THE RIGHT TO A SPEEDY TRIAL IN NEBRASKA

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INTRODUCTION

The right to a speedy trial is at once guaranteed by the federal and the state constitutions, and by statute and case law. Until modern times, the right was virtually ignored by the Supreme Court. It was predominantly state constitutional protection implemented by state law which guaranteed the right. The right has been said to be relative, and the existence of diverse state schemes reflects the elasticity of the right.

Recent events signal that the speedy trial right is receiving increased attention and taking on a new sense of importance. Less than a score of years ago the Supreme Court acknowledged that the Constitution guaranteed the right to the citizens of the states. In the last decade, the Court fashioned broad guidelines by which a denial of the right may be judged. Additionally, in the same brief period, modern statutes have been enacted at both the state and federal levels.

The central purpose of this article is to provide a detailed explanation of speedy trial rights in Nebraska. A descriptive analysis of state legislation has already been written; this will not reprise that successful effort.

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1. For a comprehensive overview of state constitutional and statutory enactments, see Joseph, Speedy Trial Rights in Application, 48 FORDHAM L. REV. 611 (1980) [hereinafter cited as Joseph].
2. "Although a speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution, this Court has dealt with that right on infrequent occasions." Barker v. Wingo, 407 U.S. 514, 515 (1972).
7. See Joseph, supra note 1, at 614 n.22. See also Poulos and Coleman, Speedy Trial Slow Implementation: The ABA Standards in Search of a Statehouse 28 HASTINGS L.J. 357, 367 n.53 (1976) [hereinafter cited as Poulos and Coleman].
To clarify the present state of the speedy trial right, three tasks must be undertaken. First, the sketchy history of the right in the Supreme Court must be explored. Although the Court has given but a minor exposition of the constitutional underpinnings of the law, it has, nevertheless, provided a framework by which state enactments and rulings may be judged.

Second, the statutory and constitutional bases of state protection should be examined. The states, of course, are always free to enhance the constitutional protections of their citizens. In the case of speedy trial rights the states have, by and large, forged ahead of the Supreme Court. Moreover, Nebraska has what can be called a bifurcated speedy trial law. Its first section is the vestige of the old "discharge from custody or recognizance" law, having relatively little impact on speedy trial as it is now understood. The remaining sections are the modern provisions incorporating, for the most part, the American Bar Association Standards Relating to Speedy Trial.

Third, the decisions of the Nebraska Supreme Court must be analyzed. Throughout the history of speedy trial adjudication, a number of trends have emerged in Nebraska. One trend has been the emphasis on the temporal factors, whether expressed in "terms of court" or months. Another has been the delineation of responsibilities of the parties to the litigation. A third has been the responsibility of the trial court to assure the right and inform the defendant of what protections are available.

10. "Of course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake." Lego v. Twomey, 404 U.S. 477, 489 (1972).
13. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial (Approved Draft, 1968); see also II ABA Standards for Criminal Justice, Speedy Trial ch. 12 (2d ed. 1980) [hereinafter referred to as Speedy Trial Standards].
15. "The primary burden is upon the State, that is, the prosecutor and the court, to bring the accused person to trial within the time provided by law. . . . A failure by a defendant to demand a trial within the time he is required to be brought to trial . . . or to object at the time trial date is set does not constitute a waiver of his rights under either the statutes or the constitution of Nebraska, but is a factor which, while not constituting good cause by itself, may be considered along with other circumstances in determining whether there was "good cause" for a delay. . . ." State v. Alvarez, 189 Neb. 281, 291-92, 202 N.W.2d 604, 610 (1972).
16. 189 Neb. at 292, 202 N.W.2d at 611.
Only after a thorough analysis of both the positive law schemes and the appellate decisions can the speedy trial right be placed in proper perspective. These tasks are also antecedent to the making of recommendations for the improvement of the administration of justice as it relates to the speedy trial protection.

I. SPEEDY TRIAL IN THE UNITED STATES
SUPREME COURT

A. Development

For more than a century of American constitutional history, the Supreme Court did not have occasion to address the issues surrounding the speedy trial guarantee of the sixth amendment. It was a quarter of a century after Nebraska’s supreme court had initially construed the state’s first statutory version of a speedy trial law, that the United States Supreme Court discussed the speedy trial right in Beavers v. Haubert. The case involved a defendant charged with more than one crime. In Beavers the Court announced a statement that has become axiomatic with reference to speedy trial jurisprudence. The passage often cited is: “Undoubtedly a defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. . . . 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 was another half century before the speedy trial issue was again before the Court. This time, in United States v. Provoo, the Court merely affirmed the decision of the district court that delay in bringing a case to trial caused by a deliberate act of the government was a violation of the defendant’s speedy trial right. Two years later, in Pollard v. United States, the Court ruled that in order for a delay to fall within the Provoo rule, it had to be purposeful or oppressive. In this case, the Court held that a two-year delay in sentencing was accidental and was promptly remedied when discovered. Additionally, the Court raised, but did not answer, the question of whether delay in sentencing is an integral

17. Ex parte Two Calf, 11 Neb. 221, 9 N.W. 44 (1881).
18. 198 U.S. 77 (1905).
19. Id. at 86-87.
23. Id. at 361.
24. Id.
part of the speedy trial protection.\textsuperscript{25}

The next time the Court addressed the speedy trial right was in \textit{United States v. Ewell}.\textsuperscript{26} This case involved a defect in original indictments against two defendants which resulted in a passage of nineteen months between the original arrests and hearings on later, corrected indictments. The Court found no speedy trial violation, noting that a requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.\textsuperscript{27} It echoed the language in \textit{Beavers} that the speedy trial guarantee is necessarily relative.\textsuperscript{28}

While the \textit{Ewell} decision broke no ground in defining the scope of speedy trial rights or in determining the factors by which violations were to be judged, it acknowledged the considerations that affect the interests of the accused. The three considerations were: (1) prevention of undue and oppressive incarceration prior to trial; (2) minimization of anxiety and concern accompanying public accusation; and (3) avoidance of possible impairment of the accused's ability to defend himself.\textsuperscript{29}

\section*{B. Incorporation}

It was not until the decision in \textit{Klopfer v. North Carolina}\textsuperscript{30} that the speedy trial provisions of the sixth amendment were incorporated in the fourteenth amendment, and guaranteed to citizens of the states.\textsuperscript{31} The case involved a North Carolina procedure by which a prosecutor could enter a \textit{nolle prosequi}, which meant that, after indictment, the prosecutor determined that he would not, at that time, prosecute the suit further.\textsuperscript{32} Such proceedings are not, however, terminated permanently. On the contrary, while the defendant is discharged, the case against him may be restored to the trial docket upon the application of the prosecutor.

The Court noted that the pendency of the indictment "may subject [the defendant] to public scorn and deprive him of employment, and almost certainly will force curtailment of his

\begin{footnotes}
\item[25] Id. At least one court has held that the speedy trial right includes the right to a speedy appeal. Rheuark v. Shaw, 477 F. Supp. 897, 908 (N.D. Tex. 1979).
\item[27] Id. at 120.
\item[28] Id.
\item[29] Id.
\item[31] Id. at 222-23.
\item[32] Id. at 214.
\end{footnotes}
speech, associations, and participation in unpopular causes.\textsuperscript{33} It explained that by the prolongation of this "oppression" the state procedure denied a defendant the right to a speedy trial.\textsuperscript{34} The Court sketched the history of the right, from its apparent inclusion in the Magna Carta through its inclusion in the constitutions of several of the first states to enter the union and held that the right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment."\textsuperscript{35}

The next major constitutional test came in \textit{Smith v. Hooey}\textsuperscript{36} in which the petitioner, indicted on a Texas criminal charge, was serving a sentence in a federal penitentiary.\textsuperscript{37} For six years he vainly sought to force Texas to try him.\textsuperscript{38} The Court reviewed the impact of delay on an imprisoned individual and concluded that, upon his demand, Texas had a constitutional duty to bring him to that state for trial.\textsuperscript{39} It analogized the situation to one involving the confrontation clause of the sixth amendment.\textsuperscript{40} The term before, the Court had held that a state could not, under the sixth amendment, refuse to produce a witness against an accused, even though that witness was jailed elsewhere.\textsuperscript{41}

By the end of the 1960's, the Supreme Court had decided very few speedy trial cases. It had, of course, incorporated the speedy trial protection in the fourteenth amendment, and protected citizens against state denials of the right. It had conceded the constitutional existence of the right and expressed the interests both of the defendant and the public, which the right was designed to protect. It had acknowledged that even an imprisoned individual was entitled, upon demand, to be tried on pending charges in another jurisdiction. But there had been no definitive opinions relating either to the incipient federal mandate for speedy trial or to the constitutional validity of the emerging state statutory schemes, which had been predicated either upon their own constitutional protections or those of the federal constitution.

Thus at the close of the 1960's, several significant issues re-

\textsuperscript{33} Id. at 222.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 223.
\textsuperscript{36} 393 U.S. 374 (1969).
\textsuperscript{37} Id. at 375.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 383.
\textsuperscript{40} Id. at 382.
\textsuperscript{41} Barber v. Page, 390 U.S. 719, 724-25 (1968) (holding that a state may not, consistent with the confrontation clause, refuse to produce a jailed witness). \textit{See also} Schindler, \textit{Interjurisdictional Conflict and the Right to a Speedy Trial}, 35 U. Cin. L. Rev. 179 (1966).
mained undecided. It was unclear at what point in a criminal proceeding the speedy trial right attached. No explicit criteria had been established upon which to determine the constitutionality of the delays. The extent of the latitude the states enjoyed in fashioning their own legislative scheme remained uncertain. The appropriate remedy was unsettled. The possible application of the right to events during the trial or even after the trial ended was not clearly understood. Some of these issues were clarified during the 1970's, at least as they pertained to federal constitutional norms. Others remain to be settled.

The following year the Court began to develop its modern position on the speedy trial right when it decided *Dickey v. Florida*. In that case, the defendant had been tried in 1968 on charges of alleged criminal acts which had been committed eight years before. Arrested on federal bank robbery charges shortly after the incident at issue in the Supreme Court, Dickey had been detained in a Florida jail. There, local officials obtained an identification of Dickey by a victim of the state crime. They secured a state arrest warrant charging him with the crime. Under Florida law, this step tolled the statute of limitations.

About two months later, Dickey was convicted on the federal charges, and was removed to out-of-state federal penitentiaries. During the next several years, Dickey engaged in repeated litigation to require Florida to take the steps necessary to try him on the state charges or withdraw the detainer for failure to provide him with a speedy trial. Finally, in 1967 an information charging Dickey with armed robbery was filed and he was returned to the state in January of 1968. Dickey filed two motions the day before the trial was to begin: one, to continue the case to determine the whereabouts of two witnesses; the other, asking that the information be quashed because the long delay denied him his right to a speedy trial. This later motion was ultimately denied and Dickey was convicted.

The Supreme Court reversed Dickey's convictions on speedy trial grounds. The Court determined that:

43. *Id.* at 30.
44. *Id.* at 31-32.
46. 398 U.S. at 32-35.
47. *Id.* at 33-36.
48. *Id.* at 38.
The right to speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases. Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial.49

The Court acknowledged the inevitability of some delays but found that no valid reason existed for the delay in Dickey's case except for the convenience of the State of Florida.50

The decision must be read narrowly, for the majority opinion contained no sweeping revelations of policy and no formulae by which future cases could be judged. Dickey merely stands for the proposition that where delay causes intolerable prejudice and where the record reveals an aggressive effort of a defendant to bring a matter to trial, the fact that a defendant is held by another jurisdiction will not be sufficient to withstand a challenge on speedy trial grounds.

It was the concurring opinion of Justice Brennan that raised and discussed two significant sets of issues which pertain to the speedy trial right. Justice Brennan addressed the questions of when, during the criminal process, the guarantee attaches,51 and by what criteria the constitutionality of delays are to be judged.52 He argued that since Escobedo v. Illinois,53 it is not unreasonable to conclude that the guarantee applies to all delays between arrest and sentencing.54 He did not go so far as to suggest that delays occurring before arrest are included in the right, but suggested that there may be some circumstances, such as deliberate governmental delay designed to harm the accused, which would constitute abuse of the criminal process.55

49. Id. at 37-38.
50. Id. at 38.
51. Id. at 41.
52. Id.
53. 378 U.S. 478 (1964). There, the Court had spoken of the time when "investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect." Id. at 490.
54. 398 U.S. at 43.
55. Id. at 46. This was the situation in United States v. Provoo, 17 F.R.D. 183, 201 (D. Md.), aff'd, 350 U.S. 857 (1955), in which the delay was caused by the deliberate action of the government in choosing the wrong venue for the case.
As to the criteria issue, Justice Brennan noted that consideration must be given to three basic factors in judging the reasonableness of a particular delay: the source of the delay, the reasons for it, and whether it prejudiced interests protected by the constitutional clause.\(^5\) Justice Brennan discussed the source of delay criterion and rejected the notion that if the defendant did not demand a speedy trial the defendant could not later base a constitutional claim on the denial of the right.\(^5\) He reasoned that: it was wrong to assume the defendant welcomed delay;\(^5\) that silence or inaction was not the constitutional equivalent of a waiver;\(^5\) and that such an implication of waiver misallocated "the burden of ensuring a speedy trial."\(^6\) He reasoned that the accused had no duty to bring on his trial but that the government had a responsibility to get on with the prosecution.\(^6\)

In addition Justice Brennan addressed the appropriate remedy issue and the proof of prejudice issue. He recognized that discharge of a defendant for denial of speedy trial rights was the only remedy and it was a "drastic step" requiring an analysis of whether the defendant has been prejudiced by delay.\(^6\) On this point he cautioned that concrete evidence of prejudice (other than lengthy pre-trial incarceration or clear governmental bad faith) is often not at hand.\(^6\) He also noted that within the context of sixth amendment rights, a defendant generally does not have to show that he is prejudiced in cases dealing with denial of counsel,\(^6\) confrontation, public trial\(^6\) or impartial jury\(^6\) as well as knowledge of the charges,\(^6\) proper venue\(^6\) or compulsory process.\(^6\) In these

\(^5\) 398 U.S. at 48.
\(^6\) Id.
\(^7\) Id. at 49. See also Von Cseh v. Fay, 313 F.2d 620, 623 (2d Cir. 1963).
\(^8\) 398 U.S. at 49. In Johnson v. Zerbst, 304 U.S. 458, 464 (1938), the Court had defined waiver as an intentional relinquishment or abandonment of a known right or privilege.
\(^9\) 398 U.S. at 50.
\(^10\) Id.
\(^11\) Id. at 52. Compare Amsterdam, Speedy Criminal Trial: Rights and Remedies, 27 STAN. L. REV. 525, 525 (1975) [hereinafter cited as Amsterdam], suggesting that the Court has enforced the sixth amendment by other means and could do so with respect to speedy trial violations.
\(^12\) 398 U.S. at 53. "Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of dimmed memories of the parties and available witnesses." Id. at 54 & n.19.
\(^14\) In re Oliver, 333 U.S. 257, 270 & n.24 (1948).
\(^15\) Reynolds v. United States, 98 U.S. 145, 154 (1878).
\(^18\) United States v. Davenport, 312 F.2d 303, 305 (7th Cir.), cert. denied, 374 U.S. 841 (1963).
cases prejudice is usually assumed. He wrote: "When the Sixth Amendment right to speedy trial is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution."\(^{70}\) This is not without difficulty, for how does one equate length of delay with assumption of prejudice? Justice Brennan seemed to opt for a combination of a temporal standard with a "scoreboard" to weigh grounds for delay and justification for each.\(^{71}\)

Justice Brennan acknowledged that his remarks were questions rather than definitive answers,\(^{72}\) but his opinion was a recognition that the Court was beginning to focus the attention on the basic questions of the scope and context of the speedy trial guarantee.

An answer to one of the unresolved issues came the next year in *United States v. Marion*,\(^{73}\) where the Court held that the speedy trial protection is not applicable until the putative defendant in some way becomes an accused.\(^{74}\) In that case, the critical event occurred only when the appellees were indicted. It is clear that no person has a right to be arrested, under either the speedy trial or due process clauses of the sixth or fifth amendments.\(^{75}\) The Court acknowledged that there is latitude for the application of the speedy trial protections, by indicating that not only formal indictment or information but also "the actual restraints imposed by arrest and holding to answer a criminal charge" may engage the safeguards.\(^{76}\)

In an opinion concurring in the result, Justice Douglas vigorously objected to the conclusion that the constitutional language meant the formal beginning of the process, that is the court-ori-

\(^{70}\) 398 U.S. at 55.

\(^{71}\) *Id.* at 55-56. This approach can be problematic. *See* Wilson v. State, 44 Md. App. 1, 408 A.2d 102 (1979) in which the court applied the Supreme Court tests through a score sheet, resulting in the finding of a speedy trial violation following an unexcused delay of seven and a half months and an excused delay of six months. *Id.* at 107-09.

\(^{72}\) 398 U.S. at 56.

\(^{73}\) 404 U.S. 307 (1971).

\(^{74}\) *Id.* at 313.

\(^{75}\) Hoffa v. United States, 385 U.S. 293, 310 (1966). There is no constitutional right to be arrested. *Id.*

\(^{76}\) 404 U.S. at 320. This latter position is consistent with the *Speedy Trial Standards*, *supra* note 13, at 12-22, but differs from the Nebraska practice. *See*, e.g., State v. Steward, 195 Neb. 90, 236 N.W.2d 834 (1974) and State v. Spidell, 192 Neb. 42, 218 N.W.2d 431 (1974). In Nebraska, a person may be arrested, held in custody and then a complaint is filed in an inferior court. Custody is continued through a preliminary hearing, at which time an information is filed in the district court. It is only at this latest stage that this state's speedy trial protections begin to operate. *Neb. Rev. Stat.* § 29-1207 (Reissue 1979).
He pointed out that other interpretations have held that the criminal process begins when there is focus upon the putative defendant. Moreover, exploring constitutional history, he concluded that the English common law, known to the framers of the sixth amendment, conceived of a criminal prosecution as being commenced prior to indictment.

C. Barker v. Wingo

The Supreme Court's benchmark decision was in the case of Barker v. Wingo. Although the Court had decided some speedy trial right cases before 1972, it had never established criteria by which the guarantee was to be judged.

Barker dealt with a homicide in Kentucky in June of 1958. Two suspects were arrested shortly after the incident and indicted by a grand jury in September. Counsel was appointed two days later and Barker's trial was set for October 21. The prosecutor believed the case against Barker's co-defendant was the stronger and that Barker could not be convicted without the co-defendant's testimony. The co-defendant was unwilling to incriminate himself, so Kentucky obtained a delay in Barker's case in late October. This was to be the first of sixteen continuances. Barker did not object immediately.

The trial of Manning, the co-defendant, was fraught with problems. The first trial ended in a hung jury. The second resulted in a conviction, but it was reversed due to the admission of illegally obtained evidence. A third trial resulted in a conviction, but again a reversal was obtained because of the trial court's refusal to grant a change of venue. A fourth trial resulted in a hung jury. As the Supreme Court noted: "Finally, after five trials, Manning was convicted, in March 1962, of murdering one victim, and after a sixth trial, in December 1962, he was convicted of murdering the other."

Barker's case was continued eleven times, although he had made no objection as he was freed on $5,000 bond after ten months.

77. 404 U.S. at 326.
79. Id. at 328-29.
81. Id. at 516-18.
82. Id. at 517.
85. 407 U.S. at 517.
in jail. In February 1962, upon a state's motion for a twelfth continuance, Barker's lawyer filed a motion to dismiss; the motion was denied and yet another continuance was granted.\textsuperscript{86} In February 1963, Kentucky moved to set trial for Barker for March 19, but on the day set for trial, it once again moved for a continuance because of the illness of the chief investigating officer in the case. Barker objected unsuccessfully.\textsuperscript{87} Finally, the court announced that it would dismiss for lack of prosecution if the case were not tried in the September term and trial was set for October 9, 1963. On that date Barker again moved to dismiss specifying the denial of his right to a speedy trial. The motion was denied, and Barker was convicted.\textsuperscript{88} The matter came to the Supreme Court on certiorari.\textsuperscript{89}

The Supreme Court began its substantive analysis by noting that the speedy trial right "is generically different from any of the other rights enshrined in the Constitution for the protection of the accused."\textsuperscript{90} There is a dual set of interests at stake: the concern that the accused should "be treated according to decent and fair procedures" and "a societal interest in providing a speedy trial" which exists separate from, and at times in opposition to, the interests of the accused.\textsuperscript{91}

The Court expressed its concern over the effect of delay on plea bargaining and the manipulation of the system as well as the opportunity of those out on bond to commit other crimes.\textsuperscript{92} It noted that delay between arrest and punishment may have a detrimental effect on rehabilitation.\textsuperscript{93} Those who cannot make bail are confined in conditions which have a destructive effect on human character and make rehabilitation much more difficult. The Court took into account the financial costs, not only of providing care for the detainees but also of the lost wages and the necessity to support the families of the accused.\textsuperscript{94}

The Court indicated that another difference between the right to speedy trial and other constitutional protections is that the de-
nial of the former may work to an accused’s advantage. With an extended period of time between perpetration of the crime and the actual trial, witnesses may be unavailable or unable to recall the crime.95

Additionally, the Court perceived that the speedy trial right is a more vague concept than other procedural safeguards. “It is impossible to determine with precision when the right has been denied.”96 The Court reiterated the passage from *Beavers v. Haubert*97: “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.”98

Finally, the Court acknowledged that the only remedy for the denial of the right to speedy trial was “the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived.”99 The court rejected the proposal that it specifically quantify the number of days or months within which the case must be brought to trial, although it acknowledged the freedom of the states to do so.100

It then analyzed the so-called “demand rule” which would restrict consideration of denial of the speedy trial right to those cases in which the accused has demanded a speedy trial.101 It coupled that notion with the “waiver” doctrine, accepted by five circuits and the District of Columbia.102 This demand-waiver approach provides that a defendant waives any consideration of his right to a speedy trial for any period prior to which he has not demanded a trial.103 The Court ruled that this approach, which presumes the waiver of a fundamental right from inaction, “is inconsistent with this Court’s pronouncements on waiver of constitutional rights.”104 The Court cited *Carnley v. Cochran*105 in which it had said:

95. *Id.* at 521.
96. *Id.*
97. 198 U.S. 77 (1905).
98. 407 U.S. at 522 (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).
100. *Id.* at 523.
101. *Id.* at 523-24.
102. *Id.* at 524. See generally United States v. Perez, 398 F.2d 568 (7th Cir. 1968), *cert. denied*, 393 U.S. 1080 (1969); Bruce v. United States, 351 F.2d 318 (5th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966); United States v. Hill, 310 F.2d 601 (4th Cir. 1962); Smith v. United States, 331 F.2d 784 (D.C. Cir. 1964); Fletch v. United States, 110 F.2d 817 (10th Cir. 1940), *cert. denied*, 310 U.S. 648 (1940).
103. 407 U.S. at 525.
"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver." But the defendant is still faced with a responsibility to assert his speedy trial right. In that regard the Court held that the defendant's assertion of or failure to assert the right is but one of the factors to be considered in an inquiry into deprivation of the right. The primary burden, however, is on the courts and the prosecutors to assure that cases are brought to trial without substantial delays. The Court recognized that speedy trial cases must be approached on an ad hoc basis, but identified four factors for assessment in determining whether a defendant had been denied the right. First, there is the matter of the length of delay. Second, there is the reason the government assigns to the delay. Third, there is the defendant's responsibility to assert his right. Finally, there is the issue of prejudice to the defendant, which is to be assessed in light of the interests the right is designed to protect: (1) the prevention of oppressive pre-trial incarceration; (2) minimization of anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. The Court then applied the factors to Barker's appeal, and affirmed the circuit court's denial of habeas corpus relief.

While the purpose of this article is not to provide a detailed critique of either the Barker decision specifically, or the Supreme Court's handling of speedy trial issues in general, Justice Powell's approach in the opinion for a unanimous Court merits some comment.

The pattern of speedy trial cases demonstrates that the Supreme Court has identified two sets of interests: those of the defendant and those of the public. Classification of those interests further indicates that in any given case, one, some or perhaps all of them may or may not be violated. The factors identified in Barker may or may not be present in any given case. The exclusive remedy of dismissal of the charges as contemplated in Barker seems to preclude inquiry into whether violation of speedy trial protections
can, in fact, be remedied in any other manner.\textsuperscript{112}

The problem with this unitary approach is that in cases where the evidence of guilt is clear, courts will be extremely reluctant to find a violation of the constitutional protection.\textsuperscript{113} Moreover, it places a burden on the defendant which, as Justice Brennan has indicated,\textsuperscript{114} is most difficult to overcome. Even if a defendant can show actual prejudice, such a showing by itself is not sufficient to bring the case within the speedy trial protections.

Perhaps most significant is the latitude granted to the states to develop their own speedy trial mechanisms.\textsuperscript{115} This is, perhaps, a recognition of the reality that court structures, case loads and personnel vary from jurisdiction to jurisdiction to such a degree that hard-and-fast rules, centered on temporal considerations, are unrealistic. The states—and indeed, the Congress—are thus free to fashion their own remedies, either by statute or court order,\textsuperscript{116} to accommodate the exigencies of a federal system. Thus, in the area of speedy trial protections, more than in any other sphere of constitutional rights, one must look to the unique state schemes to understand which protections are available to the accused.

The relatively few post-\textit{Barker} decisions of the Supreme Court seem to reinforce the idea of the independence of the states in this area. \textit{Braden v. 30th Judicial Circuit Court}\textsuperscript{117} provides a systematic remedy in cases such as \textit{Dickey v. Florida},\textsuperscript{118} for it holds that imprisoned state accuseds, following exhaustion of state remedies, may resort to federal habeas corpus in order to compel the state to try or release them.\textsuperscript{119} This applies to individuals who are detained by one jurisdiction but incarcerated in another. This adds nothing substantive to the sparse body of Supreme Court rulings,

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\item \textsuperscript{112} See Amsterdam, \textit{supra} note 62, at 539-41.
\item \textsuperscript{113} The majority of Nebraska cases illustrate this point, but in rare cases the allegations of speedy trial violations have been sustained. State v. Johnson, 201 Neb. 322, 268 N.W.2d 85 (1978) (operating a motor vehicle under a suspension) and State v. Hankins, 200 Neb. 69, 262 N.W.2d 197 (1978) (obtaining money under false pretenses).
\item \textsuperscript{115} Barker v. Wingo, 407 U.S. 514, 523 (1972). Here the Court stated: "The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise." \textit{Id}.
\item \textsuperscript{116} See generally Joseph, \textit{supra} note 1, at Poulos and Coleman, \textit{supra} note 7.
\item \textsuperscript{117} 410 U.S. 484 (1973).
\item \textsuperscript{118} 398 U.S. 30 (1970).
\item \textsuperscript{119} 410 U.S. at 488-83. However, this is not without problems, for in Nebraska, notwithstanding the possible availability of federal habeas corpus relief, the state rule remains that there are no interlocutory appeals allowed to the supreme court; there must be a final judgment, and none is final unless a sentence is pronounced. State v. Shaw, 202 Neb. 766, 770, 277 N.W.2d 106, 110 (1979); Kennedy v. State, 170 Neb. 193, 196, 101 N.W.2d 853, 855 (1960).
\end{itemize}
and yet it may be significant for it conceivably adds another avenue of relief to those whose trial is delayed, short of total dismissal of the charges.

*Strunk v. United States*\(^{120}\) restates the rule that dismissal must remain the only possible remedy when a defendant has been denied a speedy trial.\(^ {121}\) In this case, the Seventh Circuit had found that a delay of ten months violated the constitutional guarantee, but did not dismiss the charges.\(^ {122}\) The Supreme Court did not discuss whether a denial of a speedy trial had occurred but only addressed the issue of the propriety of the remedy fashioned by the Seventh Circuit.\(^ {123}\) Because a denial of a speedy trial had occurred, the Court concluded a dismissal must be granted and directed the Seventh Circuit to do so on remand.\(^ {124}\)

Finally, the Court decided *United States v. Lovasco*,\(^ {125}\) a case in which there had been an eighteen-month delay between the alleged offense and the indictment.\(^ {126}\) The Court reiterated the rule that proof of prejudice may make a due process claim ripe for adjudication, but that it does not automatically validate such a claim. The Court indicated that the reasons for delay must be taken into account, and articulated what it believed are reasons the government may desire to delay an indictment.\(^ {127}\) Of course, having said that speedy trial rights will not usually accrue until indictment, this case can only be read as a fifth amendment due process adjudication.

II. LEGISLATIVE ENACTMENTS

A. THE NEBRASKA CONSTITUTIONAL BASIS

Speedy trial protections have been a part of Nebraska law since the organization of the territory of Nebraska by the Kansas-Nebraska Act of 1854.\(^ {128}\) That law provided that the Constitution of the United States "shall have the same force and effect within the said Territory of Nebraska as elsewhere within the United States. . . ."\(^ {129}\) The Enabling Act of 1864,\(^ {130}\) authorizing the people

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\(^{120}\) 412 U.S. 434 (1973).
\(^{121}\) *Id.* at 440.
\(^{122}\) United States v. Strunk, 467 F.2d 969, 973 (7th Cir. 1972).
\(^{123}\) 412 U.S. at 437.
\(^{124}\) *Id.* at 440.
\(^{125}\) 431 U.S. 783 (1977).
\(^{126}\) *Id.* at 784.
\(^{127}\) *Id.* at 789-90.
\(^{128}\) Act to Organize the Territories of Nebraska and Kansas, ch. 59, §§ 1-37, 10 Stat. 277 (1854).
\(^{129}\) *Id.* at § 14.
\(^{130}\) Act of April 19, 1864, ch. 59, §§ 1-14, 13 Stat. 47.
of Nebraska to form a state constitution and government, also applied the laws of the United States to the pioneer territory. The first constitution of Nebraska provided:

In all criminal prosecutions and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him; to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and to have the assistance of counsel.

When the constitution of 1875 was reworded and sections of the Bill of Rights were renumbered, the guarantee of a speedy trial was retained. In sum, although the Nebraska constitution has been amended many times, the protection of a speedy trial has always remained an integral part of the fundamental law of the state.

B. THE NEBRASKA SPEEDY TRIAL LAW

The present Nebraska statutes contain what must be characterized as two distinct sets of speedy trial provisions. The first section is a holdover from an early scheme by which persons held in jail charged with an indictable offense could be discharged if not indicted at the term of court at which he is held to answer. The statute contemplates a grand jury indictment system, but it has been held to apply to prosecution by information as well. Under the scheme, the accused may either be discharged or be bonded out to answer at the next term of court. In the case of one kept in jail without indictment, he is not entitled to discharge if witnesses for the state have been enticed or kept away or are detained and prevented from attending court. The three other provisions of the original discharge from custody statute were repealed at the time of the enactment of the modern speedy trial act of 1971.

131. Id. at § 13.
136. While the fifth amendment of the Constitution provides for indictment by grand jury, in 1884 in Hurtado v. California, 110 U.S. 516, 538 (1884), the Supreme Court held that a state may, if it so desires, provide for prosecution by information. As early as 1885, Nebraska's legislature passed a statute allowing prosecution by information. Pt. III, ch. 54, §§ 578-85, Comp. St. of Neb. 1885. It was sustained in Jones v. State, 18 Neb. 401, 405, 25 N.W. 527, 528 (1885), and has been repeatedly endorsed, State v. Lehman, 203 Neb. 341, 346, 276 N.W.2d 610, 614 (1979). See also Bolln v. Nebraska, 176 U.S. 83, 89 (1900).
The second set of provisions that comprise the present Nebraska speedy trial law were enacted in 1971 and contained five sections.\footnote{139. L.B. 436, §§ 1-5, 1971 Neb. Laws 1283-84; Neb. Rev. Stat. §§ 29-1205 to -1209.}

The first section acknowledges the dual interests of the accused and the public in prompt disposition of criminal cases. It gives preference to criminal cases over civil litigation. Trial of defendants in custody and those whose pre-trial liberty is reasonably believed to present unusual risks are to be given preference over other criminal matters. The county attorney is given responsibility for calling attention to custody and risk cases, advising the court of the facts relevant to a determination of the order for trial.\footnote{140. Neb. Rev. Stat. § 29-1205 (Reissue 1979).}

The second section mandates the method for applying for continuance and requires a good cause showing and limits the continuance “only for so long as is necessary.” This section also recognizes the public interest in prompt disposition of criminal matters.\footnote{141. Neb. Rev. Stat. § 29-1206 (Reissue 1979).}

Probably the most important section, and certainly the one that has generated most appellate decisions, is the third, which limits the time within which trial must be held and provides for the computation of time, including the exclusions.\footnote{142. Neb. Rev. Stat. § 29-1207 (Reissue 1979).}

The Nebraska statute specifically requires trial to be held within six months from the return of the indictment or the filing of the information. Under Nebraska law this means that a person may be arrested or the crime and putative defendant identified, incarceration may take place and a complaint may be filed in a county or municipal court, but the six month period will not begin to run until a later date and, conceivably, well after the initial appearance in court and detaining of the accused.\footnote{143. While, in theory, an arrested person may be detained for one night “or longer” (Neb. Rev. Stat. § 29-410 (Reissue 1979)) before being brought before the proper magistrate, during examination additional incarceration is permitted (Neb. Rev. Stat. § 29-501 (Reissue 1979)). In practice the Nebraska Supreme Court has held that the accused must be brought before the magistrate “only as soon as is practical under the existing circumstances.” State v. O’Kelly, 175 Neb. 798, 812, 124 N.W.2d 211, 219 (1963). See also Gallegos v. Nebraska, 342 U.S. 55, 68 (1951), in which the delay was for a period of 25 days during interrogation.}

Where a retrial is involved, the six month period begins to run only from the date of a mistrial, an order granting a new trial or the mandate on remand.\footnote{144. Neb. Rev. Stat. § 29-1207(3) (Reissue 1979).}

Six specific periods of exclusion are provided for in the computation of the time for trial.\footnote{145. Neb. Rev. Stat. § 29-1207(4) (Reissue 1979).} These are:
One. Delay resulting from other proceedings concerning the defendant. This includes examination and hearing on competency as well as the period of incompetency, and the time from filing until final disposition of pre-trial motions of the defendant (including motions to suppress evidence, quash the indictment or information, demurrers, pleas in abatement, motions for change of venue and trial of other charges against the defendant).

Two. Delay resulting from continuances granted at the request or with the consent of the defendant or his lawyer. However, a defendant without counsel will not be deemed to have consented to a continuance unless advised by the court of his right to a speedy trial and the effect of the consent.

Three. Delay resulting from a continuance granted at the request of the prosecutor (because of unavailability of material evidence where the prosecutor has exercised due diligence to obtain it and there are reasonable grounds to believe it will be available later or where exceptional circumstances justify additional time to prepare the state's case).

Four. Delay because of the absence or unavailability of the defendant.

Five. Reasonable delay where the defendant is joined for trial with a codefendant whose time for trial has not run and where there is good cause for not granting a severance. But the statute provides, "[i]n all other cases the defendant shall be granted a severance so that he may be tried within the time limits applicable to him."

Six. Delay not specifically enumerated where the court finds it is for good cause.\textsuperscript{146}

The fourth section addresses the remedy issue and provides that if the defendant is not brought to trial before the running of the time for trial, "he shall be entitled to his absolute discharge from the offense charged and for any other offense required by law to be joined with that offense."\textsuperscript{147} The last section requires the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere, and states that his failure to do so constitutes a waiver of the right to speedy trial.\textsuperscript{148}

When these five sections were added to the Nebraska speedy trial law they reflected a more modern approach to the problem. In

\textsuperscript{146} Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1979). This last provision has generated debate on the Nebraska Supreme Court. State v. Alvarez, 189 Neb. 281, 202 N.W.2d 604 (1972).


general these modern provisions are predicated on the American Bar Association Standards for Criminal Justice as they relate to speedy trial guarantees.\textsuperscript{149} The ABA Standards had provided model guidelines for implementation of speedy trial guarantees and had recommended that:

1. The right be expressed by a temporal rule running from a specified event, excluding specifically identified delays.

2. The time for trial commence to run, without demand by the defendant: a) from charging date, with exceptions for custody or recognizance; b) in post-dismissal situations from when the defendant is held to answer; c) in retrial situations, from the date of mistrial, new trial order or remand.

3. Specific periods of excludable time should be incorporated into the scheme, such as other proceedings, court congestion, continuance, absence or unavailability of the defendant, recharging after dismissal, joinder with another defendant and good cause.

4. The prosecutor be obliged to make available speedy trial to one serving a prison term and the official having custody of the prisoner be obliged to notify the prisoner and make him available for trial.

5. There be a special computation of time for those serving a prison term, beginning with the presence for trial and subject to all excluded periods, plus unreasonable delay in filing a detainer.

6. The consequence of a speedy trial violation be absolute discharge when the time has run or, if a shorter time limit is applicable, then release of the defendant on his own recognizance.\textsuperscript{150}

On close reading the similarities between the ABA guidelines and the modern Nebraska provisions become apparent.

III. NEBRASKA CASE LAW

While the speedy trial guarantee has been a part of the federal and state constitutional fabric almost since the inception of the republic or the admission to statehood, the paucity of case law focusing on its application is due to the fact that the Supreme Court of the United States did not extend the speedy trial protections to the

\textsuperscript{149} ABA\ Standards\ For\ Criminal\ Justice,\ Speedy\ Trial\ Standards ch. 12, §§ 1.1 to 4.2 (2d ed. 1980).

\textsuperscript{150} Id.
states until 1967. However, this is not to suggest that either the state constitutional guarantee, the federal protection or the state statutory law implementing the respective guarantees has not, from time to time, been a concern of the judiciary. The Nebraska legislature enacted the discharge from custody provisions shortly after statehood and the Nebraska Supreme Court immediately construed these provisions in a number of cases.

A. THE EARLY CASES

One hundred years ago the first such case was decided. In *Ex parte Two Calf*, certain native Americans had been arrested by military authorities and delivered to the sheriff of Cuming County, Nebraska, where they were charged with murder in the unorganized territory of the state. The supreme court noted that a regular term had been held in that county since the arrest and incarceration and no indictment had been found, no preliminary examination had been held and the men were not held by warrant or commitment. Furthermore, the court ruled that there was no evidence on the record under which the men could be held, and concluded that the relators were arrested on mere suspicion and must be discharged.

Four years later, *Jones v. State* was decided. Although the case dealt with the selection procedure of a grand jury in a murder trial, the decision had ramifications for speedy trial rights. The *Jones* court construed a recently enacted statute and ruled that charging by information was tantamount to prosecution by indictment. As a result, for speedy trial purposes, the filing of an information served the same function as did an indictment.

The claim of the defendant in *Hammond v. State* was that he had not been charged within three terms and should thus be discharged. However, the court held that the language requiring dismissal if no trial were held before the end of the third term after indictment “must be construed as excluding the term at which the

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152. Pt. III, Ch. 38, §§ 389-892, Comp. St. of Neb. (1881).
153. 11 Neb. 221, 9 N.W. 44 (1881).
154. Id.
155. Id.
156. Id. at 222, 9 N.W. at 44.
157. 18 Neb. 401, 25 N.W. 527 (1885).
158. Id. at 402, 25 N.W. at 527.
159. Id. at 403, 25 N.W. at 528.
160. 39 Neb. 252, 58 N.W. 92 (1894).
161. Id. at 253-54, 58 N.W. at 93.
In *State v. Miller*, the court reiterated its acknowledgment of dual methods of charging. The court conceded that the statute required filing of charges against an accused "during the term of the district court at which he is held to answer" and that where an information is to be filed and the accused is in custody, that filing "cannot be put off to await the convenience of the prosecuting officer until a subsequent term of the court. To hold otherwise would be the rankest kind of judicial legislation." However, the court did not foreclose the filing of an amended information, in a proper case, at any term of the court. Procedurally, the court ruled that an aggrieved defendant has a duty to aver that neither an information nor an indictment has followed an arrest or the filing of a complaint. While this cannot strictly be said to be the first appearance of the demand/waiver doctrine in Nebraska, it is clear that it imposed an affirmative duty on the defendant to assure a speedy trial.

While modern speedy trial jurisprudence recognizes the duality of interests served by such guarantees, the Nebraska Supreme Court took a different position in *Ex parte Trester*. The court noted that the discharge from custody or recognizance statutes "do not promulgate any general policy on behalf of the public interests for the speedy prosecution and termination of criminal proceedings, but they are enactments for the benefit of the accused. . .{" But three years later the court in *Leisenberg v. State*, modified its position and distinguished between the right of a defendant, on the one hand, to obtain discharge from custody under the statutory terms, and the right of the state, on the other, to proceed with trial, even though the custody of the defendant was illegal. *Leisenberg* involved a failure to lodge a formal accusation at the term during which preliminary hearing had been held. Acknowledging that the order of the magistrate was not effective during the prescribed term and that the defendant was held in jail without authority, the trial court was, nevertheless, conceded the power to try the issues raised by the defendant's plea of...
not guilty.\textsuperscript{172}

In one case decided in the interim between \textit{Trester} and \textit{Leisenberg}, the court went outside the formal record to find that an information was indeed filed in a timely manner, thus denying the defendant's claim.\textsuperscript{173} This aberration from practice\textsuperscript{174} illustrates the reluctance of courts in general to impose what has come to be the exclusive remedy in cases of denial of speedy trial rights.

These early cases illustrate the following points. First, the original statute did not necessarily dictate speedy trial in the sense the term is understood today. To be sure, the guidelines suggest that, at most, three terms of court will pass before trial. But the plain meaning of the statute and of the cases is that a violation of the time limits will only trigger a discharge from custody or bail, and not dismissal of the charges.\textsuperscript{175} Second, a violation of the provisions of the statute did not automatically result in dismissal of the charges against the accused. For example, even though the court in \textit{Leisenberg} acknowledged the error of continued incarceration, it nevertheless affirmed the right of the state to proceed with the case.\textsuperscript{176}

A second stage of Nebraska case law began in 1910, when the court decided \textit{Critser v. State}.\textsuperscript{177} The case involved charges of murder against two defendants; one of the defendants was promptly tried and convicted, but the other defendant's request for an immediate trial was refused.\textsuperscript{178} After several terms of court Critser was still untried and asked for discharge. This was refused and the county attorney was permitted to enter a \textit{nolle prosequi},

\textsuperscript{172} Id.
\textsuperscript{173} Barker v. State, 54 Neb. 53, 54-55, 74 N.W. 427, 427 (1898).
\textsuperscript{174} The general rule is, if a matter is not in the record, it may not be reviewed by the supreme court. \textit{See e.g.}, State v. Price, 202 Neb. 308, 322, 275 N.W.2d 82, 90 (1979); State v. Penas, 200 Neb. 387, 393, 263 N.W.2d 835, 838 (1978); State v. McDonald, 195 Neb. 625, 637, 240 N.W.2d 8, 15 (1976); State v. Rose, 188 Neb. 84, 85, 195 N.W.2d 215, 216 (1972); State v. Mills, 179 Neb. 853, 855, 140 N.W.2d 826, 828 (1966); Shumay v. State, 82 Neb. 165, 167, 119 N.W.2d 517, 518 (1960).
\textsuperscript{175} An exaggerated illustration should demonstrate this. Assume there are three terms of court within a calendar year, January, April and October. Assume the defendant is arrested and incarcerated January 1. The indictment (or information) need not be filed until March 31. Because the term at which the information or indictment is filed is excluded, counting begins with the April term, and includes the October term, at the end of which defendant must be tried or discharged. Thus, he may be discharged from custody on December 31, but the charges are not dismissed. Trial may begin anytime thereafter.

But see text at note 143 \textit{supra}. However, several protections are built into the statutes. \textsc{Neb. Rev. Stat.} § 29-506 (Reissue 1979) (relating to release on bail) and the bail provisions of \textsc{Neb. Rev. Stat.} §§ 29-901 to -910 (Reissue 1979).
\textsuperscript{176} See note 171 and accompanying text \textit{supra}.
\textsuperscript{177} 87 Neb. 727, 127 N.W. 1073 (1910).
\textsuperscript{178} Id. at 728, 127 N.W. at 1073.
whereupon the case was dismissed and the defendant discharged. In this action Critser insisted that the prosecution, being dismissed by the county attorney, would not be a bar to further arrest and prosecution, and that his right was to be "discharged so far as relates to the offense for which he was committed." In deciding the case, the court held that from the record the defendant was entitled to a trial at a given term and "unless tried at that term, he was entitled to be discharged 'so far as relates to the offense for which he was committed.'" The court entered an order requiring the district court to discharge the defendant from the offense.

The significance of the case was that the court equated the word "discharge" with the term "absolute dismissal." The earlier cases had found the word "discharge" to mean discharge from custody or bond. This decision was a precursor of the modern speedy trial statutes, for it effected a dismissal and altered the definition of a critical word in the statute.

Equally important in Critser was the recognition of the duality of interests philosophy which is assumed in modern law. The Critser court wrote:

Public justice requires that criminal trials shall be disposed of promptly. The certainty that justice will be done and the guilty convicted without unnecessary delay is more efficacious in the prevention of crime than are severe penalties. The federal constitution has undertaken to guard the rights of the accused against unnecessary delay, and the fundamental law of this state has assured him protection against imprisonment without trial .... The court acknowledged that there was room for the exercise of sound discretion on the part of a trial court in deciding how speedy a trial must be, but that the "legislature has fixed an absolute limit beyond which the trial cannot be delayed." In other words, the court recognized that, in the constitutional sense, speedy trial is a question of sound discretion, but that the legislature may fashion the limits for protection of the guarantee.

More than thirty years later the court was faced with its next

179. Id.
180. Id. In this context, the term discharge is equivalent to an absolute dismissal of all charges against the defendant, and not discharge from custody or from the obligations of bail.
181. Id. at 732, 127 N.W. at 1075. See also Whitner v. State, 46 Neb. 144, 147, 64 N.W. 704, 705 (1895).
182. 87 Neb. at 732, 127 N.W. at 1075.
183. Id. at 728-29, 127 N.W. at 1073-74.
184. Id. at 729, 127 N.W. at 1074.
major case in this area. *Maher v. State* involved arson charges against two individuals, one of whom complained to the state supreme court that many witnesses who could have been available to testify had a speedy trial been granted were then in the armed services or dead. In this case, the court observed, the defendant never applied to have trial date set and only after it was set did he appear to object to a continuance. But the court went on to recognize that the Nebraska speedy trial constitutional protection "is self-executing" and in accordance with the United States Constitution's fourth amendment's guarantee. The court stated, quoting from a Wyoming decision:

> The statute supplements the constitutional provision and secures or provides a method for securing the right thereby declared. It is to be regarded as enacted for the purpose of rendering the constitutional guarantee effective, and as a legislative declaration of what is and what is not, under the circumstances named, a reasonable and proper delay in bringing an accused to trial in respect of his constitutional right aforesaid.

Additionally, in *Maher* the court ruled that the interpretation of the constitutional guarantee is for the court. It conceded, however, that "since the time fixed by the legislature is not unreasonable, we adopt it as our own."

The review of the United States Supreme Court decisions demonstrated that the demand/waiver doctrine was a part of the law in many jurisdictions before *Barker*. The *Maher* decision and *Svehla v. State*, decided in 1959, are evidence that Nebraska was in that category. This observation was further reinforced in *State v. Bruns*, a decision which can only be described as incredible. The defendant was charged with driving while intoxicated, a matter properly before the county court. The complaint was filed December 21 and trial set for the following January 15. No trial was

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186. 144 Neb. at 473-74, 13 N.W.2d at 649.

187. *Id.* at 569, 96 N.W.2d at 659.

188. *Id.* (quoting *State v. Keefe*, 17 Wyo. 227, 243, 98 P. 122, 125 (1908)).

189. 144 Neb. at 475, 13 N.W.2d at 649.

190. 168 Neb. 553, 96 N.W.2d 649 (1959). There the court noted its failure to "find in the record any protest or objection made on the part of the defendant until he filed his plea in abatement. . . ." *Id.* at 569, 96 N.W.2d at 659.

held that day, and after the defendant was arrested on a bench warrant four months later, he swore by affidavit that he was present for trial on the assigned day and that no one knew anything about the trial and that he wasn't required to stay.\textsuperscript{193} The defendant's argument to the court was unusual. He contended that the terms of county courts are to be held the first Monday of each month.\textsuperscript{194} He then concluded that since more than three such terms had passed from the time he was held to answer (that is, the time of filing of a complaint, since this was a county court case) and no trial had taken place, he was entitled to discharge.\textsuperscript{195}

The court absolutely rejected this argument, holding that the statute defendant cited applied to the civil calendar and that there existed no statute fixing criminal terms in a county court.\textsuperscript{196} Therefore, the rule to be applied was that no general principle fixes the exact time within which a trial must be had to satisfy the requirement of the statute.\textsuperscript{197}

This case also reinforced the demand/waiver doctrine in Nebraska, holding that the speedy trial right is ordinarily waived if the accused fails to assert his right by making a demand for trial, by resisting a continuance, by going to trial without objection that the time limit has passed or by failing to make some effort to secure a speedy trial.\textsuperscript{198} Another case during that same term reiterated the rule, declaring that a delay of six months alone is not sufficient to establish a denial of the right.\textsuperscript{199}

\textbf{B. The Post-1971 Decisions}

As discussed earlier, the modern speedy trial statute was enacted by the Nebraska Legislature during its 1971 session.\textsuperscript{200} It gave rise almost immediately to a spate of appellate decisions. The leading case was \textit{State v. Alvarez},\textsuperscript{201} decided by a divided court in 1972. It was a four to three decision, with the majority opinion writ-

\begin{footnotesize}
\textsuperscript{193} \textit{Id.} at 69, 146 N.W.2d at 788. That in itself is not so unusual in a sparsely populated county.

\textsuperscript{194} \textit{Id.} at 70, 146 N.W.2d at 788. The statute requiring monthly terms of the county court was repealed in 1979. L.B. 237, § 8, 1979 Neb. Laws 1296-97.

\textsuperscript{195} 181 Neb. at 70, 146 N.W.2d at 788.

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} \textit{Id.}

\textsuperscript{198} \textit{Id.} at 71, 146 N.W.2d at 789.

\textsuperscript{199} \textit{State v. Warner}, 181 Neb. 874, 876, 152 N.W.2d 30, 32 (1967).

\textsuperscript{200} L.B. 436, §§ 1-5, 1971 Neb. Laws 1283-84.

\end{footnotesize}
ten by Judge Clinton.202 One dissent was written by Judge McCown, joined by Judge Smith.203 A separate dissent was written by Judge Boslaugh.204

In Alvarez the information was filed on March 25, 1971 and there was no further activity until July 29 of that year, when the county attorney moved that the matter be given preference over civil cases “in order to effectuate the right of the defendant to a speedy trial.”205 The defendant appeared on August 5 and was arraigned with the court ordering trial December 6. On September 1, the state moved to consolidate the trial of Alvarez with that of another defendant, and on November 4 the order to consolidate was entered.206

On November 10, the defendant moved for discharge under the terms of the new statute; the motion was heard November 19 and 26. The evidence related generally to the business of the district court from May 2 to the date of the hearing. The motion was overruled, the trial court including in its order this language: “The Court being duly advised in the premises finds that good cause has been shown and defendant’s motion should be overruled.”207

Judge Clinton, writing for the majority, began his substantive analysis with an examination of the statute, identifying the dual interests of society and the defendant in a speedy trial. He pointed out that the statute provides that applications for continuance must be made in accordance with another statutory provision, “but in criminal cases . . . the court shall grant a continuance only upon a showing of good cause and only for so long as is necessary.”208 He ruled that the legislature intended to include docket congestion in excusable delays, provided the court found “good cause.”209 He noted, however, that there is a split in authority on the question.210 Nevertheless, Nebraska constitutional provisions relating to criminal and civil case disposal and delay211 led him to conclude that improper or inefficient docket management, scheduling of trial, or failure to use available procedures such as obtaining an available

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202. 189 Neb. at 283, 202 N.W.2d at 606.
203. Id. at 293, 202 N.W.2d at 611.
204. Id. at 295, 202 N.W.2d at 612.
205. Id. at 285, 202 N.W.2d at 607.
206. Id.
207. Id. at 286, 202 N.W.2d at 607.
208. Id. at 286, 202 N.W.2d at 608; see also Neb. Rev. Stat. § 25-1148 (Reissue 1979).
209. 189 Neb. at 289, 202 N.W.2d at 609.
210. Id.
211. Neb. Const. art. I, § 13, relating to civil actions, provides that every person shall have a remedy by due course of law, and justice administered without denial or delay.
judge from another district could not be deemed "good cause."\textsuperscript{212}

Judge Clinton followed the Supreme Court position articulated in \textit{Barker}. He placed the burden on the state to bring the accused to trial within the time limits of the statute; failure to do so would entitle the defendant to absolute discharge.\textsuperscript{213} A failure by the defendant to demand trial within the time he is required to be brought to trial or to object at the time the trial date is set did not constitute a waiver either under the statute or the state constitution. However, it was a factor which, while not constituting a good cause by itself, may be considered in a "good cause" determination. Consistent with \textit{Barker}, the Nebraska majority specifically overruled the previous demand/waiver decisions, and held that a failure to demand did not automatically constitute a waiver of the right.\textsuperscript{214} The majority of the court did not, however, adopt the position that it never constituted a waiver.

The \textit{Alvarez} majority took the position that greater burdens were placed on the prosecutor and the courts in a speedy trial case. Where a properly charged defendant is not brought to trial within six months and moves for discharge, the court reasoned that the state had the burden of proving by a substantial preponderance of the evidence that an excluded period is applicable.\textsuperscript{215} Additionally, a trial court's general finding of "good cause" in extending trial time will no longer be sufficient. Trial courts must in the future make specific findings as to the cause of extension and the period of extension attributable to such causes, applying the substantial preponderance of evidence rule.\textsuperscript{216}

In conclusion, Judge Clinton recommended that in the interests of procedural uniformity, when a date is set for trial that is later than that allowed under the statute, the trial court should: (1) advise the defendant of his statutory right to a speedy trial and the effect of his consent to a period of delay and (2) ascertain of record whether the defendant does or does not waive his right to a speedy trial and consent to the trial date set.\textsuperscript{217}

In his dissenting opinion, Judge McCown objected to the holding that a failure to demand a speedy trial may be considered in determining whether there was "good cause" for delay.\textsuperscript{218} He rejected the notion that any affirmative action by an accused is nec-

\textsuperscript{212} 189 Neb. at 290, 202 N.W.2d at 610.
\textsuperscript{213} \textit{Id.} at 291, 202 N.W.2d at 610.
\textsuperscript{214} \textit{Id.} at 291-92, 202 N.W.2d at 610.
\textsuperscript{215} \textit{Id.} at 292, 202 N.W.2d at 610-11.
\textsuperscript{216} \textit{Id.} at 292, 202 N.W.2d at 611.
\textsuperscript{217} \textit{Id.} at 293, 202 N.W.2d at 611.
\textsuperscript{218} \textit{Id.}
necessary to protect a constitutional right rather than to waive it, for this "emasculates the right just as effectively as to hold that silence or inaction imply a waiver."\textsuperscript{219} He reasoned that a defendant has no burden to bring himself to trial, and "[u]nless a defendant has affirmatively contributed to delay, his silence or inaction ought not to diminish the responsibility of the prosecution to bring him to trial within the statutory time."\textsuperscript{220} He specifically objected to the finding that any good cause was shown by the evidence in this case.\textsuperscript{221}

In his separate dissent, Judge Boslaugh pointed out that the existence of the constitutional right and the statutory right to speedy trial "are quite different and exist independently of each other."\textsuperscript{222} He felt that while \textit{Barker} set the constitutional tone for determining whether the right had been violated, the "operation of the statute is similar to a statute of limitations."\textsuperscript{223} Thus, he reasoned, "there may be no balancing of considerations involved. If there are no periods of time to be excluded, the operation of the statute is automatic."\textsuperscript{224}

\textit{Alvarez} set the tone for the subsequent rulings by the court and for a continued dialogue over the nature of the dual rights involved, that is, constitutional versus statutory guarantees. The post-\textit{Alvarez} decisions can be categorized as follows: (1) "counting" cases, those in which the court primarily looked at the progress of the litigation and determined whether six months had passed before trial, excluding permissible periods;\textsuperscript{225} (2) "good cause" cases, those in which the court's concern was whether "good cause" had been shown for a delay;\textsuperscript{226} (3) cases in which the court differentiated between the statutory right and the constitutional protection;\textsuperscript{227} and (4) "duty" cases, those in which the court

\begin{itemize}
\item \textsuperscript{219} \textit{Id.}.
\item \textsuperscript{220} \textit{Id.} at 294, 202 N.W.2d at 611.
\item \textsuperscript{221} \textit{Id.} at 295, 202 N.W.2d at 612.
\item \textsuperscript{222} \textit{Id.} at 295-96, 202 N.W.2d at 612.
\item \textsuperscript{223} \textit{Id.} at 296, 202 N.W.2d at 612.
\item \textsuperscript{224} \textit{Id.}
\item \textsuperscript{226} \textit{See, e.g.,} State v. Johnson, 201 Neb. 322, 268 N.W.2d 85 (1978); State v. Brown, 189 Neb. 297, 202 N.W.2d 585 (1972).
\item \textsuperscript{227} \textit{See, e.g.,} State v. Costello, 199 Neb. 43, 256 N.W.2d 97 (1977); State v. Clouse, 195 Neb. 671, 240 N.W.2d 36 (1976); State v. Born, 190 Neb. 767, 212 N.W.2d 581 (1973).
\end{itemize}
readdressed the issue of the burdens on the respective courtroom actors.228

The “counting” cases reiterated the rule that the time limitations arising out of the statute run only from the time of information (or complaint, in the case of a charge triable in county or municipal court). In one case the court held that the matter of granting a continuance is in the sound discretion of a trial court.229

In other cases, the court pointed out that delays caused by the defendant would toll the statutory period.230 A 1981 decision focused on the issue of what “six months” means, and held that it does not mean 180 days.231 The court cited an Illinois case which had held that the word “month” has been legislatively defined to mean calendar month,232 and reinforced its decision by reference to Nebraska authorities.233

In another “counting” case, *State v. Born*,234 the court considered an error proceeding filed by a county attorney. There, the defendant had been in custody almost six months prior to his being bound over for trial. Upon the defendant’s motion for dismissal, the district court had said that the statutory six month period began to run when the complaint was filed. But the supreme court noted that under the specific language of the statute, where a felony is involved, the time does not begin to run until the indictment is returned or the information filed.235 The court acknowledged that the legislature had not addressed the specific problem of the limits prior to the formal stage. It stated that those proceedings are still a part of a criminal prosecution and subject to the constitutional guarantee of a speedy trial, but fashioned no remedy.236

Having adopted the “good cause” doctrine under sharp protest in *Alvarez*, the court applied it in a number of cases with a variety of results. In one case, the court noted that the trial court had complied with the procedures set down.237 On another occasion the

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232. Id. at 644, 305 N.W.2d at 358 (citing People v. Gilbert, 24 Ill. 2d 201, —, 181 N.E.2d 167, 169 (1962)).
235. Id. at 769, 212 N.W.2d at 583.
236. Id. at 770, 212 N.W.2d at 583.
court found that no specific findings as to the reasons for delay had been found and recorded by the trial court. In a 1978 decision the court made clear that the general finding of good cause is not sufficient.

In State v. Costello, the court once again acknowledged that the constitutional and statutory rights exist independently of each other. The court adopted language from State v. Born: "[T]he fact that the statute does not apply to proceedings or delay occurring prior to the filing of an information in a felony case in no way lessens the duty of the State to provide the defendant with a speedy trial as required by the Constitution." The Costello court agreed that the extent of delay, the reasons for delay, and prejudice, if any, to the defendant are all relevant factors to be considered by the court when considering the constitutional right.

Lastly, there was the litigation which focused directly on the "duty" of a defendant. State v. Hert involved an information filed May 18, an arraignment in August and trial beginning the following January. The court noted that under statutory terms "the defendant would have been entitled to his absolute discharge provided he made a timely motion and provided that none of the excluded periods" were applicable. The court ruled that failure to move for discharge prior to trial or entry of a plea of guilty or nolo contendere constituted a waiver of the right to speedy trial. It stated that the rule set forth in the statute was one which is universally applied.

Hert also involved the question of whether, by virtue of counsel's failure to file such a motion, the defendant had received inadequate assistance of counsel. The court ruled that claims of ineffective assistance of counsel would not be considered on direct

241. Id. at 49, 256 N.W.2d at 102.
243. 199 Neb. at 49, 256 N.W.2d at 102.
244. Id.
246. Id. at 753, 224 N.W.2d at 190.
247. Id. See State v. Pilgrim, 182 Neb. 594, 597, 156 N.W.2d 171, 173 (1968), which asserts this proposition. Pilgrim is not a speedy trial case, since defendant did not move for discharge under Neb. Rev. Stat. § 29-1202, even though he was incarcerated for nine months between accusation and trial.
248. 192 Neb. at 755, 224 N.W.2d at 191.
appeal where the determination of the merits of such a claim may require an evidentiary hearing.\footnote{249}

RECOMMENDATIONS AND CONCLUSION

Several developments have transpired since the earliest declaration of a right to a speedy trial.

While the Supreme Court of the United States has characterized the right as relative, and has refused to establish hard-and-fast guidelines for its constitutional implementation, legislation at both the federal and state levels of government has been enacted to insure that the trial of a criminal case be held within certain, specific time limits.

Although the so-called demand/waiver doctrine has theoretically been abrogated, the Supreme Court has steadfastly required some affirmative request for speedy trial. Nebraska, likewise, imposes a duty on the defendant to make a timely motion for discharge. The Nebraska Supreme Court has only recommended that, in appropriate cases, the defendant be advised of his right to a speedy trial.\footnote{250} While it can be argued that imposing this duty on a defendant is no different from, for example, imposing upon him or his counsel the duty to object to unlawfully seized evidence, the dual interests served by the speedy trial guarantee suggest otherwise. The Nebraska court recognized in Alvarez that the interests of uniformity of the administration of justice would be served by a trial court's informing a defendant of the existence of the right. This has the ancillary benefit of limiting collateral attacks on a conviction on the grounds of ineffective assistance of counsel, at least as far as the speedy trial issue is concerned.

The Nebraska Supreme Court has blurred the distinction between the constitutional and statutory rights to a speedy trial. While the constitutional right should be measured against the rubrics set down in Barker the speedy trial act is, in truth, a statute of limitation. Nebraska has not fashioned a "good cause" exception to its statutes of limitation, and there is no sound policy reason for it to do so in the speedy trial context. This is not to suggest that the periods of exclusion found in the statute are not perfectly

\footnote{249} Id. at 754, 224 N.W.2d at 190. While the right to the assistance of counsel is guaranteed to an accused through the fourteenth amendment, State v. Moore, 203 Neb. 94, 98, 277 N.W.2d 554, 557 (1979), the burden of demonstrating ineffective assistance is upon the defendant who must show, at the proper time, how or in what manner inadequacy of counsel prejudiced him. State v. Holtan, 205 Neb. 314, 319, 287 N.W.2d 671, 673 (1980) and State v. Harlan, 205 Neb. 676, 680, 289 N.W.2d 531, 534 (1980).

\footnote{250} See note 217 and accompanying text supra.
reasonable. But, as Judge McCown has said in his *Alvarez* dissent, the mere silence of a defendant should never be construed as good cause, relieving the state of its burdens in bringing him to trial.\(^{251}\)

The speedy trial statute does not encompass periods of delay before the filing of the information or the handing down of an indictment. The courts recognize that these periods may have an impact on the constitutional right, but apply the amorphous standards articulated by the Supreme Court.\(^{252}\) While it might be argued that any delays are minimized by virtue of the statutes relating to pre-trial procedure, the fact remains that a wide disparity of time limits has been tolerated. The speedy trial guarantee was meant to protect many interests; the public interests in swift justice in criminal cases and the accused's interests in defending against the charges, in retaining a job, in supporting a family, and in being free from the public ignominy attendant to criminal allegations. Because of the importance of these interests, the legislature must undertake the difficult task of addressing the pre-information/pre-indictment stages as they relate to the speedy trial right.

Other questions which remain unanswered deal with the right to a speedy determination of guilt or innocence, to speedy sentencing and to speedy appeal. It can be said that the language of the guarantee, either in the constitutions or the statutes, relates only to the trial itself and not to any of these issues. As to the issue of appeal, a random survey of cases decided since 1971 in Nebraska demonstrates that roughly a year passes between adjudication and appellate decision.\(^{253}\) Some cases may now be disposed of without either oral argument or written opinion.\(^{254}\) Such a rule could be applied to "counting cases" which treat of no collateral issues. As the Nebraska Supreme Court has noted, the legislature has addressed itself to court personnel problems,\(^{255}\) and this vigilance

\(^{251}\) See notes 218-21 and accompanying text *supra*.

\(^{252}\) This issue may be resolved soon. The United States Supreme Court will decide whether the speedy trial clause applies to the period during which a person is not under arrest or where there has been no formal accusation of a crime. United States v. MacDonald, 632 F.2d 258 (4th Cir. 1980) *cert. granted*, 50 U.S.L.W. 3088 (1981).

\(^{253}\) State v. Johnson, 201 Neb. 322, 324, 268 N.W.2d 85, 87 (1978) (trial, 5-13-77; appellate decision, 7-5-78); State v. Hankins, 200 Neb. 69, 71, 262 N.W.2d 197, 199 (1978) (trial, 4-13-77; appellate decision, 2-8-78); State v. Costello, 199 Neb. 43, 48, 256 N.W.2d 97, 102 (1977) (trial, 7-28-76; appellate decision, 7-13-77); State v. Clouse, 195 Neb. 671, 673, 240 N.W.2d 36, 38 (1976) (trial, 4-9-75; appellate decision, 3-25-76).

\(^{254}\) Revised Rules of the Supreme Court of the State of Nebraska, Rule 19 (c) and Rule 20 (1977). See also Krivosha, *The Appeals Problem and Possible Solutions*, *The Prairie Barrister* 6 (1981).

should not abate.

America has once again had its attention focused on the alarming increase in crime.256 One recent recommendation has been to withhold bail from certain alleged offenders.257 The implementation of this suggestion should focus the attention of opinion molders on the ancillary issue of assuring justice through speedy final adjudication. As Dean Roscoe Pound urged in his scathing indictment of the American legal system three quarters of a century ago, only by doing so may this nation "look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all."258