . ¶ . . . [W]e hold that where a delay arises due to concurrent state and federal proceedings, a court must consider the nature and circumstances of the delay in order to determine whether (and how much) it weighs against the government. For instance, when the state's charges factually overlap with the federal charges, such that trying the defendant concurrently would present administrative hurdles and safety concerns, a delay may be justified and not weigh against the government. . . . On the other hand, when state charges are unrelated to the federal charges, and the government adduces no evidence that concurrent proceedings would present administrative difficulties or safety concerns, a court may weigh the delay against the government. In sum, there is no bright-line rule for this category of delay. ¶ . . . [We] remand for the district court to reweigh the four *Barker* factors in light of our decision today.").

A major limitation upon the Sixth Amendment right to a speedy trial is that the right attaches only at the time of "indictment, information, or other formal charge" or of "arrest," *United States v. Marion,* 404 U.S. 307, 321 (1971), whichever comes first (*see Dillingham v. United States,* 423 U.S. 64 (1975) (per curiam)). *See, e.g.*, *United States v. MacDonald,* 456 U.S. 1, 6-7 (1982); *Baker v. McCollan,* 443 U.S. 137, 144 (1979) (dictum); *Betterman v. Montana*, 136 S. Ct. at 1613 (dictum); *United States v. Handa*, 892 F.3d at 106-07 (holding that "the bringing of . . . [an] additional charge does not reset the Sixth Amendment speedy trial clock to the date of a superseding indictment where (1) the additional charge and the charge for which the defendant was previously accused are based on the same act or transaction, or are connected with or constitute parts of the common scheme or plan previously charged, and (2) the government could have, with diligence, brought the additional charge at the time of the prior accusation"). Therefore, pre-arrest, pre-charge delay alone will not violate the Sixth Amendment, even though it can be cited as compounding the harms suffered through postcharge delay. *E.g.*, *United States v. Wahrer*, 319 F. Supp. 585 (D. Alaska 1970); *United States v. Burke*, 224 F. Supp. 41 (D.D.C. 1963). In cases in which the precharge delay is substantial and in which it can be shown to have adversely affected the respondent's ability to prepare, preserve, or present defensive evidence, counsel may be able to secure dismissal on the alternative constitutional ground that the respondent's due process right to a fair trial has been violated. *E.g., Ross* v. *United States* 349 F.2d 210 (D.C. Cir. 1965); *United States v. Curry*, 284 F. Supp. 458 (N.D. Ill. 1968); *United States v. Chase,* 135 F. Supp. 230 (N.D. Ill. 1955). The due process protections of the Fifth and Fourteenth Amendments to the federal Constitution and the parallel provisions of state constitutions forbid delay at any stage of a criminal or delinquency proceeding – including prearrest, precharge delay – that unfairly hampers the accused's ability to make a defense. *See United States v. Marion,* 404 U.S. at 324-26 (dictum); *United States v. Lovasco,* 431 U.S. 783, 789, 795-97 & n.17 (1977) (dictum); *United States v. MacDonald,* 456 U.S. 1, 7-8 (1982) (dictum); *Betterman v. Montana*, 136 S. Ct. at 1613 (dictum); *cf. Fontaine v. California,* 390 U.S. 593, 595-96 (1968). "[T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused," *United States v. Lovasco,* 431 U.S. at 790; and although "investigative delay" will not support a due process contention, at least in the absence of very substantial and well-documented prejudice to the accused's trial defenses, *id.* at 795-96, any sort of "delay undertaken by the [prosecution] . . . solely 'to gain tactical advantage over the accused,'" *id.* at 795, or perhaps "'prosecutorial delay incurred in reckless disregard of

circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense,'" *id.* at 795 n.17, would present a case for dismissal on due process grounds. *See United States v. Gouveia,* 467 U.S. 180, 192 (1984) (dictum).

§ 15.04(c) Procedures for Litigating Speedy Trial Issues

Speedy trial motions naturally are not subject to the filing deadlines that govern other types of motions (see § 7.05 *supra*), since the violation at issue in a speedy trial motion usually will not take place until after the typical motions deadline has expired. Depending upon local rules, speedy trial motions may or may not have to be in writing.

In some jurisdictions the state constitutional speedy trial clause, the applicable statute or court rule, or both may be construed as embodying a "demand rule." The demand rule holds that a respondent waives the benefit of speedy trial guarantees unless s/he expressly invokes them and demands a trial. Its effect ordinarily is that the time limits formally expressed as running from the time of arraignment or Initial Hearing actually begin to run only at the time of a defense demand for a speedy trial. The Supreme Court rejected the "demand rule" in this form as an element of a Sixth Amendment speedy trial claim in *Barker v. Wingo,* 407 U.S. 514, 528 (1972), but *Barker* warns that the accused's failure to make "an assertion of his right" to a speedy trial is one factor to be considered in adjudicating the merits of such a claim, *id.* at 530; see § 15.04(b) *supra,* and the States remain free to insist upon compliance with a demand rule as a condition precedent to invoking state constitutional or statutory rights to a speedy trial. Accordingly, except when there are tactical reasons not to do so, counsel should make a demand for a speedy trial at the earliest possible opportunity and renew that demand whenever the case is continued or delayed, coupling it with a motion for dismissal for violation of the respondent's speedy trial rights.